Neutral Citation Number: [2006] EWHC 3275 (QB)

Case No: 5LV90190

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2006

Before :

THE HON. MR JUSTICE EADY
sitting with
SENIOR COSTS JUDGE HURST

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Between :

Marjorie Patricia Tierney	**Claimant**
- and -	
News Group Newspapers Ltd	**Defendant**

- -
- -

Adrienne Page QC and William Bennett (instructed by **Kirwans**) for the Claimant
Anthony Hudson (instructed by **Farrer & Co**) for the Defendant

Hearing dates: 7th and 8th December 2006

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE EADY

The Hon. Mr Justice Eady :

1. On 7 and 8 December 2006 I heard an appeal from the costs capping order made in this libel action by Master Campbell on 29 September. I had the valuable assistance of Senior Costs Judge Hurst as an assessor and I am most grateful to him. The nature of the exercise is, in accordance with modern practice, one of review rather than rehearing. What is more, although reference has been made to changed circumstances since submissions were made to Master Campbell (in writing) during the summer, there is no application before me for a variation or revision of the order for that reason. Nor could there be, since it would need to be made to a costs judge on notice to the other side.

2. It is well known that, as a general principle, this jurisdiction should be exercised, if at all, at an early stage: *King v Telegraph Group Ltd* [2005] 1 WLR 2282 at [80], *per* Brooke LJ. The costs capping here took place, at a remarkably leisurely pace, following an order made by McCombe J on 26 January while sitting in Liverpool. The delay in this case especially is unfortunate because the trial is due to take place in Manchester at the end of January 2007. The learned judge decided that this was an appropriate example of a CFA funded case in which to make such an order. It is by no means yet clear whether it should be regarded as a standard order, and particularly in defamation cases. There is still debate as to whether there are specific criteria to be fulfilled before such a limit is placed on the expenditure to be incurred by one or other of the parties involved. For example, does it have to be shown that there is reason to anticipate extravagance, or that a retrospective assessment would not be adequate to exclude the paying party from having to meet unnecessary or disproportionate costs?

3. It is to be noted that the restriction was imposed in this instance on the Claimant only, although I understand that it is now becoming more common in the interests of fairness and "equality of arms" for such orders, where they are thought appropriate, to be made effective on both sides. Obviously there is something to be said for that where it is capable of imposing effective discipline.

4. Nevertheless, the order was made and has not been the subject of challenge in the Court of Appeal. At certain points in the course of submissions, it seemed as though arguments were being directed to the principle of whether a capping order should have been made in the first place – rather than to the costs capping exercise itself. Plainly that would be inappropriate and I must, therefore, be careful to avoid confusing the two issues.

5. The appeal has been argued by Miss Page QC on behalf of the Claimant and has focussed on two particular aspects of the matter. First, contrary to the assessment of Master Campbell, she argues that this is a case of such importance to the parties concerned that it would certainly merit instructing leading counsel for the trial and that the budget should be correspondingly increased to make that possible. Secondly, she seeks an additional £20,000 by way of solicitors' costs to cover necessary and proportionate expenditure.

6. The background to the claim was thought by McCombe J to give rise to very straightforward issues. Just because it is a libel action, he concluded, there was no reason why it should be accorded more resources than any other form of litigation – an approach which has been echoed by Mr Hudson in responding to the appeal on

behalf of News Group Newspapers Ltd. This is despite the irony that, on his side, the case has been receiving the attention of no less than two partners of Farrer & Co. The learned Judge was also keen to impose discipline with a view to avoiding unnecessary interlocutory applications. There is a widespread perception that libel actions are prone to this hazard. Whether that is correct, or not, is not a matter I need address. The fact is that there have not been any time-wasting applications in this case.

