Neutral Citation Number: [2009] EWHC 592 (QB)

Case No: 7LV90185

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LIVERPOOL DISTRICT REGISTRY

Queen Elizabeth II Court
Liverpool

Date: 25th March 2009

Before :

MR JUSTICE COULSON

- -

Between :

MR BAHRAM NOORANI	**Claimant**
- and -	
MR RICHARD CALVER	**Defendant**

(No 2/Costs)

- -

Ms Lois Cole-Wilson (instructed by **Kirwans**) for the Claimant
Mr Jacob Dean (instructed by **E. Rex Makin and Co**) for the Defendant

Hearing dates: 19.3.09

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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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MR JUSTICE COULSON

Mr Justice Coulson:

A. INTRODUCTION

1. BACKGROUND

1. By proceedings commenced on 27th December 2007, the claimant made a claim for damages against the defendant for libel (said to arise out of a letter written by the defendant dated 28th June 2007) and for slander (said to arise out of an alleged conversation on 10th July 2007). On the first day of trial (17th March 2009), I struck out the slander claim, for the reasons set out in my ruling at [2009] EWHC 561 (QB).

2. The claimant was the deputy chairman of the West Kirby branch of the West Wirral Conservation Association ("the Association"). The defendant was chairman of the Association. According to one of the witnesses, the Association was "split from top to bottom". The claimant and the defendant were in opposing camps, and it appeared that the claimant and others in his group believed that it was appropriate to use these libel proceedings to air their long-held grievances about the other side of the Association. It goes without saying that such matters were wholly irrelevant to the issues.

3. The relevant part of the defendant's letter which triggered the libel action made no mention of the claimant by name. It reported that on the evening of the 27th June 2007, after a telephone call in which the claimant had accused the defendant (amongst other things) of dishonesty, the defendant had been subjected to a series of silent nuisance phone calls, interspersed with malicious calls which included direct threats of physical violence and sexual suggestions to the defendant's wife. The claimant's case was that the letter implied that he was responsible for these calls.

4. Although a variety of witnesses were called on the first and second day of the trial (17th and 18th March 2009), the principal evidence on those days was given by the claimant, both in examination in chief and cross-examination. In my judgment, for reasons which are explored in greater detail below, his evidence was nothing short of disastrous for his case. I was not therefore surprised when, at the start of the third day of the trial (Thursday 19th March 2009) Ms Cole-Wilson informed me that the claimant wished to discontinue these proceedings. There was no dispute that the claimant had to pay the defendant's costs of the action, but there was an issue as to the basis on which those costs were to be assessed if they could not be agreed. On behalf of the defendant, Mr Dean sought an order for indemnity costs; the claimant resisted such an order.

5. There were two elements of the dispute about indemnity costs: the parties' pre-trial conduct, and the nature of the claimant's claim itself. At the conclusion of the argument, I ordered that the costs were to be assessed on an indemnity basis if they could not be agreed, and I ordered an interim payment on account of such costs of £50,000, to be paid by the claimant to the defendant within 14 days. I said that I would provide a written note of my reasons, which are now set out below.

APPLICABLE PRINCIPLES OF LAW

6. CPR 44.3 (4) and (5) provide as follows:

> "(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances including-
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> a) The conduct of all the parties;
>
> b) Whether a party has succeeded on part of his case, even if he has not been wholly successful; and
>
> c) Any payment into court or admissible offer to settle made by a party which is drawn to the court's attention and which is not an offer to which costs consequences under Part 36 apply.
>
> (5) The conduct of the parties includes-
>
> a) Conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;
>
> b) Whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> c) The manner in which a party has pursued or defended his case or a particular allegation or issue;
>
> d) Whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

7. In addition, CPR 36.14(1) and (2) provides that, unless the court considers it unjust, a claimant who fails to obtain a judgment more advantageous than a defendant's Part 36 offer will have to pay the defendant's costs.

