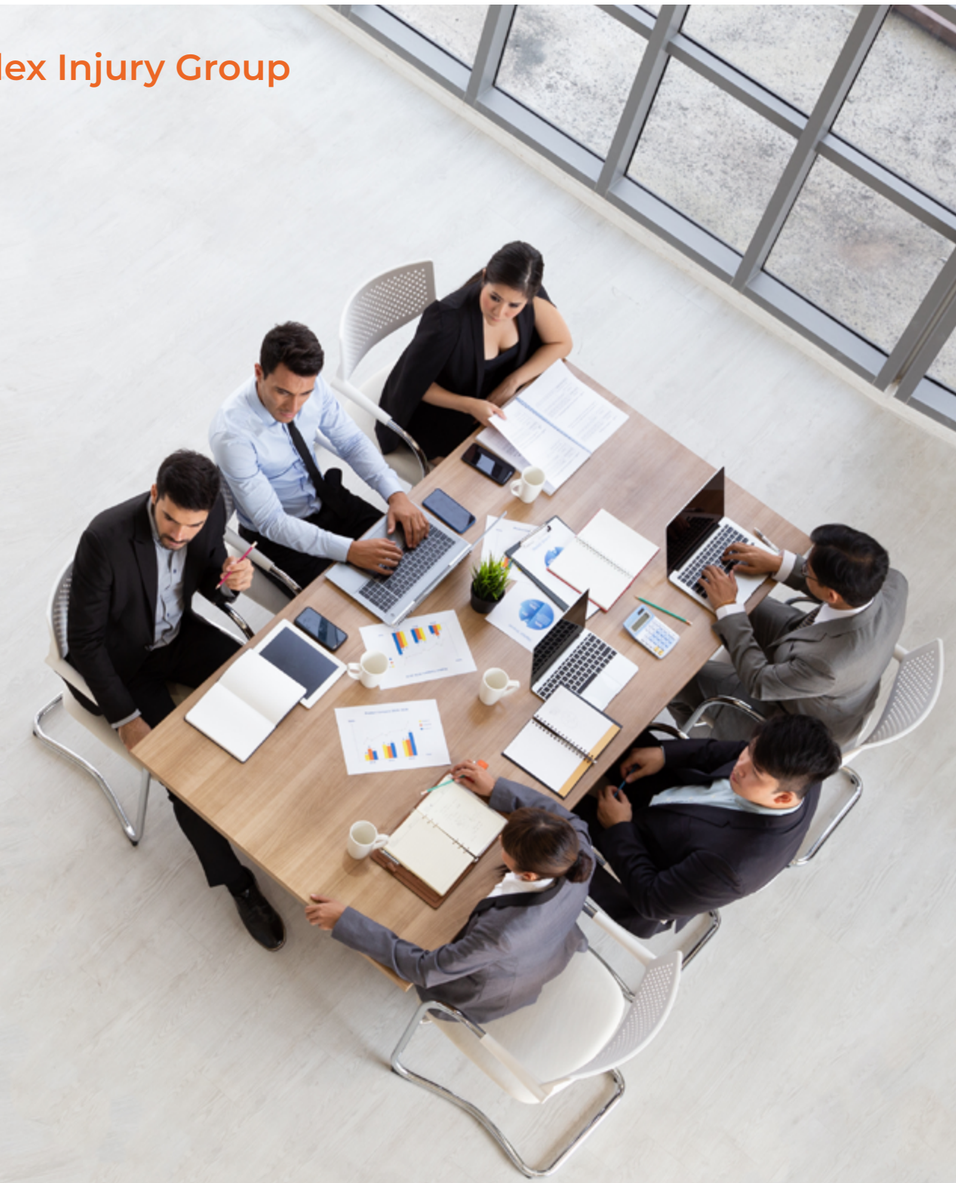
Insight 188

from Horwich Farrelly's Large & Complex Injury Group

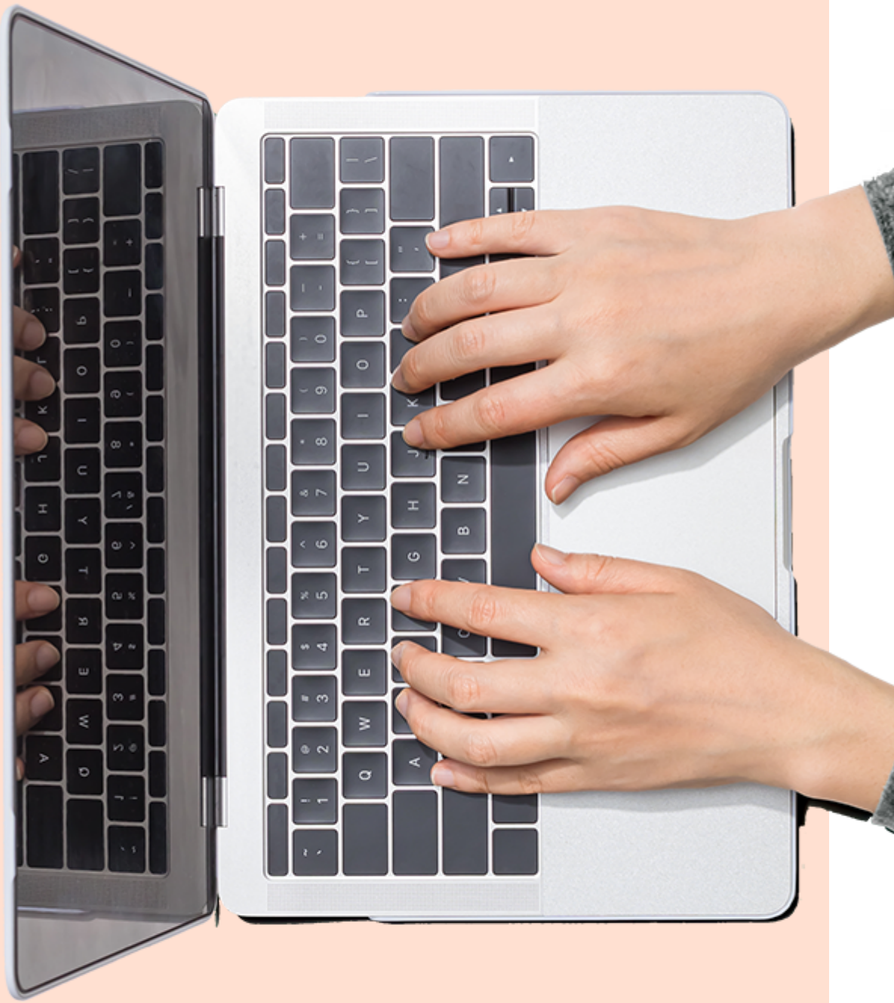


WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we report on cases relating to:

- The assessment of damages and impact of Covid on a claim for loss of earnings
- Claiming the costs of advertising for clients in a group litigation claim

Malcom Henké
Partner & Head of LACIG
malcolm.henke@h-f.co.uk



The impact of Covid on a claim for loss of earnings

Kim v Lee [2021] EWHC 231 (QB)

This is a defamation case heard in the High Court Queen's Bench Division Media and Communications List before The Honourable Mrs Justice Steyn DBE. Fascinating though the whole judgment is, if you are interested in football and social media, the specific point we are looking at here is in relation to how the court assessed damages for loss of earnings in the context of Covid.

