Neutral Citation Number: [2013] EWCA Civ 3

Case No: A2/2012/0767

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR JUSTICE BEAN
HQ11DO2225

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2013

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD NEUBERGER
and
MR JUSTICE EADY

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Between:

KC	**Claimant**
- and -	
MGN Limited	**Defendant**

- -
- -

James Dingemans QC and Julien Foster (instructed by **YVA Solicitors**) for the **Claimant**
Desmond Browne QC and Yuli Takatsuki (instructed by **MGN Legal Department**) for the **Defendant**

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Approved Judgment

The Lord Chief Justice of England and Wales:

1. On 1 November 2012 the appeal by the defendant (as we shall describe the defendant) against Bean J's assessment of damages was successful. In short, the starting point in the assessment taken by him was reduced from £150,000 to £100,000 while the 50% discount to allow for the defendant' statutory offer of amends in accordance with s.2-4 of the Defamation Act 1996 was unaltered. The award of damages to the claimant (as we shall describe the respondent) was reduced to £50,000. The issue which now arises is costs, and this is the judgment of the court.

2. Notwithstanding various skirmishes, and assertions and counter-assertions between the solicitors for the parties, this litigation was concerned with the level of damages appropriate to be paid to the claimant following the publication of a seriously defamatory article in a newspaper for which a full apology, accompanied by an offer of amends, was made at an early stage.

3. We have been supplied with a bundle of letters and emails and attendance notes passing between the parties after the offer of amends made on 12 November 2010. We do not propose to refer to each of these documents, nor to distinguish between those which, at the time they were written, were "open", or written "without prejudice" save as to costs.

4. What is entirely clear from this bundle is that the defendant, having offered on that date to pay "a proper and suitable sum by way of damages", and costs, made a first offer of £35,000 for damages, together with reasonable costs. This was rapidly followed by a letter dated 15 December with an offer of £50,000, to reflect the 50% discount, which was open for 21 days, together with payment of the claimant's reasonable legal costs, an offer contained in a separate letter. The letter continued; "in the event that our offer of damages is rejected whether explicitly or by conduct, and your client fails to receive in excess of this sum from the court then we will ask the court to order your client to pay our costs from a reasonable period after our offer". The issue of proceedings would be tantamount to a rejection of this offer.

5. On the following day this offer was rejected in a telephone conversation. A figure of £80,000 was referred to in conversation, as a figure which the claimant might be "persuaded" to accept, but no alternative figure was advanced in writing. On 22 November and 1 December 2010 the defendant' solicitors sought confirmation or clarity about the level of damages sought by the claimant in the light of the published apology and the offer of amends. By letter dated 5 January 2011, the level of the claimant's costs was quantified at a figure in excess of £25,000. The immediate response, by letter dated 6 January, was a detailed complaint about this level of costs and an all-in offer of damages and costs in the sum of £50,000, but the value of the claims for damages was not addressed. In effect this represented a return to the offer of £35,000 for damages, which unsurprisingly in view of the earlier offer, was eventually rejected.

6. By letter dated 1 February 2011 the defendant' solicitors returned to the open offer dated 15 December 2010. "If you are not prepared to engage with the Offer of Amends regime and tell us what your client wants on an open basis and/or make us an offer in a form capable of acceptance by us then unfortunately you should go ahead and prepare for an assessment of compensation hearing under s.3 of the Defamation

Act 1996. It would be unfortunate for this step to have to be taken with the attendant delay and costs consequences however it has become clear that you do not intend to try and resolve this matter". This led to a response dated 15 February 2011. The solicitors for the claimant stated that he was prepared to settle his claim for damages for £80,000, together with costs to be assessed if not agreed. Thereafter the parties met to see whether the appropriate level of damages could be agreed. The meeting was unsuccessful. Following that meeting, on 21 March 2011 the defendant' solicitors made alternative offers of either £50,000 damages together with reasonable costs up to 16 December 2010, with the claimant to pay the defendant's legal costs not exceeding £3,000 thereafter, or alternatively, a total sum of £60,000 inclusive of damages, costs and VAT. If either offer were accepted a cheque would be provided within 14 days for the damages based on the first alternative, and for the whole sum on the basis of the second. After a delay, on 4 May 2011 a Part 36 offer was sent by the claimant's solicitors to the defendant's solicitors making a firm offer of settlement in the sum of £75,000 for damages plus costs, relating to the entire claim. This Part 36 offer was rejected on 16 May.

7. Litigation began on 16 June 2011. As the trial date approached, on 23 September 2011, the defendant made clear that they were prepared to pay "£50,000 by way of damages" together with payment of the reasonable legal costs up to 16 December 2010. If this offer were accepted there would be no attempt to seek payment of any of the defendant's costs. On 6 October, the claimant's solicitors made a new Part 36 offer on the basis that £50,000 damages should be paid by the defendant to the claimant with costs to be assessed if not agreed. In short, as the trial date approached, it looked as though the parties were agreed that the appropriate level of damages, whether by way of a Part 36 offer, or other offer, taking into account the offer of amends under s.2-4 of the 1996 Act was £50,000, the actual offer of amends made on 15 December 2010.

8. By email dated 23 December 2011 the defendant suggested that the parties were indeed agreed that £50,000 was the appropriate sum of damages in the case, continuing that they "would be agreeable to settling this matter for the payment of the sum of £50,000 by way of damages to your client … In addition it will pay … your client's reasonable legal costs up to the date when the offer of 15 December 2010 expired, that being 5 January 2011 to be assessed if not agreed or £20,000 plus VAT in respect of these costs". They were "prepared to waive" their own costs from 5 January 2011 if the offer was accepted promptly. This offer was rejected on 6 January 2012.

