Neutral Citation Number: [2013] EWCA Civ 19

Case No: A2/2012/1895

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE
(Senior Costs Judge Hurst)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 January 2013

Before :

LORD JUSTICE MOORE-BICK
LORD JUSTICE AIKENS
and
LADY JUSTICE BLACK
(sitting with COSTS JUDGE CAMPBELL as Assessor)

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Between :

SYLVIA HENRY	**Claimant/ Appellant**
- and -	
NEWS GROUP NEWSPAPERS LTD	**Defendant/ Respondent**

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Mr. Simon Browne Q.C. and Miss Joanna Hughes (instructed by **Taylor Hampton Solicitors**) for the **appellant**
Mr. Alexander Hutton Q.C. and Mr. Adam Wolanski (instructed by **Reynolds Porter Chamberlain LLP**) for the **defendant**

Hearing date : 4th December 2012

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Approved Judgment

Lord Justice Moore-Bick :

Background

1. This is an appeal by Ms Sylvia Henry against a decision of Senior Costs Judge Hurst on a preliminary issue arising in the course of a detailed assessment of costs. Ms Henry, a senior social worker employed by Haringey Council, was the victim of a sustained and vitriolic campaign by the 'The Sun' newspaper following the death of the child known as "Baby P". That campaign, the object of which was to force Ms Henry out of her job and to prevent her from obtaining any further employment in connection with children, led her to take proceedings for defamation against the publisher of the newspaper. They were eventually settled on payment of a substantial sum (the amount of which is undisclosed), a statement in open court and the publication of an apology in a prominent position in the paper. That apology acknowledged that there was no truth in any of the defamatory statements made by 'The Sun' and that its campaign against the appellant was entirely unjustified.

2. As part of the settlement the respondent agreed to pay the appellant's costs of the proceedings to be assessed on the standard basis if not agreed. A consent order in Tomlin form was made to give effect to the settlement, which included a term to that effect.

Costs Management – Practice Direction 51D

3. The concept of costs budgeting as a form of case management is not new, but it obtained prominence as a potentially valuable means of controlling the costs of litigation following the publication in May 2009 of the Preliminary Report of Sir Rupert Jackson at the end of the first stage in his review of civil litigation costs. In paragraph 3.5 of chapter 48 of the report he described the essence of costs budgeting as being

> "that the costs of litigation are planned in advance; the litigation is then managed and conducted in such a way as to keep the costs within the budget."

It is clear from the discussion in section 3 of chapter 48 that at that stage Sir Rupert regarded costs budgeting as closely related to costs capping, an approach which was beginning to find favour in some quarters.

4. In response to concerns over the effect on the media of the costs of defamation proceedings a pilot costs management scheme was introduced in October 2009 in relation to defamation proceedings. That scheme is now embodied in Practice Direction 51D (the Defamation Proceedings Costs Management Scheme), which applies to all defamation proceedings started in the Central Office of the Royal Courts of Justice and the Manchester District Registry on or after 1st October 2009 and is to run until 31 March 2013. Its purpose is set out in paragraph 1.3, which provides as follows:

> "The Defamation Proceedings Costs Management Scheme provides for costs management based on the submission of detailed estimates of future base costs. The objective is to

> manage the litigation so that the costs of each party are proportionate to the value of the claim and the reputational issues at stake and so that the parties are on an equal footing."

5. The practice direction requires each party to prepare a costs budget for consideration and approval by the court at the first case management conference and a revised cost budget at various stages of the proceedings thereafter. Under paragraph 5 the court has a responsibility to manage the costs of the litigation as well as the case itself in a manner which is proportionate to the value of the claim and the reputational and public interest issues at stake, a task which it is expected to fulfil by taking account of the costs involved in each proposed procedural step when giving case management directions. Solicitors are expected to liaise monthly to check that their respective budgets are not being exceeded (paragraph 5.5); if they are, either party may apply to bring the matter back before the court for a costs management conference.

