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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**19/04/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

Between:

KEVIN WINTERS
NIALL MURPHY
JOSEPH McVEIGH
GERARD McNAMARA
PETER CORRIGAN
MICHAEL CRAWFORD
PAUL PIERCE
DARRAGH MACKIN
KRW LAW LLP

Plaintiffs

v

NEWS GROUP NEWSPAPERS LIMITED

Defendant

Mr F O'Donoghue KC with Mr P Girvan and Mr P Wilson (instructed by KRW Law Solicitors) for the 1st, 2nd, 3rd, 4th, 6th, 7th, and 9th Plaintiffs
Mr P Hopkins (instructed by Phoenix Law solicitors) for the 5th and 8th Plaintiffs
Dr T McGleenan KC with Mr J Scherbel-Ball (instructed by A&L Goodbody Solicitors) for the Defendant

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McFARLAND J

Introduction

[1] This judgment sets out my ruling in respect of an application on summons by the defendant made on 21 February 2023 for discovery and inspection of specified documents by the plaintiffs. The fifth and eighth plaintiffs had responded to the summons by providing discovery of documents within their control to the satisfaction of the defendant and as a consequence no order is sought against them. These plaintiffs did not participate in the hearing on 27 and 28 March 2023. The

provision of these documents resulted in the defendant expanding the list of documents sought from the remaining plaintiffs under the summons. The first, second, third, fourth, sixth, and seventh plaintiffs are represented by the ninth plaintiff (a firm of solicitors in which they are partners). The ninth plaintiff also represents itself. The fifth and eighth plaintiffs are represented by Phoenix Law.

[2] For convenience I will refer to the first, second, third, fourth, sixth, seventh and ninth plaintiffs as "the KRW plaintiffs" and the fifth and eighth plaintiffs as "the Phoenix plaintiffs" in this judgment. At the time of the issue of proceedings in 2016 the first, second, third, fourth, fifth, sixth and seventh plaintiffs were partners in the ninth plaintiff and the eighth plaintiff was an employee of the ninth plaintiff.

Background

[3] By writ of summons issued on 16 December 2016, the KRW plaintiffs and the Phoenix plaintiffs claimed damages for harassment, defamation, breach of privacy and data protection, and breach of copyright. The claim arises out of the publication by the defendant in its newspaper *The Sun* and its on-line version of that newspaper of articles on 7 December 2016, 8 December 2016 and 10 December 2016.

[4] I have set out below the dates of the pleadings and a judgment relevant to this application:

a) Writ of summons dated 16 December 2016.

b) Statement of claim served 6 February 2017.

c) Defence served 9 March 2017.

d) Reply to defence served 21 April 2017.

e) Amended statement of claim served 15 June 2017.

f) Judgment of Stephens LJ dated 6 November 2017 ([2017] NIQB 100) ("the meanings judgment").

g) Second amended statement of claim served 30 November 2017.

h) Amended defence served 21 December 2017.

[5] The KRW plaintiffs have applied by summons dated 24 February 2023 to further amend their statement of claim and their reply to defence. The KRW plaintiffs have furnished six further versions of their proposed amendments to the statement of claim and two versions of their proposed amendments to the reply to defence. The court has fixed 12 May 2023 for determination of this application

(which also includes an application for an order for further discovery to be made by the defendant).

[6] The court has been assisted by the written and oral arguments presented by counsel for the defendant and the KRW plaintiffs.

The defendant's summons

[7] The defendant seeks discovery of documents which have been requested by accountants instructed on its behalf to review financial information received from the KRW plaintiffs as part of the discovery process. A revision of the requested documents from the KRW plaintiffs was provided after the Phoenix plaintiffs provided further discovery. The purpose of the request was to provide information so that the accountants could determine whether full and proper accounts had been furnished, whether a schedule of what were described as 'legacy' payments was consistent with the statutory accounts (ie the accounts filed with Companies House), if further information was required to gain a complete understanding of the financial position of KRW Law, and whether the 'legacy' part of KRW Law constituted a small percentage of turnover and profits of KRW Law.