9. The case proceeded to the hearing before Bean J. Following his judgment the defendant successfully argued for a stay in relation to the order for damages in excess of £30,000. It is now suggested that the effect of this order was that the claimant had "been successful in the appeal because he was obliged to contest it in order to obtain the balance of the damages now ordered in this court". This suggestion is featherlight: there is no doubt that this was a successful appeal by the defendant. There was a subsidiary issue about the rate at which interest should accrue on any increase in the sum of £30,000. This, however, is irrelevant to present considerations.

10. Stripped to essentials, this is the uninspiring narrative of the circumstances in which the issue of costs of the litigation must now be addressed. In summary, the defendant contend that in the context of s.2-4 of the 1996 Act an open offer of £50,000 for

damages was made on 15 December 2010, which, at the end of the proceedings, the respondent had failed to beat, and that accordingly the respondent should pay the defendant's costs of trial and appeal from the day when that offer was rejected, on an indemnity basis. The claimant suggests that the order made by Bean J in relation to the costs of trial should be maintained, and that the appellant should pay his costs of the appeal. The sums are not trivial. The defendant' costs from 16 December 2010 now approach £90,000, and the base costs sought by the claimant exceed £100,000.

11. With that background we can summarise the essential features of the present dispute.

12. Long before this litigation began the defendant had made an appropriate apology with an offer of amends in accordance with the procedure created by the 1996 Act. Pursuant to the offer of amends, the defendant offered£50,000 for damages together with reasonable legal costs. At the outset this offer was rejected. After it was rejected it was temporarily withdrawn. We surmise, but do not have to decide, that the decision to reduce the original offer of £50,000 and costs to £50,000 inclusive of costs was intended to focus the claimant's attention on the realities. Be that as it may, the original offer was effectively reinstated. In the meantime the claimant was seeking damages of £80,000, and then £75,000, and litigation was started. Nevertheless by the time the case came to the hearing both sides were agreed that £50,000 would represent a fair level of damages, an assessment which, but for its temporary withdrawal, had represented the contention of the defendant from start to finish, and which was available for acceptance by the claimant on 15 December 2010. The litigation continued, and although Bean J made an award of damages of £75,000, which the claimant sought to uphold in this court, our decision, reached without any knowledge of the state of negotiation and discussion between the parties, confirmed what both sides had, eventually, agreed was the appropriate level of damages. By the date when the claimant accepted that £50,000 was indeed appropriate the costs had escalated considerably. In reality, the argument thereafter was directed to the costs of litigation with the defendant, in effect, sticking to their basic contention that the offer of £50,000, together with the costs incurred by the respondent at the time when it was made, provided sufficient amends for the defamatory statement of which the claimant had been the victim.

13. Without attempting to rewrite the terms of s.2-4 of the 1996 Act, it is plain that its purpose was to enable those who had been wrongly traduced to be vindicated by an apology and an appropriate offer of amends, and to provide those responsible for the defamatory statement with a means of acknowledging their error and making an offer of compensation to provide appropriate amends. The objective, to the advantage of both sides, is vindication without litigation. If the court concludes that the offer of amends was adequate, it would normally follow that any litigation following such an offer was indeed inappropriate and unnecessary. As Eady J observed in *Cleese v Clarke* [2004] EMLR 37, "the purpose of the offer of amends procedure is to reduce delay and expense", a view endorsed by this court in *Warren v Random House Group Limited* [2009] 2 WLR 314, which underlined that s.2-4 of the 1996 Act provided "an exit route for a defendant who is unwilling or unable to advance a substantive defence" while providing the claimant with an opportunity "to achieve an economical and rapid resolution of his complaint or part of it". In summary therefore, if within the statutory procedure, following an appropriate apology, a claimant chooses to reject a clear and unequivocal offer of damages, and thus incurs additional legal

expense himself, and requires the defendant to incur further expense, the burden of what proves to have been unnecessary legal expense should normally fall on the claimant who has incurred it or caused it to be incurred. In our judgment this is the appropriate approach to be adopted in this case.

14. In these circumstances the appropriate orders are:

1) the Defendant will pay the Claimant's costs up to and including 16th December 2010 on the standard basis to be the subject of a detailed assessment if not agreed;
2) there be no order as to costs from 17th December 2010 up to an including 10th April 2011;
3) the Claimant will pay the Defendant's costs of the case from 11th April 2011 onwards, to include the costs of the trial and the appeal, on the standard basis to be the subject of a detailed assessment if not agreed;
4) no further interest shall accrue on the outstanding balance of damages (pursuant to Paragraph 2 of the Order of the Court of Appeal dated 1st November 2012) from the date of this Order;
5) the sums owed by the Defendant to the Claimant pursuant to the Order of the Court of Appeal dated 1st November 2012, namely, the outstanding balance of damages of £20,000 and interest thereon, be set-off against the costs to be paid to the Defendant pursuant to Paragraph 3 of this Order;
6) the following sums owed to the Defendant:

a) any costs paid to the Claimant's solicitors by the Defendant on 9th March 2012 (pursuant to paragraph 5 of the Order of Bean J dated 5th March 2012) in excess of the sum owed pursuant to Paragraph 1 of this Order; and
b) interest accruing thereon at the Judgment rate from 9th March 2012 be paid to the Defendant by the Claimant's solicitors

7) the Claimant will pay the Defendant the sum of £25,000 on account of the costs ordered against him within 28 days of the date of this Order;

8) the Claimant's solicitors will pay the Defendant the sum of £5,000 on account of the repayment due at Paragraph 6 above within 14 days of the date of this Order.