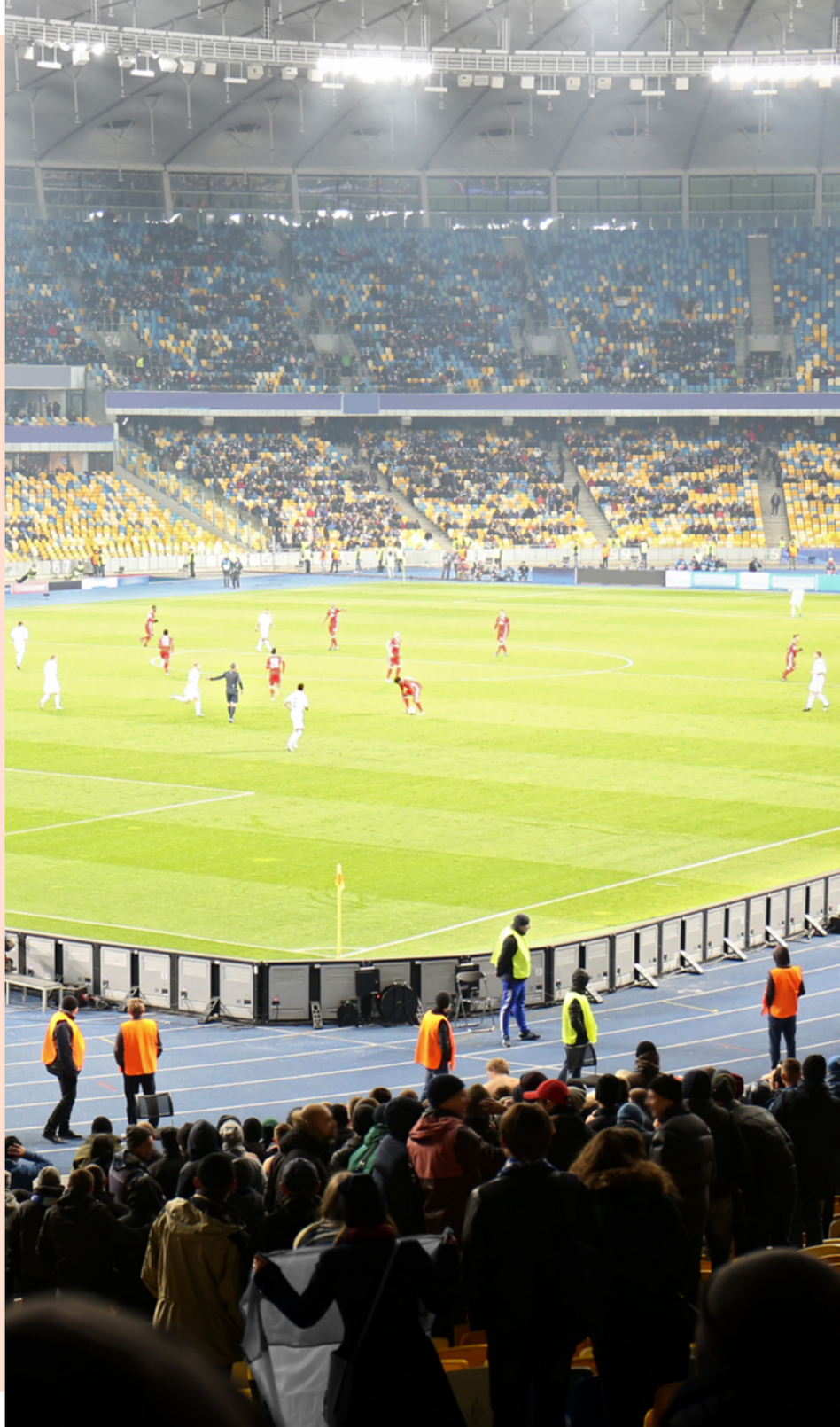
Background

The claim for libel arose from the publication by the defendant of eight posts on Facebook and Instagram between 6 and 11 December 2018. At the time, the claimant and the defendant worked in the UK as football reporters and journalists for Korean media companies, delivering English and European football news to South Korea and to the Korean community in the UK. This was a part-time job for the claimant, alongside his primary occupation as a church pastor in New Malden, Surrey.

The defendant, who had been debarred from defending the claim, did not attend the hearing and was not represented.