8. Indemnity costs are no longer limited to cases where the court wishes to express disapproval of the way in which litigation has been conducted. An order for indemnity costs can be made even when the conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation: see ***Reid Minty v Taylor*** [2002] 1 WLR 2800). However, such conduct must be unreasonable "to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight": see Simon Brown LJ (as he then was) in ***Kiam v MGN Limited No2*** [2002] 1WLR 2810.

9. In any dispute about the appropriate basis for the assessment of costs, the court must consider each case on its own facts. If indemnity costs are sought, the court must decide whether there is something in the conduct of the action, or the circumstances of the case in question, which takes it out of the norm in a way which justifies an order for indemnity costs: see Waller LJ in ***Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspden and Johnson*** [2002] EWCA (Civ) 879. Examples of conduct which has lead to such an order for indemnity costs include the use of litigation for ulterior commercial purposes (see ***Amoco (UK) Exploration v British American Offshore Limited*** [2002] BLR 135); and the making of an unjustified personal attack by one party by the other (see ***Clark v Associated Newspapers*** [unreported] 21st September 1998). Furthermore, whilst the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless)

may well lead to such an order: see, for example, ***Wates Construction Limited v HGP Greentree Alchurch Evans Limited*** [2006] BLR 45.

4. OFFERS/RELEVANT PRE-TRIAL CONDUCT

10. The defendant's defence was served on 1st February 2008. Amongst other matters raised, there was the assertion that the malicious calls had been made by a 16 year-old called Michael Dodd, a person well-known to the claimant, who had said that he had made the malicious calls on the claimant's express instructions. This allegation was supported by a written statement from PC Crowe, to whom the alleged confession had been made. On 18th February 2008, the defendant's solicitors wrote to the claimant's solicitors referring to the defence, and inviting them to withdraw the claim form and the particulars of claim, and pay the defendant's costs to be assessed if not agreed. In their response of 22nd February 2008, the claimant's solicitors said: "We do not intend to take our client's instructions with regards to the contents of your letter of above date, to do so would be highly insulting".

11. There is no doubt that this is an important exchange. The defendant's defence had identified one of the critical parts of the evidence in this case, namely the link between the claimant and the person who had apparently admitted making the malicious calls. In consequence of that discovery, the defendant's solicitors, entirely reasonably, invited the claimant's solicitors to withdraw the claim. I regard the response - suggesting that the claimant's solicitors were not even going to discuss the matter with their client - as extraordinary.

12. More importantly, however, is the stark fact that now, over 2 years on, the defendant has achieved precisely the same result that he would have achieved if the claimant had accepted his offer. The claim has now been withdrawn, at the claimant's cost. The only difference is that the defendant has had to incur considerable costs to achieve that result; costs which would never have been incurred but for the claimant's solicitors' wrongful dismissal of the offer of 18th February 2008. That is an important part of the story and the parties' conduct which, so it seems, to me, would, on its own, justify an order in the defendant's favour for indemnity costs.

13. That view is confirmed by a consideration of the other offers that were made in the case before trial. During 2008, the claimant made offers to the defendant, but they involved the payment of money by the defendant to the claimant; the giving of an unreserved apology by the defendant to the claimant; and the payment by the defendant of the claimant's costs. In other words, they were all much more beneficial to the claimant than the bad result which he eventually obtained.

14. On the other hand, it seems to me that the defendant continued his reasonable attempts to bring about an end to these proceedings. By earlier this year, it was apparent to the claimant that, not only was there police evidence concerning Michael Dodd's confession that he made the malicious phone calls on the claimant's instruction, but there was also documentary evidence which showed that the silent phone calls had, in all probability, been made by the claimant himself (see below). In a lengthy letter of 17th February 2009, the defendant's solicitors pointed out these various fundamental difficulties in the claimant's case. They then offered that, if the proceedings were discontinued by the end of February, the defendant would agree to costs being assessed on the standard basis only, and would agree to a joint statement in which, amongst other things, both parties said they were happy with the outcome.