6. Paragraph 5.6 lies at the heart of this appeal. It provides:

> "When assessing costs on the standard basis, the court –
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> (1) will have regard to the receiving party's last approved budget; and
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> (2) will not depart from such approved budget unless satisfied that there is good reason to do so."

7. In the present case costs budgets were prepared by both parties for the first case management conference which took place before Master Eastman on 20th September 2010. The totals of the two budgets were remarkably similar, but the amounts included for the various stages of preparation for trial differed considerably. The Master approved both budgets, but thereafter neither party sought approval to any revised budget, although shortly before trial the respondent applied for a costs management conference.

The detailed assessment

8. Although they were able to settle the proceedings, the parties were unable to reach agreement on the amount of costs recoverable by the appellant, who therefore commenced detailed assessment proceedings. The respondent took objection to the appellant's bill of costs on the grounds that it exceeded the budget that had been approved by Master Eastman. In those circumstances the parties agreed that the following question be tried as a preliminary issue:

> "Whether there is good reason for the court to depart from the court approved costs budget as approved on 20 September 2010, following which:
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> (i) in the event that the court finds that there are no good reasons to depart from the budget the court will at that hearing determine the sums recoverable by reference to the budget;

> (ii) in the event that the court finds that there are good reasons why the budget should be departed from the court will determine by how much the budget should reasonably be exceeded and will if necessary provide directions in respect of the remaining budget items."

It will be appreciated that the only question that actually arose for determination was whether there was a good reason in this case to depart from the appellant's approved budget.

9. On the hearing of the preliminary issue the appellant contended that the way in which the defendant had chosen to conduct the proceedings had caused her to incur a substantial amount of costs that could not reasonably have been predicted at the time when the budget was prepared. That provided a good reason for departing from it. The respondent argued that there was no good reason to depart from the budget because the appellant had failed to comply with the requirements of the practice direction: her solicitors had failed to keep the respondent's solicitors informed of the costs being incurred and had failed to obtain the court's approval for a revised budget when the costs overran. It also argued that the appellant's budget was in any event flawed from the outset and that she should bear the consequences.

10. In his judgment the judge set out in some detail the parties' competing submissions about the way in which the case had developed and its effect on the amount of work that the appellant's solicitors had been required to carry out. However, he quickly came to the conclusion that in order to test the competing arguments properly it would be necessary to hear the solicitors give evidence, a process which would have taken an inordinate amount of time and would not have greatly assisted him in deciding whether there was good reason to depart from the approved budget. However, he was clearly not impressed by the respondent's argument that its conduct of the case had caused the appellant nothing more than minor inconvenience.

11. As to the appellant's bill, the judge expressed himself to be in no doubt whatsoever that, if it were to be the subject of detailed assessment, those representing the appellant would be able to argue very strongly that the costs incurred were both reasonable and proportionate, but, as he recognised, that was not the question he had to decide. He expressed his conclusion on the question whether there was good reason for him to depart from the approved budget as follows:

> "67. It is clear that the Claimant did not keep either the Defendant or the Court informed of the fact that its budget was being exceeded. Although Mr Browne does not accept the Defendant's analysis of the costs budget, saying that the Claimant's costs lawyer arrived at lower figures in his analysis, the fact is that the budget has been exceeded by a very significant amount, and there has been no attempt by the Claimant to pass this information on. The fact that both sides exceeded their budgets does not assist the Claimant. The Defendant kept the Claimant informed, but the Claimant gave no indication to the Defendant.

> 68. The provisions of the Practice Direction are in mandatory terms. Each party *must* prepare a costs budget or revised costs budget (paragraph 3.1), each party *must* update its budget (3.4), solicitors *must* liaise monthly to check that the budget is not being or is likely to be exceeded (paragraph 5.5). The objective of the Direction is to manage the litigation so that the costs of each party are proportionate to the value of the claim and reputational issues at stake, and so that the parties are on an equal footing (paragraph 1.3) I am forced to the conclusion that if one party is unaware that the other party's budget has been significantly exceeded, they are no longer on an equal footing, and the purpose of the cost management scheme is lost.
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> 69. Whilst, as I have said, I have no doubt that the Claimant could make out a very good case on detailed assessment for the costs being claimed, the fact is the Claimant has largely ignored the provisions of the Practice Direction and I therefore reluctantly come to the conclusion that there is no good reason to depart from the budget."