[8] The KRW plaintiffs sought to develop an argument that the summons was defective as it sought an order under Order 24 Rule 7. The wording of the summons was that it sought "discovery and inspection" of documents instead of requiring the KRW plaintiffs to provide an affidavit stating whether any document is, or has been, in their possession as provided for in the Rule. This argument was not pursued with much vigour, and I consider that to have been the correct approach as it is not overburdened with merit. The summons is adequately drafted. It identifies the correct rule and it clearly identifies the order sought. Both the court and the KRW plaintiffs know exactly what is being sought. Providing an affidavit concerning documents is part of the well-established discovery process. Rule 7, is stated as being subject to Rule 9, which describes an application under Rule 7 to be an application for discovery.

Discovery generally

[9] Order 24 sets out the relevant provisions in relation to discovery of documents. It provides for a process of mutual discovery under Rules 1 and 2. Both rules emphasise that discovery of documents is limited to documents "relating to matters in question in the action." The relevant test for discovery is well established. It was set out by Brett LJ in *Compagne Financiere du Pacifique v Peruvian Guano Company* [1882] 11 QBD 55 at 62/63:

> "… any document, which it is reasonable to suppose, contains information which may enable the party (applying for discovery) either to advance his own case or to damage that of his adversary, if it is a document which

> may fairly lead him to a train of enquiry which may have either of these two consequences, must be disclosed."

[10] Under Rule 3 a court can order general discovery against a party and under Rule 7 a court can order specific discovery of particular documents. The court's approach to making orders is regulated by Rule 9 which states-

> "On the hearing of an application for an order under rule 3, 7 or 8 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

[11] Keegan J in *Flynn v Chief Constable of the PSNI* [2017] NICA 13 at [25] set out how the question should be approached:

> "The test that emanates from Order 24 is whether discovery is necessary to dispose fairly of the case and to deal with costs. It seems to us that this test is comprised of 3 limbs. Firstly, there is the necessity requirement which is related to relevance. The second limb relates to subject matter and comprised within that is deference to the aim of achieving justice in a particular case. The third limb relates to costs which is a factor raised in this case in terms of the burden of discovery."

The pleadings

[12] The first limb referred to by Keegan J in *Flynn* is necessity and relevance based on the matters in question in the action. It is well established that what relates to a matter in question in the action means what relates to an issue which is in dispute in the pleadings (see Lindley LJ in *Yorkshire Provident Life Assurance Company v Gilbert* [1895] QB 148 at 152:

> "The defendant's right then is to have discovery of all matters relating to questions in issue *as narrowed by the particulars*." [my emphasis]

[13] Special rules apply to pleadings in defamation cases, and these are set out in Order 82. The defendant submits that the relevance of the documents it seeks relates to its defence of honest comment on a matter of public interest. Order 82 Rule 3(b) provides:

> "Where in an action for libel or slander the defendant alleges that, insofar as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he must give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true."

[14] Before turning to the actual pleadings in the case, it is necessary to deal with two preliminary arguments raised by Mr O'Donoghue KC relating to the pleadings. The first is that the pleading the defendant seeks to rely on, namely the amended defence served on 21 December 2017 was served without the leave of the court and therefore is not a permitted pleading. The second is that the amended defence was a device to re-introduce pleadings first made in the defence relating to the now abandoned defence of justification (ie the statements of fact were true in substance and fact).

[15] I can deal with these matters very briefly. The first is based on the provisions in Order 18 Rule 20(1)(a) (pleadings close 21 days after the service of the reply) and Order 20 Rule 3(1) (a party can only amend a pleading without leave of the court once before pleadings have closed). In this case the pleadings closed on 12 May 2017 and the amended defence was served on 21 December 2017.

[16] Although a superficially attractive argument it ignores the fact that the amended defence was required to reply to not one, but two of the plaintiffs' amended statements of claim, both served without leave of the court and in default of the provision that is now pleaded by the plaintiffs in their aid. I suggested to Mr O'Donoghue KC that "what was sauce for the goose was also sauce for the gander." Lord Hatherley LC perhaps with more eloquence and gravitas, and in another context, stated that a court "never allows a man to make profit by a wrong" (*Jehon v Vivian* (1876) Law Rep 6 Ch App 742).

[17] A party under Rule 4 can apply to the court to disallow any amendment made without leave and Rule 12 permits any amendment with the consent in writing of the other party. In the intervening five years neither party has taken steps to apply to the court to disallow the other's amendments. By serving its amended defence, the defendant, by implication, has consented to the amendments. In any event Rule 3(2) permits a defendant to serve an amended defence within six weeks of the amended statement of claim (albeit one served within the provisions of Rule 3).