15. I consider that this offer was more than reasonable in the circumstances. It was wrongly rejected by the claimant. Whilst the claimant did make some suggestions about mediation in the same period, it is difficult to see quite what mediation, at such a late stage, was intended to achieve. I note also that the defendant had suggested mediation even before the proceedings had begun, and had been met with the unreasonable response that, if there was to be any mediation, it would have to be paid for by the defendant. The defendant had made a clear offer in his solicitors' letter of 17th February 2009 and that offer should have been accepted. It was not.

16. Following a without prejudice meeting on Wednesday 11th March, there was a pre-trial review on Thursday 12th. At that pre-trial review, I rejected the claimant's attempt to keep out the police evidence relating to Mr Dodd. It was rightly conceded by Ms Hope-Wilson during the argument that the consequences for the claimant if her application failed were potentially fatal to his claim. The defendant was therefore in an even better position on Friday 13th March when the offer of 17th February was repeated by his solicitors. Again, the claimant inexplicably failed to accept that offer. Again, there can be no doubt that the claimant would have been in a much better position than he is now if he had accepted that offer.

17. Accordingly, it seems to me that the defendant's pre-trial conduct was eminently fair and reasonable. The defendant's offers, if accepted by the claimant, would either have put the claimant in precisely the same position as he is now, or in a better position. The defendant has incurred considerable costs (estimated at £100,000) to achieve the dismissal of the claim against him, a result which, but for the claimant's intransigence, he would have achieved two years ago.

18. For those reasons I am in no doubt that the contrasting conduct of the parties prior to the trial makes this a case in which indemnity costs are appropriate. The defendant's pre-trial conduct was unreasonable to a high degree (see ***Kiam)*** and out of the norm (see ***Excelsior)***.

5. THE UNDERLYING CLAIM

19. The second reason why I have concluded that the claimant should pay the defendant's costs on an indemnity basis is because of the fundamental flaws in the underlying claim. First, I am in no doubt that the claimant was seeking to use these libel proceedings in order to pursue the bizarre vendettas that bedevilled the West Wirral Conservative Association. I therefore consider that the action was being used for ulterior purposes (see ***Amoco***). In addition, the claimant had made a series of earlier personal attacks of one sort or another on the defendant and his integrity, and these libel proceedings were another unjustified attack on the defendant's reputation (see ***Clark***).

20. However, the most significant thing of all about this claim was that, in my judgment, it should never have been brought at all. One conclusion is that it was pursued and maintained on an entirely false basis, of which the claimant was always aware. Alternatively, giving him the greatest possible benefit of the doubt, the only other explanation is that the claim was maintained in circumstances where the claimant must have known, on his own case, that, in order to find for him, the jury were going to have to accept a whole series of highly improbable explanations and coincidences.

21. At root, what mattered in this case was the defendant's description in the letter of 27th June 2007 of the silent and malicious calls that he had received. The defendant did not say that the claimant had made those calls. The claimant maintained that the letter inferred that he

had, and since he denied making the calls, he claimed that he had been libelled in consequence. But the evidence painted a rather different picture.

22. First, it is important to note that the background to the silent and malicious calls was not ultimately disputed by the claimant. He admitted in cross-examination that he had had a telephone conversation with the defendant immediately before the calls in question when, amongst other things, he had accused the defendant of dishonesty, and made a number of serious criticisms of his conduct. That call had been terminated by the defendant.

23. The claimant's original case was that he had not made the subsequent silent calls. However, once he had provided disclosure of his mobile phone bill, it became apparent that he had made a series of short calls to the defendant's home number at precisely the time that the defendant had alleged that the silent calls had been made. The claimant then changed his story to say that, although he had made those calls, there had been "no connection". Of course, the oddity of that explanation was that, if there had been no connection, the calls would not have shown up on his bill at all. This discrepancy was pursued in cross-examination. The claimant was obliged to change his case again and said, for the very first time during cross-examination, that he had made a connection on those calls, but there had been something wrong with the telephone and he had not been able to speak to the person at the other end of the line. At one point during his evidence, the claimant admitted that he had not said anything when the phone was picked up, which seemed to me to be an unqualified admission that he had made the silent calls in question, although at another point he said that he had said 'hello'.