7. It is right then that I should first identify what the issues in the litigation are. The Claimant is Ms Patricia Tierney who, it is common ground, worked in a Liverpool brothel for a time, although it is her case that she was a receptionist rather than herself a prostitute. She came to prominence as a result of an article published on 25 August 2004 in *The Sun*, which alleged that she was indeed a prostitute and that one of those who had taken advantage of her services was Mr Wayne Rooney, a well known footballer. The memorable headline on the front page, accompanied by what appears to be a photograph of the Claimant, was "Don't fancy yours much Wayne". The claim was made that *The Sun* had revealed the "PVC gran he bedded in brothel". The person in question (who the Claimant says is easily identifiable as herself) was said to be widely known as "the Auld Slapper". The allegation has become notorious and has been repeated over and over again, not least in *The Sun*.

8. Ms Tierney now wishes to vindicate her reputation, saying that she is not and never has been a prostitute, and that she has not offered sexual favours to Wayne Rooney or anyone else. She seeks compensation for the damage done to her reputation and the distress and hurt to her feelings brought about by this massive and plainly offensive coverage. Recently, without objection, an amendment has been made to advance a claim for punitive or exemplary damages, on the grounds that the allegations were known to be false at the time of publication and were published cynically to sell more newspapers. The Defendant's case is that she was indeed a prostitute and that the sting of the libel was therefore true.

9. It was not actually alleged until recently that Mr Rooney had been a client but, says Mr Hudson, that is hardly material since the meaning originally relied on in the particulars of claim was that the Claimant was a prostitute known as the Auld Slapper. The identity of any particular client or clients was immaterial. There have been more recent developments, in that it was sought to narrow the pleaded meaning on the Claimant's side to having offered sexual favours to Mr Rooney and, only last week, a witness statement was served alleging that this was indeed true. Whether that makes any significant difference is another matter, since it is almost certainly the case that the real sting of the words is that the person concerned was a prostitute.

10. Thus the case involves serious allegations on both sides. There is plainly lying on one side or the other and, conceivably, also an attempt or attempts to pervert the course of justice. The case must be tried fairly and with appropriate resources. In judging what is appropriate, it is relevant (at least as a "starting point", according to Brooke LJ in *King v Telegraph Group Ltd* [2005] 1 WLR 2282) that libel damages have been scaled down in recent years, so that it is widely reckoned that the maximum possible award would be of the order of £215,000 for the most serious of libels (taking into account inflation and the impact on personal injury awards of the Court of Appeal's decision in *Heil v Rankin* [2001] QB 272). Against the unusual background I have briefly described, on the other hand, the level of financial compensation is one factor only. The case is clearly of importance to both sides and should not be dismissed too

lightly. There could well be in due course a prosecution, or prosecutions, for perjury or attempting to pervert the course of justice. There are at least three precedents for this following libel actions, over the last 25 years, and it is obviously more likely to happen in a high profile case. It is perhaps difficult to imagine a more high profile case than this, which combines two of the topics which are closest to the hearts of tabloid editors; namely sex and football. The trial is likely to be a "media scrum".

11. It is inherent in the task of prospective costs capping that a good deal of informed guess work will come into play. That is, if anything, more difficult in a libel action than in a "standard" personal injury or clinical negligence case, because no one case is like another and there are generally hidden traps around every corner. Nevertheless, the Master carried out his tasks, in the light of his experience, in accordance with the order of McCombe J. The effect of his order was to set the cap at £92,630 for base costs including counsel's fees (which was about £100,000 below the estimate provided by Mr Sandys, the Claimant's solicitor). It emerges from the judgment that a major element in his reasoning were that there was no need for leading counsel, the case being perceived as a "modest" one. Also, the solicitors' costs were allowed at £50,755 (being some 40% less than the estimate).

12. Miss Page urged me to focus on why the estimate of the solicitor should have been so discounted. There is no apparent reason to disbelieve the estimate, and yet Master Campbell came to the conclusion that it was "overstated". It is said by Mr Hudson that, even if this was an infelicitous expression to use, it is nonetheless apparent what he intended to say (i.e. something along the lines of "disproportionate"). There is no actual reasoning set out to show why the estimate was overstated. It is to be noted that Kirwans is by no means a huge firm and that the hourly rate put forward was extremely modest. It is thus not obvious why Mr Sandys should, by contrast, be exaggerating the work to be done in other respects.

