



Neutral Citation Number: [2019] EWHC 213 (QB)

Case No: HQ18M03118

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 February 2019

Before :

THE HONOURABLE MR JUSTICE NICKLIN

Between :

Petro Poroshenko

Claimant

- and -

British Broadcasting Corporation

Defendant

Justin Rushbrooke QC (instructed by Atkins Thomson) for the Claimant
Andrew Caldecott QC and Jane Phillips (instructed by BBC Legal Department)
for the Defendant

Hearing date: 7 February 2019

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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THE HONOURABLE MR JUSTICE NICKLIN

The Honourable Mr Justice Nicklin :

1. The Claimant is the President of the Ukraine. The Defendant is a well-known broadcaster.
2. This is a claim for libel. It arises from the broadcast of an item on the BBC's *News at Ten* on 23 May 2018 ("the Television Report") and also from the publication of a news report on the BBC News website ("the Website Report").
3. The agreed transcript of the Television Report is set out in Appendix A to this judgment. The Website Report is set out in Appendix B. For ease of reference in this judgment, line numbers are added to the Television Report and the Website Report has paragraph numbers added.
4. The Claim Form was issued on 3 September 2019. Particulars of Claim were served together with the Claim Form. The Claimant contends that the natural and ordinary meaning of both the Television and Website Reports is:

“... the Claimant had made or arranged for a secret payment of \$400,000 to Michael Cohen, the personal lawyer of Donald Trump, in order to fix back-channel talks between him and the American President in June 2017, and were therefore guilty of serious corruption”
5. In the Particulars of Claim, the Claimant selected for complaint only lines 7-41 of the Television Report, and paragraphs [1]-[22], in the Website Report. To avoid any dispute about the extent to which a claimant can rely, for context, upon parts of a publication not selected for complaint, at the hearing, Mr Rushbrooke QC sought permission to amend the Particulars of Claim to include the balance of the Reports in the words complained of. The BBC consented to that amendment.
6. In an email of 1 October 2018, the BBC contended that the meaning of the Reports was:

“(1) there are strong grounds to suspect that there was a secret payment by intermediaries acting on behalf of the Ukrainian government of at least \$400,000 to Michael Cohen, the personal lawyer of Donald Trump, at Cohen's improper request, to extend a brief meeting that had already been agreed into more substantial talks between the Claimant and President Trump

(2) if such a payment was made, there are strong grounds to investigate whether the Claimant authorised the said payment or was otherwise culpably aware of it before it was made.”
7. From 1 October 2019, it was plain, therefore, that the issue of meaning was disputed by the parties.
8. Following an Application issued on 8 October 2018 by the BBC, on 24 October 2019, Master Davison directed that the meaning of the Television and Website Reports be determined as a preliminary issue. By the same order, he extended the time for service of the Defence until 21 days after the determination of the preliminary issue of meaning. The Master reserved the issue of the costs of the BBC's Application.

9. This is the judgment following the trial of this preliminary issue and also contains my decision on the reserved costs issue.
10. I should make clear, at this stage, the Court is determining solely the issue of meaning. The Court is not adjudicating upon the truth or falsity of any allegations contained in the Report.
11. The trial of the preliminary issue does not extend to whether the meaning found by the Court is defamatory at common law or under s.1 Defamation Act 2013 in the absence of evidence of serious reputational harm. Nevertheless, helpfully, Mr Caldecott QC had indicated that the BBC's position is that, if the Claimant's meaning prevails, the BBC would not dispute either. However, if the BBC's meaning prevails, the BBC would contend that neither threshold is met. If the Court determines an intermediate meaning, the BBC reserves its position.

Natural and Ordinary Meaning: the Law

12. In determining the meaning, I apply the well-established principles set out in *Koutsogiannis -v- The Random House Group Ltd* [2019] EWHC 48 (QB) [12]-[15].
13. Some of the principles have more application than others depending on the individual case. In this case, the 'repetition rule' and the treatment of 'bane and antidote' have particular importance. In respect of the latter, Mr Rushbrooke QC has also relied upon my decision in *Zarb-Cousin -v- Association of British Bookmakers* [2018] EWHC 2240 (QB). That was also a claim brought over a television broadcast. In [40], I noted that the effectiveness of any antidote to reduce the gravity of the meaning of the publication as a whole was highly context dependent:

“Mr Speker, however, makes a powerful point as to what the viewer is to make of the emphatic denial that they see from the claimant immediately after the second claimant's words. I think there is force in this submission. It is analogous to the newspaper article that reports allegations made against somebody but also includes a clear denial by that person. Whilst everything does depend on the context, the effect of that type of reporting is often not to create the impression of guilt but to leave in the mind of the ordinary reasonable reader grounds to suspect the person of guilt of the conduct alleged. Sometimes, the effect of the denial can itself be undone by the way it is reported. If a mountain of evidence is presented in an article and there is a mealy-mouthed denial, the reader may conclude that the denial is insincere or not to be accepted.”

Parties' submissions as to meaning

14. In summary, Mr Rushbrooke QC for the Claimant submits:
 - i) Apart from the final six words, the Claimant's meaning emerges plainly and easily from the words of the Reports themselves and the reader does not have to 'read between the lines' to appreciate it.
 - ii) The allegation of corruption, although not made expressly, is the overall message that the viewer/reader would get from the publication as a whole; it is the obvious implication arising from the report of the circumstances of the payment to Mr Cohen.

