Neutral Citation Number: [2009] EWHC 769 (QB)

Case No: HQ08X03419

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 April 2009

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

MATTHEW PEACOCK	**Claimant**
- and -	
MGN LIMITED	**Defendant**

- -
- -

Adam Speker (instructed by **Carter-Ruck**) for the **Claimant**
Adam Wolanski (instructed by **Davenport Lyons**) for the **Defendant**

Hearing dates: 31 March – 1 April 2009

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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 HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

1. In my ruling of 31 March 2009 I set out the background of this case and do not need to repeat it. The Claimant is funded by means of a conditional fee agreement ("CFA") and I am now asked by Mr Wolanski on the Defendant's behalf to make a costs capping order, presumably in accordance with the court's power under CPR 3.1(2)(m) to "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective".

2. What was actually sought in the application notice was an order that:

   i) there be a costs cap in respect of the costs incurred by the Claimant and the Defendant through to and including trial;

   ii) the level of such cap is to be determined by a costs judge if not agreed, but will not include provision for the costs of instructing leading counsel at any stage.

3. We are moving slowly but, it seems, inexorably towards some form of restriction on the costs incurred in libel cases. The recent government consultation paper makes clear the nature of parliamentary and media concerns.

4. As is obvious, the considerations that arise in defamation are rather special – not least because of the rights to freedom of expression protected under Article 10 of the ECHR. There is no doubt that the costs of libel litigation generally, and the implications of CFAs in particular, are capable of exerting a significant chilling effect on freedom of expression. As has been pointed out, on more than one occasion, there is a huge incentive in some cases to settle for purely commercial reasons without reference to the merits of any defences that may be available.

5. Defamation costs are perceived to be both out of line with the level of costs in other forms of litigation (e.g. personal injury and professional negligence cases) and disproportionate to the monetary compensation nowadays recoverable. The recovery of damages is not the only purpose of defamation proceedings, of course, but it is a factor that must be taken into account, as was recognised by the Court of Appeal in *Musa King v Telegraph Group Ltd* [2005] 1 WLR 2282.

6. A parliamentary select committee is currently looking into various issues relating to the media, including the cost of defamation proceedings. A number of questions have been put to witnesses, apparently expressing puzzlement that judges are "allowing" costs to escalate and not using their power to make costs capping orders more frequently. It may be in due course that they will be made much more regularly, specifically in relation to this form of litigation, if proposals now under discussion are implemented. Meanwhile, however, amendments to the CPR have come into force on 6 April 2009, a few days after the argument concluded in the present case which, on the recommendations of the Civil Procedure Rule Committee, appear to take a more restrictive approach.

7. It is right to note that the new rules (taking the form of amendments to CPR Part 44 and to the Costs Practice Direction) are of general application and that, despite receiving recommendations based on the experience of media lawyers as to how CFAs work in practice, no attempt was made to treat libel litigation in any way

differently. Following the observations of the Court of Appeal in *Willis v Nicolson* [2007] EWCA Civ 199 there had been extensive consultation. The court had there declined to attempt to give further judicial guidance on costs capping without affording that opportunity.

8. Thus, it is clear that, at least for the moment, the proactive and interventionist approach recommended by Brooke LJ in *Musa King* (cited above) is on the wane. The contrasting judicial viewpoint, exemplified by the cautious approach of Gage J (as he then was) in *Smart v East Cheshire NHS Trust* [2003] EWHC 2806 (QB) at [22], is now in the ascendant. Indeed, it is clearly reflected in the wording of the new rules.

9. There is a general stipulation contained in what is now paragraph 23A.1 of the Costs Practice Direction to the effect that "the court will make a costs capping order only in exceptional circumstances". Further, such an order should only be made if certain criteria have been fulfilled. These are consistent with the underlying "exceptionality" principle, since if they are properly applied, it is likely that such orders will indeed be rare.

10. It is provided at CPR 44.18 that:

> "(1) A costs capping order is an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made.
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> (2) In this rule "future costs" means costs incurred in respect of work done after the date of the costs capping order but excluding the amount of any additional liability.
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> (3) This rule does not apply to protective costs orders.
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> (4) A costs capping order may be in respect of –
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> (a) the whole litigation; or
>
> (b) any issues which are ordered to be tried separately.
>
> (5) The court may at any stage of proceedings make a costs capping order against all or any of the parties, if –
>
> (a) it is in the interests of justice to do so;
>
> (b) there is a substantial risk that without such an order costs will be disproportionately incurred; and
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> (c) it is not satisfied that the risk in sub-paragraph (b) can be adequately controlled by –
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> (i) case management directions or orders made under Part 3; and
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> (ii) detailed assessment of costs.

> (6) In considering whether to exercise its discretion under this rule, the court will consider all the circumstances of the case, including –
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> (a) whether there is a substantial imbalance between the financial position of the parties;
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> (b) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation;
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> (c) the stage which the proceedings have reached; and
>
> (d) the costs which have been incurred to date and future costs.
>
> (7) A costs capping order, once made, will limit the costs recoverable by the party subject to the order unless a party successfully applies to vary the order. No such variation will be made unless –
>
> (a) there has been a material and substantial change of circumstances since the date when the order was made; or
>
> (b) there is some other compelling reason why a variation should be made."

