Neutral Citation Number: [2005] EWHC 2503 (QB)

Case No: HQ04X02769

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 November 2005

Before:

THE HON. MR JUSTICE GRAY

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Between:

MARION HENRY	**Claimant**
- and -	
BRITISH BROADCASTING CORPORATION	**Defendant**

- -
- -

RICHARD RAMPTON QC and JACOB DEAN
(instructed by **Carter Ruck**) for the **Claimant**
ANDREW CALDECOTT QC and CATRIN EVANS
(instructed by **BBC Litigation**) for the **Defendant**

Hearing dates: 27-28 October 2005

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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 GRAY

Mr Justice Gray:

The question to be decided

1. This judgment is solely concerned with the incidence of costs in this action between Ms Marion Henry who claims damages for libel against the BBC in respect of a short news item broadcast as part of a local news programme, "Points West", on 12 May 2004. The trial of the action is due to start next week.

2. The particular question which I am asked to decide is whether the BBC is entitled to a costs capping order. I heard argument on that and other ancillary questions at the hearing of the Pre Trial Review which took place on 27 and 28 October 2005. At the conclusion of that hearing I was invited by the parties to defer giving judgment. On 7 November, however, I was asked to deliver judgment after all.

3. The question of the BBC's entitlement to a cost-capping order arises in circumstances which may be summarised as follows: the Claimant's lawyers act under a Conditional Fee Agreement ("CFA") and after the event insurance ("ATE") is in place. The amount of the percentage uplift payable by the BBC in the event that the claim succeeds ("the success fee") has not been disclosed but it is thought that it is likely to be 100%. It will be necessary at a later stage in this judgment to examine the detailed wording of the exclusion clauses in that policy. In-house solicitors are conducting the litigation for the BBC. Both sides have instructed leaders and juniors to conduct the trial.

4. The allocation questionnaire filed by the BBC on 10 October 2004 estimated its costs through to the end of trial at about £290k. The allocation questionnaire of the Claimant contained an estimate in the sum of £360k (assuming a nine-day trial with leading and junior counsel). That figure excluded VAT, the success fee provided for in the CFA and any claim in respect of the premium payable for the ATE.

5. Following a prolonged exchange of correspondence to which I shall have to return, the BBC on 4 October 2005 issued an application for a costs cap. It was subsequently revealed (on 21 October 2005 shortly before the application for a costs cap was due to be heard) that the estimate of the Claimant's costs had increased from £360k to £694k, again exclusive of VAT, success fee and any claim in respect of the ATE premium. It follows that, assuming the success fee to be 100% of the base costs, the potential exposure of the BBC in respect of the costs of the action, inclusive of VAT, is £1,600,000.

6. The BBC's estimate of costs has also risen substantially from the figure specified in the allocation questionnaire: the estimate as at 24 October 2005 was £515k. I shall have to consider at a later stage in this judgment the factors which brought about that increase.

The background

7. On or shortly before 12 May 2004 the confidential report of an investigation carried out by Mr Michael Taylor ("the Taylor report") was issued. The subject matter of the report was alleged waiting list mismanagement at Weston Area NHS Trust ("the Trust"). The investigation followed allegations made by the Trust's former

Admissions Co-ordinator, Ms Michele Masson, that waiting lists had been mismanaged and manipulated on the instruction of senior management in order to meet Government targets. Failure to meet those targets might adversely affect the Trust's funding and its published rating as a hospital. The publicly stated position of the Trust prior to Mr Taylor's report had been that any mismanagement that had occurred had been minor and was attributable to the unauthorised activities of Ms Masson.

8. The whole of the Taylor report was not disclosed. A summary of it was issued to the media. The summary stated that Ms Masson's principal allegations had been substantiated and that she and another member of staff had received direct instructions from her "superiors" and "senior managers". According to the summary "direct proof" had not been found to identify who the relevant managers were. The full report had in fact named one person as having authorised manipulation.