13. It is often said that everything can be left to the experience of the costs judge. As it happens, however, in reality costs judges are unlikely to have any experience of running libel litigation (as opposed to carrying out retrospective assessments). Here, it is said by Mr Hudson that Master Campbell was assisted in his prospective assessment by the observations and criticisms of Mr Sandys' cost schedule made by the Defendant's solicitor (Mr Beabey, a partner in Farrer & Co). This rings warning bells for two reasons. Not only was there very little information as to the actual proposed expenditure on the Defendant's side, for comparison purposes, but it is hardly satisfactory to elevate the Defendant's own solicitor to quasi-expert status. If Mr Sandys was so far out in his estimate, one would expect to see what items of expenditure were to be jettisoned and in what respects he was "overstating" by 40%. In the absence of such a clear and reasoned explanation, it is possible to regard the prospective assessment exercise in this respect as flawed and then to carry out the exercise afresh. I shall return to the subject in due course.

14. Miss Page invites me to bear in mind some of the risks inherent in a costs capping regime, which are now becoming apparent as such orders are put into effect. For one thing she was concerned that the budget could be seriously dented by dealing with the costs capping issues themselves. It is an exercise which can lead to costs and time being diverted into satellite litigation. It is the view of Judge Hurst, however, that the costs of the costs capping application itself should not have any impact on the capped

figure but should be treated separately. Otherwise there might not be enough for the substantive litigation.

15. Also, it is easy for an unscrupulous and wealthy opponent, or even one who is unduly zealous or enthusiastic, to engage the capped party in correspondence or applications which will cause the budget to be used up in responding to them. In libel actions particularly, cases can change shape as they make their way towards trial, and thus a need will arise for money to be spent which could not have been foretold at the time of the capping. It may seem easy to appeal, or to come back and apply for an increase in the budget, because of changed circumstances, but such procedural steps are in themselves risky and inevitably incur extra costs.

16. It is surely important to try to ensure, so far as possible, "equality of arms" and thus not to apply two different standards of what is "reasonable" expenditure. What is "reasonable" for one side can hardly be "unreasonable" for the other. There is a temptation therefore to consider mutual costs capping (not necessarily, of course, by reference to the same figures, since each side will inevitably have different tasks to perform). It was considered in this case, I gather, before McCombe J and the subject was also raised in the appeal. In the end, however, as both counsel recognised, it would hardly make any difference. It would not prevent this Defendant from spending what it wished on the litigation and, since it could recover hardly anything against this Claimant if it succeeds, there would be no incentive to contain expenditure for that reason. It would make no difference to its financial position. I was reminded more than once that a costs capping order does not limit the expenditure of the capped party: it merely limits what can be recovered from the other side in the event of success. Nevertheless, it is important always to have regard to the court's case management powers and, in particular, the power to obtain estimates on both sides and to limit costs to what are proportionate: see e.g. *Solutia UK Ltd v Griffiths* [2001] EWCA Civ 736 at [28]-[29] and [33].

17. It is necessary to have in mind the provisions of the Practice Direction 11.9 and the "seven pillars of wisdom" identified in CPR 44.5, which must be relevant in a prospective as in a retrospective assessment. It is provided in 44.5(3) that the court *must* have regard to:

a) the conduct of the parties; and, in particular, to (i) conduct before as well as during the proceedings; and (ii) the efforts made, if any, before and during the proceedings in order to try and resolve the dispute;

b) the amount or value of any money or property involved;

c) the importance of the matter to all the parties;

d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

e) the skill, effort, specialised knowledge and responsibility involved;

f) the time spent on the case; and

g) the place where and the circumstances in which work or any part of it was done.

