Neutral Citation Number: [2018] EWHC 253 (QB)

Case No: HQ14D04882

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2018

Before:

MR JUSTICE WARBY

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Between:

(1) SIR KEVIN BARRON MP **(2) RT HON JOHN HEALEY MP** **(3) SARAH CHAMPION MP**	**Claimants**
- and -	
(1) JANE COLLINS MEP **(2) UNITED KINGDOM INDEPENDENCE PARTY**	**Defendants**

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- -

William McCormick QC (instructed by **Steel & Samash**) for the **Claimants**
Jonathan Swift QC and David Bedenham (instructed by **UKIP**) for the **Second Defendant**
The First Defendant did not appear and was not represented

Hearing dates: 8 & 9 February 2018

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Mr Justice Warby :

1. This is an application by the claimants for a third-party costs order against the second defendant (UKIP, or the Party). UKIP has agreed to be joined to the action for the purposes of resolving the question of whether it should pay costs incurred by the claimants in their successful claims for libel against the first defendant (Ms Collins), who is and has at all relevant times been the MEP for Yorkshire and North Lincolnshire, and a member of the Party.

Essential background

2. This litigation has a long history. Details are set out in a number of previous judgments of mine, the four most important of which are readily available to the public: those given on 20 April 2015 (see [2015] EWHC 1125 (QB), (the Meaning Judgment)), 16 May 2016 ([2016] EWHC 1166 (QB), (the Stay Judgment)), 22 December 2016 ([2016] EWHC 3350 (QB), (the Application to Vacate Judgment)), and 6 February 2017 ([2017] EWHC 162 (QB), (the Assessment Judgment)). The last of these incorporates a procedural chronology to which those interested can refer for a comprehensive and more precise account. For present purposes, however, the key features of the background can be quite shortly summarised.

3. The claimants are three Labour MPs for constituencies in or near Rotherham. They sued Ms Collins for slandering and libelling them in a speech she gave to the UKIP Party Conference on 26 September 2014, at which time the 2015 Election was in prospect and Ms Collins was the prospective UKIP Parliamentary Candidate for the constituency of Rotherham. The speech was broadcast live on the BBC Parliament Channel and republished on the UKIP website and via various other media. Complaint was made promptly and proceedings followed in November 2014.

4. The Meaning Judgment resulted from an application made by the claimants for the trial of preliminary issues. At that time, Ms Collins was represented by RMPI LLP, solicitors, and specialist Counsel. Following a hearing, I held that the speech referred to all three claimants, and bore three defamatory meanings about them, to the effect that they had known many of the details of the scandalous child sexual exploitation that took place in Rotherham, yet deliberately chose not to intervene but to allow the abuse to continue; that they had done this for motives of political correctness, cowardice, or selfishness; and that they were thereby guilty of misconduct so grave that it was or should be criminal. I ruled that although the second and third of these imputations were comment, the first amounted to an allegation of fact.

5. Within a month, following legal advice, Ms Collins made an Offer of Amends pursuant to the Defamation Act 1996, that is to say an offer to make a suitable correction and sufficient apology and pay such damages and costs as should be agreed or determined by the Court. This was promptly accepted by the claimants. But Ms Collins made no such correction or apology as she had offered to make. No agreement was reached on how to implement the agreement for amends. So, the claimants made an application to the Court (the Assessment Application), for the assessment of the compensation due to them under the Offer of Amends regime. The Assessment Application was issued on 9 September 2015.

6. At this point Ms Collins, who had by now parted company with her lawyers, changed her position. She asserted that she had been badly advised and/or had misunderstood, and that she had good defences to the claims. She applied for an order "vacating" her Offer of Amends (the Application to Vacate). Before that application came on for hearing Ms Collins, still acting in person, made a further application (the Stay Application) seeking an order staying these proceedings pending a reference to the European Parliament, for its opinion on whether this action infringed Ms Collins' immunities as an MEP.

7. In the Stay Judgment I initially rejected Ms Collins' Stay Application. And I went on to hear argument on the Application to Vacate. That involved review of documents disclosed by Ms Collins pursuant to a waiver of privilege which had been ordered by HHJ Moloney QC (the Original Collins Disclosure). (Judge Moloney had ordered such disclosure because Ms Collins was criticising her previous legal representatives; such criticisms could only be fairly assessed if she gave an insight into the advice they had provided). But the day after hearing that argument I felt bound to grant the Stay Application, as a formal request had by then been received from the European Parliament which, on the authorities, obliged me to grant a stay.

8. In due course, the European Parliament expressed its opinion, which was that the action did not represent an infringement of Ms Collins' Parliamentary immunities. That view was not binding on me, but I agreed with it and therefore proceeded to deal with the Application to Vacate the Offer of Amends, which I dismissed. For the reasoning behind those conclusions, see the Application to Vacate Judgment, ruling that Ms Collins' criticisms of her lawyers were ill-founded, and that she had no right to resile from an agreement into which she had freely entered in full knowledge of the consequences. I then rejected further applications by Ms Collins to adjourn and/or to stay the proceedings and gave directions for the hearing of the Assessment Application.

9. In the Assessment Judgment, I determined that Ms Collins was liable to pay each claimant compensation in the sum of £54,000, making a total of £162,000. I went on to rule on applications by the claimants for appropriate costs orders. I ordered Ms Collins to pay the claimants' costs of the action, and to make an interim payment on account of those costs in the sum of £120,000.

10. None of that has been paid, and the claimants' position is that they do not anticipate any significant recovery from Ms Collins. The claimants' intention to pursue UKIP for costs was first indicated in July 2017, following a hearing on 1 June 2017 at which Ms Collins was questioned about her assets, and review of disclosure given by her following that hearing. It was at this point, according to the claimants' evidence, that they became aware that she had been financially supported by UKIP. It was on 11 July 2017 that the Party was notified that the claimants would seek a third-party costs order. The present application was issued on 14 September 2017.

Issues

11. The claimants' application invokes the power of the Court pursuant to s 51 of the Senior Courts Act 1981, which makes provision for the payment of costs "*of and incidental to"* proceedings in the High Court. By s 51(1) such costs are "in the

discretion of the court". By s 51(3), "*The court shall have full power to determine by whom and to what extent the costs are to be paid*."

12. The application notice states that the third-party costs order is sought "due to UKIP's control/funding in this litigation due to political interest/benefit". For the claimants, Mr McCormick QC submits that UKIP's conduct in (1) providing financial support and (2) seeking – as the claimants allege - to influence the conduct of the defence of the action by Ms Collins for its own ends, makes it just to order that it bear the costs of that action. Central to this argument is the proposition that "on any fair analysis, UKIP regarded the conduct of this litigation (and in particular the delaying of any settlement) as part and parcel of its 2015 General Election campaign."

13. The Party's case as presented by Mr Swift QC is that it would be unjust to make any third-party costs order because (1) although it did provide some assistance to Ms Collins, it did not seek control of the litigation; (2) its primary concern was to help Ms Collins settle the claims against her, which is entirely at odds with any suggestion that UKIP promoted the litigation; (3) Ms Collins' obvious determination to defend the claims means that the claimants cannot say that UKIP's assistance has put them to expense that they would not otherwise have incurred; and (4) the fact that the claimants did not give notice of their intention to seek a non-party costs order until July 2017 points strongly against any decision to make such an order.

14. The Bill of Costs for the action as a whole, which the claimants' solicitors have served on Ms Collins and UKIP, amounts in total to £669,605.68. That sum does, however, include ATE insurance premiums, VAT, and success fees. It also covers costs incurred after 22 June 2015, which is the point at which Ms Collins became a litigant in person and, as Mr McCormick QC acknowledges on the claimants' behalf, UKIP's involvement came to an end. The costs claimed in respect of work done up to that date, inclusive of ATE, VAT, and success fees, are £178,140.96.