24. Accordingly, on the basis the claimant's own evidence, it seemed to me overwhelmingly likely that the jury would find that the claimant had indeed made those silent calls. For the jury to have accepted the claimant's third and final explanation, they would have had to have disregarded his first two attempts to distance himself from the calls, and accepted the claimant's case that, by a coincidence, there had been something wrong with the defendant's telephone when those calls were made, but not apparently at any other time. Such an eventuality was extremely unlikely. This probable outcome on the issue of the silent calls may well have been enough, on its own, to defeat the defamation claim.

25. The claimant's case as to the malicious calls was just as difficult to divine. As noted above, a statement had been provided by PC Crowe which made plain that, using police information, he had traced the telephone number from which the malicious calls had been made. The number turned out to be the number of Michael Dodd, a man known to the claimant and with who, at this period, the claimant was in constant touch. Michael Dodd's explanation to PC Crowe was that he had been asked to make the calls by the claimant just after the call in which the claimant had accused the defendant of dishonesty. That statement was served over a year ago. What was the claimant's case in response to this potentially fatal evidence?

26. As noted above, at the PTR on 12th March 2009, Ms Cole-Wilson endeavoured to keep out PC Crowe's evidence on the basis that the interview had not been conducted on accordance with the **Police and Criminal Evidence Act 1978**. I rejected that submission, first because it seemed to me questionable whether PACE applied in a civil case at all, and more significantly because, even if it did, in the exercise of my discretion, I considered that such evidence was important and should be admitted. In the light of the unsuccessful efforts that the defendant's solicitors had made to contact Mr Dodd, it seemed to me that it would be artificial and unjust to exclude the evidence of PC Crowe on this important topic.

27. Ms Cole-Wilson's suggestion in her opening to the jury was that, in some way, because the interview took place over the telephone, PC Crowe did not know for sure that he was talking to Michael Dodd. It seemed to me that this point was irrelevant for two reasons. First, it was no part of the defendant's case that the malicious calls had to come from Michael Dodd: the important point was that they came from a person who had said that they had been made on the instructions of the claimant. And secondly, when the point arose during the claimant's cross-examination, he assured the court that PC Crowe had been talking to Michael Dodd in that interview.

28. In addition, the claimant's team went to some lengths, both in the oral opening to the jury, and at other times during the trial, to make clear that Michael Dodd was a wholly unreliable witness. There was certainly something in that. But it seemed to me that, ultimately, the attack on Mr Dodd rather missed the point. After all, in cross-examination the claimant confirmed that, if the BT records were right (and there was no reason to doubt them), the malicious calls had been made from a telephone number which he knew belonged to Michael Dodd. Michael Dodd gave an explanation for the making of the calls, namely that they had been made on the claimant's instructions. If that was denied by the claimant (and that was what he maintained), then what other possible reason or motivation could be offered to the jury to explain why these vile calls had been made? I waited throughout the opening and the claimant's oral evidence for such an explanation to be suggested, but it was never forthcoming.

29. Accordingly, it seemed to me that the jury would be faced with overwhelming evidence that the calls had been made from a telephone belonging to a known associate of the claimant, with the explanation (via his confession to PC Crowe) that they had been made on the claimant's instructions. No other explanation for the making of the calls would have been offered to the jury. Thus, to find for the claimant on this issue, the jury were going to have to decide that there was an extraordinary coincidence in which, following the probable making of the silent calls to the defendant by the claimant, the claimant's associate, for unknown reasons wholly unconnected to the claimant, chose that very moment to make malicious calls to the defendant.

30. I am bound to say that I consider that such a result was extremely unlikely. Its inherent improbability was made even worse by the disclosure, only in the last few days, of the claimant's mobile text records. Indeed a court order had to be obtained against the claimant in order for this information to be provided. Those records demonstrated that, on the evening of 28th June 2007, when the defendant received a further malicious call, the call in question had been made just moments after the claimant had sent a text message to Michael Dodd's phone. The inference was obvious: that the text had instructed a further malicious call. Although the point was put repeatedly to the claimant during his cross-examination, he had no explanation for it. He was driven to say: "it is just a coincidence… it is very strange".

