Neutral Citation Number: [2007] EWHC 1489 (QB)

Case No: HQ0602312

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2007

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

Martyn Jones MP	**Claimant**
- and -	
Associated Newspapers Ltd	**Defendant**

- -
- -

Ronald Thwaites QC and William Bennett (instructed by **Carter-Ruck**) for the Claimant
Bernard Livesey QC and Sarah Palin (instructed by **Foot Anstey**) for the Defendant

Hearing dates of the costs issue: 14th and 15th June 2007

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RULING ON COSTS

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 HONOURABLE MR JUSTICE EADY.

The Hon. Mr Justice Eady :

1. The trial of this libel action took place between 11 and 14 June 2007 when the jury, after about five hours' deliberation, returned a majority verdict in the Claimant's favour and awarded £5,000 by way of damages. There then followed more than three hours of submissions on the issue of costs, in particular over the applicability of CPR 36.14. Later I received supplemental submissions in writing.

2. The relevant provision was introduced by the Civil Procedure (Amendment No. 3) Rules 2006 (SI 2006/3435). Although the underlying philosophy has not changed, it is necessary to have regard to the new wording, which differs somewhat from the former CPR 36.21. It is obviously necessary, in so far as they may be material, to have regard to those changes when considering the guidance afforded in the earlier authorities relating to the previous provisions. The current wording, so far as is material, is as follows:

> "(1) This rule applies where upon judgment being entered -
>
> (a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or
>
> (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.
>
> (2) Subject to paragraph (6), where rule 36.14(1)(a) applies, the court will, unless it considers it unjust to do so, order that the defendant is entitled to –
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> (a) his costs from the date on which the relevant period expired; and
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> (b) interest on those costs.
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> (3) Subject to paragraph (6), where rule 36.14(1)(b) applies, the court will, unless it considers it unjust to do so, order that the claimant is entitled to –
>
> (a) interest on the whole or part of any sum of money (excluding interest) awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
>
> (b) his costs on the indemnity basis from the date on which the relevant period expired; and
>
> (c) interest on those costs at a rate not exceeding 10% above base rate.
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> (4) In considering whether it would be unjust to make the orders referred to in paragraphs (2) and (3) above, the court will take into account all the circumstances of the case including –

> (a) the terms of any Part 36 offer;
>
> (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
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> (c) the information available to the parties at the time when the Part 36 offer was made; and
>
> (d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated.
>
> … "

3. In July of last year an offer had been made on the Claimant's behalf to settle the case for £4,999 plus an apology. Mr Thwaites QC asked on his behalf for indemnity costs from the appropriate date, together with interest on damages and costs at 10% above base rate. He soon conceded that interest on damages would not be appropriate, for reasons explained below, but pursued the matter of indemnity costs plus interest (albeit ultimately confined to only 4% above base rate). These applications were firmly resisted by Mr Livesey QC for the Defendant. His primary submission is that the criteria set out in CPR 36.14(1)(b) have not been fulfilled.

4. The facts may briefly be summarised as follows. The Claimant is the Labour Member of Parliament for Clwyd South. He was suing in respect of articles in the issues of *The Mail on Sunday* published respectively on 14 and 21 May 2006.

5. The first was headed "Labour MP in foul-mouthed outburst at police guard" and alleged that during an incident (on 10 May 2006) in Portcullis House (being part of the Parliamentary estate) the Claimant had refused to show a security guard his House of Commons pass when requested to do so and twice told him to "fuck off". The Claimant alleged that the article contained meanings defamatory of him, which included that he had refused to show his pass; that he had told the police security guard to "fuck off" twice; that as a result of his conduct the Serjeant at Arms had called for an investigation into his conduct; that he had been reported to the Labour Party Whips because of his conduct; and that he was to be disciplined by the Speaker following a complaint by a fellow Member of Parliament.

6. The second article appeared in the newspaper's "Black Dog column" and described the Claimant at "ludicrous". It is alleged that the article bore the meaning that he had concocted a farcical and dishonest excuse to explain why he swore at a police security guard, who had asked him to produce his pass; namely, to the effect that "… he couldn't wear one because if Al Qaeda had got in, they would have been able to identify him".

7. The Claimant gave evidence himself and called Mr Bob Ainsworth MP, the Deputy Chief Whip, and Sir Stuart Bell MP, who had been referred to and quoted in the first article. The Defendant relied upon the evidence of the security guard, the Serjeant at Arms, Chief Superintendent David Commins, who is the Divisional Commander responsible for day to day security at the Palace of Westminster, and Inspector

Andrew Richford, who serves as the Operations Inspector within the Parliamentary estate and is one of the security guard's superior officers.

