Case No:HQ03X01439

**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

**Neutral Citation number: [2004] EWHC 190 (QB)**

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 10 February 2004

**Before** :

**THE HONOURABLE MR JUSTICE EADY**

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**Between :**

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| **Karen Phillipps** | **Claimant** |
| **- and -** | |
| **Associated Newspapers Ltd** | **Defendants** |

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**Mr Matthew Nicklin** (instructed by Davenport Lyons) for the Claimant

**Mr David Sherborne** (instructed by Reynolds Porter Chamberlain) for the Defendants

Hearing date : 2 February 2004

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**Judgment**

**Mr Justice Eady:**

1. A short hearing took place on 2 February 2004 at which I granted permission in these libel proceedings for a statement in open court to be read, on a suitable occasion, in the terms of the draft then placed before me. The parties had reached agreed settlement terms in December of last year, when a Part 36 offer had been accepted on the Claimant's behalf. It was made clear prior to acceptance that the Defendants, Associated Newspapers Ltd, were not

prepared to participate in the making of a joint statement (although shortly afterwards an apology was published in the newspaper). Nevertheless, it would have been clear to all concerned, in the light of practice both before and after the coming into effect of the CPR in April 1999, that it would be open to the Claimant to apply for permission to make a statement unilaterally.

2. In the course of correspondence between the parties, and indeed in letters sent directly to the Court, the Defendants raised objections to some of the wording in the draft originally proposed. More importantly, however, it was also made clear that their legal advisers did not believe that the Court would grant permission for a unilateral statement to be made at all, in the light of the sum of money taken out of court, and that they wished to object on the Defendants' behalf to any such statement being made. There was thus objection in principle as well as to some of the detailed wording.

3. By the time the matter came before me Mr Nicklin, on the Claimant's behalf, was seeking permission in respect of a revised draft statement, in the light of the fact that some relatively minor suggestions as to wording made on the Defendants' behalf had been accommodated. On this occasion, Mr Sherborne attended to make submissions on the Defendants' behalf, but made it clear that he did not wish to press any objections to the statement being read and wished to confine his submissions to the matter of costs. Mr Nicklin was applying for the costs of the hearing, as well as those already incurred in the preparation of the statement, and those yet to be incurred in respect of the ultimate reading in open court. There was nothing surprising about this, since it was generally recognised, at least under the old procedure, that a defendant who made a payment into court might well have to bear those incidental costs if the claimant wished, and was granted permission, to make a unilateral statement. The question now raised is whether, and to what extent, that long established practice has been altered or modified by the terms of the CPR.

4. I have not previously heard it suggested that the CPR entailed any change in the established practice, and there is certainly nothing in the wording to make it clear that any such change was contemplated. My attention was drawn to two separate provisions of the CPR which, Mr Sherborne suggested, gave rise to a certain tension and required reconciliation.

5. On the one hand, there is provision for the consequences of acceptance by a defendant of a Part 36 offer or payment at CPR 36.13. Not surprisingly, perhaps, it is in general terms and makes no specific reference to the particular features of a defamation claim. It is provided in 36.13(1) that:

   "Where a Part 36 offer or Part 36 payment is accepted without needing the permission of the court the claimant will be entitled to his costs of the proceedings up to the date of serving notice of acceptance ".

6. It was accepted by both counsel that this provision is relevant to the present situation. Although it has no direct relevance to these circumstances, it is to be noted that CPR 36.13(2), which governs the situation where a Part 36 offer or payment "relates to part only of the claim" *and* the claimant abandons the balance of the claim, provides that he will be entitled to his costs up to the date

of serving notice of acceptance *unless the court orders otherwise*. There is no such qualifying phrase in sub-paragraph (1). It seems tolerably clear, however, that the wording of sub-paragraph (2) is intended to draw attention to the Court's power to deprive a claimant of some part of his costs in respect of a partial offer where the balance of the claim is abandoned.

7. One of Mr Sherborne's submissions was that the "costs clock" stopped ticking, in circumstances such as the present, where a Part 36 offer cannot be described as relating to "part only of the claim", once notice of acceptance has been served. In other words, he argued that a claimant who wishes to make a unilateral statement following the taking of the money out of court must do so at his own expense.