- iii) Both Reports indicate that the Claimant was directly involved: “Poroshenko instructed two close associates to open a back channel” (Television Report [11.29-30]); or that “Mr Poroshenko decided to establish a back channel to Mr Trump” (Website Report [7]). The payment was said to have been “sent to Mr Cohen by intermediaries acting for the Ukrainian leader Petro Poroshenko” (Television Report [11.16-17]), and “arranged by intermediaries acting for Ukraine’s leader, Petro Poroshenko” (Website Report [2]).
- iv) In the context of the Reports read as a whole, there is simply no room for the viewer or reader to conclude that the Claimant was not directly involved in the secret deal. He must have known what was going on, and he must have approved the payment of such a substantial amount of money. By contrast, the viewer/reader is specifically told that “there is no suggestion that Mr Trump knew about the payment” (Website Report [10]), or that “there’s no suggestion that Trump knew of this” (Television Report [11.32-33]).
- v) There is nothing in the way the ‘story’ of the secret payment to Michael Cohen is presented to viewers/readers, either in its tone or content, that tends to cast doubt on its veracity or to present it as a matter which required investigation. On the contrary, it is a headline news item, given prominence on the BBC’s flagship news programme, and described as an “exclusive report” by the news presenter, and similarly presented on the BBC News website.
- vi) The details of the story are a combination of indisputable facts and facts based on “claims” made by the BBC’s sources which are presented as reliable and authoritative – both by reason of the nature of the sources and the fact that the details are all presented as fitting neatly together to make a coherent and credible whole. The BBC goes to some lengths to convey that this is not a matter of unsubstantiated hearsay, or allegation and counter-allegation, or possible politically-motivated disinformation: on the contrary, there are multiple sources for the story, and they are “those with direct knowledge of the process who have spoken to the BBC” (Television Report [11.15-16]) or “sources in Kiev close to those involved” (Website Report [1]).
- vii) The position with the Website Report is even stronger because it contains further incriminating detail. Readers are told expressly that Cohen was “not registered as a representative of Ukraine as required by US law” (Website Report [2]). The details of the secret deal are said to have been provided by “a high-ranking Ukrainian intelligence officer in Mr Poroshenko’s administration” [5]. Particular detail is provided in [19]-[22].
- viii) As regards the Manafort scandal, readers are also given further detail that implicates Mr Poroshenko directly as someone who is pulling the strings [27].
- ix) There is also a clear suggestion of the ‘*quid pro quo*’ of dropping the investigation into the Manafort payments [38].
- x) Paragraphs [40]-[47] contain further apparently authoritative information regarding the nature of the deal done between “Mr Poroshenko’s team” and Mr Trump, culminating in the claim that “These deals can only be understood as Poroshenko buying American support” [47].

- xi) As to the denials on behalf of the Claimant, these are flat denials of the corrupt payment in circumstances where the reader/viewer will have decided this has been more than amply demonstrated by the evidence. The effect may have been different had the reported denial suggested that the Claimant had had no knowledge of the payment to Cohen. That, at least, might have given the viewer/reader specific reason to question whether the evidence did actually demonstrate that the Claimant had himself authorised the payment or known about it.
15. Mr Caldecott QC, for the BBC, submitted that the Court should assess the meaning of each Report separately. Viewers of the Television Report are not likely to have read the Website Report together with watching the Television Report (and vice versa). The Claimant had not relied upon one Report as context for the other.
16. Mr Caldecott submits that there are two key questions that the Court should pose when assessing the meaning the hypothetical reasonable reader/viewer would find each Report to bear.
- i) First, was there a payment of US\$400,000 to Mr Cohen?
- ii) Second, did the Claimant authorise the payment?
17. He submits that the reader or viewer of both Reports would conclude that the answer to the first question is, “probably” and the answer to the second is, “no idea”. It is those key points that he says should lead the Court to find the BBC’s meaning (or something similar to it).
18. In relation to the Television Report, in summary he argued:
- i) The Television Report makes clear, from the outset, that what is being reported are ‘*claims*’ [1:7] and this is repeated shortly afterwards [1:15]. The claim is that a secret payment of at least \$400,000 was made to Mr Cohen, Mr Trump’s personal lawyer, to arrange substantive talks between the Claimant and Mr Trump. The sources for the claim are said to have ‘*direct knowledge of the process*’ [1:15] and are clearly considered by the BBC to be credible.
- ii) However, denials are also prominently mentioned in the opening section by the Ukrainian government, Mr Cohen, his partner and the two intermediaries. They are not – as is often the case – tacked on at the end. Denials on a BBC News programme would indicate to viewers the people against whom the claims were made.
- iii) There is no suggestion that Mr Poroshenko personally authorised the payment. If that were the charge, or even a focus of the BBC’s investigation, his personal position would expected to be stated.
- iv) Ukraine’s adverse stance to Mr Trump during the campaign is presented as the reason for President Poroshenko being ‘*desperate*’ to have talks of substance with Mr Trump (hence the phrase ‘So in early 2017’ [1:27]).