8. The Defendant newspaper accepted that, in certain respects, its article had been inaccurate but pleaded justification on the basis that its defamatory sting was substantially true. In particular, the security guard, Mr Christopher Ham aged 21, was called to confirm that the Claimant had only shown his pass to him on the morning in question at the third request and with "bad grace". He gave evidence also that he had indeed told him to "fuck off" at the first two requests. The Claimant denied that he had used that expression, but nevertheless accepted that he only showed the pass with bad grace at the third request, having earlier told the security office that he did not "give a shit" what he was and that he ought to have been in a position to recognise all members of Parliament.

9. One can only speculate, in these circumstances, as to the evidence that was accepted and rejected by the jury and as to its reasoning processes. It would appear that the majority rejected the security officer's evidence at least in some respects, and in particular as to whether or not the Claimant told him to "fuck off", but Mr Livesey does not accept that this is necessarily so. Whatever the position, it seems clear that the jury rejected the submission that the article was substantially true. It is unnecessary to speculate further.

10. Against that background, there is nothing to justify making a penal order against the Defendant. It is clear from the decisions of the Court of Appeal in *Petrograde Inc v Texaco Ltd (Note)* [2002] 1 WLR 947 and *McPhilemy v Times Newspapers Ltd (No. 2)* [2002] 1 WLR 934 that the costs regime under CPR Part 36 should not be regarded as carrying any of the punitive overtones previously associated with an order for indemnity costs. The new regime is rather aimed at bringing discipline to bear on litigants and encouraging reasonable offers of settlement to be made both by claimants and defendants. It is only upon this regime that Mr Thwaites relied in claiming an order for indemnity costs and for enhanced interest. There is no other basis for considering an order for indemnity costs as, for example, sometimes happens where the court intends to express its disapproval of a party's conduct or tactics.

11. The first question is whether or not Part 36 applies at all to the facts of the present case. In other words, I need to determine whether the judgment obtained against the Defendant may be characterised as being "at least as advantageous to the claimant as the proposals contained in [his] Part 36 offer".

12. The offer in question was made by letter on 4 July 2006 in the following terms:

    i) The Defendant was to pay the Claimant £4,999.00 in damages;

    ii) It was to publish an apology, for which purpose a draft was enclosed for consideration;

    iii) It was to undertake not to repeat the same or similar allegations concerning the Claimant; and

    iv) It was to agree to pay his costs, to be assessed on the standard basis if not agreed.

The draft apology proposed was in these terms:

> "In the *Mail on Sunday* on 14 May 2006 and 21 May 2006, we made allegations regarding the conduct of Martyn Jones MP. Having considered the matter, we now wish to state that these allegations were completely without foundation and we consequently withdraw them entirely. We regret that they were ever made.
>
> We would like to apologise to Martyn Jones MP for the damage we have caused to his reputation. We have accordingly paid him a sum of damages, together with his legal costs."

13. There is a special characteristic of damages for defamation which is material in this context. Such an award is supposed to take account of injury to reputation and hurt feelings down to the moment of the jury's verdict (or judgment if the trial is by judge alone). For that reason, it has been recognised that it will generally be inappropriate to award interest on libel damages, even under the CPR Part 36 regime, from the moment that the cause(s) of action arose: see e.g. *McPhilemy v Times Newspapers Ltd (No. 2)*, cited above, at [21] (Chadwick LJ) and [28] (Simon Brown LJ). That is why Mr Thwaites readily conceded that interest should not be payable on damages in this case.

14. This consideration needs, in my judgment, also to be taken into account in determining the issue of whether the judgment obtained is more advantageous to this particular Claimant than the proposals contained in the Part 36 offer or, for that matter, the broader question of "who may be said to have won": see the discussion in *Roache v News Group Newspapers Ltd* [1998] EMLR 161, where Sir Thomas Bingham MR (as he then was) made the following observation in the light of the authorities:

> "The upshot of these cases is in my judgment clear. The judge must look closely at the facts of the particular case before him and ask: who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?"

15. In this case, the Defendant did not respond to the 4 July offer; it did not offer to pay anything by way of damages or to negotiate the terms of any possible correction.

16. It seems to me to be necessary to compare the value of a payment of £4,999 (coupled with a suitable apology) in July 2006 with the award of £5,000 (with such vindication as that represents) following a contested trial in June 2007.