8. The other provision which needed to be considered is to be found in paragraph 6 of the Practice Direction to CPR Part 53:

   "6.1 This paragraph only applies where a party wishes to accept a Part 36 offer, Part 36 payment or other offer of settlement in relation to a claim for

   (1) libel;

   (2) slander.

   6.2 A party may apply for permission to make a statement in open court before or after he accepts the Part 36 offer or the Part 36 payment in accordance with Rule 36.8(5) or other offer to settle the claim.

   6.3 The statement that the applicant wishes to make must be submitted for the approval of the court and must accompany the notice of application.

   6.4 The court may postpone the time for making the statement if other claims relating to the subject matter of the statement are still proceeding.

   (Applications must be made in accordance with Part 23)".

9. It is reasonably clear that paragraph 6.2 is contemplating an application for permission being made *before* accepting a Part 36 offer or payment for the purpose of enabling a claimant to know whether he will obtain that extra element of vindication. It is possible, I suppose, that a claimant might decide to reject a payment or offer if he had not obtained permission for a unilateral statement in open court. It does not seem to me, however, logically to follow that unless the application is made prior to acceptance the claimant should be deprived of the costs which claimants have always hitherto expected to recover. Mr Nicklin argues that it is implicit that in making a Part 36 offer or payment a defendant is recognising that he may have to bear the incidental costs of that offer being accepted, which would include in defamation proceedings those incurred in the making of a statement in open court. At the time of making the payment or offer, a defendant will not necessarily know whether the claimant would wish to avail himself of the opportunity or, if he

does, whether the application for the Court's permission will be made before or after acceptance.

10. Mr Nickin made the point that, if I were to uphold Mr Sherborne's submission that the "clock" stopped ticking at the moment a Part 36 offer or payment was accepted, then defendants would be free to make obstructive objections to a claimant's statement without fear of any sanction by way of costs. That would clearly be unsatisfactory.

11. Mr Sherborne accepts that the Court will have a discretion as to costs when entertaining the Part 23 application contemplated in paragraph 6.2 of the Practice Direction. It is likely that the costs will be correspondingly greater insofar as a defendant chooses to oppose the making of a unilateral statement or to make submissions in relation to the terms proposed. If a Part 23 hearing becomes necessary by reason of a defendant's objections, and they are not upheld, there is no reason why he should not normally be expected to bear those costs. What Mr Sherborne does not accept, as I understand it, is that a defendant should also be expected to carry the cost of a unilateral statement where he makes little or no objection.

12. I cannot accept that there has been any significant change of practice governing statements in open court following the implementation of the CPR. If a defendant makes a payment into court under Part 36, it would generally be the case that the costs of any formal application under Part 23 for permission to make a unilateral statement, and those of making the statement itself, will fall to be paid by the defendant as an integral part of the costs of the action.

13. I saw no reason to refuse this Claimant permission to make a unilateral statement, as to which she would have had a reasonable expectation, and the sum of money taken out of court was certainly well above any level which could be characterised as nominal. There is one briefly reported case where a plaintiff was refused permission to make a statement, and counsel were unable to cite any other example. In *Church of Scientology v Borth News* (1973) 117 Sol Jo 566, leave was refused on the taking out of £50 which seemed to the Court relatively trivial as compared to the libel itself. In the light of experience, it would appear to be quite exceptional for the Court to refuse permission for the making of a reasonable and proportionate statement in open court: see e.g. *Barnet v Crozier* [1987] 1 WLR 272, 280 *per* Ralph Gibson L.J.

14. Generally, the Part 23 application would nowadays come before the Senior Master, where there is no significant opposition, and indeed Mr Nicklin suggested that it might very well be dealt with on paper. The cost should normally therefore be relatively modest. If there is opposition from the defendants, however, it is made clear in the White Book at 53 PD 15.2 that the application should be referred or made directly to the judge in charge of the jury list.

15. In this case I was invited to make a detailed assessment of the costs incurred over the correspondence and the Part 23 application before me. I made some reduction to take account of proportionality, but I declined to rule that the Claimant's costs should in any way be reduced to take account of the

moderate concessions made by her legal advisers in the wording of the statement for the purpose of taking into account the Defendant's suggestions. There was no major concession of principle and the objections seemed to me to be footling.