9. The broadcast of which the Claimant complains included as part of the coverage of the Taylor report an interview with Ms Masson and an excerpt from a press conference held by her outside the hospital. In the course of that press conference Ms Masson said:

> "The first inquiry, which was set up by the former Chief Executive in 2003, was undoubtedly a cover up and clearly laid the blame for any irregularities at my foot despite evidence to the contrary. As a result, the senior management team including the Finance Director, Meredith Collins, Linda Marvin and Marion Henry Justice of the Peace, were permitted to continue in post…"

10. The Claimant, who was at the time the Facilities and Administration Manager at the Trust complains that those words and other parts of the BBC broadcast (which I do not need to set out) are defamatory of her in that they bear the following meanings:

> "4.1 The Claimant was guilty of systematically falsifying waiting list figures at Weston General Hospital and had been found to be so by an independent inquiry report;
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> 4.2 The Claimant was guilty of bullying and placing heavy-handed pressure on staff at Weston Hospital under her management in order to perpetrate the waiting list fraud;
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> 4.3 The Claimant had been complicit in a cover up of the waiting list fraud which allowed her to continue in her post when she should have been dismissed; and
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> 4.4 Patients are likely to have suffered as a result of the Claimant's role in perpetrating the waiting list fraud."

The Claimant seeks damages, including aggravated damages, and an injunction.

11. The substantive defences relied on by the BBC are justification and qualified privilege. As to the former, the meaning sought to be justified is that

> "(1) the Claimant was part of the senior management team [at the Trust] which was involved in, and pressured staff into, manipulating patient waiting lists in order to meet targets; and
>
> (2) the Claimant was a party to the cover-up of waiting list mismanagement and manipulation at [the Trust]".

The particulars of justification implicate Mr Meredith Collins, the Claimant and Ms Linda Marvin (all of whom had been named by Ms Masson in the course of the press conference) in the mismanagement and manipulation.

12. The qualified privilege defence is an amalgam of traditional common law privilege (duty/interest and reply to attack), statutory privilege (fair and accurate report) and (I think) *Reynolds* privilege. A detailed reply has been served. A positive case is advanced by the Claimant that neither she nor Mrs Marvin had any knowing involvement in the manipulation. The reply does not include any allegation of malice.

The costs capping regime

13. As Dyson LJ observed in *Leigh v. Michelin Tyre plc* [2004] 1 WLR 846 at 848h:

> "One of the principal objects of the Woolf reforms was the control of costs".

Part of the control mechanism for which the CPR provide is the exchange at the allocation stage of costs estimates. The Practice Direction supplementing CPR Part 26 provides that the allocation questionnaire should be in Form N150, which requires estimates to be given of costs incurred by legal representatives to date and of the overall costs. Paragraph 2.1 of CPR 26 PD provides that "attention is drawn to Costs Practice Direction 4.5(1) which requires an estimate of costs to be filed and served when the allocation questionnaire is filed".

14. Section 6 of the Costs Practice Direction current at the time when the present action was commenced defined an "estimate of costs" as an estimate of "base costs (including disbursements)". It provides at paragraph 6.1:

> "This section sets out certain steps which parties must take in order to keep the parties informed about their potential liability in respect of costs and in order to assist the court to decide what, if any, order to make about costs and about case management".

Paragraph 6.3 provides:

> "The court may at any stage in a case order any party to file an estimate of costs and to serve copies of the estimate on all other parties. The court may direct that the estimate be prepared in such a way as to demonstrate the likely effects of giving or not giving a particular case management direction for a split trial or for the trial of a preliminary issue. The court may specify a

> time limit for filing and serving the estimate. However, if no time limit is specified the estimate should be filed and served within 28 days of the date of the order".

Also worthy of note is paragraph 6.6 which is in these terms:

> "On an estimate of the costs of a party the court may have regard to any estimate previously filed by that party, or by another party in the same proceedings. Such an estimate may be taken into account as a factor among others, when assessing the reasonableness of any costs claimed".

15. Although understandably neither party was aware of it at the time when argument took place on the present application, I should for completeness mention amendments to the CPR which are to be found in the latest update to the Rules published on 30 September 2005. The first amendment adds to the court's general powers of management in CPR Part 3.1 the additional power to "order any party to file and serve an estimate of costs". This power appears to be exercisable at any stage of the proceedings. The other amendment is an addition to section 6 of the Costs Practice Direction a new paragraph 6.5A:

> "(1) If there is a difference of 20% or more between the base costs claimed by a receiving party on detailed assessment and the costs shown in an estimate of costs filed by that party, the receiving party must provide a statement of the reasons for the difference in the bill of costs.
>
> (2) If a paying party
>
> (a) claims that he reasonably relied on an estimate of costs filed by a receiving party; or
>
> (b) wishes to rely upon the costs shown in the estimate in order to dispute the reasonableness or proportionality of the costs claimed,
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> the paying party must serve a statement setting out his case in this regard his points of dispute…".