- v) The Television Report is explicit about the instruction that the Claimant gave: namely to open a back channel to Mr Trump's administration – after formal channels had achieved nothing more than a 'Whitehouse photo op' [1:28]. Back channel in this context would have been understood as meaning an approach by an informal contact with a person or persons with influence on the administration. The Report does not state that the Claimant selected Mr Cohen, still less that he authorised any payment to Mr Cohen before it was made. The language at [11:30-32] would be different if that claim was being made by the BBC's sources.
 - vi) There is nothing unusual or impermissible about a President instructing trusted associates to act as intermediaries to approach an informal contact close to Mr Trump with a view to setting up a substantive meeting between him and the American President (when formal channels had failed). Even if Mr Cohen was mentioned when the instruction was given (as a trusted 'fixer'), there is no suggestion that it was known at that stage that Mr Cohen would insist on payment. Necessarily the involvement of Mr Sater, described as a '*former mobster once in business with Trump*' [11:33-34] must have come after the approach to Mr Cohen by the intermediaries. The piece does not suggest, expressly or by implication, that on the sources' account, Mr Cohen's demand for payment was referred back to the Claimant before the payment was made.
 - vii) Mr Avenatti's contribution provides some support for the claim that Mr Cohen was paid at [11:34-41], in that bank records he has seen are said to show that Mr Cohen took money from US companies for access to the President. Mr Avenatti sheds no light on the detail of how the alleged payment to Mr Cohen by Ukrainian intermediaries was handled.
 - viii) There then follows a separate section dealing with the aftermath of the meeting. It does contain a suggestion that Ukraine's investigation into Mr Manafort may have been wound down or stymied to assist Mr Trump. This suggestion is put to the Claimant's office and vehemently denied as 'fake news' [11:54-55].
 - ix) The Claimant's meaning is strained and should not be accepted as the meaning of the Television Report.
19. In relation to the Website Report, Mr Caldecott QC submitted, in summary:
- i) Mr Cohen's denial is given prominently [3]. Following the talks, Ukraine's Manafort investigation was wound down [4].
 - ii) The detail of the Report is contained in [5] to [22]. Similar points arise as in relation to the Television Report. The Claimant's decision is described merely as his wish to open a back-channel after formal avenues had failed: [6]-[7]. There is no suggestion that the Claimant targeted Mr Cohen; and there is nothing wrong (as such) with trying to establish informal channels. Importantly (at [7]) it is said in terms that the Claimant delegated the task to a former aide. The chain then lengthens. The aide recruits a Ukrainian MP who in turn uses his personal contacts and that this '*eventually*' led to Mr Cohen (the implication is not directly). Again, Mr Slater is mentioned as assisting Mr Cohen [15]. All these developments clearly followed the Claimant's initial request; and there is no

suggestion that these complex dealings were referred back to the Claimant before the payment was made.

- iii) There are some significant statements towards [22]. The BBC's sources clearly do suggest that, unsurprisingly, the Ukrainian side was aware of Mr Cohen's promise and his receipt of money by the time of his trip. The statement that the Claimant's inner circle were '*shocked by how dirty this whole arrangement [with Cohen] was*' suggests that the payment was a discovery after the event. It is possible, but odd, to be shocked by an arrangement which you have yourself authorised. This statement also reinforces the point that Mr Cohen, the payee, is portrayed as the corrupt fixer.

Decision

- 20. The governing principles require the Court to put itself, so far as possible, in the position of the hypothetical reasonable viewer or reader. Several points flow from that:
 - i) First, the ordinary reasonable viewer will have watched the Television Report once. Although modern technology now makes it possible for many viewers to pause or rewind and replay live television broadcasts, few will do so. The important consequence of this, when assessing the meaning of a television broadcast, is that the ordinary reasonable viewer has a limited opportunity to analyse what s/he is viewing and hearing. The overall impression created by the broadcast is likely to be more important, and the Court should be careful not to pore over a transcript, which no viewer would have had.
 - ii) That principle is relaxed, to an extent, in relation to publications delivered in text. There, the ordinary reasonable reader has a greater opportunity to absorb what s/he is being told. Nevertheless, the principle is still that s/he will read the text once and will not subject it to any form of textual analysis.
 - iii) Second, no reader or viewer has someone at their shoulder making submissions as to what s/he should make of the broadcast/text, highlighting particular sentences or phrases.
 - iv) Finally, proper regard to the overall context and presentation of the words complained of is probably the most important principle to be applied in the assessment of meaning.
- 21. To put myself, so far as possible, in the position of the hypothetical ordinary viewer or reader, I watch or read the broadcast or text that is the subject of the action *once* before the hearing and *before* I have read or heard any of the parties' submissions as to meaning. In that way, I am able to capture my immediate reaction to the publication and the meaning that I think it bears. That, largely, avoids the risk of over analysis. Of course, the Court must still consider the submissions of the parties – and I have – but the Court must be astute not to allow consideration of the submissions to cause the Court to drift away from the impression the publication would have on a viewer/reader and towards the meaning ascribed by lawyers after prolonged analysis. It is the former, not the latter, which governs the assessment of the natural and ordinary meaning of words in defamation actions.

22. Equally, whilst the parties are entitled to a reasoned judgment explaining my decision, I must try to avoid an over analytical approach in explaining the meaning I have found.
23. I accept Mr Caldecott's submission that I must assess the meaning of the two Reports separately, even if, ultimately, the Court arrives at the same meaning. I accept that the Court should not elide the two assessments, as this would risk allowing material in one Report to influence the meaning of the other.
24. I have reached the clear conclusion that both the Television and Website Reports make allegations at *Chase* level 1. This is a 'bane and antidote' case, but there is very little antidote in either Report. In my judgment, Mr Caldecott's submissions as to what the viewer/reader would have understood as the meaning are far too analytical. Most of the points that he has argued I am satisfied would only have occurred to the hypothetical ordinary reasonable reader/viewer if s/he had analysed the text with such care as to ascertain clearly what the Reports had *not* actually said in express terms: e.g. that it was not stated, expressly, that the Claimant had authorised the payment to Cohen.
25. My clear answers to Mr Caldecott QC's two questions (see [16] above) are "Yes" and "Yes". In respect of the first, the correct application of the repetition rule in this case can lead to no other answer. In respect of the second, my reasons are explained in more detail below.