12. It can be seen from this passage that the judge felt constrained to hold that the failure of the appellant's solicitors to comply with the practice direction had prevented the parties from being on an equal footing, which in turn meant that there was no good reason to depart from the approved budget. The effect of the judge's order was to disallow £268,832 before any success fee was added under the appellant's conditional fee agreement with her solicitors.

The respondent's notice

13. At this point it is necessary to mention another argument that was raised before the judge, but on which he expressed no concluded view, namely, that the receiving party cannot ask the court to depart from the approved budget if that budget was plainly inadequate.

14. The judge set out the parties' respective arguments at some length. The main thrust of the respondent's argument seems to have been that, since the appellant's solicitors had failed to comply with the requirements of the practice direction, she was in no position to argue that there was a good reason to depart from the budget approved by Master Eastman. The argument appears to have been of a rather broad nature, but it included a submission that in some, if not all, respects her budget had been flawed from the outset and that a defect of that kind could not provide a good reason to depart from it. However, the appellant did not accept the respondent's criticism of her budget. She disputed its analysis of the figures and the judge said that it had not been tested before him. It does not appear to have formed any part of the basis of his decision.

15. Mr. Hutton Q.C., who did not appear below, sought permission to file a respondent's notice out of time to enable him to pursue that issue on the appeal. It was common ground that any respondent's notice should have been filed by 20th July 2012, but it

was not until 26th November 2012 that the respondent filed the necessary notice seeking to uphold the judge's decision on this alternative ground. The hearing of the appeal had been fixed for 4th December 2012 and by that time was only a few working days away. The only explanation for the delay was that counsel now representing the respondent took a different view of the case from that which had been taken by counsel who had appeared below, which had led to a last-minute attempt to raise the point. Most importantly, it seemed to us that not only would it be difficult for the appellant to deal with the new point at such short notice, it would be difficult, if not impossible, for the court to decide the question without having the benefit of findings of fact made by the judge. As we have mentioned, the point was touched on below, but it was not decided. The judge made no findings about the extent to which, if at all, the appellant's budget was defective, and if so, the reasons for it. To embark on that question would have led the court and the parties into a detailed analysis of the appellant's original budget, which was not a proper exercise for an appellate court to undertake or one that we were likely to be able to undertake successfully in the time available. We therefore refused permission for the respondent's notice to be filed out of time.

Good reason

16. I can now return to the question raised by the preliminary issue. It is implicit in paragraph 5.6 of the practice direction that the approved costs budget is intended to provide the framework for a detailed assessment and that the court should not normally allow costs in an amount which exceeds what has been budgeted for in each section. That makes good sense if the proper procedure has been followed and the costs have been managed in a way that ensures that they are restricted to an amount that keeps the parties on an equal footing and is proportionate to what is at stake in the proceedings. However, paragraph 5.6 expressly recognises that there may be good reasons for departing from the budget and allowing a greater sum. On the other hand, costs budgeting is not intended to derogate from the principle that the court will allow only such costs as have been reasonably incurred and are proportionate to what is at stake; it is intended to identify the amount within which the proceedings should be capable of being conducted and within which the parties must strive to remain. Thus, if the costs incurred in respect of any stage fall short of the budget, to award no more than has been incurred does not involve a departure from the budget; it simply means that the budget was more generous than was necessary. Budgets are intended to provide a form of control rather than a licence to conduct litigation in an unnecessarily expensive way. Equally, however, it may turn out for one reason or another that the proper conduct of the proceedings is more expensive than originally expected.