15. None of these costs have yet been submitted for detailed assessment. The order sought is for any costs which the Court orders UKIP to pay to be subject to such assessment, on the standard basis, if not agreed. Such an order, if made, would leave it open to UKIP to contest, in the course of the detailed assessment, the recoverability and amount of any particular items or heads of costs, such as success fees, and ATE insurance premiums, and to challenge the time spent, the hourly rates claimed and the proportionality of the costs. I am being asked to rule on the principles of recoverability, not the amount.

Legal principles

16. It is well-established that that the power conferred by s 51(3) of the Senior Courts Act 1981 includes the power to order that all or part of the costs of litigation be paid by a person who was not a party to the proceedings. The approach to be adopted has been much-discussed over many years. The leading authorities include *Symphony Group Plc v Hodgson* [1994] QB 179 (CA), *Metalloy Supplies Limited v MA (UK) Limited* [1997] 1 WLR 1613 (CA), and *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39 [2004] 1 WLR 2807.

17. From these authorities Mr Swift draws the following general principles:

(1) The power to make a costs order against a non-party is exceptional in the sense that such orders are not usually made. Such an order may only be made where there has been conduct by the non-party such as to render the order just and reasonable: *Symphony Group* at 192H (Balcombe L), *Metalloy* 1620B-C (Millett LJ).

(2) The power should be exercised only against non-parties who can properly be described as "... the real party interested in the outcome of the suit": *Metalloy* ibid.

(3) It will not generally be used against "pure funders", that is to say persons who provide financial support to a litigant but who have no personal interest in the litigation, who do not stand to benefit from it, who do not fund the litigation as a matter of business, and who do not seek to control its course: *Dymocks* [25(1) – (3)] (Lord Brown).

(4) Even where the circumstances are such that *prima facie*, a non-party order could be made, no such order should ordinarily be made in respect of costs which the successful party would have incurred in any event: *Dymocks* [20] (Lord Brown).

(5) A party to litigation who wishes to make a non-party costs application should warn the non-party of that possibility "at the earliest opportunity": *Symphony Group* 193C (Balcombe LJ).

18. UKIP's first and second submissions (see [13] above) rely on the first three of these principles. The Party's third and fourth submissions rely, in turn, on the fourth and fifth principles.

19. To the fifth principle, Mr Swift would add a sixth, related proposition, namely that "It will usually be unfair for a non-party costs order to be made in relation to a period before such warning was given". For this, Mr Swift relies on *Brampton Manor (Leisure) Limited v McLean (No 2)* [2009] BCC 30 [26] (Lewison J).

20. Mr McCormick does not take issue with the first and second principles above, but he does not accept the way in which the other propositions are stated and, more generally, submits that UKIP's approach to the exercise of the discretion is unduly rigid. Mr McCormick points to more recent authority indicating that the principles that emerge from the authorities I have cited are not to be treated as "immutable", but rather as examples of the application to particular factual situations of a single underlying principle, namely that "the discretion must be exercised justly", the critical factor being is the nature and degree of the third party's connection with the proceedings. For these points he relies on *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23 (Moore-Bick LJ, giving the judgment of the Court) and the later decision in *Turvill v Bird* [2016] EWCA Civ 703 (Hamblen LJ and Gross LJ).

21. The extent of the differences in the parties' overall approaches to the applicable law should not perhaps be overstated. Nor should one over-estimate the importance of any such differences in the overall scheme of this application, which turns largely on points of fact and issues of discretion. But I will address the disagreements later in this judgment.

22. It is not in dispute that any order I made would be in addition to, and not in substitution for, the existing costs order against Ms Collins, who would remain jointly and severally liable: see *Dymocks* [17].

The evidence

23. This is a summary procedure, by which the issues are to be resolved on the basis of written evidence, without cross-examination. Neither side has suggested that this is inappropriate.

24. The claimants' application is supported by a witness statement of Gerald Shamash (his fourth in the action). Mr Shamash is a partner in Steel & Shamash, the firm which has conducted this litigation for the claimants from the outset. His statement recounts the history of the proceedings to date, including more detail about the oral examination of Ms Collins' means on 1 June 2017, the contents of the disclosure she gave as a consequence of that hearing (The Further Collins Disclosure), and the steps then taken by Mr Shamash on the claimants' behalf to pursue the present third-party costs application. The statement exhibits documents evidencing the procedural history, and the Further Collins Disclosure. The statement was made on 22 August 2017, and served in support of the claimants' application in September of that year.

25. On 27 December 2017, UKIP signed a disclosure list for the purposes of this application. Copies of the listed documents were provided thereafter (UKIP Disclosure Tranche 1). UKIP was at that time without legal representation. In early January 2018, solicitors were instructed. On 1 February 2018 further disclosure of documents was given, amounting to some 540 pages (UKIP Disclosure Tranche 2). That was less than a week before the hearing date that had been fixed for the claimants' application. UKIP Disclosure Tranche 2 has also been referred to as "the RMPI Documents". The documentation had been provided to UKIP by Ms Collins.

26. In opposition to the claimants' application, UKIP relies on three witness statements and their exhibits, as follows:

    (1) Stephen Crowther, who was UKIP's Party Chairman from November 2010 until July 2016, and a member of the National Executive Committee (NEC) during the same period. His period of office thus covered nearly all of the relevant events in this case. His statement gives an account of the decisions taken by the NEC to provide funding for Ms Collins in connection with her defence in the main litigation. His statement has three exhibits: (i) UKIP Disclosure Tranche 1; (ii) UKIP Disclosure Tranche 2; and (iii) a copy of the minutes of the NEC Meeting for October 2014.

    (2) Matthew Richardson, a barrister who was UKIP Party Secretary and a member of its NEC (non-elected and non-voting) between December 2014 and June 2015. He acted as the primary point of contact between the NEC and Ms Collins and her lawyers during this key period.

    (3) Adam Richardson, also a barrister. He was an administrative assistant employed by UKIP, who was involved in events up to June 2015, about which he gives some evidence.

27. UKIP Disclosure Tranche 2/the RMPI Documents were said to constitute "the full file of papers created by RMPI in the course of their instruction" by Ms Collins. In the course of the hearing, it emerged that this was not quite accurate. For whatever reason, the RMPI Documents did not include some that had been in the Original Collins Disclosure. An instance is an attendance note of the conference with Counsel to which I shall refer later in this judgment. In that respect, I am able to draw on findings I made in the Application to Vacate Judgment, on the basis of the Original Collins Disclosure. But given that UKIP had not been provided with the Original Collins Disclosure, I was concerned to ensure that there was nothing else in that disclosure that should have been before the Court on this occasion. I required the claimants, through Steel & Shamash, to review it, to check and confirm whether that in any way altered or undermined the evidence in Mr Shamash's Fourth Witness Statement. In the event, the claimants' solicitors and Counsel have both reviewed the material and I have been assured that it did not. UKIP has been provided with the additional documents, and agrees that there is nothing in what has been disclosed that needs to be drawn to my attention.

28. The three UKIP statements were served just before 1pm on Tuesday 6 February 2018. That was well over 4 months after the application was first made to the Court, and one clear day before hearing began. There is no explanation of the delay. It is hard to disagree with the comment of Mr McCormick, that the failure to address the factual basis of the claimants' application in good time, and the late service of all this new material is "deeply unsatisfactory". Mr McCormick's position on behalf of the claimants is, however, that it is in the end of no real import. His argument is that the evidence cannot undermine the contemporaneous documents, and it is those on which the claimants principally rely.

Narrative and findings of primary fact

29. There is no dispute that UKIP agreed to and did make substantial payments in respect of the costs incurred on Ms Collins' behalf in dealing with these claims. There is a dispute about exactly how much it paid, with which I shall have to deal. But there is no dispute as to the period over which financial support lasted: the first commitment was made in early December 2014 and support continued until about early or mid-June 2015. It is that period which has been the primary focus of the arguments on this application. Those arguments have mainly concerned the nature of UKIP's role in relation to the litigation and, in particular, the nature, extent, and effect of the Party's involvement in decision-making about how the action should be dealt with.