16. In *King v. Telegraph Group Limited* [2005] 1 WLR 2282 Brooke LJ reviewed the cost capping legislation. At paragraph 83 of his judgment he said:

> "83. It is, after all, an important feature of the overriding objective that the court must be enabled to save expense and deal with a case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party (CPR r 1.1), and the parties are required to help the court to further the overriding objective: CPR r 1.3".

17. Having pointed out that *King* was the first occasion when the Court of Appeal had had to consider matters relating to the use of CFAs in defamation actions, Brooke LJ continued:

> "99. What is in issue in this case, however, is the appropriateness of arrangements whereby a defendant publisher will be required to pay up to twice the reasonable and proportionate costs of the claimant it he loses or concedes liability, and will almost certainly have to bear his own costs … if he wins. The obvious unfairness of such a system is bound to have the chilling effect on a newspaper exercising its right to freedom of expression of which [the defendant's solicitor] spoke in his witness statement, and to lead to the danger of self-imposed restraints on publication which he so much feared…
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> …
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> 101. In my judgment the only way to square the circle is to say that when making any costs-capping order the court should prescribe a total amount of recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability. It cannot be just to submit defendants in these cases, where their right to freedom of expression is at stake, to a costs regime where the costs they have 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.
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> 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.
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> …
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> 104. In this judgment I am not concerned to give more than general guidance as to the procedure that should be followed in future cases to mitigate the evils of which [counsel for the defendant] and his clients were right to complain. The details of what may be appropriate to order in individual cases will have to be worked out on a case by case basis. Nor am I willing to accept [counsel for the defendant]'s invitation that we should make a specific order disallowing costs in relation to any of the acts of extravagance of which he made complaint. This is not the subject matter of this appeal. It will be sufficient only to say that the claimant's lawyers appear to have advanced their client's claim from time to time in a manner that is wholly incompatible with the philosophy if the Civil Procedure Rules, and that I would expect a costs judge to take an axe to certain elements of their charges if the matter ever proceeds to an assessment. If the action goes to trial, the trial judge should express his views on matters of this kind and direct that they be transcribed for the benefit of the costs judge, since the trial judge will be much better able than the costs judge to identify those parts of a case in which costs have been wastefully or extravagantly incurred.
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> 105. There are three main weapons available to a party who is concerned about extravagant conduct by the other side, or the risk of such extravagance. The first is a prospective costs capping order of the type I have discussed in this judgment. The second is a retrospective assessment of costs conducted toughly in accordance with CPR principles. The third is a wasted costs order against the other party's lawyers, but this is not the time or place to discuss the occasions when that would be the appropriate weapon."

18. Lord Hoffman in *Campbell v. MGN Ltd* [2005] UKHL 61 endorsed what Brooke LJ had said in *King*. He commented that 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 proportionate and reasonable. At paragraph 31 of his speech he said of the problems which defamation litigation with CFAs is causing:

> "31. The blackmailing effect of such litigation appears to arise from two factors. First, the use of CFAs by impecunious claimants who do not take out ATE insurance. That, of course, is not a feature of the present case. If MGN are

> right about Ms Campbell's means, she would have been able to pay their costs if she had lost. The second factor is the conduct of the case by the claimant's solicitors in a way which not only runs up substantial costs but requires the defendants to do so as well. Faced with a free-spending claimant's solicitor and being at risk not only as to liability but also as to twice the claimant's costs, the defendant is faced with an arms race which makes it particularly unfair for the claimant afterwards to justify his conduct of the litigation on the ground that the defendant's own costs were equally high".

The history of the litigation

19. The history of this case provides a vivid illustration of the problems to which CFA-financed litigation can give rise. In the hope that it may give some guidance for future cases, I will attempt to summarise that history, although not, I hope, at excessive length.