[18] If I am wrong in relation to my analysis of this point, I will rely on the court's discretion to grant leave for amendments of pleadings at any stage of the proceedings (see, for example, *Reilly* v *Valley Dyeworks* [1973] Oct NIJB 3 when

amendments were permitted at the end of the evidence). If leave is technically required, I will grant leave both to the plaintiffs to serve both of their amended statements of claim and to the defendant to serve its amended defence. No party will suffer any prejudice by such an order.

[19] Mr O'Donoghue KC's second point related to what he asserted was the defendant's belated attempt to reintroduce pleadings relating to the abandoned justification defence but now tacked on to the honest comment defence. This point has no substance. The original defence served on 9 March 2017 set out the defence of justification at para 9 and provided particulars at (a)–(h). The defence then set out the defence of honest comment at para 10, setting out the particulars of fact on which the comment was based at (i)–(ix).

[20] Para 10 (ix) stated – "The facts and matters set out at paras 9(a)-(g)." On any reading of the defence, the facts and matters pleaded in relation to the justification defence were also pleaded in relation to the honest comment defence. For convenience, and for the avoidance of unnecessary repetition, that type of pleading at para 10 (ix) is often used, its use is entirely proper, and it is to be encouraged.

[21] The amended defence then deleted the justification defence in old para 9 and amended the honest comment defence by deleting 9(ix). This was necessary as it was a meaningless statement as it incorporated 9(a)–(g) which had been deleted. It then added new 10(x)–(xvi) which replicated old 9(a)–(g).

[22] No new pleading was added by the amended defence to the particulars of fact on which the defence of honest comment is said to be based. There is no merit to this point.

[23] I turn now to deal with the substance of the application by the defendant and why it is resisted by the KRW plaintiffs.

The pleaded case on honest comment

[24] The common law defence of 'fair comment' was renamed by the Supreme Court in *Joseph v Spiller* [2010] UKSC 53 as 'honest comment.' (It has now evolved as 'honest opinion' as a result of the Defamation Act (NI) 2022, although the provisions of that Act do not apply to this case.) It has been described by Scott LJ in *Lyon v Daily Telegraph* [1943] 1 KB 746 at 753 as "one of the fundamental rights of free speech and writing … of vital importance to the rule of law on which we depend for our personal freedom." However, *Gately on Libel and Slander* (12th edition) at para 12.3 described it as "one of the most difficult areas of the law of defamation." The Supreme Court in *Joseph* sought to add some definition to the issue. The tension between this judgment and an earlier decision of the Court of Final Appeal of Hong Kong in *Chun v Cheng* [2001] EMLR 777 was the subject of submission and counter-submission before me.

[25] In *Joseph* Lord Philips quoted extensively from the judgment of Lord Nicholls in *Chun* which set out five propositions relating to the defence of honest comment in respect of which the burden of proof is on the defendant. These were set out in the following terms:

> "16. … First, the comment must be on a matter of public interest. Public interest is not to be confined within narrow limits today …
>
> 17. Second, the comment must be recognisable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege …
>
> 18. Third, the comment must be based on facts which are true or protected by privilege …
>
> 19. Next, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made …
>
> 20. Finally, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views …
>
> 21. These are the outer limits of the defence. The burden of establishing that a comment falls within these limits, and hence within the scope of the defence, lies upon the defendant who wishes to rely upon the defence."

[26] The focus on the submissions before me was on the fourth proposition, and in particular the need for the requirement that the facts upon which the comment is based are true. Hence the need for the defence to plead the facts upon which the defendant relies for its comment.

[27] Lord Nicholls justified his fourth proposition on the need for the defendant to identify the matters on which the comment is based with sufficient particularity to enable the reader to judge for himself whether it was well founded. Lord Philips at [104] considered that this was an incomplete statement of the law adding:

> "The comment must, however, identify at least in general terms what it is that has led the commentator to make the comment, so that the reader can understand what the

comment is about and the commentator can, if challenged, explain by giving particulars of the subject matter of his comment why he expressed the views that he did. A fair balance must be struck between allowing a critic the freedom to express himself as he will and requiring him to identify to his readers why it is that he is making the criticism."

On that basis, the fourth proposition was re-cast by Lord Phillips in the following terms:

> "Next the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based."