17. The Claimant will undoubtedly have suffered concern and distress in that 11 month period leading up to and including the public hearing, during which his reputation was attacked in the process of attempting to justify the libel. All of that, it is to be supposed, will have been taken into account by the jury in arriving at its award. At the time the offer was made last year, those elements of injury were yet to be incurred. In

purely financial terms, therefore, the jury's award would appear to be less advantageous than the figure he had proposed at that time.

18. Apart from monetary value, it also perhaps appropriate to compare the worth of the unqualified apology he had been seeking with the vindication subsequently obtained. A number of matters have been publicly canvassed which would not have emerged if the offer had been accepted. As I have said, the Claimant accepts that he did refuse twice to show his pass to the security officer before producing it "with bad grace" on the third occasion.

19. Moreover, although he denied saying "fuck off" (whether once or twice), he did accept that he said to the officer "I don't give a shit what you are" (a fact of which the Defendant remained unaware until November 2006, when it was mentioned in the Reply). It has also been highlighted that he, along with a significant number of other members, declines to wear his security pass on the Parliamentary estate, as the Speaker has requested on more than one occasion. This obviously makes life more difficult for those charged with the responsibility for security of the buildings and those who work in them. This was borne out by the evidence of the Serjeant at Arms and Chief Superintendent Commins.

20. These publicly revealed facts, it may be said, put the Claimant, to some extent, in a less favourable light than would a bland and unqualified apology if it had been published in a newspaper last summer.

21. Moreover, although the matter was debated before the jury and one cannot know the conclusion reached, the security guard gave evidence to the effect that he would have regarded what the Claimant did say as "swearing" at him and as being just as offensive to him as telling him to "fuck off".

22. In all the circumstances, I find that I am unable to conclude that the offer made last year was "at least as advantageous" as the ultimate outcome and, therefore, I do not consider that Part 36.14 applies in this particular instance.

23. I should nonetheless go on to consider the other arguments that were raised and the possible relevance in that context of the fact that the Claimant was funded by a conditional fee agreement (CFA) with 100% uplift. It is argued by Mr Thwaites and Mr Bennett (who conducted most of the argument on costs) that this factor should be regarded as irrelevant. On the other hand, Mr Livesey submitted that it cannot be left out of account when considering what is just, fair and proportionate. He, therefore, submits that even if Part 36.14 does have application to these facts, I should decline to make the orders sought on the basis that it would be "unjust to do so".

24. Mr Bennett drew my attention to the decision of the House of Lords in *Hunt v Douglas* [1990] 1 AC 398.

25. The background to the case was the controversy as to whether or not interest on costs should run from the date of judgment (referred to as the "*incipitur*" rule) or from the date when the costs were taxed (known as the "*allocatur*" rule). Their Lordships rejected the practice then current, which was in favour of the *allocatur* rule, based upon a decision of the Court of Appeal in *K v K (Divorce Costs: Interest)* [1977] Fam

39, and held that the *incipitur* rule was more appropriate. The conclusions were expressed at pp 415-416:

> "1. It is the unsuccessful party to the litigation who, ex hypothesi, has caused the costs unnecessarily to be incurred. Hence the order made against him. Since interest is not awarded on costs incurred and paid by the successful party before judgment, why should he suffer the added loss of interest on costs incurred and paid after judgment but before the taxing master gives his certificate?
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> 2. Since, as the Court of Appeal rightly said in the *Erven Warnink* case [1982] 3 All ER 312 payments of costs are likely nowadays to be made to lawyers prior to taxation, then the application of the allocatur rule would generally speaking do greater injustice than the operation of the incipitur rule. Moreover, the incipitur rule provides a further necessary stimulus for payments to be made on account of costs and disbursements prior to taxation, for costs to be more readily agreed, and for taxation, when necessary, to be expedited, all of which are desirable developments. Barristers, solicitors and expert witnesses should not be expected to finance their clients' litigation until it is completed and the taxing master's certificate obtained. If interest is not payable on costs between judgment and the completion of taxation, then there is an incentive to delay payment, delay disbursements and taxation.
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> 3. It is common ground between the parties that the unsatisfactory situation illustrated in *K v K* can be simply dealt with by an express agreement between the solicitor and his client that any interest recovered on costs and disbursements after judgment is pronounced but before the taxing master's certificate is obtained, which costs and disbursements have not in fact been paid prior to taxation shall as to the interest on the costs belong to the solicitor, and as to the interest on disbursements be held by him for and on behalf of the person or persons to whom the disbursements are ultimately paid ".

26. As Mr Livesey pointed out, this case was decided long before the CFA became available and, in particular, before the concept of an uplift was introduced. That is clearly to be borne in mind.