20. As I have said, Carter-Ruck ("CR"), the Claimant's solicitors, promptly and properly informed the BBC on 18 June 2004 that they were acting on a CFA. That same day CR obtained ATE insurance. On 18 June 2004 the Claimant entered into an insurance agreement with Temple Legal Protection Limited. The limit of indemnity was £100k. Mr Andrew Caldecott QC for the BBC draws attention to what he submits are the highly significant exclusion clauses 2, 10 and 11 in the policy. Clause 2 provides that the insurer shall not be liable for disbursements or opponent's (i.e. defendant's) costs if the legal action is lost, discontinued or abandoned "as a result of the dishonesty of the insured". Clause 10 exempts the insurer from liability for such disbursements and costs if the insured or the appointed legal adviser has given "any fraudulent, false or misleading information in connection with the legal action". Clause 11 provides a similar exemption if the insured or the appointed legal adviser has "failed to provide any material information in connection with the legal action".

21. The significance of provisions such as these is obvious in a case where one of the defences relied on is justification: if the defence of justification, involving as it does allegations of deception and cover-up on the part of the Claimant, were to succeed, it is, to put it no higher, very likely that the insurer would be able to disclaim liability for the costs incurred by the "opponent", i.e. the BBC.

22. In answer to a request from the BBC's Litigation Department for information as to the level of cover and for a copy of extracts of the policy, CR replied that their client was under no obligation to provide copies of the insurance documentation which "is clearly privileged". CR's letter did not specify the amount of cover. Mr Caldecott was highly critical of that response and, in my judgment, rightly so.

23. Both the amount of cover and the existence of material exclusions in the policy are of obvious relevance to the opposite party, who must be in a position to make informed choices as to the conduct of the litigation. If the discrepancy between the amount of cover and the updated estimate of costs up to and including trial had been made known promptly to the BBC (as they could and should have been), the present application could have been mounted far sooner. It is said on behalf of the Claimant

that exclusions such as those contained in the Temple policy are commonplace in this field. If so, that is a further reason for candour on the part of the insured's solicitors about the possible limits on the ability of the opposite party to recover under the policy. It is also said on behalf of the Claimant that insurers such as Temple would be unlikely to seek to avoid liability by reference to the exclusion clauses summarised above. I see no reason why this or any other defendant should proceed on any such assumption particularly in a high cost case.

24. As for the claim to privilege made in CR's letter of 14 July 2005, it was utterly misconceived. As the Litigation Department pointed out in its letter of 19 September 2005, the BBC must be entitled to see the provision of the policy in order to assess its financial exposure in the action and to consider whether to apply for a costs capping order. The letter stressed the urgency of the request. Despite that and despite a reminder letter having been written to CR on 23 September it was not until after the BBC on 4 October issued an application seeking disclosure of the policy and a cost cap that CR finally disclosed the policy. By this time the trial was only six weeks away.

25. It is difficult to understand how CR can have thought that the claim to privilege was well-founded. This is particularly so in the light of what had happened in another case, *Al-Koronky v. Time Life* [2005] EWHC 1688 (QB). CR also acted for the claimant in that case with ATE cover on a CFA. In that case CR refused, at least initially, to disclose the policy although not on grounds of privilege. An application for security for costs having been made in that case against the claimant, CR acknowledged that the ATE insurance policy in that case was likely to be of no value to the defendant as the plea of justification (the only defence relied on) required proof of dishonesty in order to succeed.

26. The significance of *Al-Koronky* for present purposes, as it appears to me, is two-fold: firstly that no claim for privilege was made in that case. It is difficult to understand how such a claim came to be made in the present case. One would expect that the question of privilege of ATE policies would have been carefully considered within a specialist firm like CR which regularly acts for clients on CFAs. Secondly, it must have been apparent to anyone reading the report of that case that, in many cases where a defence of justification is relied on, the policy may be worthless to the defendant because the insurer will be entitled to rely on the exclusions. Mr Richard Rampton QC for the Claimant dismissed that proposition as simplistic but, at least in the circumstances of the present case, it seems real enough to me. In any event it is to be hoped that in future the ATE policy will as a matter of course be disclosed to the opposite party.

27. By letter dated 12 July 2005 the BBC had asked CR for a current estimate of the Claimant's projected costs. That request was refused by CR on the ground that such information was not needed in order to enable the BBC to provide an accurate estimate of its costs.

28. It is clear from the witness statement of Mrs Jones of the BBC Litigation Department that in early October she was assuming that CR's costs would broadly reflect the estimate of £360k in the allocation questionnaire. However, shortly before the cost capping application by the BBC was due to be heard the Claimant served a revised costs estimate in the sum of £694k exclusive of VAT, success fee and the premium

for the ATE cover. This was the first indication from CR that there had been any increase in the estimate provided as long ago as 21 October 2004. That revised estimate revealed to the BBC for the first time the true extent of its financial exposure in the action (see paragraph 5 above). It also revealed how woefully inadequate was the cover provided by the Temple policy, namely £100k. The BBC had understood that the amount of cover originally designated would be "stepped up" as the trial approached.