[28] Before leaving *Joseph* it is also noteworthy to refer to the concurring judgment of Lord Walker and his comment at [131] on the development of the defence of honest comment:

> "In the half-century or more since [1952] society and its concerns have continued to change. The creation of a common base of information shared by those who watch television and use the internet has had an effect which can hardly be overstated. Millions now talk, and thousands comment in electronically transmitted words, about recent events of which they have learned from television or the internet. Many of the events and the comments on them are no doubt trivial and ephemeral, but from time to time (as the present appeal shows) libel law has to engage with them. The test for identifying the factual basis of honest comment must be flexible enough to allow for this type of case, in which a passing reference to the previous night's celebrity show would be regarded by most of the public, and may sometimes have to be regarded by the law, as a sufficient factual basis."

[29] Stephens LJ in his concluding remarks in the 'meanings judgment' at [44]–[47] set out his ruling in respect of the range of potential meanings pleaded by the plaintiffs in their amended statement of claim at para 11. These are set out in [18] of the judgment:

(ii) The plaintiffs are engaged in a malicious campaign to target ex-British servicemen with unmeritorious allegations and litigation;

(iii) That this campaign has been mounted for the financial gain of the plaintiffs;

(iv) The plaintiffs are greedy; and

(vii) The plaintiffs have obtained and will seek to obtain legal aid inappropriately

[30] At para 10 of the defence (and repeated again in the amended defence), the defendant made out the defence of honest comment on a matter of public interest, namely the appropriateness or otherwise of (i) historical enquiries into the actions of British soldiers and/or the British state (ii) the use of very substantial amounts of public money to fund lawyers to pursue such claims and (iii) the use of very substantial amounts of public money to fund police investigations which would divert resources from other policing objectives.

[31] Particulars of fact on which the comment is based are then set out at (i)–(xvi). The pleadings relevant to the discovery application include:

> "(vii) Many of the inquiries are brought by lawyers acting on legal aid and a substantial amount of these costs will go towards lawyers claiming legal aid;
>
> (xi) The plaintiffs offer and promote a 'Legacy Litigation' service which includes representing 'a number of families in relation to civil actions against the PSNI and/or the Ministry of Defence in relation to allegations of collusion by state agencies and paramilitaries in the deaths of their loved ones during the recent conflict';
>
> (xiv) Between 2012/2013 and 2014/15 the ninth plaintiff has received over £7.4 million for legal aid work a very substantial (but presently unquantifiable pending discovery in the action) amount of which funding related to claims in respect of and/or investigations into and/or inquiries into historical killings by British soldiers and/or the role of the British State in legacy cases; and
>
> (xv) In light of the plaintiff's continuing representation of clients concerned in over 200 deaths involving or allegedly involving the British State it is to be inferred that since 2014/15 the ninth plaintiff has received further very substantial (but presently unknown pending discovery in the action) amounts of legal aid funding to fund these cases."

[32] In their reply to defence served on 21 April 2017 at para 1 the plaintiffs stated, "Save as provided below and save insofar as it contains admissions, the plaintiffs join issue with the defendant on its defence." Of particular relevance are the pleadings contained at para 6 (e) and (f). The ninth plaintiff admitting receiving £7.4 million pounds from legal aid work between 2012 – 2015 (although it stated that a

substantial amount related to counsels' fees and disbursements). It was denied that a very substantial amount of legal aid monies paid during this period related to legacy matters and that further very substantial amounts of legal aid funding had been received to fund the representation of clients' cases relating to deaths involving or allegedly involving the British state. In addition, a positive case was made that "payments in relation to this part of the plaintiffs' legal practice constituted a small percentage of the turnover and profits of the ninth plaintiff."

[33] At para 6(f) the plaintiffs stated that they would "provide discovery at the relevant stage of proceedings to substantiate the falsity of the defendant's plea."

[34] Returning to the test for discovery (see [12] above), the documents must relate to an issue which is in dispute in this action as set out in the pleadings. Mr O'Donoghue KC argued that the process was self-limiting as it had to relate to documents pertaining to facts known to the defendant at the time, and further, as the statements and/or comment set out in the articles related to what had been payments already received, it had nothing to do with future payments.

[35] It is important to take into account the qualification placed by Lord Philips in *Joseph* on Lord Nicholls's fourth proposition. The need for the comment to either explicitly or implicitly indicate, at least in general terms, the facts on which it is based, gives a degree of leeway, and the court should avoid applying too narrow an interpretation.