17. It follows that when considering whether there is good reason to depart from the approved budget it is necessary to take into account all the circumstances of the case, but with particular regard to the objective of the costs budgeting regime. In the case of the present scheme the objective is set out in paragraph 1.3 of the practice direction, namely, to manage the litigation so that the costs of each party are proportionate to what is at stake and to ensure that the parties are on an equal footing. The emphasis in paragraph 1.3 is on the court's management of the proceedings and thereby of the costs, a requirement reflected in paragraph 2(1), which for these purposes adds a new paragraph to Practice Direction 29 requiring the court to manage the costs of the

litigation as well as the case itself, and paragraph 5.1. These paragraphs make it clear that, just as the court has responsibility for managing the proceedings, so also it has a responsibility for managing the costs and that it is expected to manage the costs by managing the proceedings in a way that will keep them within the bounds of what is proportionate.

18. I do not think that it would be wise to attempt an exhaustive definition of the circumstances in which there may be good reason for departing from the approved budget. The words themselves are very broad and experience teaches that any attempt by an appellate court to provide assistance in a matter of this kind risks creating a set of rigid rules where flexibility was intended. Circumstances are infinitely variable and it is vital that judges exercise their own judgment in each case. Having said that, the starting point must be that the approved budget is intended to provide the financial limits within which the proceedings are to be conducted and that the court will not allow costs in excess of the budget unless something unusual has occurred. Whether there is good reason to depart from the approved budget in any given case, therefore, is likely to depend on, among other things, how the proceedings have been managed, whether they have developed in a way that was not foreseen when the relevant case management orders were made, whether the costs incurred are proportionate to what is in issue and whether the parties have been on an equal footing.

19. In the present case the judge found himself in a difficult position. He thought that there was a strong argument that the costs incurred by the appellant were both reasonable and proportionate, but he was faced with the fact that the appellant had largely failed to comply with paragraph 5.5 of the practice direction, which obliges solicitors to communicate with each other regularly to ensure that the budgets are not being exceeded. Indeed, as he recorded it, the main plank of the respondent's argument was that the court cannot properly find that there is good reason to depart from the approved budget unless the parties have complied with the practice direction. The judge concluded that the failure of the appellant's solicitors to tell the respondent's solicitors that they were exceeding their budget prevented the parties from being on an equal footing and that because they had largely ignored the provisions of the practice direction there was no good reason for departing from the approved budget.

20. In my view the judge misunderstood the reference in paragraph 1.3 to the parties' being on an equal footing and took too narrow a view of what may amount to good reason under paragraph 5.6(2)(b). The object of the practice direction, as described in paragraph 1.3, is twofold: (i) to ensure that the costs incurred in connection with the proceedings are proportionate to what is at stake and (ii) to ensure that one party is unable to exploit superior financial resources by conducting the litigation in a way that puts the other at a significant disadvantage. The intention is that both these objects are to be achieved by management of the proceedings in a way that controls the costs being incurred. When paragraph 1.3 speaks of the parties' being on an equal footing it is concerned with the unfair exploitation of superior resources rather than with the provision of information about how expenditure is progressing. Paragraph 5.5 assumes that the parties will exchange information about expenditure at regular intervals, but a failure to do so does not of itself put the parties on an unequal footing in the sense in which that expression is used in paragraph 1.3. In this case neither

party was financially embarrassed and in my view, whatever else may be said about the way in which the proceedings were conducted, there was no inequality of arms.