18. CPD 11.9 was inserted to prevent a judge, having assessed reasonable and proportionate base costs and, separately, reasonable and proportionate additional liability (or "success fee"), from then considering the combined total and deciding that it is itself so disproportionate as to justify further reductions. It has been recognised, for example, by Lord Hoffmann in *Campbell v MGN Ltd (No 2)* [2005] 1 WLR 3394 at [34], and by Lord Hope at [45], that the legislature intended that CFA litigants should be able to recover a reasonable and proportionate success fee *in addition* to the reasonable and proportionate base costs. In other words, it is inherent in the new regime that such litigants may well recover what would traditionally have been seen as unreasonable and disproportionate costs. It is thus provided:

> "11.9 A percentage increase will not be reduced simply on the ground that when added to base costs which are reasonable and (where relevant) proportionate, the total appears disproportionate".

The base costs and additional liability must be assessed separately.

19. These principles have to be reconciled with the court's understandable desire to cut down expenditure in CFA funded litigation, and especially in libel litigation where financial compensation has been significantly restricted over the past ten years for public policy reasons explained in *John v MGN Ltd* [1997] QB 586: see e.g. the observations of Brooke LJ on 18 May 2004 in *King v Telegraph Group Ltd* (cited above) at [96]–[103]. It seems to have been recognised there that it was necessary "to square the circle"; that is to say, to acknowledge, on the one hand, that Parliament *as a general rule* had intended that an unsuccessful paying party might have to pay to a CFA funded litigant costs at a level that would not ordinarily be regarded as reasonable or proportionate while, on the other hand, to construe the legislation compatibly with the European Convention on Human Rights and Fundamental Freedoms in a defamation context, so as to minimise the chilling effect on press freedom inherent in the system.

20. One of the most important passages to be found in the detailed and carefully thought out proposals put forward by Brooke LJ is to be found at [101]:

> "It cannot be just to submit the defendant in these cases where their right to freedom of expression is at stake, to a costs regime where the costs they will have to pay if they lose are neither reasonable nor proportionate and they have no reasonable prospect of recovering their reasonable and proportionate costs if they win".

21. It is inherent in this reasoning that there should be an exception to the "general rule" for defamation cases because of the special value attached to freedom of speech. Miss Page has boldly argued, authoritative though this case was and directly in point, that it would be for the legislature to make an express statutory exception for defamation cases, and that a judge should not in considering the prospective assessment of costs disregard or qualify the clear provisions of CPD 11.9 or CPR 44.5(3), which are

ultimately derived from statute. It is simply wrong, she argues, for a party in defamation proceedings to be debarred from incurring expenditure, which would otherwise qualify as "reasonable", just because he or she is operating in a CFA environment. This is especially so when the "equality of arms" principle is also infringed because the restrictions impact on one side only.

22. What is more, she suggested that her point has been given added impetus since it was made clear in the very same month (6 May 2004) by the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457 that, where competing Convention rights fall to be balanced, there is no reason to give automatic priority to Article 10 over any other right (e.g. Article 8 or Article 6): see also *Re S* [2005] 1 AC 593.

23. Mr Hudson responds *inter alia* that the inappropriateness of Article 10 "trumping" other Convention rights had been accepted well before the *Campbell* case reached the House of Lords (although it was certainly re-emphasised there): see e.g. *R v Central Independent Television plc* [1994] Fam 192, 203; *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908 at [36]-[41]; *Douglas v Hello! Ltd* [2001] QB 967 at [137].

24. In any event, he submits that Lord Hoffmann in *Campbell v MGN Ltd (No 2)* [2005] 1 WLR 3394 positively endorsed the proposals of Brooke LJ. On the other hand, it is fair to say that he concluded at [37]:

> "In the end, therefore, it may be that a legislative solution will be needed to comply with Article 10".