30. The hearing has involved a detailed review of quite extensive correspondence and other documentation involving Ms Collins, her solicitors and Counsel, and a variety of representatives or members of UKIP. Although – as I have mentioned - there are some omissions, the documentation now available adds considerably to what was revealed in the Original Collins Disclosure, and discloses a fuller picture. It is appropriate to set out the sequence of events in some detail. Unless indicated otherwise the emphasis in what follows is mine, designed to highlight points of significance.

October and November 2014

31. The claim against Ms Collins was first notified to her on 2 October 2014, within days of her speech, by letter from Steel & Shamash. The letter of claim set out the terms on which the claimants would settle the matter namely, removal of the offending allegations, a full and unqualified apology, damages and costs. The figure given for damages was £10,000 each, which the claimants said they would give to named charities.

32. The claim was first discussed by UKIP's NEC at its monthly meeting on *13* October 2014, when the Party Secretary (Matthew Richardson) reported *"We have someone suing Jane Collins for defamation – we are dealing with that currently"*. He expressed the opinion: "*I don't see it going anywhere*". That proved wrong.

33. It seems clear that "dealing with it" involved referring Ms Collins to RMPI. The firm was later to bill for work beginning on 2 October 2014, commencing with "*receiving and perusing the letter of claim and advising you accordingly*". On 14 October 2014, RMPI wrote to Steel & Shamash with a holding response acknowledging the complaint, and put papers before junior Counsel in specialist defamation chambers. The letter bore the initials of Andrew Reid, senior partner of RMPI, who was Treasurer of the Party and, it appears, UKIP's landlord. RMPI's offices were in the same building. I find that senior UKIP officials were aware from 2 October 2014 of the nature of the claim and the terms of settlement offered by the claimants.

34. RMPI wrote again on 23 October 2014, with an offer to undertake not to republish the speech on the UKIP website and to settle by way of a joint statement "clarifying" the parties' respective positions, failing which it was said to be "high likely" that Ms Collins would defend her speech as honest opinion or a publication in the public interest. It appears from the RMPI bills that this letter was drafted by or with the assistance of Counsel.

35. The claim form against Ms Collins was issued on 25 November 2014, without any further correspondence. Having been sent to RMPI, it was returned by them on the grounds that they had no instructions to accept service. That no doubt is correct, but they did of course have instructions more generally.

36. I find that although it was UKIP that referred Ms Collins to RMPI those instructions were formally speaking from Ms Collins. The firm was, up to this point in time, instructed by and acting solely for Ms Collins. That is consistent with the retainer letter sent to her personally by RMPI on 26 November 2014, requesting £5,000 on account of costs.

The initial funding decision

37. However, at its meeting on 1 December 2014, the NEC decided to allocate £10,000 to Ms Collins in connection with the claimants' action against her. A motion was proposed and passed by 12 to 1 with 1 abstention, that "*The party should cover JC cost in gaining, to a total of £10,000, counsel's advice and serving a defence*." The Party's Head of Press was said to have looked over a version of the speech, and Ms Collins believed that he had approved it. The minutes indicate that NEC members felt that in these circumstances the Party bore a degree of responsibility for the fact that Ms Collins' speech had attracted legal action. That this was their motivation at this stage is not disputed by Mr McCormick.

The extent of the funding

38. Particulars of Claim were served on 5 December 2014, and on 8 December Ms Collins contacted Gabrielle Rowland of RMPI referring to UKIP's decision "*to sponsor myself to the value of £10,000*" for initial costs and Counsel's advice on the merits. It was the following day, 9 December 2014, that RMPI came on the record as acting for Ms Collins. She never replied to the retainer letter she had been sent on 26 November 2014 and, as I find, all RMPI's bills from this point onwards were sent to UKIP and solely to UKIP.

39. These bills, covering work between 2 October 2014 and 2 June 2015, amounted in total to £36,121.61. All or the vast majority of this was paid by UKIP. It appears from a reconciliation and an email of 3 June 2015 that Ms Collins may have contributed to a final payment of a few thousand pounds.

40. The evidence of Mr Crowther is that UKIP "contributed" £36,121 towards Ms Collins legal costs, which he understands to have totalled £71,000. The Party sought to bolster that evidence through Counsel, who told me that Mr Crowther had reaffirmed it, after consulting Ms Collins. I cannot place reliance on hearsay information from this source, provided in that way. And, whatever the basis for the witness's understanding, it cannot be right, in my view. There is no documentary or other evidence to corroborate it. The narratives to the bills I have mentioned cover the whole of the relevant period and appear to be a comprehensive account of the work done by RMPI. The papers contain no other bills, nor do they contain any indication that there ever were such bills. On the contrary, the paperwork in this respect appears complete. Comparison with the bills rendered by Steel & Shamash for the same period, and calculations by reference to hourly rates, show that it is implausible that the costs incurred by Ms Collins were as much as £71,000. The suggestion is also inconsistent with the email sent to the Party by Ms Rowland on 3 June 2015 in which she said that "a*ll future invoices will be sent to Jane directly as I understand that she will be funding this matter herself from now on*". I find that Ms Collins' legal costs between 2 October and 2 June 2015 were some £36,121 and that the Party paid all, or all but a small part of that sum.

The role of UKIP

41. In addition to paying all the bills, UKIP was in several other respects treated by RMPI as a client. Throughout the period in which RMPI was acting in the litigation all file notes made by RMPI were marked "UKIP". Reports from RMPI were generally made in the first instance to UKIP (normally in the person of Matthew Richardson) but not copied to Ms Collins, who was reported to separately and later. "Instructions" were sought from UKIP, and this was done without prior reference to Ms Collins who was brought into the picture afterwards. For instance, on 18 December 2014, Ms Rowland emailed Matthew Richardson, with copy to Andrew Reid of RMPI but not to Ms Collins, advising as to choice of Counsel and costs. She sought Matthew Richardson's instructions, asking him when Ms Collins could attend. All of this was done before consulting Ms Collins herself. Further, as I will recount, in April 2015, when the Meaning Judgment was sent out in draft pursuant to CPR 40, RMPI immediately circulated it to UKIP officials as well as Ms Collins.

January 2015

42. A conference with Counsel was arranged for 16 January 2015. In advance of the conference, Counsel raised a number of issues with RMPI. Ms Rowland referred these to UKIP. She sought documents from Adam Richardson. At one point he raised objection to Ms Rowland having copied in Ms Collins on an exchange between him and Ms Rowland in which he, Mr Richardson, had referred to how Ms Collins might be "*managed*". The objection is understandable, as the exchange was private and its disclosure embarrassing. But the use of the word *"managed*" is relevant to the issues for my consideration.

43. The conference with Counsel was attended by Ms Collins, her partner Mr Kendall, Adam Richardson, and one other in addition to Ms Rowland. It took some 45 units of Ms Rowland's time, that is, well over 3 hours (including travel and preparation of the file note). This much appears from UKIP Disclosure Tranche 2 which contains part of an attendance note of the conference, but only part. Counsel's advice was negative. That is not clear from the partial copy document, but it is obvious from what was said, and from what happened, later. And it is here that my earlier judgment provides some help. In the Application to Vacate Judgment at [44(2)] I made this finding:

> "On 16 January 2015 the defendant attended a conference with Counsel. The file note shows that she was advised that "in light of the lack of evidence the client has provided us with in order to support her potential defence" an offer of amends "may be the best option open to her." Detailed advice on the offer of amends regime was given, which explained "that this would entail agreeing to make a suitable apology and … paying damages to the claimants. If the offer was accepted by one or all of the claimants then the parties would try and agree damages but if they failed to do so then damages would be determined by the court."