The Television Report

26. The main section of the Television Report presents a series of factual allegations. The application of the repetition rule in this case does play a significant role in the determination that the meaning is *Chase* Level 1. Viewers are presented with information provided by sources which they are given no reason to doubt beyond the various denials. Publications that result in a meaning at *Chase* level 2 or 3, tend to flag clearly to viewers/readers that there are reasons why they should be cautious before accepting allegations made by others, perhaps for motives of their own, for example. Not only are there no independent signals in either Report for the need for caution, on the contrary, the various sources' credibility appears to the reader/viewer mutually to support the overall credibility of the allegations that are being presented. Some characters in the story are insulated from the central allegations: Mr Trump, for example, is expressly acquitted.
27. By the time the viewer gets to the single sentence that contains the key denial advanced on behalf of the Claimant (ll: 53-56), the die is cast. Further, that denial is sandwiched between the linguistic device "Well..." (which is apt to signal to the viewer that what is said should be discounted or not accepted by the viewer), and a sentence that provides further corroboration of the allegations. The Television Report ends with a reaffirmation of the sources' (plural) conviction of the existence of the back-channel between the Claimant and Mr Trump.
28. The overall effect is, as I observed in *Zarb-Cousin*, the viewer is presented with a large amount of incriminating evidence and a denial that, in context, the viewer will discount or reject. The presentation of the evidence is entirely one-sided. There is no evidence presented to the viewer that s/he might regard as providing reason to doubt the allegations being made. The only available antidote is the denial advanced on the

Claimant's behalf. In context, that is insufficient to negative or reduce the defamatory impact of the overwhelming message of guilt.

29. I have considered whether the viewer would pause before concluding that the Claimant personally had been involved in the US\$400,000 payment made to Cohen, but I am satisfied that the ordinary reasonable viewer would not find any basis on which to exclude the Claimant from involvement. Perhaps if Mr Caldecott QC (or someone equally as persuasive) were sitting next to the viewer on the sofa and pressed him/her to think carefully whether the report said *expressly* that the Claimant had been involved in the payment the viewer might perhaps, after watching the Report again, accept that the Report had not said so expressly. But that sort of dialogue does not happen in the real world, and it is not the test of the natural and ordinary meaning. The viewer is told, unequivocally, that the payment to Cohen was "*arranged [or sent] by intermediaries acting for [the Claimant]*" (ll:16-17). Of course, if analysed carefully, this statement does not say, in terms, that the Claimant *approved* of the intermediaries' actions, but the natural meaning of the words "*acting for*" suggests approval or at least knowledge on the part of the Claimant. In my judgment, the overall impact of both Reports is that the Claimant had personally approved or arranged for (if not actively directed) the payment to be made. His reasons for doing so are articulated clearly in the latter parts of both Reports. By point of contrast, whereas Mr Trump is expressly acquitted of knowledge of what his intermediary, Mr Cohen, had done, the Claimant is not expressly exonerated of knowledge of his intermediaries' payment of US\$400,000 to Mr Cohen.
30. The corrupt nature of the payment is made plain, not only because it was expressly stated to be secret, but because it bought the Claimant greater access to the US President than he would otherwise have obtained.

The Website Report

31. The Website Report is longer, but my conclusion is the same for the reasons I have given. If anything, the reader of the Website Report is presented with even more material pointing towards guilt.
32. Mr Caldecott QC relied on the fact that, in the Website Report, the reader clearly can see the length of the chain of individuals by which the money was paid to Mr Cohen. I accept that is correct, but I reject Mr Caldecott QC's suggestion that this would lead the reader to conclude that the Claimant was not aware of what people were doing on his behalf. I accept Mr Rushbrooke QC's submission that this argument does not lead to the conclusion for which Mr Caldecott QC contends. The route to Mr Cohen may have been tortured, but that does not imply, or require the reader to conclude, that the Claimant had no knowledge of ultimately where it led. The clear impression is of intermediaries acting on the Claimant's behalf. If those intermediaries were on a frolic of their own in making a corrupt payment of US\$400,000, that is certainly not a point that emerges from the text. As I have found above, this point only arises if the reader is asked the specific question whether the text says expressly that the Claimant knew about the payment. That is not the test.
33. For these reasons, in my judgment the meaning of both Reports is:
- "... the Claimant had procured or authorised a corrupt payment of \$400,000 to be made to Michael Cohen, the personal lawyer of Donald Trump, to extend a

brief meeting between the Claimant and President Trump, that had already been agreed, into more substantial talks.”

34. This is principally based on the Claimant’s meaning, but with some modifications. I have reflected the corruption element in the description of the payment. I consider that the BBC’s description of what the payment was for to be more accurate.