21. The appellant's solicitors did comply with the requirements of paragraph 3.1 of the practice direction, but they failed to comply with the obligation to exchange information regularly and they also failed to serve a revised budget 7 days before the costs management hearing fixed for 8th June 2011. However, I am unable to accept that compliance with all the requirements of the practice direction is essential before a party can ask the court to depart from the approved budget. It is no more than one factor which the court may take into account in deciding whether there is in fact good reason to do so. In the present case the appellant was not the only one at fault. The practice direction makes it clear that the management of costs is the responsibility of all parties to the litigation and ultimately of the court itself. In this case all three were at fault to a greater or lesser degree. By the middle of May 2011 both parties had exceeded their budgets to a significant extent, but until 19th May 2011, when the respondent made an application for a costs management conference, neither party sought to bring the matter back to court to enable revised budgets to be considered. Moreover, although the case came before the court on 13th April 2011 on the appellant's application for specific disclosure and the respondent's application to strike out the claim for aggravated damages, neither party took the opportunity to raise the question of costs and unfortunately the court failed to take the initiative by enquiring whether the parties' costs were within the approved budgets. Had it done so, the likelihood is that revised budgets would have been agreed or approved then or shortly thereafter.

22. There is one other matter which deserves mention in this context. By the middle of May the parties were exploring the possibility of settlement. The respondent's solicitors were aware that they had exceeded their budget because they had prepared a revised budget which they sent to the court on 19th May when seeking a costs management hearing. That budget provided for a total expenditure of £645,906, an increase of £114,160 or a little over 20%. On the same day the respondent's solicitors asked the appellant's solicitors for a clear indication of their total costs to date to assist in the settlement talks and were told that they amounted to £1,567,365, inclusive of disbursements, the success fee payable under the appellant's conditional fee agreement and the ATE premium. Armed with that knowledge the respondent agreed as part of the settlement to pay the appellant's costs of the proceedings, subject to detailed assessment.

23. Mr. Hutton drew our attention to the decision in *Leigh v Michelin Tyre plc* [2003] EWCA Civ 1766, [2004] 1 W.L.R. 846 in which the court considered the relevance of costs estimates provided pursuant to paragraph 6.6 of the Costs Practice Direction. It held that where the costs claimed exceed the estimate and no satisfactory explanation is provided, the court may treat that as evidence that the excess was not reasonably incurred. However, it also held that unless the court had relied on the estimate in giving case management directions or the other party had relied on it in relation to its own conduct of the proceedings, the receiving party would not be deprived of costs to the extent that they were reasonable and proportionate. Mr. Hutton submitted that there is an important difference between costs estimates provided under the Costs Practice Direction and the costs budgets provided for by Practice Direction 51D, because it is apparent from the terms of the latter that budgets are intended, if not to

impose a cap on what the receiving party can recover, at least to impose a limit that cannot be exceeded simply on the grounds that it failed to budget efficiently. He relied on an observation of Dyson L.J. at page 859A-B that costs estimates cannot be equated with costs budgets or costs caps, thereby suggesting that a budget is intended to act as a cap in normal circumstances.

24. I would accept that costs estimates fall at one end of a scale that runs through costs budgets to cost caps. Clearly the very fact that the court has responsibility for approving budgets as a means of managing costs is an indication that budgets are intended to provide some constraint. On the other hand, the budget is not intended to act as a cap, since the court may depart from it when there is good reason to do so. The question in the present case is whether there was indeed good reason to depart from the approved budget. In my view it is open to a costs judge when answering that question to take into account all the circumstances of the case. However, it will rarely, if ever, be appropriate to depart from the budget if to do so would undermine the essential object of the scheme. As I have already pointed out, the failure of the appellant's solicitors to comply with paragraph 5.5 of the practice direction or to apply for a costs management conference with a view to obtaining the court's approval of a revised budget did not lead to an inequality of arms. Moreover, it is strongly arguable that it did not result in the appellant's incurring costs that were disproportionate to what was at stake in the proceedings. Accordingly, it was open to the costs judge to find that the essential objects of the scheme had not been frustrated. In those circumstances he was obliged to consider all the circumstances of the case, including the extent to which the parties and the court had exercised their respective responsibilities under the scheme, the way in which the proceedings had developed, the response of the appellant's solicitors to the demands imposed by the way in which the respondent's case developed and the respondent's agreement to pay the appellant's costs as part of the compromise of the claim.