44. It is clear that, following the conference, Ms Rowland was authorised to approach Mr Shamash to discuss the prospects of settlement. Just before 6pm on 21 January 2015 she emailed Matthew Richardson, with copy to Adam Richardson, reporting on her discussions that day with Mr Shamash. Ms Collins was not copied in. Ms Rowland reported that Mr Shamash had declined to make any offer other than the one contained in the letter of claim. She proposed to Mr Richardson that she should make a counter-offer: to remove the allegations, make a statement in open court, and "*pay a global sum of £9,000 (ie £3,000 each*)". It is unclear where these figures came from. No advice had at this stage been taken from Counsel. Ms Rowland asked, "*If agreed, will UKIP fund the settlement?*" She added that she would also need Ms Collins' approval.

45. An email discussion ensued about what the Party might approve, with Ms Collins involved. She said, "*I am in the hands of the party of course*" and stated that she would be advised by Matthew and Adam Richardson along with the NEC. Matthew Richardson said he would "*ask the NEC and revert",* and that RMPI should "*Please make any settlement as low as possible*".

46. Before reporting to UKIP on her settlement discussions Ms Rowland had asked Mr Shamash for details of the claimants' legal costs. On 23 January and again on the morning of 27 January 2015 she chased him for those details. At lunchtime that day he provided the figure: £38,105.88 inclusive of Counsel's fees, disbursements, ATE insurance, VAT and CFA uplift. Towards the end of the day, Ms Rowland reported to Matthew Richardson with copy to Andrew Reid, advising on the right approach to this aspect of the matter. She made various points about how parts of the costs might be irrecoverable, and others could be negotiated down. Ms Collins was not copied in, nor do the files disclose any comparable communication to her.

February 2015

47. The action was further discussed at the NEC meeting on 2 February 2015. In attendance were (among others) Matthew Richardson, Andrew Reid, and Adam Richardson. The minutes record that Matthew Richardson "*outlined the situation*" to the Committee. Evidently, "*the situation"* concerned the cost of settlement. According to the record, he said "*It looks like £300,000 is the damages if she loses outright and then costs would be in excess of that. If we settle it will look closer to £60,000 it is looking like.*"

48. The minutes record that "*The NEC now asked if the political angle is important"*. Two questions were identified for decision: *"do we settle and if so how much do we pay and in that eventuality*". A resolution was proposed, seconded and passed by 10-1 with no abstentions, that "*The NEC resolve settling as low as possible and the party be held liable for the costs.*" I am satisfied that this is a resolution that the NEC made. It wanted the case to settle and was prepared to fund the settlement, but (naturally enough) wanted to spend as little on the settlement as it could. An email from Matthew Richardson to Ms Rowland of 3 February 2015 reflects this. This determination reflected, in my judgment, a recognition based on legal advice that Ms Collins' position was legally very weak indeed. The minutes of this meeting do not record or reflect any suggestion that she might have a defence. The decision also reflects the moral responsibility the Party had assumed at the outset.

49. The case for UKIP is that these minutes are, and should be treated as, an accurate and complete account of the discussion at and decision of the NEC at this meeting on the question of the claim against Ms Collins. On that basis, it is submitted that the Party was, at this point (as well as at other times), doing no more than acting as a "pure funder" of the litigation, without any control or meddling. The claimants invite me to treat the minutes as inaccurate and incomplete.

50. I can easily accept that invitation when it comes to the damages figure of £300,000. I regard this as an obvious typographical error, when what had in fact been said by Mr Richardson and heard by the NEC was "£30,000". It is only if they are regarded in that way that the minutes make sense. A global settlement estimate of £60,000 would represent £30,000 for damages and £30,000 for costs. That is consistent with Ms Rowland's email report. Mr McCormick's point is different, though. He submits that, by this stage, UKIP had decided to try to delay the progress of the proceedings, for political reasons. He points to two items of evidence. First, the reference in the minutes to the *"political angle*", which is left hanging. Secondly, an email of 2 February 2015 from Ms Rowland to Ms Collins, reporting that Mr Reid and Matthew Richardson "*would like to delay the hearing* [of the claimants' meaning application]

for as long as possible." She hinted that Ms Collins should declare a wish to attend the hearing, and that this could help put it off. Ms Collins did so declare. The suggestion is that this email was probably sent after the NEC meeting, and was part of a scheme initiated at the NEC.

51. There is something in this argument. The email probably was sent after the meeting, and reflected a decision by two people who had been present. Deliberately delaying the hearing would not be a proper course of action. It would appear to be a breach of the duty to help the Court to further the overriding objective. It would be naïve to suppose that the tactic had no connection to politics. Mr Crowther's witness statement acknowledges that the reference in the NEC minutes to the "*political angle*" reflects the fact that the NEC appreciated that the outcome of the case would have political repercussions. It would be surprising if it were otherwise. Neither the minutes nor Mr Crowther's statement gives any account of what answer(s) the NEC gave to the question. It is highly improbable that the issue was left hanging, as the minutes would imply. The record is in my judgment incomplete, as well as being inaccurate in the way already identified.

52. But I am not persuaded that the NEC had at this time decided to try to delay the hearing. The more likely explanation of the documents is that this decision was one taken by Mr Richardson and Mr Reid, after the meeting. Nor do I think it has been established that their motivation was quite as submitted by Mr McCormick. They were not, at this stage, intent on stringing out the proceedings until after the election. My conclusion is that they had decided, probably rightly, that delay would help them achieve the best possible settlement. One reason for that finding is the likelihood that they foresaw defeat at the hearing of the meaning application. They had every reason to do so. Another is that the minutes of the next NEC meeting, on 28 February 2015, record that "*At a previous meeting, the NEC resolved to settle at the lowest possible cost and the earliest opportunity"* (my emphasis). Thirdly, on 5 February 2015 a settlement offer was made by RMPI, which is hard to reconcile with the strategy suggested by Mr McCormick.

53. The offer was on the lines that Ms Rowland had proposed to UKIP: damages of £3,000 for each claimant, with other settlement terms including costs to be assessed if not agreed. Objectively assessed, this was an offer that properly merits the much-misused description "derisory". There was no prospect of its acceptance. It was swiftly rejected outright by Mr Shamash. But I do not believe that this was part of any Machiavellian plot. Ms Rowland, who had not consulted Counsel, seems to have thought for some reason that this was a reasonable negotiating move. It was nothing worse than wildly optimistic, ill-informed, and ill-advised.

54. Proper advice on quantum was given by Counsel in writing on the afternoon of Wednesday, 18 February 2015. This was pursuant to instructions prompted by the rejection of the offer of £9,000. Counsel advised that each claimant could expect to recover damages of at least £30,000 and up to £65,000 at a trial. Counsel thought it *"highly unlikely that an award following trial would be less than £30,000 each."* Counsel's estimate was £40,000 each. In other words, the offer that had been made represented 10% of the lowest realistic award, and a smaller percentage of Counsel's estimate. In a covering email, Counsel made the point that *"prompt settlement and the non-financial elements of any settlement would obviously affect what may be an acceptable amount of compensation."*

55. The advice was forwarded by Gabrielle Rowland to Andrew Reid and Matthew Richardson with the observation that *"Counsel's estimate is significantly higher than the sum the Claimants offered to accept in their letter of claim, ie £10,000 each …"* Ms Rowland mentioned earlier advice that *"it would be more cost effective to settle the case than to fight it*" and concluded "*I … await your instructions"*. The advice was forwarded separately, and later that day, to Ms Collins. Ms Collins promptly emailed Ms Rowland to say: "*I agree that it is too bigger risk for the party or myself in going to trial*" (sic). She did question why the figures did not differ for each claimant, but appears to have firmly agreed in principle to settlement.