The Reserved Costs of the Application for a Preliminary Issue

35. In the email of 1 October 2018 (see [5] above), after setting out its contention as to the meaning of the Reports, the BBC invited the Claimant’s solicitors to agree that meaning should be determined as a preliminary issue. In support of that, the BBC referred to the Court’s observations as to the desirability of an early determination of meaning as soon as it became clear that meaning was an issue of dispute between the parties (see *Morgan -v- Associated Newspapers Ltd* [2018] EMLR 25 [8]-[10] and *Bokova -v- Associated Newspapers Ltd* [2019] 2 WLR 232; [2019] EMLR 6 [9]-[10]).

36. That was an obviously sensible suggestion by the BBC.

37. The Claimant’s solicitors responded on 2 October 2018, protesting that the proposal that the Court should determine meaning as a preliminary issue had been made 2 days prior to the date on which the BBC was due to serve its Defence, and contending that the suggestion should have been made upon receipt of the Particulars of Claim. In a paragraph that is difficult to understand, they added:

“This is yet a further example of your client’s unhelpful and dismissive attitude to these proceedings and how your client has chosen to respond to President Poroshenko’s complaint since your publication and broadcast. This has only added to the damage and distress caused as a result of the article complained of remaining accessible online. We can only consider that this is deliberate”.

38. The Claimant’s solicitors did, however, agree a short extension of time for service of the Defence until Monday 8 October 2018. The BBC responded the same day asking the Claimant’s solicitors to respond substantively on the proposal that meaning be tried as a preliminary issue before the deadline for the Defence to allow for an appropriate application to be issued the following Monday.

39. The Claimant’s solicitors did not respond.

40. On Friday 5 October 2018, the BBC wrote again to say that, as they had not received a response, an application would have to be issued on Monday. They also sought consent, by return, to an extension of time for service of the Defence pending determination of any application for a preliminary issue. That was an entirely reasonable request to make.

41. At 8pm on Friday 5 October 2018, the Claimant’s solicitors emailed a letter in response:

“We have now had an opportunity to discuss with Counsel and our client the proposal raised in your email of 1 October 2018, timed at 19.41pm (sic).

We remain extremely concerned at the fact that you only chose to raise such matters on the eve of service of your Defence, nearly 4 weeks after you received our client’s Particulars of Claim. The fact that you then gave our client less than 24 hours to

consider your proposal for an application for a preliminary ruling on meaning only serves to highlight the extraordinary and unreasonable nature of your behaviour.

As we pointed out in our earlier letter of this week, this is an issue which could and plainly should have been raised on receipt of our client's Particulars of Claim, not at the point when our client was expecting to receive your Defence, finally committing to its position as regards his claim for libel. Given the seriousness of the allegation, and the prominence with which it was disseminated by the BBC, our client is entitled to know whether you are intending to defend the charge as true. This is, and always has been, a matter of enormous concern for him, as we have pointed out to you throughout our correspondence. The allegation still stands uncorrected in the public domain, which has only added to the damage and distress caused to our client as a result of the article complained of remaining accessible online.

In the circumstances, and particularly in light of your refusal to state in clear and unambiguous terms whether you do intend to advance the defence of truth, we fail to see what the benefit is of such a preliminary issue, especially with the substantial delay and additional cost that it will inevitably create. Nor do you explain how such a case management direction would assist in this case, as opposed to merely citing the case management decision taken in other claims without explaining how this would apply here.

We cannot therefore consent to your application. We invite you instead to serve the Defence as you should have done yesterday.

However, should you change your position and commit to stating the nature of the defences which you will be relying on in the Defence, then our client is willing to reconsider his position. Of (sic) this exercise cannot be either onerous or problematic since you waited until two working days before the Defence was due to be served before raising this new proposal, by which time such matters would plainly have been investigated and decided upon."

42. That letter was obstructive. Whatever criticism the Claimant's solicitors believed was warranted by the lateness of the proposal for meaning to be determined as a preliminary issue, once raised, it needed to be dealt with constructively. The obligation on the parties to litigation is clear. It is to assist the Court to further the overriding objective (CPR Part 1.3). That includes the early identification of issues of dispute and the most proportionate, cost effective and expeditious way of resolving them. In defamation claims, as explained in *Morgan* and *Bokova*, that includes express consideration of trial of meaning as a preliminary issue. The letter's treatment of these two authorities suggests that the author had failed to understand their general application.
43. As a result of the stance adopted by the Claimant's solicitors, the BBC was forced to issue an urgent Application seeking an extension of time for the service of its Defence. It also sought a direction for meaning to be tried as a preliminary issue. In its letter of 8 October 2018, the BBC advised the Claimant's solicitors of its intention to apply for the costs of the Application.
44. The Claimant's solicitors responded that same day:

“It is disappointing that you have failed to respond or even to engage with the contents of our letter dated 5 October 2018. It is also notable that you have omitted in your client’s application to the Court that the request for a hearing on meaning was first made only 2 working days prior to the date of service of your client’s defence. To make clear, it is as a result of your client’s actions and the lateness of your request that your client finds itself in a position whereby applications have been prepared – these costs are therefore not the responsibility of our client.

We wish to consider your client’s proposal further with our client’s Counsel. Due to Counsel’s availability, we will not be in a position to respond until later this week. Given this we are prepared to grant a further short extension for service of your client’s Defence until 4pm on 18 October 2018. We trust that this is satisfactory and avoids the need for any applications to be issued at Court, which is in the best interests of the Court and both parties.”