[36] The pleadings set out at [30]–[33] (above) clearly put in issue aspects relating to the income and profits generated by the plaintiffs in relation to legacy work. They specifically pleaded that legacy work "constituted a small percentage of the turnover and profits", thus bringing into play three matters – their overall turnover, their profitability and the relevant percentage of both totals attributable to legacy cases.

Is discovery outstanding?

[37] The plaintiffs have provided discovery by serving the usual list of documents first on 19 May 2017, and this has been updated on 1 May 2019, 20 July 2020 and 15 September 2020.

[38] On 30 September 2022 the court fixed 27 February 2023 as a trial date, and in preparation for the trial a draft index to a trial bundle was sent by the KRW plaintiffs on 20 December 2022. This specifically referred to 26 individual legacy cases and seven individual Police Ombudsman reports for which work had been undertaken between 2016 and 2022.

[39] By letter of 23 December 2022 the defendant's solicitors raised concerns about the draft index in the context of previous discovery which had not referred to work in progress ("WIP").

[40] A document dated 20 January 2023 was discovered. This is the Alpha Law Legal Management System printout ("Alpha Law"). It is a case management tool which consists of 53 pages of cases relating to 'Branch 2 – KRW Law LLP (Legacy) only.' It comprised of 1,738 cases in total. It basically sets out the file reference, the file name, the type of case, when the file was opened, the balances in the firm's office and client bank accounts, and WIP. In each case WIP is shown as '0.00' (ie nil). In his submission on this document Mr O'Donoghue KC advised that the Alpha Law system does not record WIP, and I will accept that proposition at this stage of the proceedings.

[41] By an amended draft index to the trial bundle of 24 January 2023, the KRW plaintiffs removed 18 of the legacy cases (leaving eight) and all of the Police Ombudsman cases. This suggested change was made without comment or explanation.

[42] On 27 January 2023, the KRW plaintiffs replied to the defendant's solicitors stating – "no question arises of the disclosure of financial records in this matter as there is no claim on the Legal Aid Fund." They further referred to two specific cases (Barnard and Arthurs) stating that those cases had been transferred to Phoenix Law.

[43] By letter of 31 January 2023 the defendant's solicitors again referred to the position of WIP summarising the position in the following terms:

> "A cursory review of the judgments and reports makes it clear that extensive WIP would in fact have been incurred between 2012 and 2017."

[44] The defendant's sought advice from ASM accountants ("ASM") with specific instructions to comment upon the following matters:

> "a) whether full and proper accounts have been provided for both KRW Law LLP and KRW Law Advocates Ltd from 2012 to 2017 and if the accounts provided are consistent with the accounts filed at Companies House;
>
> b) if the schedule of Legacy payments from 2012 to 2017 (enclosed with the letter from KRW dated 21 October 2019) is consistent with the statutory accounts, management accounts and 'group' accounts provided;
>
> c) if further information/documentation is required to gain a complete understanding of the financial position and financial performance/'success' of KRW Law LLP between 2012 and 2017; and

d) whether or not the 'Legacy part' of KRW Law LLP '*constituted a small percentage of turnover and profits*' as pleaded by KRW Law." [The emphasis is as in the letter]

[45] By letter of 21 February 2023, ASM replied. (This letter, and a subsequent letter of 20 March 2023, both contain the expert's declaration required by Practice Direction PD11/2003.) It refers to outstanding profit and loss accounts for the partial year from incorporation in July/August 2012 and 31 March 2013. In the analysis of the accounts from 2014 to 2017, ASM comment that the management accounts provided do not record WIP, and further, that in the three years 2015, 2016 and 2017 the 'legacy' expenses are actually higher than the total KRW LLP expenses. The final analysis is that the "the management accounts are **clearly not correct** and, in our opinion, cannot be relied upon when assessing the financial performance of Legacy cases." [my emphasis] In an appendix D2, ASM provided details of how the full accounts were showing WIP in 2015 at £239,884, in 2016 at £241,754 and in 2017 at £265,929, although the firm's Legacy management accounts were not showing any WIP for these periods.

[46] ASM, on the basis of its analysis of the available documentation provided by the plaintiffs, set out a list of information/documentation it required "to gain an understanding of the financial performance and position of the LLP and the Legacy part of the LLP from 2012 – 2017." I will deal with this in more detail below.