56. On Monday 23 February 2015, Stephen Crowther called an Emergency NEC Meeting for Saturday 28 February, the stated purpose being "*to meet Jane Collins MEP for a short discussion*". There is a dispute between the parties about what prompted this. The claimants' case is that it was Counsel's advice on quantum. UKIP submits that it was pressure from Ms Collins, who had been repeatedly passing on to UKIP and RMPI pieces of information that she apparently considered might assist in defending the case. I find that the claimants are right on this point. The question of whether Ms Collins' bits and pieces of information were worth anything by way of defence was in the hands of the lawyers. Mr Richardson, a barrister himself, knew that. Ms Collins was not putting any real pressure on the NEC at this time. Mr Crowther was evidently sent Counsel's advice by Mr Reid at about 3:35pm on 23 February 2015, as was Mick McGough of the NEC. The notice of Emergency meeting was sent by email at 16:56. At 17:09 Mr McGough replied to say, "*A no-brainer in my humble opinion.*"

57. On Friday 27 February 2015, Ms Rowland emailed Mr Reid and Matthew Richardson seeking "*instructions in relation to Counsel's opinion on damages and the attached advice"*. She advised that if Counsel was correct "*then Jane would be better off accepting the offer in the letter of claim … we have not been put on notice that it has been revoked.*" She reported that the hearing of the meaning application was due to take place on 26 March. Mr Richardson forwarded this email to "*UKIP Legal*".

58. At the Emergency Meeting on 28 February 2015, Adam Richardson reported to the NEC. He gave figures for the likely cost of settlement, identifying a range of damages of £30-60,000 per claimant plus costs. These figures were clearly based on Counsel's advice. There was again a misunderstanding of some kind, as the minutes show these as figures which the claimants were asking for. In fact, they had only ever asked for £10,000 each. Judging by other NEC minutes I think this error may well be a mistake by whoever acted as secretary rather than the speaker. I do not think that matters much. What does matter is the nature of the NEC's decision. As I have already noted, the Minutes record that the NEC had previously resolved *"to settle at the lowest possible cost and the earliest opportunity".* They go on to record that, after hearing from Ms Collins, *"The meeting resolved to await the outcome of the Hearing as to Meaning, at which JC will be seeking to prove that her remarks were directed at Dennis McShane rather than Sarah Champion."*

59. UKIP's case is, again, that this is a full and accurate record of the NEC's decision; and that only a decision of that body can be relied on in support of the claimants' application. I am invited to treat these minutes as evidence that the NEC changed its previous position, and decided not to settle for the time being, on the basis of representations from Ms Collins. The suggestion is that the NEC did so in the belief that Ms Collins' arguments were tenable or at least that it would be appropriate to

fund her to test the arguments. I do not accept these submissions. I accept the submission of Mr McCormick, that the minutes do not tell the full story.

60. The background was Counsel's advice, showing that previous thinking had been seriously wrong. The response of one member of the NEC had been that the situation was a "*no-brainer*". I take that to mean that a decision to settle would obviously be right. According to the minutes, Ms Collins told the NEC that her speech did not implicate Ms Champion because she had not been elected until 2012, and that she had some prospect of proving the truth of her allegations against Sir Kevin Barron. The NEC itself had received no legal advice about the merits of these arguments. The legal advice which the Party had received or was aware of was negative, and gave it no grounds for any confidence that any of these arguments had any merit. And what happened thereafter is at odds with this interpretation.

March 2015

61. A further meeting of the NEC had been scheduled for Monday 2 March 2015. On 23 February, giving notice of the Emergency Meeting, Mr Crowther had emailed NEC members to say that this, the regular monthly meeting, would go ahead "*as usual*". At 14:44 on 2 March 2015, Mr Richardson emailed Ms Rowland and Ms Collins as follows: "*The NEC has asked that this matter not be settled until after the General Election and that the party will continue to fund the action in relation to the hearing as to meaning up to a maximum of £50k + VAT...*" Within the hour, at 15:41, Ms Rowland emailed Counsel's clerk to report that "*My instructions are to not settle this matter until after the general election …"* Ms Rowland was clearly troubled by the Party's stance, as was Andrew Reid. At 16:43 on 2 March 2015, Ms Rowland emailed Mr Richardson recording that she and Mr Reid had spoken and did not think that "*you have thought this out and considered the costs consequences that are involved if this matter is prolonged*." She explained their thinking, and concluded with written advice that "*you consider settling this matter as soon as possible and before the hearing on meaning. …"*

62. An RMPI attendance note shows that Ms Rowland spoke to Mr Richardson that day. It records an outgoing communication involving 2 units of time "*discussing with client …*" She told him she thought that "*the client should settle the case as the costs will be very high.*" Mr Richardson said that he understood this and considered the costs would be £250,000 in total. The note goes on: "*MR explained that <u>they</u> did not want to settle the case as it would [look] like the party is not standing by what it is saying."*. I think it likely that this conversation took place in the evening, after the emails I have mentioned.

63. The case for UKIP is that Mr Richardson's email of 2 March 2015, and the record of what he said to Ms Rowland that day, do not properly reflect the Party's then position. But the Party is unable adequately to account for the email or the record of the conversation. Mr Crowther cannot explain what Mr Richardson said, but points out that he was not at the Emergency Meeting. Mr Richardson himself has *"no clear recollection"* of the conversation and says that "*if I used the words*" attributed to him by Ms Rowland he does not know who "*they*" were. He goes on to say, "*It was not the case that the NEC did not want the case to settle*." But that misses the point, which is about *when* the NEC wanted to settle. My conclusion is that the conversation was accurately recorded by Ms Rowland and that her record, and Mr Richardson's email,

both accurately represented the Party's position, as adopted either at the meeting on 28 February 2015 (but not minuted) or at the meeting on 2 March 2015, or both, or authorised by the Party's senior management in the person of Mr Crowther. This not only fits with the documents, but also with the role played by Matthew Richardson, and the course of events thereafter. One significant point is that the position adopted by Mr Richardson in his email was not questioned by Ms Collins, to whom the email was copied. Further, it was discussed or mentioned repeatedly in email correspondence over the weeks that followed, without Mr Richardson or anybody else suggesting that it was a mistake or misunderstanding.

64. The first such reference was on 3 March 2015, when Ms Rowland emailed Mr Richardson to record that she understood that "*UKIP do not want to settle this matter before the election*", but suggested that the claimants' offer should be accepted in relation to Sarah Champion. No such instructions were forthcoming. Nor does the record reveal any challenge to Ms Rowland's understanding. A number of later emails recording this settled position were sent or copied to others, without any question being raised as to its accuracy.

65. On 6 March 2015, RMPI instructed Counsel to advise on the merits. Before Counsel's advice was received the NEC met again and considered the case. On 10 March 2015 Matthew Richardson reported that *"We cannot expose her and the party to that liability £250,000 – her evidence is thin and in dribs and drabs"*. The question put to the meeting was, according to the minutes *"a question of <u>when</u> she should settle the matter"*. The question of whether to settle was not discussed. The first relevant consideration identified in the minutes is: *"We should consider the political ramifications."* Mr Richardson explained that *"<u>we</u> could delay until after May"* and the NEC then considered the pros and cons of doing so. A number of contributions were made, not all of them very clearly set out in the minutes. But Mr McCormick understandably attaches significance to the following

(1) Neil Hamilton: "*… this is clearly about the political ramification…*"

(2) Alan Bown raised "*Short money*" (funding for smaller political parties based on their votes) saying "*after May 7th UKIP can get large amounts of money from the government. Every single vote counts and take this into consideration. Votes are more important than more money now."*

(3) John Bickley: "*this is a game of political poker which I think we should see through until the end."*

66. The NEC resolved unanimously to pass the following resolution, proposed by Piers Wauchope: "*We should continue to fund the legal action on the basis we will be challenging that Sarah Champion is used as a quote up to a maximum liability £60,000*". The "*funding*" here appears to relate to Ms Collins' legal costs rather than any damages or other settlement sums. This slightly incoherent account of the basis for such funding was evidently based on an explanation given by someone, but unattributed in the minutes, that "*the hearing as to meaning could remove Sarah Champion and this would put us on a very different footing <u>politically"</u>*. The emphasis in this quotation and those above is mine.