29. It is fair to say that there had been delay on the part of the BBC in providing an estimate of its projected costs, despite a request from CR on 17 June 2005 and a chaser on 14 July 2005. The BBC had indicated earlier by letter dated 9 March 2005 that its costs to trial would be significantly more than previously estimated. Even so, the delay on the part of the BBC in providing an estimate is regrettable. It is implicit in the power of the court by virtue of the provisions summarised at paragraph 14 above to order costs estimates to be provided that both sides should keep each other informed of their respective up-to-date costs positions. I was told in the course of the hearing that it is technically possible to produce an accurate estimate within a fairly short time. Where a party prevaricates the remedy lies in making a prompt application to court for an order. The present case shows what may happen if that is not done.

30. On 25 October 2005 the BBC provided a revised estimate of its costs up to and including trial in the sum of £515k (which figure includes £37k in respect of costs payable to a third party solicitors in connection with the obtaining of evidence from their clients). Mr Rampton on behalf of the Claimant was quick to point out that this figure is not far short of the Claimant's revised estimate of £690k. Moreover he points out that the BBC is using in-house solicitors. I think comparisons of this kind between the respective estimates can be misleading. As a general rule the costs incurred by a defendant advancing a substantial plea of justification are likely to be significantly greater than the costs of the Claimant. I accept that the BBC's costs would have been significantly reduced if CR on behalf of the Claimant had felt able to make the admissions sought in a Notice to Admit dated 7 March 2005 and which, I accept, was served by the BBC with the laudable intention of reducing costs. I agree that costs are saved by using in-house solicitors. On the other hand, in-house solicitors tend to consult counsel more than specialist firms like CR.

The predicament of the BBC

31. As will already be apparent, the predicament of the BBC at the time when this application was argued was an unenviable one. If the case goes to trial, the BBC's own costs will be £515k. If the BBC wins at trial, there is reason to doubt if it will recover under the Temple policy. In any case the BBC will not be entitled to recover more than 20% of its costs. The combined assets of the Claimant and her husband come to about £235k, most of which consists in the equity in the matrimonial home. The Claimant's share is therefore only £117k. Conversely if the Claimant wins at trial the BBC will be faced with a bill of the Claimant's costs which, inclusive of uplift, will total in the region of £1.6 million. That figure is of course subject to assessment. On the other hand the BBC will also have to pay its own costs.

The argument for a cost cap

32. It is in those circumstances that the BBC now applies for an order that the Claimant's costs be capped. Mr Caldecott says that the playing field is not level as between the parties. He points out that the case raises an issue of considerable public interest. He argues that wherever a media (or indeed any other) defendant in a libel action is compelled on financial grounds to abandon any attempt to defend it, there is a serious inhibition on freedom of expression. This was expressly recognised by the House of Lords in *Campbell* (see speech of Lord Hoffman at paragraph 19).

33. Mr Caldecott acknowledges that the application for a costs cap is made at a very late stage: the trial is now only days away. He submits that the delay in applying has arisen through no fault of the BBC; if this litigation had been conducted on behalf of the Claimant with the candour and open-handedness required under the CPR, the application could and would have been made much sooner. Mr Caldecott accepts with regret that it is not open to him now to seek a retrospective costs cap. He urges the court to adopt the approach recommended in *King* to prescribe "a total amount of costs which will be inclusive, so far as [the] CFA funded party is concerned of any additional liability" from now until the conclusion of the trial. He contends that the cap should extend to brief fees and to the hourly rates charge by CR. Alternatively he suggests that the Claimant's costs should be capped at the amount of the present estimate inclusive of the uplift. In return Mr Caldecott accepts that the costs of the BBC should be capped.

34. In response Mr Rampton on behalf of the Claimant rejects the criticisms made of the conduct of the case by CR. In particular he rejects the charge that any deception has taken place either in relation to the amount of ATE insurance cover or as to the terms of the policy. The witness statement of Mr Tudor, the partner in CR who has conduct of this case, contains a detailed refutation of the claim that CR misrepresented the position to the BBC. Mr Tudor argues that the correspondence cannot sensibly be read as indicating that the Claimant had in place insurance cover up to the amount of the BBC's estimate, still less up to the "significantly higher" revised figure which the BBC perversely refused to disclose (see paragraph 29 above). Mr Tudor's evidence is that there is nothing out of the ordinary about the exclusions in the Temple policy (see paragraph 20 above).