[47] At [1] (above) I referred to some discovery provided by the Phoenix plaintiffs. This was provided by letter dated 10 March 2023. These included a summary of the bill of costs submitted for taxation in the Barnard case and a bill of costs submitted by KRW Law to Phoenix Law dated 22 September 2020 referring to work carried out in the Flynn case between 2008 and 2018 (which includes £90,464 for professional fees).

[48] This additional information together with an affidavit sworn by the first plaintiff on 28 February 2023 were sent to ASM and by a further addendum report of 20 March 2023 made further comment. Specifically in relation to the Barnard case, ASM identified the value of WIP in respect of that case as at 31 March 2018 was £212,366, against a total WIP for the entire business at 31 March 2018 as £298,512. (ASM were referring to the actual accounts not the management accounts.) If correct, this would suggest that the Barnard case alone represented approximately 70% of the WIP of the firm.

[49] On the basis of what ASM considered were remaining outstanding issues and this discrete point raised by the Barnard case discovery from the Phoenix Law plaintiffs, further information and documents were requested by ASM, which I will also deal with in more detail below.

[50] The contents of the ASM letters and the opinions expressed therein may be a matter of contention at the trial and I therefore do not wish to place too much

reliance upon them at this stage. However, the use of WIP is a well-established accountancy principle assisting in any assessment of profitability. I will accept, at this stage, the opinion of ASM (para 15 of letter of 20 March 2023) that "The value of WIP is a key component when calculating the profit generated by a law firm." I do not consider that to be a controversial statement. A simple reliance on money generated by invoices furnished and/or paid could not provide a fair indication of the profitability of a law firm.

The KRW plaintiffs' objections

[51] The objections are two-fold. The first is that some of the documents sought do not actually exist and would therefore have to be created. As such, they do not form part of the discovery process. I accept that proposition, and I also consider that a variation of the proposition is that the defendant cannot require, through the discovery process, a detailed breakdown, analysis, or other explanation, relating to the plaintiffs' accounts and general accounting practices.

[52] The second objection relates to the issues of relevance and proportionality. The argument was that the key component of the alleged defamation was that the plaintiffs were "ripping off" the Legal Aid Fund having received £7.3 million over three years. The potential meanings of what was published have been determined by Stephens LJ in the meanings judgement (see [29] above) including the mounting of a campaign for financial gain, greed and inappropriate obtaining of legal aid. The use of phraseology such as "trousering" has nothing, or little, to do with profitability. The key issue relates to receipts for this area of work rather than WIP or profitability. WIP was not the basis upon which the comments could have been made by the defendant.

[53] Mr O'Donoghue KC referred to several authorities. It is not necessary to deal with these in great detail as they reflect what are regarded as well-established principles. In *Yorkshire Provident* and *Evans v Granada Television* [1996] EMLR 429 (both justification cases) it was held that a plaintiff was only obliged to give discovery in relation to matters alleged in the defendant's particulars of justification.

[54] Reliance was also placed on *Taranissi v BBC* [2008] EWHC 2486 (another justification case) which stressed that the burden was on the defendant to allege any impropriety or failure in professional standards in clear and equivocal terms, and until this was done the defendant was not entitled to obtain any documents. This judgment is not the place to discuss the different approach brought about by the English Civil Procedure Rules ("CPR") which were applied in *Taranissi*. They do not apply in Northern Ireland. It is noted by Eady J at [3] that the CPR did apply a "somewhat more rigorous "test to the old *Peruvian Guano* ('train of enquiry') test (see [9] above).

Discussion

[55] In approaching this application I have taken into account the overriding objective set out in Order 1 Rule 1A:

> "1A-(1) The overriding objective of these Rules is to enable the Court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable:
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate to -
>
> (i) the amount of money involved;
>
> (ii) the importance of the case;
>
> (iii) the complexity of the issues; and
>
> (iv) the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.
>
> (3) The court must seek to give effect to the overriding objective when it -
>
> (a) exercises any power given to it by the Rules; or
>
> (b) interprets any rule."