25. In the rather unusual circumstances of this case the preliminary issue should in my view be answered in the affirmative for several inter-related reasons. First, because unless the court departs from the budget the appellant will not be able to recover the costs of the action. That alone would not be enough; if it were the scheme would be otiose, but it is an important factor to the extent that on examination the court is persuaded that the costs actually incurred were reasonable and, most importantly, proportionate to what was at stake in the litigation. Allied to that is the fact that the failure of the appellant's solicitors to observe the requirements of the practice direction did not put the respondent at a significant disadvantage in terms of its ability to defend the claim, nor does it seem likely that it led to the incurring of costs that were unreasonable or disproportionate in amount. In other words, the objects which the practice direction sought to achieve were not undermined. In those circumstances a refusal to depart from the budget simply because the appellant had not complied with the practice direction would achieve nothing beyond penalising her. That might encourage others to be more assiduous in complying with the practice direction in the future, but to penalise the appellant for that reason alone would be unreasonable and disproportionate. That is all the more so in the context of proceedings which were constantly changing in ways that, in the words of the judge below, could not be passed off as no more than a minor inconvenience. Then there is the fact that the appellant's solicitors were not alone in failing to comply with the requirements of the practice direction. The respondent's solicitors also exceeded their budget (admittedly

not to so large an extent) and the court itself was less active than it should have been in monitoring the parties' expenditure when the matter came before it on the procedural applications in April 2011. The failure of the respondent's solicitors to register any protest when they were finally informed of the amount of costs incurred by the appellant suggests to me some recognition of the extent to which the development of the litigation had affected the appellant's preparation.

26. Taking those matters together I am satisfied that there is good reason in this case to depart from the appellant's budget. It will be for the costs judge to decide in what respects and to what extent the appellant should be allowed to recover costs in excess of those for which the budget allows. That will depend principally on the extent to which the costs actually incurred were reasonable and proportionate to what was at stake in the proceedings and on the extent to which they could have been reduced if the practice direction had been properly followed. The burden of satisfying the court that it should depart from the budget in any particular respect, and if so to what extent, will be on the appellant. However, the costs judge will no doubt wish to bear in mind not only the course which the proceedings took but the number and nature of the publications in respect of which the appellant sued since they bear directly on the reputational issues involved.

The future

27. The practice direction with which this appeal is concerned applies only to proceedings for defamation. It was the first pilot scheme introduced by the Civil Procedure Rule Committee ("the Rule Committee") and was intended both to control the costs of defamation proceedings and to provide experience of how costs management would work in practice. A similar costs management pilot scheme which reflected developments in the understanding of how costs management could most usefully be applied was subsequently introduced in the Mercantile Courts and the Technology and Construction Courts (see Practice Direction 51G).

28. In the light of the experience gained from those pilots the Rule Committee decided to adopt Sir Rupert Jackson's recommendation that the management of costs by the court should in future form an integral part of the ordinary procedure governing claims allocated to the multi-track. Those rules, which will become effective from 1st April 2013, differ in some important respects from the practice direction with which this appeal is concerned. In particular, they impose greater responsibility on the court for the management of the costs of proceedings and greater responsibility on the parties for keeping budgets under review as the proceedings progress. Read as a whole they lay greater emphasis on the importance of the approved or agreed budget as providing a prima facie limit on the amount of recoverable costs. In those circumstances, although the court will still have the power to depart from the approved or agreed budget if it is satisfied that there is good reason to do so, and may for that purpose take into consideration all the circumstances of the case, I should expect it to place particular emphasis on the function of the budget as imposing a limit on recoverable costs. The primary function of the budget is to ensure that the costs incurred are not only reasonable but proportionate to what is at stake in the proceedings. If, as is the intention of the rule, budgets are approved by the court and revised at regular intervals, the receiving party is unlikely to persuade the court that costs incurred in excess of the budget are reasonable and proportionate to what is at stake.

29. For these reasons I would allow the appeal and answer the question posed by the preliminary issue in the affirmative.

Lord Justice Aikens :

30. I agree.

Lady Justice Black :

31. I also agree.