A number of preliminary procedural matters had to be decided, followed by a detailed review of the evidence and issues to be considered, as a result of which The Honourable Mrs Justice Steyn DBE found the defendant liable. She provided for an injunction against further publication; and damages to include aggravated general damages and special damages.

The claim for special damages was for £31,250 loss of income from his media activities. He did not make any claim for loss of church income, nor any claim for future loss of income. The sum claimed represented 25 months' loss of an average net monthly income of £1,050 from Daum Kakao Sports and £200 from Ilgan Sports.



Judgment on special damages

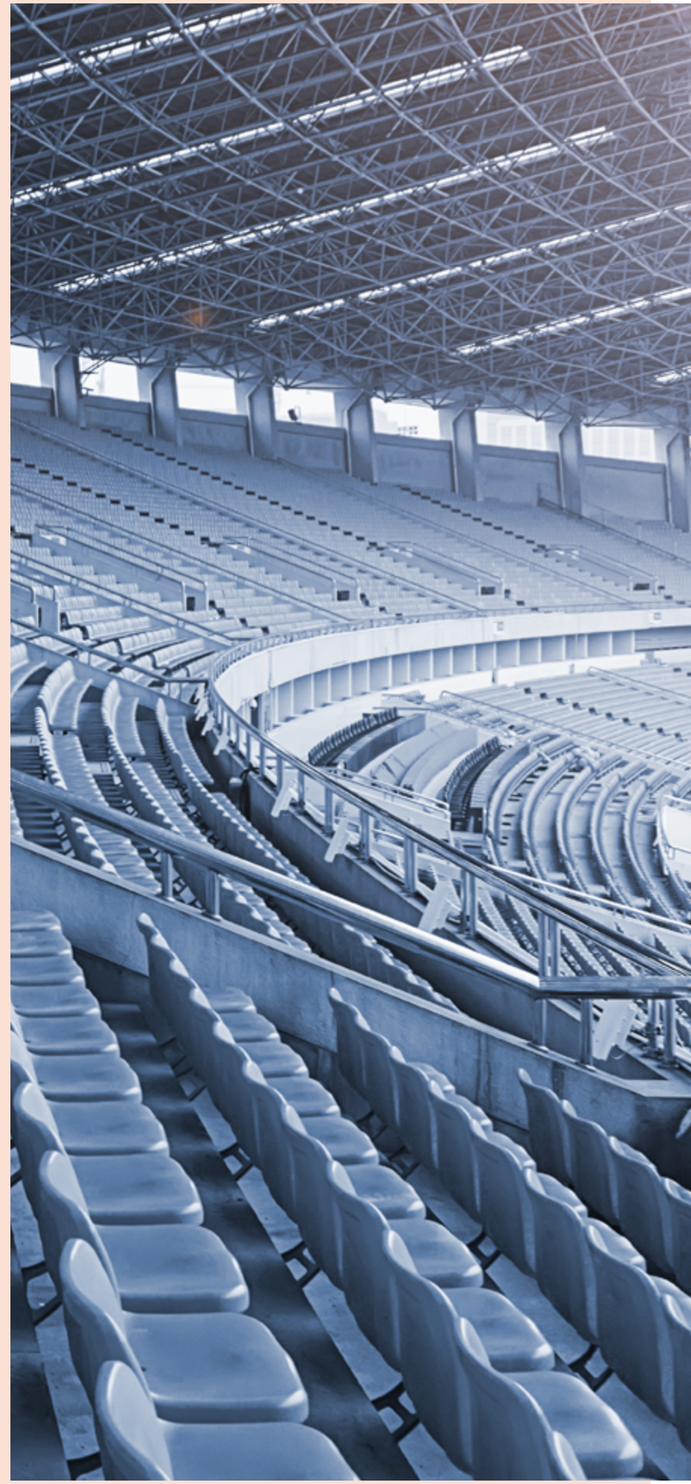
"I raised the issue of the extent to which the claimant's income as a reporter might have been reduced, in any event, by the Covid-19 pandemic. Mr Roberts helpfully explored this issue with each of the witnesses. The claimant did not believe there would have been any reduction due to the pandemic. Mr Lee's evidence was that his income had reduced by about 10% over the course of the 12 months or so of the pandemic. Ms Hur said that she was working on similar contracts to the claimant. Ms Hur's evidence was that her income from covering EPL matches did not reduce.