31. In my judgment, therefore, both the claimant's oral evidence and the documentary evidence showed that, on the balance of probabilities, the malicious calls to the defendant's home had been made on the instructions of the claimant. It certainly seemed to me that the jury was overwhelmingly likely to reach that conclusion. And even if it is appropriate to give the claimant the greatest possible benefit of the doubt on this issue, the claimant would always have been aware that, whatever his denials, on the basis of the documents and the evidence of PC Crowe, and in the absence of any other cogent explanation for the making of the malicious calls, the jury were very likely to have concluded that they had been made on his instructions.

32. Accordingly, I am driven to conclude that the claimant launched defamation proceedings either knowing that they were based on a lie or, giving him the greatest possible benefit of the doubt and assuming that he was not responsible for the calls, knowing that his case depended on a number of odd coincidences. He started the action in the knowledge that he had made the silent calls (albeit, on his case, with a convoluted explanation which he shared with no-one until the second day of the trial); and in the knowledge either that he had also instructed the malicious calls, or knowing very soon after the proceedings started that the evidence pointed inexorably to that conclusion. And yet he maintained the claim until the third day of the trial, allowing him over a day in the witness box to make all sorts of unfounded and often risible suggestions about the defendant and a host of other people in the Association who were not even parties to the proceedings.

33. In those circumstances it is appropriate for the court to mark its grave concern about the underlying claim and the claimant's conduct of it. One way in which that can be done is by requiring the claimant to pay the defendant's costs on an indemnity basis. This was a hopeless claim from the outset, and I find that the claimant knew it: see ***Wates***. The claimant acted unreasonably to a high degree by commencing these proceedings, let alone maintaining them: see ***Kiam***.

6. INTERIM PAYMENT

34. In accordance with CPR 44.3(8), the defendant's sought an interim payment. There is no dispute about the defendant's entitlement in principle to such an order. I was told that the defendant's costs are in the region of £100,000. The defendant sought an interim payment of £50,000 on account of those costs. That sort of proportion is in accordance with authority: see ***Allason v Random House Uk Limited*** [2002] EWHC 1030 (Ch) and the earlier case of ***Mars UK v Teknowledge Limited*** [1999] 2 Costs LR 44.

35. The claimant sought a lower figure on the basis of his financial difficulties. I am afraid that, during the course of argument, I made plain to Ms Cole-Wilson my lack of sympathy for such a submission. Those who start High Court libel proceedings must realise that, if those proceedings fail, and if, as here, the court concludes that those proceedings should never have been started, then they will be held responsible for the consequences, whatever their personal circumstances.

36. However, that submission does lead on to a final observation that I would wish to make. Whilst the defendant was incurring costs of £100,000, the claimant had the benefit of a Conditional Fee Agreement ("CFA"). There is no doubt that, in certain cases, a CFA can be beneficial, and allow a claim to be brought where otherwise the claimant may not have had the financial resources to come to court. But, so it seems to me, the operation of a CFA agreement in practice can be fraught with difficulties, and can be a positive disadvantage for the other party. This case is a good example. I am in no doubt that, if the claimant had not had the advantage of a CFA, and had had to pay all his legal costs as they fell due, as the defendant had to do, he would have realised much earlier that his claim should not be pursued, and that he was running a wholly unjustified financial risk. The existence of a CFA can inure a party like the claimant to the chilly winds of reality; it can make him oblivious to the significant financial risk that he is running, and the potentially ruinous costs liability that he may be incurring. In my judgment, the conduct of libel proceedings on credit is a thoroughly bad idea, and I consider that the claimant's CFA agreement was a factor in the wrongful maintenance of these proceedings, and their thoroughly unsatisfactory conclusion.

7. SUMMARY

37. For the reasons set out above I am in no doubt that the claimant must pay the defendant's costs on an indemnity basis. The claim should never have been brought. The claimant must make an interim payment of £50,000 within 14 days as a payment on account of that costs liability.