That is consistent with Miss Page's argument that if an exception is to be made to the "general rule" it is for Parliament to make it. Nevertheless, meanwhile, Lord Hoffmann appeared to recognise the need for a "palliative" at [34]:

> "*In Callery v Gray (No 2)* [2002] 1 WLR 2000 all members of this House agreed that the responsibility for monitoring and controlling the new costs regime lay with the Court of Appeal and that this House should be slow to interfere. And I would certainly indorse the sentiments expressed by Brooke LJ in *King*'s case and hope that judges in lower courts will put his suggestions into practice. It is, however, only a palliative. It does not deal with the problem of a newspaper being faced with the prospect of incurring substantial and irrecoverable costs. In the *Turcu* case, News Group Newspapers Ltd was financially strong enough not to submit to pressure. But smaller publishers may not be able to afford to take such a stand. Furthermore, neither capping costs at an early stage nor assessing them later deals with the threat of having to pay the claimant's costs at a level which is, by definition, up to twice the amount which would be reasonable and proportionate".

It is worthy of note that the other members of the House of Lords in that case agreed with Lord Hoffmann.

25. Thus, interesting though Miss Page's argument is, it seems to me that I should do my best to follow Brooke LJ and "put his suggestions into practice". It would not be right for me to approach them (as I believe Miss Page would wish) as though they were not compliant with the Convention or were inconsistent with the CPR provisions to which I have referred. Although Lord Hoffmann (and no doubt the remainder of their Lordships) recognised that ultimately it was a matter for Parliament, he plainly would not have endorsed Brooke LJ's suggestions if he thought they were unlawful.

26. The Court of Appeal's decision in *John v MGN* (cited above) was intended to render the process for assessing libel damages complaint with Article 10: see also *Tolstoy Miloslavsky v United Kingdom* [1996] EMLR 152. Even so, however, it is worth emphasising that even since that decision was promulgated, some ten years ago, it would be virtually inconceivable that a costs judge on a retrospective assessment would have ruled in a case such as this that the fees of leading counsel should not be recoverable. That is because the "reasonableness" hurdle could easily be surmounted: See the notes in *Civil Procedure*, Vol. 1, at para 48.14. The costs capping order made in this case illustrates starkly, therefore, that a new approach was being adopted for the prospective assessment (as no doubt Brooke LJ intended).

27. I need to pay particular regard to what was said in *King v Telegraph Group Ltd* at [102]:

> "If this means, now that the amount at stake in defamation cases has been so greatly reduced, that it will not be open to a CFA-assisted claimant to receive the benefit of an advocate instructed at anything more than a modest fee or to receive the help of a litigation partner in a very expensive firm who is not willing to curtail his fees, then his/her fate will be no different from that of a conventional legally aided litigant in modern times. It is rare these days for such a litigant to be able to secure the services of leading counsel unless the size of the likely award of compensation justifies such an outlay, and defamation litigation does not open the door to awards on that scale today. Similarly, if the introduction of this novel costs-capping regime means that a claimant's lawyers may be reluctant to accept instructions on a CFA basis unless they assess the chances of success as significantly greater than evens (so that the size of the success fee will be to that extent reduced), this in my judgment will be a small price to pay in contrast to the price that is potentially to be paid if the present state of affairs is allowed to continue."

28. The approach of McCombe J (which I most certainly cannot go behind) and that of Master Campbell (duly attempting to give effect to the order of McCombe J) was that this should be regarded as a simple and straightforward case, without undue legal or factual complexity. Whether I happen to agree with that assessment is hardly relevant. As I observed in *Gazley v Wade* [2004] EWHC 2675 (QB) at [38]:

> "I accept that because of my own particular background, in dealing with libel litigation, I have a very different perspective from that of the Costs Judge. It is therefore important that I

> should not allow that rather unusual viewpoint to colour my judgment about the assessment of an experienced Costs Judge".