[57] At [30]–[33] above, I have set out the pleaded cases. I do not consider that a simple statement of joinder of issue is sufficient to create a relevance to a particular, or particulars, pleaded in a defence (see the Irish case of *Norris v RTE* [2016] IEHC 554 at [51] – "A denial of a material fact pleaded does not convert that material fact into a pleading by the plaintiff that he was defamed"). However, the nature of the plaintiffs' pleaded case in its reply to defence (see [32] above) clearly puts in issue

certain key accountancy factors - turnover, profits, and percentage of 'legacy' and 'non-legacy' business.

[58] This was not simply a denial but is an asserted positive case. As such I do not consider that the plaintiffs can draw assistance from *Norris*. Nor can they rely on *Taranissi* as I consider that the defendant had pleaded its case and the facts that it relied upon with sufficient specificity, and to which the plaintiffs pleaded in their reply to defence.

[59] The plaintiffs also pleaded that the discovery process would substantiate their case and prove the falsity of the defendant's pleaded case.

[60] I do not consider that this is a 'fishing' exercise. A 'fishing exercise' is when a party is looking for evidence to make a case which is not pleaded with sufficient precision. The request is for documents which specifically relate to the issues raised by both parties in the pleadings. The key issues are turnover, profitability and the percentage of 'legacy' business. Mr O'Donoghue KC suggested that this will be a matter for the court to determine at hearing. That is correct and it can only do this by consideration of the evidence. In the interests of fairness any trial process must take place after both parties have provided adequate discovery so that each party can prepare for the hearing, seeking expert opinion if necessary, and then by presenting its case. The *Peruvian Guano* test is based on the provision of documents which can advance or damage the respective cases.

[61] The court is conscious of the need to apply the test fairly to avoid the encouragement of a pure 'fishing' exercise. To this extent, the 'train of enquiry' envisaged by *Peruvian Guano* will be scrutinised with care. Eady J in *Taranissi* at [8] set some limits on this exercise:

> "It is important to remember, nevertheless, that wherever it may be appropriate to apply the "train of enquiry" test, what is being contemplated is that the relevant train of enquiry is supposed to offer potential assistance in resolving a pleaded issue. It is not supposed to enable a party to fish for a new case that has hitherto not been pleaded."

[62] The ability of ASM to advise the defendant, is clearly hampered by the failure to provide any meaningful figures on WIP. This may not be a factor in relation to turnover, if turnover is restricted to straightforward 'sales', but it is clearly relevant by the application of the most basic of accounting practice to profitability and percentage of work-types in the business.

[63] In general terms, I consider that the need for the KRW plaintiffs to provide discovery dealing with these issues is unarguable. Some of the documents sought relate to accountancy matters post-dating the dates on publication (December 2016).

The final relevant financial period therefore ended on 31 March 2017. Some of the documents sought relate to the period ended 31 March 2019. Clearly facts and evidence not in existence at the time of the publication could not form the basis for honest comment. The defence pleaded that an inference could be drawn that further very substantial, as yet unquantified sums, would be due in respect of the work being undertaken. This must be considered in the context of the lack of discovery in respect of WIP, and in particular work undertaken prior to publication for which a liability has been assumed under a legal aid certificate (subject to taxation) or will be assumed by another party in the litigation should the client be successful, and which will be actually paid post-publication. I have set out below the exact discovery requirements which include documents relating to later periods. I, on balance, consider that discovery is required for these periods to obtain a complete picture of the profitability issue pleaded by the plaintiffs.

[64] The court is mindful of the need to ensure that there is not a disproportionate burden on parties when complying with any discovery obligations (Keegan J's third test in *Flynn*). The KRW plaintiffs have not sought to argue that compliance will place a particularly onerous burden on them in practical terms. Dr McGleenan KC suggested that the documents could be made available with only the minimum of clicks from a computer 'mouse.' That may be an underestimate, but I will proceed on the basis that whatever I order to be discovered will not create an unsustainable administrative burden on the KRW plaintiffs. The information provided to date appears to indicate a computerised accounting system and I am assuming the documents are available, can be recovered and can be made available without difficulty.

[65] I now turn to the specific requests set out in the letters from ASM. My general approach is that the defendant is entitled to documents under the discovery process but not to information and explanations. The KRW plaintiffs are not required to create any document that does not already exist in hard or electronic form.