67. On Friday 13 March 2015, by email timed at 19:22, Counsel gave her written advice on the merits. It was unequivocal and pessimistic. The proposition that Ms Collins' speech did not refer to Sarah Champion was considered "*again*", and described as *"unarguable"*. As to meaning, the advice was that whatever precise meaning the Court found the speech to bear "*part of the sting of the speech was that the MPs knew, but did not act.*" (Emphasis in original). This was described as *"serious".* As to other defences, Counsel advised that "*I remain of the view that in order to defend the claims, Jane Collins would have to prove that her allegations were true …. I do not believe that Mrs Collins can prove the allegations are true in respect of any of the MPs."* That view was adhered to, after considering new documents, of which Counsel said, "*I do not think that the new documents provide any additional evidence which could be relied upon to defend the three claims.*" The terms of this advice make clear that this was not the first time Counsel had expressed such opinions. My conclusion is that she had said much the same at the conference on 16 January 2015. This latest advice also concluded that "*Jane Collins will, I believe, have to concede liability (by making an offer of amends or otherwise) to all or some of the defendants by 23 April (or shortly thereafter)."* This was based on the then timetable for service of a Defence. Counsel warned that "*if there is a desire to settle sooner, rather than nearer to the election, it is clearly in the client's interest to avoid costs being incurred."* She suggested "*early next week to keep a lid on the costs.*"

68. No step was taken towards any such settlement at any time before the General Election. What did happen can be summarised as follows:

    (1) On Tuesday 17 March 2015, having reviewed Counsel's advice, RMPI told her they suspected "*that the client/UKIP will want to formulate some kind of defence and then settle after the election.*" The understanding clearly was that there would be a settlement, but not yet. Counsel's reply indicates that she could not see what "*kind of defence*" could be run, other than the "*unarguable*" point on reference to Ms Champion.

    (2) Further attempts were being made at this time to induce Ms Collins to come up with something that could found a defence, though it is unclear what that might have been. In that context, RMPI's understanding that Ms Collins wished to defend the case *"until after the election"* was recorded in a further email of the same day, sent by RMPI to Ms Collins and copied to Matthew Richardson, Mr Crowther, and Kirsten Farage. Nobody quarrelled with this.

    (3) On 20 March 2015, the hearing of the meaning application was adjourned on the basis that instructions could not be obtained from Ms Collins due to her father's illness. By 25 March, the hearing had been re-fixed for 20 April 2015. The following day there was a discussion between RMPI and Counsel about the re-listing, and the possibility that the hearing might need to be moved further back to accommodate the point on reference which was now to be taken. Counsel was unable to say that the half-day allocation was insufficient. Ms Rowland noted that "*this still got us beyond the election to file a Defence and that it was fine*".

April 2015

69. The record is silent on what happened between then and the hearing on meaning, which proceeded on 20 April 2015. After the hearing, I reserved judgment, but not for long. My draft judgment was sent out to the parties' lawyers on 22 April 2015. It bore the usual rubric, in accordance with PD40:

> "This draft is confidential to the parties and their legal representatives and accordingly neither the draft itself nor its substance may be disclosed to any other person or used in the public domain. The parties must take all reasonable steps to ensure that its confidentiality is preserved. No action is to be taken (other than internally) in response to the draft before judgment has been formally pronounced. A breach of any of these obligations may be treated as a contempt of court.

70. Notwithstanding this, RMPI (Ms Rowland) emailed the draft to Ms Collins and the Party Secretary, Mr Richardson, addressing them as "Dear Jane and Matthew". Adam Richardson was copied in. So was Andrew Reid. On any view to send the draft judgment to UKIP officers who were neither parties nor legal representatives was contrary to the provisions of the Practice Direction and the wording on the draft, and nobody has suggested otherwise. For present purposes, the significance of this is that it shows (at least) that RMPI treated UKIP as if it was a party to the action.

71. The email is significant for other reasons. It shows that nobody thought that anything had materially changed in the month and more since Counsel's written advice on the merits, and it reconfirms without contradiction the UKIP policy decision to delay settlement until after the election. Ms Rowland took the opportunity to remind her client and UKIP that *"based on the information we have been provided with to date Counsel does not think that she can formulate a viable defence to the claim."* She added "*I understand that you wanted to delay these proceedings until after the general election and then look at settling the matter"*. She was not contradicted. She suggested they discuss a proposal to be sent to the claimants "*on Friday 8 May 2015*", the day after the election. Mr Richardson responded within 2 minutes of Ms Rowland's email, to the effect that the Party could not carry on funding the action and *"we need to settle, as soon as possible".* Ms Collins emailed later that *"I agree that we should settle May 8th if everybody is in agreement."* No step was taken towards settlement until after the election.

72. Judgment was handed down at a hearing on 29 April 2015. Two calls were made that day to RMPI by someone from Ms Collins' office, asking about how to manage the PR. An attendance note was made by Ms Rowland. This shows that she told the caller that *"at no point have we said that we think that JC has reasonable prospects of success."* I find as a fact that this is the position. The advice had always been to the contrary. For that reason, the plan had always been to settle the case. Ms Rowland went on to say that "*Her instructions [had] always been to kick this claim beyond the election without making an admission of liability" … "she was always lead to believe that after the election <u>they</u> would settle the case."* In this, I believe Ms Rowland was going a little beyond the strict position. But my finding is that from 2 March 2015 at the latest RMPI was in receipt of instructions from UKIP, endorsed by Ms Collins, to avoid the case coming to a conclusion by settlement or otherwise before the election.

73. On 30 April 2015, Matthew Richardson emailed the entire NEC, reporting that Ms Collins had lost "*which came as little surprise to anyone".* He went on: *"the matter has been kicked into touch as the NEC requested".* The fact that not a single NEC member disputed that proposition is the most telling reason to reject UKIP's submission to me, that Mr Richardson had somehow misunderstood the position. Mr Richardson reported that Ms Collins now intended to settle the litigation but was planning to do so "*as soon as possible after the election"*. The way he put this was to say that "*Jane agrees"* to do so. This is of course entirely consistent with the conclusion that Mr Richardson's email of 2 March 2015 reflected a decision by UKIP, through the NEC and/or its senior management, that this is what should happen.

74. There was however an issue with which the NEC does not appear to have grappled properly, if at all. On 28 February 2015, it had agreed to "*await the outcome of the meaning application*". On 10 March 2015, the resolution was to fund the case up to £60,000, but that related to Ms Collins' legal costs. The NEC had dealt with the matter on both occasions without making any (or any explicit) decision on how to fund the damages and costs that would need to be paid to the claimants to achieve a settlement, although a figure of £250,000 was mentioned on 10 March 2015. On 2 February 2015, the NEC had resolved to settle "*as low as possible and the party be held liable for the costs.*" This is ambiguous, but can be read as a decision to fund all the costs of settlement. As matters turned out, the Party decided that this was unaffordable and did not do it.