Adopting a similar approach here, I remind myself that I am conducting a review rather than a rehearing. If the correct legal principles have been followed, and the appraisal of the case falls within the "generous ambit within which a reasonable disagreement is possible", I should not interfere (I adopt the terminology used by Lord Fraser of Tullybelton in *G v G (Minors*: *Custody Appeal*) [1985] 1 WLR 647, 652). I need to look and see whether any relevant considerations have been taken into account (or *vice versa*), or whether the decision could be said to be "unjust because of a serious procedural or other irregularity in the proceedings". Was the decision just "plainly wrong"?

29. I should be loath to indorse a decision which involved precluding the Claimant from employing the services of leading counsel while the Defendant was free to do so, and to lash out correspondingly greater resources for the purpose. That would hardly be consistent with "equality of arms". In this context, I note that the Defendant had resisted an invitation many months ago to agree that the trial should be a "junior only" trial; that is to say, each side would accept that the case should be conducted by junior counsel. Moreover, in the allocation questionnaire, it was the Defendant's contention originally (as signed by Mr Beabey) that the case was especially complex and required to be dealt with by a specialist judge in London. In due course, however, whether or not as a matter of tactics, it was accepted in a letter of 13 November 2006 that the Defendant would instruct only junior counsel. In the light of that concession, it seems to me that I can hardly conclude that it would be so unfair as to be unreasonable that the Claimant should be similarly confined.

30. I naturally appreciate that strictly I am concerned with assessing matters at the date of Master Campbell's order, and the concession had not been made at that stage. Nevertheless, I do not think his conclusion exceeded the generous ambit within which a reasonable disagreement is possible. Had it subsequently emerged that the Defendant *did* intend to instruct leading counsel, having kept this strategy up its sleeve hitherto, then any possible injustice or imbalance could have been addressed by a further application to the costs judge to vary the budget accordingly (and it may very well be that the Defendant would have had to pay the costs of that exercise for not having "come clean" earlier).

31. Of course, I need to bear in mind that if the Claimant decides to instruct leading counsel there is no question of his or her costs being disallowed on a retrospective assessment. What Master Campbell was doing, effectively, was to confine the "pot" which could be spent on counsel's fees. He was not stipulating that the Claimant must instruct, and only instruct, someone who had not taken silk. Mr Hudson, therefore, points out that I must focus on the amount which Master Campbell allocated for counsel; that is to say, approximately £80,000 including preparation and trial (on the assumption that it did not go beyond eight days). He says it is absurd to suggest that confining the advocate's fees in that way could be said to amount to an infringement of the Claimant's Article 6 rights. It would not in any real sense restrict her "access to justice". She would like to instruct a junior at such a fee in addition to a leader at nearly double, but the Master was entitled to conclude that this would in the circumstances be disproportionate and amount to what would now be perceived as "luxury".

32. Subject to any question of increasing the allowance for counsel's fees because of changed circumstances, which would have to be addressed to a costs judge on notice, I do not believe it is open to me in all the circumstances of the case to overrule the Master. Mr Hudson pointed out that there would be many experienced advocates wiling to do the case (including, no doubt, some who had taken silk) at the allocated rate of remuneration. He drew my attention to the fees which leading and junior counsel might expect to obtain nowadays in criminal proceedings on a publicly funded basis. He no doubt did so because of the comparison drawn by Brooke LJ in the passage I have cited above. I was hardly surprised to hear that they were very modest by comparison. Therefore I do not propose to disturb the assessment made by Master Campbell in respect of counsel's fees. I need hardly add that time and trouble could have been saved if the Defendant had chosen to reveal its hand earlier, or alternatively had made its decision earlier, to the effect that it would be content for the trial to be conducted by junior counsel.

33. I now return to the second aspect of the appeal. The Claimant seeks to be able to spend £70,755 on solicitors' costs instead of the £50,755 currently allowed. As I have indicated, I see no evidence in this case of Kirwans racking up costs unnecessarily. They have done nothing to deserve the strictures levelled at the solicitors in the *King* case itself or those in *Ledward v Kent & Medway Health Authority* [2003] EWHC 2551 (QB).