35. The principal grounds on which Mr Rampton opposes the application for a costs cap are, firstly, that the application comes far too late. It would, he submits, be unfair to cap costs now, given that a major part of the rationale for the costs capping regime is that the capped party can plan ahead and allocate resources appropriately in the light of the cap: see *Lownds v Home Office* [2002] 1 WLR 2540 at paragraph 23. Secondly, Mr Rampton says that the evidence does not justify the conclusion that there has been extravagance on the part of the Claimant's legal advisers resulting in the "arms race" which Lord Hoffman deplored in *Campbell* (see paragraph 18 above). Thirdly, Mr Rampton argues that it would be impracticable for me, sitting alone without the benefit of assistance and advice from a Costs Judge, to embark on the task of determining the right figure for the cap.

Conclusion

36. I should say at the outset that this case strikes me as a prime candidate for a costs capping order. Where costs are running at the levels which I have indicated earlier in this judgment and a CFA with a substantial success fee is in place, the court is likely to be ready to intervene. The court cannot, however, intervene of its own motion. As is clear from the Costs Practice Direction quoted at paragraphs 14 and 15 above it is up to the parties to keep themselves informed of their opponents' estimated costs, if necessary by making an application to the court for an order that an estimate be provided.

37. Unfortunately no such application was made in the present case. I have set out the chronology at some length in paragraphs 20-30 above. It will be apparent from that chronology how it came about that it was not until October 2005 that the BBC was informed that the estimate of the Claimant's costs had risen from £360k to £690k. The BBC could and should have been informed by CR far sooner about the escalating costs, especially in view of the existence of a CFA which might well double the costs exposure of the BBC. It is to be hoped that in future, where a litigant encounters difficulty in obtaining information about his opponent's costs position, application will be made pursuant to paragraph 6 of the Costs Practice Direction for an order for an estimate.

38. But in the present case that was only part of the problem: the BBC was kept in the dark about the terms of the ATE insurance cover. That should not have happened: the BBC had a legitimate interest in knowing the extent of the protection provided under the policy. Whether or not the exclusion clauses in the Temple policy are commonplace, the BBC had a right to know what they were.

39. I have every sympathy for the predicament, described at paragraph 31 above, in which the BBC, through no fault of its own, now finds itself. It does not, however, follow that it would be right for me at this stage in the proceedings to impose a costs cap. Mr Caldecott has, as I have said, accepted that any cap would have to be prospective. He is in my view right to adopt that stance. There is ample authority that cost capping orders should invariably operate prospectively and not retrospectively: see *King v. Telegraph Group plc* per Brooke LJ at paragraph 80; *Weir v. Secretary of State for Transport* (Ch D 20.4.05) per Lindsay J at paragraph 28. I see considerable force in the point made by Mr Rampton that the imposition of a costs cap so close to trial would in effect penalise the Claimant, or perhaps more accurately her legal advisers, when, as has often been said, the purpose of a capping order is to enable the capped party to plan ahead the appropriate level of expenditure to bring the case to trial at a cost which is in line with the amount of the cap. It would in my opinion be wrong to use the cost capping jurisdiction in a way which would deny the Claimant the benefit of the CFA to which she is statutorily entitled.

40. I would therefore with some reluctance decline to make a cost capping order on the ground that the application is made too late. But there is a further reason why I would not do so. I do not feel that I am qualified to determine without assistance from a Costs Judge the amount of the brief fees, the charging rates and how much work is reasonable and proportionate between now and the end of the trial. Such an exercise is more suitable for a Costs Judge or at least by a judge like myself sitting with a Costs Judge: see *King* at paragraph 95; *Matadeen v. Associated Newspapers* (Master

Eyre, 17.3.05); *Various Ledward Claimants v. Kent & Medway Health Authority* [2003] EWHC 2551 and *A and B and others v. Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034. Such discussion as took place during the course of the hearing about figures satisfied me of the impracticability of the exercise which I was being asked to perform.

41. If I say no more about figures, it is because I bear in mind there may come a time when the costs of one party or the other will be subject to detailed assessment.