Neutral Citation Number: [2006] EWHC 50 (QB)

Case No: 5LV90190

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

Queen Elizabeth II Law Courts,
Derby Square,
Liverpool

Date: 26/01/2006

Before :

THE HONOURABLE MR JUSTICE MCCOMBE.

~~**Double-click to add the Judges name**~~

Between :

MARJORIE PATRICIA TIERNEY	**Claimant**
- and -	
NEWS GROUP NEWSPAPERS LIMITED	**Defendant**

Mr William BENNETT (instructed by **Kirwans**) for the **Claimant**
Mr Anthony HUDSON (instructed by **Farrer & Co**) for the **Defendant**

Hearing dates: 13 January 2006

Judgment Approved by the court for handing down (subject to editorial corrections)

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Mr. Justice McCombe :

1. This is an application by the Defendant for an Order that the court impose a "cap" on the potentially recoverable costs of the Claimant. The application is made under CPR rule 3.1(2)(m). There is no dispute that the court has jurisdiction to make such an order, as is well established by recent authority both in the Court of Appeal and the House of Lords, to which I shall return. The question is whether the court should, in its admitted discretion, make such an order in this case. Before turning to the nature of the proceedings and to the application I would mention that immediately prior to argument on this matter I had heard an application by the Defendant for the transfer of this action out of the Liverpool District Registry. I granted that application and, subject to the present application, the action now stands transferred to the Manchester District Registry of this court.

2. In the action the Claimant claims damages, including aggravated damages, and an injunction in respect of alleged defamation arising out of the publication by the Defendant in August 2004 of a series of articles in *The Sun* newspaper. The articles report the Claimant to be a prostitute who had sexual intercourse for money with a well-known professional footballer. The Claimant is about 48 years old and it is alleged that the sting of the libels is that she is "a repulsive and disgusting prostitute who goes by the name of the "Auld Slapper" ". The defence includes a plea of justification that the Claimant had indeed worked as a prostitute and was known as the "Auld Slapper". In the reply it is pleaded that the Claimant had worked in a named establishment, not as a prostitute but as a receptionist. Those are the issues in the action. They are relatively straightforward issues of fact of no great complexity, which ought to be capable of being resolved within a reasonable costs regime.

3. It is not disputed that the Claimant is a person of modest means. She has no assets of sufficient substance to meet realistically any liability for costs that she might incur if the action were unsuccessful. Her claim is funded by a conditional fee agreement ("CFA") with her solicitors. It was assumed by the Defendant in its argument, without contradiction by the Claimant, that the relevant "uplift" on success is 100%. Again, the Defendant stated, also without contradiction, that the Claimant appears not to have the benefit of "after the event" (ATE) insurance to meet the contingent liability for costs. A schedule of the Claimant's costs to 1 November 2005 totals £32,072.65. The schedule of her estimated future costs totals £209,095.00. The estimate for the action as a whole is therefore £241,167.65. That estimate comprises total future expenditure on solicitors, junior and leading counsel respectively of £86,875, £71,300 and £40,000. With the assumed uplift, therefore, the final bill could be in excess of £480,000. It should be said immediately that the Defendant estimated informally its own likely costs of the action at between £250,000 and £300,000. The Defendant's Allocation Questionnaire stated its estimated costs at "not less than £300,000". The parties were also content for me to assume that the Claimant's likely damages, if successful, would be no more than £100,000 to £150,000.

4. It was the Defendant's submission that a case in which costs of nearly £1/2 million on the Claimant's side could be at stake to recover up to £150,000 only, under CFA arrangements and without ATE insurance, was a classic type of action in which a costs cap should be imposed. It was submitted that the recent authorities indicated that

such a cap should usually be ordered as a matter of routine in such circumstances. For the Claimant it was argued that such an order would only be made where it could be demonstrated that there was a tendency on the part of a claimant to incur costs extravagantly or unreasonably in a manner calculated to cause the defendant to incur unnecessary expenditure on its own part. Further, it was said that in defamation cases, a claimant may well have to expend more than might otherwise be thought to be commercially justified in money terms in order to vindicate his or her reputation; it was not appropriate, therefore, to concentrate simply on the proportion the estimated costs bore to the likely sum to be recovered. (This last submission is made good by reference to paragraph 95 of the judgment of Brooke LJ to which I shall shortly refer.)

5. The records of cases for 2003 reveal two cases in which "costs capping" orders of the type now sought were made. Those cases were ***AB v Leeds Teaching Hospitals NHS Trust*** [2003] EWHC 1034 (QB) (Gage J, as he then was) and ***Ledward v Kent & Medway Health Authority*** [2003] EWHC 2551 (QB) (Hallett J, as she then was). The jurisdiction to make cost capping orders and the decisions in those two cases were confirmed by the Court of Appeal in ***King v Telegraph Group Ltd.*** [2004] EWCA Civ 613, the first case in which that court had to consider matters relating to the use of CFAs in defamation litigation, or to order costs-capping orders in that context.

6. At paragraph 93 of the judgments in the ***King*** case Brooke LJ said,

> "If defamation proceedings are initiated under a CFA without ATE cover, the master should at the allocation stage make an order analogous to an order under Section 65(1) of the [Arbitration Act 1996]"

That is the section which, in arbitration proceedings allows the tribunal to make orders limiting the recoverable costs of the arbitration.

7. At paragraph 99 (and following) of the judgments, the learned Lord Justice continued:

> "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 if 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 ...
>
> [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 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.

[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 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 the 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 ...

[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 of 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.

[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."