11. However understandable the present concerns of the media or parliamentarians may be, it is obvious that I must apply the law and practice as it currently stands.

12. Mr Wolanski submits on behalf of the Defendant that the court needs to "get a grip" in the present case, which he argues is admirably suited for a costs capping order. I have considerable sympathy with that view.

13. Here the figures put before me on the application are not by any means set in stone. They are rough estimates. But there would appear to be a realistic possibility of the Defendant having to pay something of the order of £800,000 if it should lose after a ten day trial on the issue of liability (taking account of such factors as a 100% uplift, ATE insurance premiums and VAT) in addition to its own costs. (I should add that although Mr Wolanski made lengthy and detailed submissions on ATE insurance and the tactical use which can be made of premiums in that context, these are not matters I need to address for present purposes.)

14. Whilst I would hope that the trial could be completed within a shorter time span (perhaps five days), the Defendant remains concerned that it could find itself liable for total costs of over £1m. That would be manifestly absurd and would cause, no doubt, consternation among members of the general public (especially in these times of recession), when the case is set against the very straightforward facts now in issue and the potential level of damages the Claimant might recover if he succeeds.

15. Looking at the case overall, I would characterise it as just the kind of "ding dong" dispute about allegations of "domestic" violence which is tried regularly up and down the country at a fraction of the cost contemplated here. Mr Wolanski submits that the idea of this uncomplicated squabble costing anyone £1m, or even half that figure, is simply unacceptable.

16. I need, however, to remember that Parliament has sanctioned the CFA regime, of which uplifts and ATE insurance are, at least for the moment, an integral part. Moreover, the terms of CPR 44.18(2) exclude "the amount of any additional liability" from the definition of "future costs". I should, therefore, concentrate on base costs and the particular matters which Mr Wolanski has highlighted; that is to say, hourly rates and the appropriateness or otherwise of instructing two counsel. These were the focus of attention also in *Tierney v News Group Newspapers Ltd* [2006] EWHC 50 (QB) and [2006] EWHC 3275 (QB).

17. I should ask myself whether there is a risk of extravagance or disproportionate escalation and, if there is, whether it can effectively be countered by ordinary case management decisions or by the retrospective process of detailed costs assessment. Those are the steps prescribed by the new rules.

18. Leaving out of account ATE insurance premiums, the matter of 100% uplift, and the element of VAT, it does seem to me that there is a substantial risk that costs will be disproportionately incurred and that, accordingly, it might well be in the interests of justice at this stage to make a costs capping order. My conclusion as to the risk of disproportionality is reached by reference purely to the matter of hourly rates and the proposal to instruct leading counsel (at an additional cost measured in tens of thousands of pounds). I have in mind especially what was said by the Court of Appeal in *Musa King* at [102]. It has to be recognised that city rates and leading counsel may well not be appropriate, at least for a straightforward libel action. As I have already indicated, this is such a case.

19. As Mr Wolanski points out, if the Claimant instructs leading counsel, then there will be an "arms race" effect, so that the Defendant will feel the need to do likewise. This in turn is likely to be reflected in an increased premium for ATE cover.

20. I have to ask, in relation to Mr Wolanski's primary concerns, whether the reasonableness or otherwise of instructing two counsel, and the appropriateness or otherwise of city hourly rates, are matters which can be adequately addressed retrospectively on a detailed assessment. It is difficult to see why they cannot. These are matters dealt with regularly by experienced costs judges.

21. Mr Speker argues that, as and when the time comes, the Defendant's representatives (assuming the Claimant succeeds on liability) will be able to argue before the costs judge that instructing a leader was unreasonable. Mr Wolanski says that is all very well in theory, but in practical terms it is going to be rather difficult to present the point persuasively if the Defendant has itself, in the meantime, brought in a leader.

22. If I had a free hand, and were to follow the guidance offered in *Musa King*, I should be strongly inclined to impose a costs cap and to refer the matter to a costs judge to address hourly rates. I should also recommend that the case was not one in which the costs of leading counsel could reasonably be incurred. At the moment (unlike the

situation confronting Gray J in *Henry v BBC* [2006] 1 All ER 154) the proceedings are not so far advanced that it would be too late to make a prospective costs capping order. It might be possible thereby to reduce the Defendant's exposure by approximately £100,000. On the other hand, consistency in these matters is important and I do not have a free hand. I am inhibited both by the "exceptionality" principle and by the fact that I am satisfied that the risk of disproportionality could be adequately controlled by a costs judge at the stage of detailed assessment. While I take into account Mr Wolanski's concerns arising from the "arms race", which I have just identified, I believe that his client should not be prejudiced on either hourly rates or leading counsel, if the costs judge is sufficiently robust, as has proved to be the case in the past. I am sure that the parties will bear this in mind when making future plans on expenditure.

23. I should add that I cannot at the moment foresee any scope for controlling the risk of incurring disproportionate costs by "case management directions or orders". Mr Speker, no doubt partly for that reason, attempted to persuade me to strike out a large number of the allegations against his client from the particulars of justification, as being severable and distinct from the central allegation of violence. But I rejected the argument in my ruling of 31 March, on the basis that the Defendant was entitled to present a case to the effect that it was merely the culmination of a continuum of behaviour. I do not believe that anything further can be done at this stage to narrow the issues.