[66] By way of brief explanation, the directions set out below at [67] and [68] make reference to "the LLP" and "the Company." I have been working on the basis that the structure of the business is that KRW LLP (referred to as "the LLP") is a limited liability partnership (incorporated on 30 August 2012) consisting of seven designated individual members and a corporate member – KRW Law Advocates Limited (referred to as "the Company"). The Company (incorporated 20 July 2012) has the seven individual members of the LLP as its shareholders and directors. The LLP appears to deal with legacy and judicial review matters and the company appears to deal with all other business, including other civil and criminal litigation.

[67] Turning to the request in the letter of 21 February 2023 at para [22], I will direct that the KRW plaintiffs provide discovery of the following documents:

(i) WIP ledgers for the LLP at each year ended 31 March 2013, 2014, 2015, 2016 and 2017 (as per 22a);

(ii) Any document setting out the detailed breakdown/analysis of any adjustments to the WIP balances recorded per the ledgers and the amount recorded in the statutory accounts (as per 22b);

(iii) Any document detailing how WIP is valued/recorded in the WIP ledger (as per 22c);

(iv) Management accounts for the LLP and the Legacy part for the years ended 31 March 2012, 2013, and 2014 (as per 22d);

(v) A list of the bills raised and receipts of fees for each legacy case including active and settled cases between 2012 and 2017 (as per 22e);

(vi) Full accounts (statutory accounts plus additional notes, including the detailed profit and loss account) for the LLP and the Company for the period ended 31 March 2013 (as per 22f);

(vii) A list of the legacy cases fees included in debtors from 31 March 2013 to 2017 (as per 22g);

(viii) A list of the legacy cases fees included in sales in the statutory accounts from 31 March 2013 – 2017 if different from (iv above)(as per 22h);

(ix) Any document detailing how practice overheads, particularly salaries are split between the LLP and the Company before the management charge from 2012 to 2017 (as per 22i);

(x) Any document detailing how practice overheads, particularly salaries are split between the Legacy part and the remaining parts of the LLP from 2012 to 2017 (as per 22j);

(xi) Any document detailing how the management charge between the LLP and Company in 2015 and 2017 is calculated particularly staff salaries allocation if the staff member is working on matters for both the LLP and Company (as per 22k).

[68] The request in the letter of 20 March 2023 is at para [31]. I will direct that the KRW plaintiffs provide discovery of the following documents:

(i) Documents showing detailed calculations on a case by case basis of WIP included in the year end accounts from 31 March 2013 to 2019 and as at 18 August 2018 (as per 31a);

(ii) A list of the bills raised and receipts of fees for each legacy case including active and settled cases between 2017 and 31 March 2019 (as per 31b);

(iii) Full accounts (statutory accounts plus additional notes, including the detailed profit and loss account) for the LLP and the Company for the period ended 31 March 2019 (as per 31c);

(iv) A list of the legacy cases fees included in debtors at 31 March 2018 and 2019 (as per 31d);

(v) Any documents detailing how a management charge of £84,591 was arrived at in the period from 1 April 2018 – 18 August 2018 (as per 31e);

(vi) Any documents detailing what the consultancy fees of £72,061 relate to in the period from 1 April 2018 – 18 August 2018 (as per 31f);

(vii) Any document confirming the date on which the Taxing Master concluded the taxation of the legal costs in the Barnard case (as per 31g);

(viii) Any document confirming which entity (the LLP or the Company) recorded the fees, WIP and associated costs in the Barnard case (as per 31h).

[69] Dr McGleenan KC referred to the potential relevance of the decision of Tugendhat J in *Joseph v Spiller* [2012] EWHC 2958 when dealing with the substantive hearing of the defamation action which followed the Supreme Court's decision on a preliminary issue (see [24]–[28] above). At [128] *et seq*, special damages were disallowed because of a finding that the plaintiff had intended to evade the payment of VAT. This is a far cry from the situation in this case which merely relates to a failure to provide discovery of complete accountancy records. I am unattracted by this argument. The decision in *Joseph* is linked to the court's jurisdiction in dealing with an abuse of its process. *Joseph* had included a false claim for special damages in the libel action and as such was abusing the court's process. There is no such evidence or suggestion in this case.

[70] Mindful of the administrative burden to be placed on the KRW plaintiffs to comply with any order, I will hear counsel about what a realistic time frame for compliance would be, bearing in mind the hearing date in November 2023, and the need for ASM to be able to assimilate the information contained in the documents and provide advice to the defendant.

[71] The costs of this application will be reserved to the trial judge.