8. This approach was approved by Lord Hoffmann in ***Campbell v MGN Ltd (No. 2)*** [2005] UKHL 61.

9. Most recently in ***Henry v BBC*** [2005] EWHC 2503 (11 November 2005, [2006] 1 All ER 154), Gray J indicated that where costs were running at high levels and there was a CFA with a substantial success fee in place, "the court is likely to be ready to intervene" by way of a costs capping order: see paragraph 36 of the judgment. He declined to make such an order in that case because of the late stage at which the application had been made, with the trial then imminent.

10. Mr. Bennett of Counsel, in his able argument for the Claimant, submitted that costs-capping orders should be confined to those cases where there had been demonstrable tendencies to extravagance on the part of a claimant. He also submitted that the unrelenting style of the conduct of the defence of the proceedings in this case had meant that the Claimant herself had been obliged to expend more than might normally be expected in pursuing a claim of this type. He submitted that a costs cap should not be imposed simply because an impecunious litigant was proceeding under a CFA; that was a legitimate course sanctioned by Parliament. He argued that, if the Claimant were to win, a costs cap would not help because costs unreasonably/unnecessarily incurred would not be recoverable on assessment and the Defendant would be able to offset costs incurred by it as a result of such unreasonable or unnecessary behaviour. He submitted that if the Claimant loses, the irrecoverability of the Defendant's costs was endemic in the system under which litigants of modest means are now permitted to proceed with benefit of CFAs. It is only where extravagance on the Claimant's part has inflated the costs of the Defendant that the latter is unfairly prejudiced. He submitted that in weighing these factors the court should not underestimate the force of the retrospective assessment of costs as a controlling weapon in cases of this nature: see paragraph 105 of Brooke LJ's judgment. He also submitted that, in weighing the balance a Defendant's right to freedom of expression, guaranteed under the Convention, this was a qualified right and that there was the world of difference between, for example, investigative journalism which exposes terrorism and that of the merely prurient character represented by the articles in issue here.

11. It seems to me that care must be taken not to put a discretionary power of the court, such as this power is, into an over-rigid straightjacket. Each case will require consideration on its merits and on its own particular facts. Brooke LJ was at pains to emphasise this in his judgment in the ***King*** case (supra) at paragraph 104. However, his view was as stated in paragraph 101 of the judgment, namely that it cannot be just to submit defendants in defamation cases, where their right to freedom of expression is at stake, to a costs regime where the costs which they will have to pay if they lose are neither reasonable not proportionate and they have no reasonable prospect of recovering their reasonable and proportionate costs if they win. The learned Lord Justice was there clearly concerned by the inflating effect of the success fee payable under a CFA and not merely with potential extravagance in the base costs incurred by a claimant. In the ensuing paragraph, he considered that under such arrangements the base fees of the claimant might have to be controlled by a costs capping order,

limiting the fees to be paid to the advocate and the costs available for other preparatory work. In such cases, while higher fees might not be unreasonable, the litigant operating under a CFA, without ATE insurance, might have to accept further limitations in the reasonable protection of the opposing party.

12. I accept Mr. Bennett's submission that the Court is entitled to bear in mind the nature of the "freedom of expression" sought to be exercised (see the speech of Baroness Hale of Richmond in ***Campbell*** (supra) at paragraphs 148-9 of the judgments), but that can only be one factor in many and it will not always be easy for the court to make qualitative judgments of the journalism in issue. In this case, however, I think that Mr. Hudson for the Defendant was correct to accept in argument that the "public interest" in publication of the material here was well down in the scale of importance when compared with an article relating, for example, to alleged terrorist activity.

13. It is clear from the judgments of Brooke LJ in ***King*** and of Gray J in ***Henry*** that there will be many cases of the present type in which the court is "likely to be ready to intervene" with a costs-capping order. In this case, the Claimant's anticipated costs are very substantial indeed compared with likely recovery on success. On the other hand, it is clear from the evidence adduced on her behalf that the articles had an immediate adverse effect on her reputation in her local area. It is right that, if the allegations were untrue, that she should have legitimate means to vindicate her reputation. However, it is accepted by all that the issues of fact and law are neither complex nor novel. That is also clear from a reading of the pleadings and other material in this case. In my view, it is a claim that can be reasonably and competently advanced without resort to luxury, particularly if the Court exercises a robust case management to ensure that the case is brought promptly to trial and that attempts by either party to indulge in expensive interlocutory proceedings are curtailed.

14. I have come to the conclusion that the considerations of justice highlighted in the reported cases, together with the particular features of this case which I have sought to identify, call for a costs-capping order. It will be appropriate for the level of the cap to be determined by a costs judge. I do not consider that it is necessary for a High Court judge to be involved, as was submitted in Mr. Bennett's outline argument. I would not presume to dictate to that judge how best to reach his decision in the matter. However, I would suggest that costs saving techniques should be applied to that exercise also, by way of using limited written submissions, confined to a very short number of pages (as opposed to an extensive "costs draughtsman's" approach) and, so far as necessary, with limited oral argument. As is clear from the reported case, and most recently from Gray J's judgment (paragraph 39), a cap must invariably operate prospectively and not retrospectively. Further, without extensive inquiry into the interstices of the litigation to date, the costs judge will be entitled to bear in mind in fixing the cap the vigorous manner in which the defence of the action has been and may, therefore, be likely to be pursued. Any extravagance on the Defendant's behalf in its conduct of the proceedings hereafter may result in the court increasing the level of the cap.

15. For these reasons, the Defendant's application succeeds.