May 2015

75. The General Election took place on 7 May 2015.

76. There was a further NEC meeting on 11 May 2015. Matthew Richardson told the meeting that Ms Collins had "*been given ample assistance but now she has to settle*." RMPI attended, through Ms Rowland, who set out the costs position, which she put at *"a minimum of £60,000 and possibly up to £200,000".* As before, the minutes are muddled. They report that *"Counsel has advised that the quantum to the claimant is £30,000 but beforehand they used to accept £10,000."* I find that these figures are per claimant and reflect an accurate report by Ms Rowland, relaying Counsel's advice that damages would be at least £30,000 for each claimant. An overall figure of £120,000 mentioned in the minutes is likely to reflect an (optimistic) estimate by Ms Rowland of the overall cost of settlement. Nothing was resolved. Ms Rowland was sent away to "*look where we will be at settlement".*

77. She did so, and was unsurprisingly told that the pre-action offer was no longer available. She reported back the following day. On 13 May 2015 Ms Collins made clear that she would defer to the Chair, Mr Crowther and the NEC. Internal communications at this time betray confusion within UKIP about what was going on in connection with the claim. No settlement offer was made. On 17 May 2015 Ms Collins, by now exasperated by the lack of action, sent a strongly worded email setting out the importance to the party of giving her support, which she asserted had been offered at the outset. Mr Crowther sent a carefully considered response which was copied to Nigel Farage, Paul Nuttall, Matthew Richardson and a number of other senior figures within the Party. It contains some important passages:

(1) *"The NEC has taken the view that … there was arguably a degree of responsibility in [the press officer' having approved the speech. That is why it took the decision to support you …"*

(2) *"The NEC was advised by the lawyers … that the chances of success in your case were slim … It nevertheless took the view that we should continue to support you through the election both to ensure that there was no settlement before the election and to try and establishing … that you had been referring to Denis McShane and not Sarah Champion …"*

(3) *"The party has been supporting you, and is fully aware of its responsibilities; but this is at least as much your case as ours, and cannot be fully carried by the party. … settlement… without your (financial) participation will be impossible…."*

78. Things got difficult. On 21 May 2015, Ms Rowland emailed James Pawlowski at UKIP, with copy to Ms Collins and a number of other UKIP personnel, expressing her *"extreme"* concern that *"throughout the duration of this matter my instructions have come from a variety of people and not Jane directly"*. She was not contradicted. She insisted on written instructions from Ms Collins herself. These, as I have previously found, were eventually forthcoming. The more recent disclosure does not undermine that finding, but it does reveal more about the intervening events that was known to me when I made it. It is sufficient to summarise.

(1) Efforts were made to put together a jointly funded settlement package sufficient to strike a deal with the claimants. UKIP considered and probably made a commitment to fund £45,000 by way of damages.

(2) UKIP and Ms Collins also discussed in principle additional funding of £100,000 to cover her costs liability to the claimants. RMPI were assured that this sum could be raised. Mention was made of a "draw down guarantee" in this respect.

(3) Instructions were given to RMPI to *"proceed with the offer of £15,000 compensation to each plaintiff, with reasonable costs to be negotiated and an apology as already stated."* Thereafter, the offer of amends was made by RMPI and accepted by Steel & Shamash on behalf of the claimants. That brought an end to the libel action but left the question of remedies outstanding.

(4) The claimants did not accept the offer of compensation, that was made separately on Ms Collins' behalf, of £15,000 each. Internal discussion at UKIP led to the conclusion that the Party could not afford to fund the costs liability. No resolution to do so was ever passed.

(5) There was some discussion about a proposed form of words to be used to apologise to the claimants. UKIP discussed this internally, but no agreement was reached.

(6) On 23 June 2015, Ms Collins told RMPI in writing that the rejection of her offer of amends (as she described it) had serious financial implications, and after much agonising and family discussion she had decided that she was

going to represent herself and defend the claim. She reiterated this two days later in a conversation. That in substance is what took place thereafter. Ms Collins became a litigant in person. UKIP left the scene, so far as one can tell.

Discussion

79. In my judgment, Mr McCormick is right about the way the Court should approach the exercise of the discretion under s 51(3). The true state of the modern jurisprudence is in my judgment reflected in *Turvill v Bird* [2016] EWCA Civ 703, where Hamblen LJ (with whom Gross LJ agreed) said at [24] that:-

> "A number of recent authorities have stressed that this is a jurisdiction which must be exercised in the interests of justice and that its exercise should not be overcomplicated by authority."

Hamblen LJ went on to cite the observations of Laws LJ in *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2006] EWCA Civ 1038 [2007] 2 Costs LR 212 and Moore Bick LJ in *Deutsche Bank* (above) at [62].

80. Laws LJ said this:-

> "11. There is a danger that the exercise of the jurisdiction to order a non-party to proceedings to pay the cost of those proceedings becomes over-complicated by reference to authority." (Longmore LJ)
> ….
> 19. I would wish to emphasise my agreement with his statement at para 11 that the exercise of this jurisdiction becomes over-complicated by reference to authority. Indeed I think it has become overburdened. Section 51 confers a discretion not confined by specific limitations. While the learning is, with respect, important in indicating the kind of considerations upon which the court will focus, it must not be treated as a rule-book."

81. Moore Bick LJ said this:-

> "'As all three members of the court observed in *Petromec*, the exercise of the discretion is in danger of becoming over-complicated by authority. The decision of the Privy Council in *Dymocks*, which contains an authoritative statement of the modern law, explains and interprets the *Symphony* guidelines in a way which reflects the variety of circumstances in which the court is likely to be called upon to exercise the discretion. Thus, the Privy Council has explained that an order of this kind is "exceptional" only in the sense that it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. Similarly, it has made it clear that the absence of a warning is simply one factor which the court will take into account in an appropriate case when

> deciding whether, viewed overall, it would be unjust to exercise the discretion in favour of making an order for costs against the third party. We think it important to emphasise that the only immutable principle is that the discretion must be exercised justly. It should also be recognised that, since the decision involves an exercise of discretion, limited assistance is likely to be gained from the citation of other decisions at first instance in which judges have or have not granted an order of this kind.'"

82. Hamblen LJ referred also to *Dymocks* and to *Systemcare (UK) Ltd v Services Design Technology Ltd* [2011] 4 Costs LR 666. His conclusions were that

> "27. The authorities illustrate "the variety of circumstances in which the court is likely to be called upon to exercise the discretion" and "the kind of considerations upon which the court will focus", but are not to be treated as providing "a rulebook". The kind of considerations illustrated by the authorities include the following:
>
> (1) Whether the non-party funds the proceedings and substantially also controls or is to benefit from them and is the "real party" to them;
> (2) Whether the non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit;
> (3) Whether there is impropriety by the non-party in the pursuit of the litigation.
> (4) Whether the non-party causes costs to be incurred….
>
> 28. (1) (2) and (3) are all examples of circumstances in which non-party costs orders have been made. Generally (4), causation, is also required "to some extent" (per Morritt LJ in *Global Equities Ltd v Globe Legal Services Ltd* [1999] BLR 232) although it is not a necessary pre-condition, as held in *Total Spares & Supplies Ltd v Antares SRL* [2006] EWHC 1537 (Ch). In that case, however, there was still a causal link between the non-party's actions and the claimant's costs recovery in that he had deprived the claimant of any realistic opportunity of recovering its costs. The link was with the recovery of costs rather than the incurring of costs, but in both cases the claimant has to bear costs in circumstances where he otherwise would not have done."

83. Applying this approach to the facts as set out above, my conclusions are these.

(1) UKIP is not to be held responsible in these proceedings for causing or allowing Ms Collins to make the speech that generated the libel claims, or for its own role in broadcasting that speech online. No such suggestion is made on the claimants' behalf.

(2) The Party was evidently aware of the claimants' complaint by 13 October 2014. But in the light of later events I do not read anything into the NEC Minutes of that date other than an intention to offer or consider support for Ms Collins. On the evidence before me, the Party was not involved in the decision to reject the complaint made in the letter before action. If it was, it was not involved in a way that makes it culpable, or liable to contribute towards the early costs of the claim. For present purposes, therefore, the Party cannot be regarded as bearing any responsibility for the origins of the litigation, or for the conduct of Ms Collins' case before December 2014.

(3) The Party cannot be criticised, either, for its initial decision of December 2014 to provide limited funding for Ms Collins. There is no evidence, or none that I find persuasive, that the resolution passed by the NEC on 1 December 2014 was motivated by electoral considerations. On the face of the minutes, the funding resolution was prompted by motives of conscience. I accept that these minutes accurately reflect the reality of the matter. The purposes for which that initial tranche of funding was provided were therefore legitimate. This was "pure funding".