34. The Defendant's advisers could have assisted Master Campbell by giving a broken down costs estimate. It is accepted that in judging reasonableness the costs to be incurred by the other side "may provide a guide, and in some respects a good guide": *AB v Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034 (QB), *per* Gage J. Despite the absence of a detailed breakdown it has become clear that the Defendant was proposing to spend a good deal more (not less than £300,000 according to the allocation questionnaire).

35. Also it is fair to point out that the Defendant's advisers could have saved the Claimant some of the expenditure she has had to incur by making admissions where obviously appropriate; for example by admitting that the article did indeed refer to her and that the photographs were of her. It was quite unnecessary to make her incur the costs of proving these matters. There have also been requests for irrelevant information, such as about the Claimant's tax affairs. That is not what the article was about. Miss Page suggests that the case provides a very good example of experienced, specialist and expensive solicitors applying their skills to run rings around a firm with significantly less experience in this field. I need draw no such inference, but I am quite satisfied that the Claimant's advisers have been obliged to spend limited resources and valuable time in dealing with disproportionate and irrelevant matters. The narrowing of issues and saving money are important considerations under the CPR and libel actions should certainly be no exception. It would thus appear that the Defendants have not observed the overriding objective or their duties under CPR 1.3.

36. Against this background, I believe that the Master had no or no sufficient reason to think that the Claimant's solicitors' costs were being overstated and failed to take into account the need to deal with the costly tactics of the Defendant's advisers. I will allow the relatively modest increase of £20,000. At the end of the hearing, I indicated that this was what I intended to do. Subsequently, I have been informed that a further £30,000 has been allowed by consent.

37. There was a specific complaint that the Claimant was only permitted to spend up to £2,865 on interim applications. No evidence had been submitted by the Claimant in the form of a costs estimate covering this item; nor would there be any rational basis for making such a calculation, since it would not be possible to guess at the nature of any such applications.

38. For so long as the cap remains effective, the Claimant's advisers are inhibited, to that extent, in the conduct of the litigation; for example, they do not know how far to resist any interlocutory application made against them.

39. What is suggested is that it would generally be unnecessary to include in a costs capping order any specific provision about interlocutory applications, not least because, in accordance with the CPR practice, a CFA funded litigant could expect to have to pay the costs if she made an unmeritorious application or, on the other hand, if she inappropriately resisted one brought by the other side.

40. I would agree with that approach, unless there is evidence in the particular case which would justify making such an order. Here there was none. While it is true, as Mr Hudson submits, that McCombe J did not rule out the possibility of a cap directed expressly at interlocutory applications, I would not accept that this in itself required such an order to be made.

41. In the light of the additional £50,000 now allowed by way of solicitors' costs, there is no need to make any further adjustment to take account of interlocutory applications.

42. Master Campbell capped the solicitors' success fee at 90%, and this is criticised by the Claimant's advisers because he had heard no argument on the matter. This was not surprising as, for the purpose of the costs capping exercise, the Defendants were prepared to proceed on the assumption of a 100% uplift.

43. The Defendants point to CPR 44.3B(1)(a), which provides that no proportion may be recovered of the percentage increase attributable to the postponement of fees and expenses. But, as I say, this was not argued before Master Campbell.

44. Naturally, the order was made without any risk assessment being produced, since it would inevitably involve the disclosure of privileged information about the merits of the case. In these circumstances, I do not consider that the 10% reduction should have been made.

45. Criticism is also made of the fact that Master Campbell ordered the costs before him to be made subject to a detailed assessment and paid by the Claimant forthwith. It is said that they should have been left to detailed assessment at the conclusion of the proceedings – especially since the Defendants themselves were arguing, as a ground for making the capping order, that the Claimant might be unable to meet any potential costs order against her. In any event, it is said, the immediate detailed assessment would itself incur unnecessary expenditure.

46. I consider that this was a matter well within Master Campbell's discretion and that I should not interfere with this part of the order.