45. It is not clear to me why Counsel had not been asked about the BBC’s proposal that meaning should be tried as a preliminary issue before the letter of 5 October 2018 had been written (with input from Counsel), or indeed, why it was necessary for experienced solicitors in the field to seek advice from Counsel about this issue at all, unless it was to disabuse themselves of the view that the decisions of *Morgan* and *Bokova* were simply case management decisions in the instant cases and of no general application.
46. On 8 October 2018, Master Davison extended time for service of the Defence until 21 days after determination of the BBC’s application for meaning to be tried as a preliminary issue, which he fixed for hearing on 25 October 2018. He reserved the costs of the application. Master Davison’s Order was served by the BBC, together with the issued Application Notice, on 8 October 2018.
47. What followed was some further pointless correspondence from the Claimant’s solicitors complaining that the BBC’s application for an extension of time had been unnecessary and questioning whether the Master had been shown copies of the Claimant’s solicitors’ correspondence at the hearing.
48. The BBC responded on 12 October 2018, again referring to *Bokova*, and declining to be drawn on the issue of what, if any, substantive defence(s) the BBC would rely upon until meaning had been determined as a preliminary issue. The BBC invited the Claimant’s solicitors to reconsider their position on the preliminary issue trial in the hope that the hearing on 25 October 2018 could be vacated and the hearing of the preliminary issue be fixed more speedily.
49. The Claimant’s solicitors did not respond until 18 October 2018 when they told the BBC that “*due to Counsel’s heavy engagement on a separate matter*” they had been unable to respond but were hopeful that they would be able to do so no later than the close of business on 19 October 2018.
50. In their substantive response of 19 October 2018, the Claimant’s solicitors continued their argumentative stance, but finally agreed to meaning being tried as a preliminary issue, stating that the Claimant was “*keen to progress his claim as quickly as possible*”. They argued that the BBC’s applications had been “*premature and unnecessary*” (they were neither) and sought to make the Claimant’s consent to the trial of the preliminary issue contingent on the BBC agreeing to pay the costs of the Application.

“As should now be clear to you, had this firm been provided with sufficient time to discuss the matter with our client and Counsel, and not faced with unreasonable and arbitrary deadlines, then our client would have consented to your client’s applications. Simply put, it was as a result of your client’s lateness in raising the issue of meaning that there was insufficient time in which to consider your proposal. The need for applications was therefore a direct result of your client’s actions and not the responsibility of our client”.

I reject those assertions entirely. The Claimant was responsible for this wasteful and obstructive stance. Agreement to the trial of meaning as a preliminary issue should have been provided swiftly after the BBC’s proposal and, at the latest, by 5 October 2018, when the Claimant’s solicitors stated that they had had the opportunity of speaking to Counsel. In the end, the Claimant’s solicitors never did articulate any reasoned opposition to meaning to be determined as a preliminary issue.

51. Mr Rushbrooke QC has submitted that while trials of preliminary issues of meaning are routine, they are not automatic. In my judgment, whilst they are not mandatory, once it is clear that meaning is in dispute, the issue should be considered by all parties, and a burden will normally fall on any party who contends that the issue should not be resolved by determination at a preliminary issue trial to present cogent and case-specific reasons why not. The disadvantages of ploughing on, not only to the parties in terms of potentially wasted costs, but also in disproportionate drains on the resources of the Court mean that that burden may be difficult to discharge.
52. In my judgment, the conduct of the Claimant in this case more than justifies an order that he should pay the costs of and occasioned by the BBC’s Application and, for the avoidance of doubt, that includes all of the correspondence after 5 October 2018. I will so order.

1 **Appendix A – The Television Report**

2

3 **[INTRODUCTION]**

4

5 **Donald Trump:** “And we’ve had some very, very good discussions.”

6

7 **Huw Edwards (BBC News Presenter):** “Claims that last year’s meeting between President
8 Trump and the Ukrainian leader was arranged after a big payment to Mr Trump’s personal
9 lawyer, we’ll have an exclusive report.”

10

11 **[REPORT]**

12

13 **Huw Edwards:** “Donald Trump’s personal lawyer Michael Cohen received a secret
14 payment of at least \$400,000 to arrange talks between the Ukrainian president
15 and President Trump. That is the claim made by those with direct knowledge of the
16 process who have spoken to the BBC. They say the money was sent to Mr Cohen by
17 intermediaries acting for the Ukrainian leader Petro Poroshenko. The Ukrainian government
18 has denied the claims. Mr Cohen, his partner Felix Sater and the two intermediaries also deny
19 involvement as our correspondent Paul Wood tells us”

20

21 **Paul Wood (BBC North American Correspondent):** “Donald Trump’s run for the US
22 presidency was watched with alarm by Ukraine’s government, dismayed by his apparently pro-
23 Russian rhetoric. Then Trump had a setback, his campaign manager Paul Manafort was forced
24 to resign, accused of getting millions of dollars from Russian interests in Ukraine. The leak
25 that brought Manafort down came from the very top of the Ukrainian government according to
26 sources here and outside Ukraine. If that’s true, the Ukrainians badly miscalculated, backing
27 the losing side in the US election. So, in early 2017, President Poroshenko was desperate to get
28 talks with Donald Trump, but he was being offered little more than a Whitehouse photo op.
29 According to a senior official here, who has direct knowledge of what happened, Poroshenko
30 instructed two close associates to open a back channel. That back channel, our source says,
31 was President Trump’s personal lawyer and trusted fixer Michael Cohen. The senior official
32 says Cohen was paid \$400,000. A second source says it was more. There’s no suggestion that

33 Trump knew of this. We're told that Cohen got help from Felix Sater, a convicted former
34 mobster once in business with Trump. Cohen is under investigation for paying hush money to
35 a porn actress, Stormy Daniels, on Trump's behalf. Her lawyer says Cohen's bank records
36 show he took money from US companies for access to the President."