There was a period during last season when Premier League matches were suspended, but each of those matches was subsequently played (and so she was able to report on them), with the season ending later than usual. However, Ms Hur's income from covering the Champions League reduced by about £350-400 (representing the loss of articles in respect of about seven or eight matches). This was due to a reduction in the number of Champions League matches (due to fixtures that would normally be played both home and away being reduced to one match) and due to restrictions on travel abroad.

In my judgment, it is likely that there would have been some reduction in the claimant's income due to the pandemic, but it is probable that his income would have reduced by a similar amount, and for the same reasons, as Ms Hur's income reduced. I therefore find that the claimant's loss of income is £30,850, plus interest on special damages of 2.5% per annum from the mid-point of the period of loss."

There is nothing ground-breaking here. Unsurprisingly, the judge assessed the available evidence and come to a sensible conclusion.

However, this is likely to be a live issue in many cases in the next few years, and ever more detailed investigations will need to be made into the particular working environment and relevant comparators.



Claiming the costs of advertising in group litigation

Weaver & Ors V British Airways Plc [2021] EWHC 217 (QB)

Mr Justice Sani was unimpressed with the claimants' costs budget in a case involving a Group Litigation Order (GLO) where claimants were pursuing the defendant for damages in respect of a data leak. The claimants' solicitors claimed the past and future costs of advertising for clients as part of their costs budget.

Background

The ongoing litigation concerns claims for damages brought against the defendant, BA, consequent upon a cyber-attack on BA's electronic systems that was identified in September 2018. That attack affected systems containing customer personal data on BA's website and on its mobile application. You may have been affected personally.

The claims for damages can be summarised as:

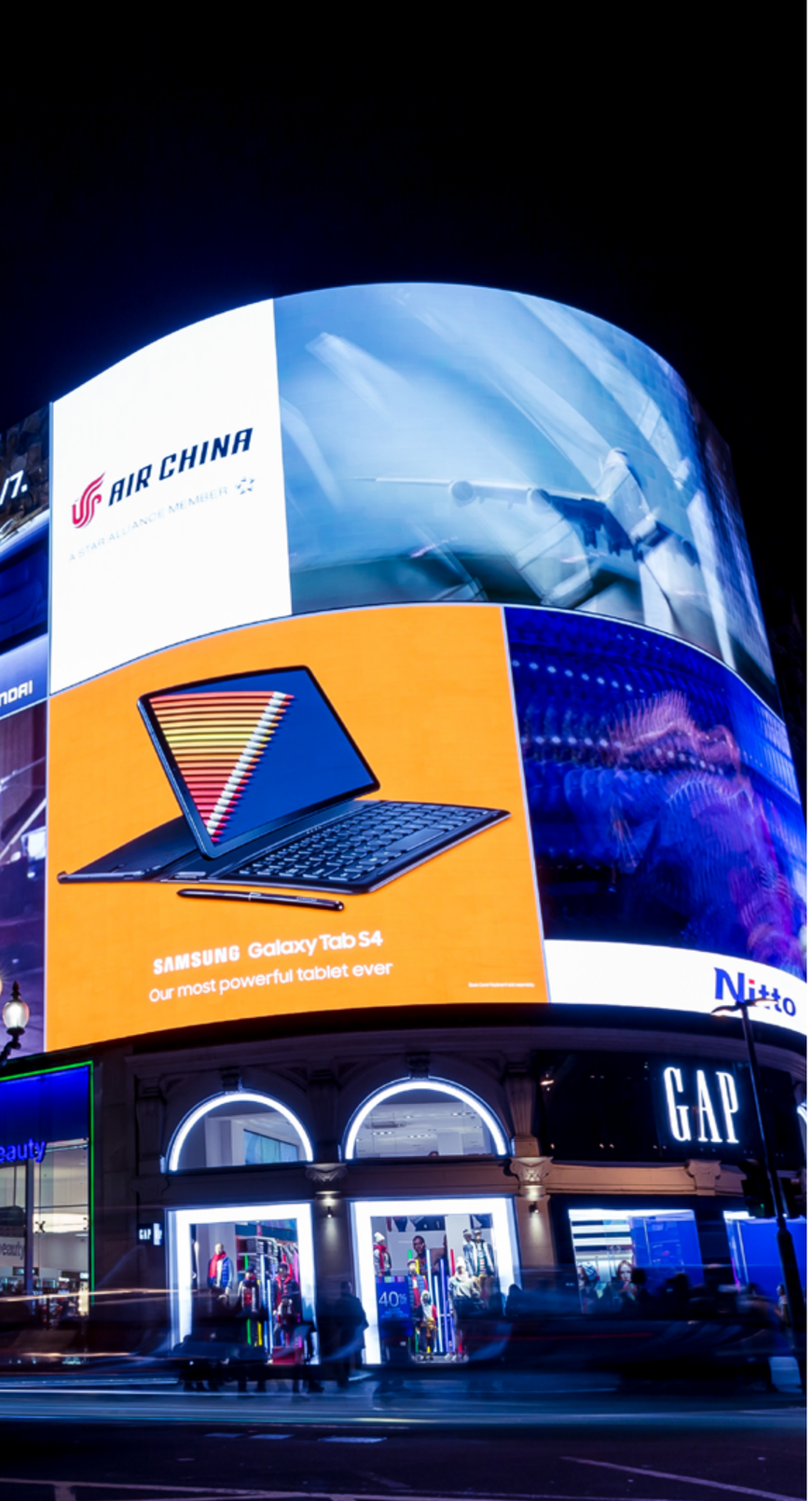
(1) The attack resulted in the persons responsible for the attack obtaining identifiable customer data including (but not limited to) certain payment card data and, in turn, resulted in BA sending notifications to all of the claimants that their data may have been affected by the attack.

(2) The attack succeeded as a result of BA failing to put in place appropriate or sufficient security measures aimed at safeguarding relevant data. It is said that that failure was a breach of BA's obligations under the General Data Protection Regulation 2016/679 and/or a breach of certain contractual obligations said to be owed to the claimants and/or a breach of confidence.

(3) Harm is alleged to have been suffered as a result of these breaches in the form of distress and/or pecuniary loss and/or loss of control of data.

BA continues to deny the claim in its entirety and, specifically, that the alleged breaches were causally relevant to the compromising of customer data. It also puts in issue whether any of the claimants have suffered compensable harm as a result of the alleged breaches. Time will tell when the matter concludes by compromise or trial.

The judgment at the CCMC on 2 February 2021 addressed two discrete issues:



(i) the claimants' application to extend the "cut-off" date to join the litigation through entry on the Group Register; and,

(ii) the recoverability of advertising costs incurred, and to be incurred, by the claimants' solicitors, in publicising the claims in the media. This issue arose as a matter of dispute in the costs budgeting process which the parties had agreed to apply to the claim.

Our interest is in the second issue. In advertising the proceedings to seeker joiners, the claimants' firm had incurred £443,000 to the date of the CCMC and intended to incur another £557,000 on future advertising. Therefore, it fell to the judge to consider the budget for the cost of future advertising.

Judgment

"A threshold point has been argued before me in relation to the recoverability as a matter of principle of these costs, both the historically incurred costs and the intended costs to be incurred in the future.