27. Mr Bennett relies upon this case to support his general proposition that interest should be ordered, even in circumstances where the lay client has not had to pay a penny to his solicitor in advance, and is in that sense himself not out of pocket. That is the situation here. I need, however, to remember one of the points emphasised by the Court of Appeal in *Rowlands v Bryn Alyn Community (Holdings) Ltd* [2003] EWCA Civ 383 at [21] in the light of the CPR Part 36 regime:

> "First, the interest on costs is intended to compensate a litigant who is out of pocket having funded litigation which he should not have had to fund."

It was also emphasised that double compensation should be avoided, since the Part 36 provisions are not to be regarded as penal.

28. Mr Livesey submitted that the provisions contained in CPR 36.14, directed towards the payment of interest on costs, must be concerned at least primarily with protecting a lay client who has been out of pocket by funding his solicitor from time to time in the run up to trial. Different considerations apply to solicitors who are prepared to take on CFA litigation, he submits, since there is the ultimate prospect for them of being rewarded by an uplift (which in libel litigation will, as here, often be as much as 100%). Mr Bennett suggests that this makes no difference at all; whereas Mr Livesey argues that it could plainly have a bearing on the justice of the case when it comes to considering whether interest is appropriate.

29. In the *Bryn Alyn* case at [23], as Mr Bennett points out, it was held that it made no difference that the litigant had been publicly funded (thus not being personally out of pocket) and enhanced interest was ordered on costs at the rate of 4% above base rate from the date upon which the work was done or liability for the disbursements incurred. This was held not to be unjust "in the circumstances". Here the circumstances are different in at least two respects. First, the public purse is not involved. Secondly, there was no question of an uplift in the *Bryn Alyn* case.

30. In this case, the terms of the agreement reached between the Claimant and his solicitor had not been revealed to the Defendant's solicitors before the hearing. Mr Livesey's submission was that, in so far as the Claimant was relying upon the terms of an agreement, it was surely incumbent upon him to reveal the relevant terms so that the strength of that submission could be assessed. In due course, a small extract from the agreement was revealed on instructions by Mr Bennett and it was read out to me. My understanding is that it simply said that *if* any interest was recovered the solicitors would be entitled to keep it. This did not seem to me to have very much bearing on whether it would be just, in the particular circumstances of the case, to order that interest should be payable.

31. In determining the justice of the case, which will be a matter to a large extent of the judge's impression of the individual facts, it seems to me that one is entitled to take the matter of uplift into account in determining whether or not it is appropriate for a solicitor to recover interest on costs at an enhanced rate *in addition to* a 100% uplift. In that context, it would be relevant no doubt to take into account the public policy considerations underlying Parliament's approval of introducing the uplift, some years ago, as part of the new CFA regime. It is primarily directed towards compensating solicitors for taking the risk in a CFA case of not being paid at all. Mr Bennett submits that it is not additionally intended to compensate, in circumstances such as these, for the solicitor being kept out of his money by bearing the costs of the litigation at the interlocutory stage. That is why interest is required on top of the 100% uplift.

32. I am not sure, on the other hand, that it is helpful to divide these considerations up so exclusively. In determining the justice of the case for the purposes of the CPR 36.14

discretion, one can surely look at the overall circumstances in arriving at one's decision. Mr Livesey argues that, in looking at the case in the round, I should conclude that it is simply disproportionate for the solicitors to recover interest on top of the 100% uplift. It is out of proportion, he submits, to the relative triviality of the libel and to the level of vindication obtained by the Claimant, especially having regard to the rather unattractive aspects of his conduct which he actually admitted before the jury.

33. If, contrary to my primary conclusion set out above, I were to reach the stage of exercising my discretion under CPR 36.14, I would not have decided that there was anything unjust about the Claimant recovering indemnity costs as such. That would obviously be on the hypothesis that the Part 36 offer had been "at least as advantageous" as the final outcome. But I would not think it appropriate to award interest at an enhanced rate in these particular circumstances, and where (a) the Claimant himself was not out of pocket and (b) the solicitors were to receive, in any event, a 100% uplift on the recoverable costs. I naturally emphasise, however, that this would not necessarily apply in all CFA cases. It is clear that the rule requires the individual judge to consider what is "just" on the particular facts of the case in hand.

34. In the event, however, this stage will not be reached because I have held that the threshold criteria set out in CPR 36.14(1)(b) have not been fulfilled. Thus, I award the Claimant the costs of the action on the standard basis only. I award neither interest on damages nor enhanced interest on costs.