(4) Further, the period and the activities which that funding was intended to cover were both restricted. This was in essence an investigative phase, at least from UKIP's perspective. It was acting in good faith by funding the provision of initial advice and representation to a defendant towards whom it felt some moral responsibility and sympathy. It would be unjust and contrary to the public interest to expose such a third party to the risk of costs' liability.

(5) As to later events, the mere fact that UKIP was kept informed of what was taking place in the action would not be enough to justify a third-party costs order. The key questions relate to the Party's influence, or lack of it, on the course which the litigation took and the Party's reasons for wielding any such influence. The critical period starts with the conference with Counsel on 16 January 2015. I find that Counsel was clear at that time that there was no tenable defence and the advisable course of action was an offer of amends. By that time, in my judgment, it was clear that the case would have to be settled and the only real questions were on what terms, and when?

(6) In the light of my findings about the NEC meeting of 2 February 2015, I see no proper basis for holding the Party liable for costs incurred up to, or at, that point in time. UKIP was playing a supportive role, aiming to facilitate and fund a settlement, and it was not manipulating the situation. The decision deliberately to delay the meaning hearing was improper, but it was part of a settlement strategy, not a tactic to delay the resolution of the case. Nor do I consider that responsibility can reasonably be attributed to the Party for the derisory nature of the settlement offer made on 5 February 2015.

(7) But in my judgment things changed significantly with the NEC's decision(s) of late February and/or early March 2015. In that period the Party took a deliberate, informed and calculated decision, for reasons of party political advantage, to ensure that the case was not settled before the General Election. In my judgment, it very probably did thereby prevent a settlement that it had been advised should be made and which would otherwise have occurred quite

swiftly. The likelihood is that, but for its role, the case would have settled. At any rate it had a causative role. The consequence was that the action continued until the acceptance of the offer of amends. The decision to delay meant that by this time the costs had escalated to a point that made settlement unaffordable for the Party (or so it decided). There was so little room left for manoeuvre that the party was unable to achieve a settlement, alone or jointly with Ms Collins. Further costs that could have been avoided were therefore incurred after that, to no useful purpose, until late June 2015 when Ms Collins was left to her own devices.

(8) Ms Collins' conduct as a litigant in person between June 2015 and January 2017 was not in my judgment caused or contributed to by UKIP, nor was it foreseen or reasonably foreseeable by the Party. The Application to Vacate was an exceptional step to take, and lacked any merit. Those responsible at UKIP knew that Ms Collins had been properly advised, and had taken an informed decision to offer amends. They could not have foreseen such an application. Ms Collins' call for the intervention of the European Parliament was legally sound, but, for reasons given in the Application to Vacate Judgment, plainly and obviously bad on the facts. UKIP did not cause or contribute to these unreasonable applications, and it would be unjust to make them pay towards the costs incurred as a result.

(9) But there is every likelihood that a settlement in the Spring of 2015 would have obviated any need for the assessment hearing which, in the event, took place in January 2017. The costs of that part of the proceedings are fairly attributable to the Party's decision to ensure that there was no settlement before the election.

(10) For these reasons, on some of which I elaborate below, it is just and reasonable to make UKIP jointly and severally liable with Ms Collins in respect of the claimants' reasonable costs incurred between 20 March and 24 June 2015, and the claimants' reasonable costs of and caused by the assessment hearing in January 2017. It seems to me that, in principle, the Party should also be liable for the claimants' reasonable costs of enforcement proceedings following the decision on quantum, which would not have been necessary had there been a settlement in March 2015.

84. I should say a little more about the key decisions. Whatever exactly happened on 28 February and 2 March 2015, it is sufficiently clear that, by the second of those two dates, a decision had been taken at a high level within UKIP that the action should be settled, but not until after the election. The only credible motives for such a decision are political. The minutes of the NEC meeting of 10 March 2015 serve to double-underline this point. They unquestionably represent corporate decision-making. The decision-makers knew that Ms Collins' cause was hopeless, and that settlement was the only realistic option, but decided to delay that step. They did so knowing this would in all probability make settlement more difficult and more expensive, having reckoned that this risk was outweighed by the prospects of political gain (or avoiding political damage). This was a process of calculation in which extra votes were expressly weighed in the balance against the certainty of additional costs, and the risk that these might be unaffordable.

85. It is said on UKIP's behalf that the claimants are seeking to criticise the Party for not putting enough into the settlement pot. But that is a mischaracterisation of the claimants' case. Their criticism is that the Party, having become involved, then used its influence to ensure that the case did not settle. That is a fair point. Of course, it is impossible to be certain now what would have happened if the Party had not made its decision(s) of late February and early March 2015, or if it had not become involved at all. It may not be necessary to reach a conclusion on the balance of probabilities for the purposes of what is, after all, a discretionary exercise in which causation is not a pre-requisite (and is only required – where it is – "*to some extent*"). But my conclusion is that if UKIP had not become involved at all, or if it had stood by its initial decision of 2 February 2015, the case probably would have settled in mid to late March, before the parties started to incur costs in preparation for the hearing on meaning. And the probability is that the settlement would have taken the form which I take the Party to have envisaged at the time of the 2 February resolution. The Party would have met the damages and the costs, as well as Ms Collins' legal costs.

86. There is every chance that the claimants would have been prepared to accept a modest settlement at that time. As for damages, the shrewd move would have been to accept the offer made in the letter of claim. Failing that, the claimants would probably have taken £15,000 each, at that time. These are sums which the Party was later able to commit itself to funding by way of damages. The rejection of that offer in May 2015 says next to nothing about what would have happened had it been made in March, before the meaning application and the election. The claimants' recoverable costs in late March 2015 will have remained relatively modest. The all-inclusive total, according to the claimants, was some £38,000 at the end of January. Not much had gone on the interim. Doing my best on the available evidence I find that the claimants' costs in March 2015 would have been, and would have been regarded, as affordable by the Party.

87. Failing this, I am confident that Ms Collins would have made an offer of amends, which would have been accepted. She probably would have been able, and her lawyers would have persuaded her, to fund a settlement from her own resources. The costs of the assessment hearing would have been avoided. I am not persuaded by Mr Swift's submission that Ms Collins would have been resistant to settlement. I can understand why he relied for that submission on her later behaviour, when she was a litigant in person. But in the winter to the spring of 2014-2015 she was, in my judgment, taking a mostly sensible approach, prepared to listen to and act on advice from her lawyers and the Party.

88. I would reach the same conclusions if I were to adopt the more rigid approach advocated by Mr Swift on behalf of UKIP. Dealing with the first four principles identified at [18] above: I have identified the conduct which I consider makes it just and reasonable to impose a costs liability on the Party. UKIP was not "*the*" party interested in the outcome of the suit, but it was certainly "*a*" party with such an interest, and it was for that reason that it took the key decision(s) of late February and early March 2015. It was not, at that time, a "pure" funder. It sought to and did control the course of the action, for its own Party purposes. For the reasons I have given, I do not consider that the costs which I have identified would have been incurred in any event.

89. That leaves the questions of warning, and fairness ([18(5)] and [20] above). It is of course true that the claimants and their lawyers were aware of the close connection between Ms Collins and UKIP from the outset. They threatened to sue UKIP itself for broadcasting the offending speech online. But I am not persuaded that the claimants were aware of UKIP's role as a funder or controller of the defence at any time before they saw the Further Collins Disclosure in the summer of 2017. They gave prompt notice at that time. On the facts of this case I do not consider it unfair, in any event, to impose a third-party costs liability the prospect of which had not been notified to UKIP at the material time. The Party expressly contemplated paying third-party costs. It does not suggest that it has suffered prejudice through not being joined to the action in 2015, or that the delay has led to evidence going missing, or to financial decisions that would have been different.

Conclusion

90. For the reasons given in this judgment I have concluded that a limited costs order, as indicated above, should be made against UKIP, to reflect the impact on the action and its costs of the Party's deliberate and calculated decision(s) of late February and early March 2015, to ensure for Party political and specifically electoral reasons that the claimants' action should not be settled before the General Election.