In paragraph 41 of the GLO there was provision made under the heading "Publication" for the lead solicitors to take reasonable steps to publicise the GLO in accordance with CPR Rule 19.11(3)(c) in the form attached to that order as schedule 3. Schedule 3, in summary, contained a form of advertisement for publication which described the terms of the GLO and referred to the data breach. It also provided the contact details of the lead solicitors.

The costs which are the subject of the budget, as well as those which have been historically incurred, arise from very substantial media publicity of these proceedings. BA argues that, as a matter of law, these costs are not recoverable and relies principally upon the decision of the Court of Appeal in the case of *Motto v Trafigura [2012] 1 WLR 657 (CA)*.

BA argues, in summary, that the ratio of that case, and in particular what was said by Lord Neuberger MR at paragraph 110 of that decision precludes any claim for advertising costs. It is accepted, however, for the purposes of the argument before me, that the costs incurred pursuant to paragraph 41 of the GLO would in principle be recoverable.

Turning then to the position of the claimants, reliance has been placed upon a number of cases including *Ross v Owners of the Bowbelle (Review of Taxation under RSC Order 62 Rule 35) 2 Lloyd's Reports 196 (Note)*, as well as the well-known case *Re Gibson's Settlement Trusts [1981] Ch 1789*, per Megarry V-C at 185. It is said that under well-established principles, these advertising costs constitute work done "for use and service in the litigation". These are said to be costs relevant to an issue in the claim and/or attributable to the paying party's conduct. The claimants also rely upon the decision in *Arif v Berkeley Burke [2017] EWHC 3108 (Comm)* at paragraph 40.

I have in addition been referred to the text to which I have already made reference, Class Actions, at paragraph 3-065.

In my judgment, it is clear as a matter of binding authority that these are not recoverable costs."

He went on to quote Lord Neuberger MR from Motto:

"The expenses of getting business, whether advertising to the public as potential clients, making a presentation to a potential client, or discussing a possible instruction with a potential client, should not normally be treated as attributable to, and payable by, the ultimate client or clients. Rather, such expenses should generally be treated as part of a solicitor's general overheads or expenses, which can be taken into account when assessing appropriate levels of charging, such as hourly rates."

He accepted BA's argument that this was essentially a reflection of the well-known indemnity principle and concluded:

"In my judgment, the reasoning of Lord Neuberger MR applies directly to the facts before me. The costs which have been incurred and which are to be incurred by the claimant solicitors are, in my view, essentially general overheads, albeit that they are incurred in the context of a GLO. They are not the costs that are being incurred pursuant to the GLO, paragraph 41, to which I have already made reference, but are, rather, more accurately described as the costs incurred by the claimant solicitors of "getting the business in". They are not for the account of BA, should BA be unsuccessful in the litigation. See also *Friston on Costs (3rd Edition)*, para.65-100 which seems to me to reflect the correct position in law.

As to the reliance placed by the claimants upon the decision in the *Arif* case, it does not seem to me that there was any argument before the judge in that case in relation to the specific matters argued before me. Specifically, the judge's observations that are relied upon by the claimants in paragraph 40 of that judgment appear to have been a matter of common ground before him. I note also that the judge was not referred to the *Motto* case. For completeness, I should say that I do not draw assistance on the issue of principle from the *Bowbelle* case."

For the reasons set out, he found that the advertising costs in issue were not recoverable in any event and therefore they would fall out of the budget.

This seems to be a victory for common sense and another example of the indemnity principle being upheld.

The GLO contained a form of advert for publication that did the job. The costs which were the subject of the budget, as well as those already incurred, arose from substantial media publicity, which was altogether different and should be treated as part of the solicitor's general overheads.

Horwich Farrelly

Disclaimer & Copyright Notice

The contents of this document are considered accurate at the time of delivery. The information provided does not constitute specific legal advice. You should always consult a suitably qualified solicitor about any individual legal matter. Horwich Farrelly Solicitors accepts no liability for errors or omissions in this document.