37

38 **Michael Avenatti (Lawyer for Stormy Daniels):** "I think it's pretty obvious at this point that
39 Michael Cohen took substantial sums of money and was selling access to the highest office in
40 the land, namely to the US president. We have every reason to believe that there are
41 additional payments that have not been reported yet from those with Ukrainian interests."

42

43 **Paul Wood:** "Poroshenko couldn't hide his delight at meeting Trump and
44 before Russia's Vladimir Putin. How many minutes he'd get was still being negotiated
45 as he flew from Kiev. But this was more than just a photo op and after Poroshenko
46 went home, Ukraine's inquiry into Trump's former campaign manager, Paul Manafort,
47 was steadily wound down. There was never a direct order to stop the Manafort inquiry,
48 special prosecutor in Kiev tells me but, he says, 'from the way the investigation
49 progressed it was clear that our superiors were trying to create obstacles'. Did President
50 Trump's lawyer ask the Ukrainians to stall their inquiry? Perhaps he didn't need to.
51 Poroshenko knew that to do otherwise, said one source, 'would be like spitting in Trump's
52 face'. The US is continuing its own investigation into Paul Manafort and Russian influence in
53 the American election, but without help from Ukraine. Well, President Poroshenko's office
54 initially refused to respond to the allegations in that report, but they've since issued a furious
55 statement calling the claims 'fake news' and saying they are designed to undermine
56 American/Ukrainian relations. It is interesting nevertheless to look at how those relations
57 have changed since an election when our sources say the Ukrainians tried to help President
58 Trump's opponent, to today when the US has promised to send 210 javelin anti-tank missiles
59 to Ukraine, something that was never done under President Obama. That, our sources insist,
60 is part of a process that began with the opening of a back channel to the Trump
61 administration through the President's lawyer."

62

63 **Huw Edwards:** "Paul many thanks again. Paul Wood with that exclusive story for
64 us from Washington."

Appendix B – The Website Report

"Trump lawyer ‘paid by Ukraine’ to arrange White House talks

- [1] Donald Trump's personal lawyer, Michael Cohen, received a secret payment of at least \$400,000 (£300,000) to fix talks between the Ukrainian president and President Trump, according to sources in Kiev close to those involved.
- [2] The payment was arranged by intermediaries acting for Ukraine's leader, Petro Poroshenko, the sources said, though Mr Cohen was not registered as a representative of Ukraine as required by US law.
- [3] Mr Cohen denies the allegation.
- [4] The meeting at the White House was last June. Shortly after the Ukrainian president returned home, his country's anti-corruption agency stopped its investigation into Trump's former campaign manager, Paul Manafort.
- [5] A high-ranking Ukrainian intelligence officer in Mr Poroshenko's administration described what happened before the visit to the White House.
- [6] Mr Cohen was brought in, he said, because Ukraine's registered lobbyists and embassy in Washington DC could get Mr Poroshenko little more than a brief photo-op with Mr Trump. Mr Poroshenko needed something that could be portrayed as "talks".
- [7] The senior official's account is as follows – Mr Poroshenko decided to establish a back channel to Mr Trump. The task was given to a former aide, who asked a loyal Ukrainian MP for help.
- [8] He in turn used personal contacts who attended a Jewish charity in New York state, Chabad of Port Washington. (A spokesman for the Chabad has asked us to make clear that officials there were not involved.)
- [9] This eventually led to Michael Cohen, the president's lawyer and trusted fixer. Mr Cohen was paid \$400,000.
- [10] There is no suggestion that Mr Trump knew about the payment.
- [11] A second source in Kiev gave the same details, except that the total paid to Mr Cohen was \$600,000.
- [12] There was also support for the account from a lawyer in the US who has uncovered details of Mr Cohen's finances, Michael Avenatti. He represents a porn actress, Stormy Daniels, in legal action against President Trump.
- [13] Avenatti said that Suspicious Activity Reports filed by Mr Cohen's bank to the US Treasury shows he had received money from "Ukrainian interests".

- [14] As well as Mr Cohen, the two Ukrainians said to have opened the backchannel for their president also denied the story.
- [15] The senior intelligence official in Kiev said Mr Cohen had been helped by Felix Sater, a convicted former mobster who was once Trump's business partner. Mr Sater's lawyer, too, denied the allegations.
- [16] The Ukrainian president's office initially refused to comment but, asked by a local journalist to respond, a statement was issued calling the story a 'blatant lie, slander and fake'.
- [17] As was widely reported last June, Mr Poroshenko was still guessing at how much time he would have with Mr Trump even as he flew to Washington.
- [18] The White House schedule said only that Mr Poroshenko would 'drop in' to the Oval Office while Mr Trump was having staff meetings.
- [19] That had been agreed through official channels. Mr Cohen's fee was for getting Mr Poroshenko more than just an embarrassingly brief few minutes of small talk and a handshake, the senior official said. But negotiations continued until the early hours of the day of the visit.
- [20] The Ukrainian side were angry, the official went on because Mr Cohen had taken 'hundreds of thousands' of dollars from them for something it seemed he could not deliver.
- [21] Right up until the last moment, the Ukrainian leader was uncertain if he would avoid humiliation.
- [22] 'Poroshenko's inner circle were shocked by how dirty this whole arrangement [with Cohen] was.'"
- [23] Mr Poroshenko was desperate to meet Mr Trump because of what happened in the US presidential election campaign.
- [24] In August 2016, the *New York Times* published a document that appeared to show Mr Trump's campaign manager, Paul Manafort, getting millions of dollars from pro-Russian interests in Ukraine.
- [25] It was a page of the so-called 'black ledger' belonging to the Party of the Regions, the pro-Russian party that employed Mr Manafort when he ran a political consultancy in Ukraine.
- [26] The page appeared to have come from Ukraine's National Anti Corruption Bureau, which was investigating him. Mr Manafort had to resign.
- [27] Several sources in Ukraine said that Mr Poroshenko authorised the leak, believing that Hilary Clinton was certain to win the presidency.

- [28] If so, this was a disastrous mistake – Ukraine had backed the losing candidate in the US election. Regardless of how the leak came about, it hurt Mr Trump, the eventual winner.
- [29] Ukraine was (and remains) at war with Russia and Russian-backed separatists and could not afford to make an enemy of the new US president.
- [30] So Mr Poroshenko appeared relieved as he beamed and paid tribute to Mr Trump in the Oval Office.
- [31] He boasted that he had seen the new president before Russia’s leader, Vladimir Putin. He called it a ‘substantial visit’. He held a triumphant news conference in front of the north portico of the White House.
- [32] A week after Mr Poroshenko returned home to Kiev, Ukraine’s National Anti Corruption Bureau announced that it was no longer investigating Mr Manafort.
- [33] At the time, an official there explained to me that Mr Manafort had not signed the ‘black ledger’ acknowledging receipt of the money. And anyway, he went on, Mr Manafort was American and the law allowed the bureau only to investigate Ukrainians...
- [34] Ukraine did not terminate the Manafort inquiry altogether. The file was handed from the Anti Corruption Bureau to the state prosecutor’s office. It languished there.
- [35] Last week in Kiev, the prosecutor in charge of the case, Serhly Horbatiuk, told me: ‘There was never a direct order to stop the Manafort inquiry but from the way our investigation has progressed, it is clear that our superiors are trying to create obstacles.’
- [36] None of our sources say that Mr Trump used the Oval Office meeting to ask Mr Poroshenko to kill the Manafort investigation. But if there was a back channel, did Michael Cohen use it to tell the Ukrainians what was expected of them?
- [37] Perhaps he didn’t need to.
- [38] One source in Kiev said Mr Poroshenko had given Trump ‘a gift’ – making sure that Ukraine would find no more evidence to give the US inquiry into whether the Trump campaign ‘colluded’ with Russia.
- [39] Mr Poroshenko knew that to do otherwise, another source said, ‘would be like spitting in Trump’s face’.
- [40] A report by a member of a Western country’s intelligence community says Mr Poroshenko’s team believe they have established a ‘non-aggression pact’ with Mr Trump.
- [41] Drawing on ‘senior, well placed’ intelligence sources in Kiev, the report sets out this sequence of events.
- [42] *As soon as Trump was elected, the report says, Ukraine stopped ‘proactively’ investigating Manafort.*

- [43] *Liaison with the US government was moved away from the National Anti Corruption Bureau to a senior aide in the presidential administration.*
- [44] *The report states that Poroshenko returned from Washington and, in August or September, 2017, decided to completely end cooperation with the US agencies investigating Manafort. He did not give an order to implement this decision until November 2017.*
- [45] *The order became known to the US government after scheduled visits by Poroshenko's senior aide to see Mueller and the CIA director, in November and December, were cancelled.*
- [46] *The report says that an 'element of the understanding' between Poroshenko and Trump was that Ukraine agreed to import US coal and signed a \$1bn contract for American-made diesel trains.*
- [47] *These deals can only be understood as Poroshenko buying American support, the reports say.*
- [48] *In March, the Trump administration announced the symbolically important sale of 210 Javelin anti-tank missiles to Ukraine.*
- [49] Even under President Obama, the US did not sell arms to Ukraine. A well known figure in Kiev, now retired from his old job in government, told me he didn't like what had happened with the Manafort inquiry; however, Ukraine was fighting for its survival.
- [50] 'I want the rule of law', he said, 'but I am a patriot'.
- [51] He said he had kept in touch with his former subordinates and had heard many of the details about a 'Cohen backchannel'.
- [52] He said if Ukrainians came to believe that a corrupt deal had been done over Mr Manafort: 'This thing might destroy support for America'.
- [53] Ukraine's domestic intelligence service, the SBU, did their own – secret – report on Mr Manafort.
- [54] It found that there was not one 'black ledger' but three and that Mr Manafort had been paid millions of dollars more from Ukraine than had been made public. (Mr Manafort has denied any wrongdoing).
- [55] This information was given to me by a very senior police officer who saw the report. He said it had not been passed to the Americans.

[The Website Report appeared underneath a photograph of the Claimant sitting alongside the President of the United States, Donald Trump, whilst the two leaders are pictured shaking hands, with the caption: "Ukrainian leader Petro Poroshenko (left) meets US President Donald Trump at the White House in June 2017".]