Neutral Citation Number: [2009] EWHC 122 (QB)

Case No: HQ07X00181

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 January 2009

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

JEFFREY WAKEFIELD
(trading as "Wills Probate and Trusts of Weybridge") **Claimant**

- and -

(1) IAN ROGER FORD
(2) CAPORN CAMPBELL (A Firm) **Defendants**

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Aidan Eardley (instructed by **Daltons**) for the **Claimant**
Adam Speker (instructed by **Russell-Cooke LLP**) for the **Defendants**

Hearing date: 12 January 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. The Claimant in these proceedings is Mr Jeffrey Wakefield, who apparently trades as "Wills Probate and Trusts of Weybridge". He is not a solicitor but writes and advises on the preparation of wills. He complains in respect of an allegation contained in a letter written as long ago as 12 January 2006, in which the First Defendant, Mr Roger Ford, alleged that he was negligent and, moreover, that negligence had been admitted on his behalf. Mr Ford is a solicitor and at the material time was a partner in a firm called Caporn Campbell, who are in fact the Second Defendants. That firm later merged with Russell-Cooke, and the firm is now known as Russell-Cooke LLP, of which Mr Ford is a partner and also the head of the private client department at the Kingston upon Thames office.

2. The letter of 12 January 2006 was written to a firm of solicitors called Crellins, and it dealt with various matters including a query as to the Claimant's involvement in the preparation of documents. A request was made for information about his qualifications. The particular words extracted for complaint in the particulars of claim are as follows:

> "Indeed in relation to another unconnected matter we are acting for a client in respect of a claim against another local solicitor arising out of Mr Wakefield's admitted negligence and in that matter we have asked a similar question … "

It is said that the words bore the meanings that the Claimant:

a) had been negligent in another case, and

b) that this negligence had been admitted by him or on his behalf.

3. Much significance has been attached, both in correspondence and in submissions throughout this case, to the distinction between asserting of someone that he is negligent and, on the other hand, asserting that this negligence had been admitted. It seems that the Claimant takes particular exception to the suggestion that negligence had been admitted by him or on his behalf. As Gray J has pointed out, however, at an earlier hearing in December 2007, the essential sting of the words is contained in the allegation of negligence. If one has been negligent, or indeed has behaved wrongfully in any other respect, and the wrongdoing can be established, one would hardly expect to recover damages in such circumstances in respect of a marginal allegation to the effect that it had been admitted. Indeed, it will often be regarded as being to a person's credit that, if wrongdoing has indeed taken place, he has been prepared to come clean and admit it.

4. There was a ruling by the Master in September 2007 to the effect that the occasion of publication was protected by qualified privilege. There was plainly a common and corresponding interest in the subject-matter between Mr Ford and Crellins. In order to overcome this defence, therefore, the Claimant would obviously have to establish that Mr Ford was malicious at the time he wrote the letter. That would ordinarily mean proving that he knew what he was saying to be false, or that he was reckless in the sense of being genuinely indifferent to its truth or falsity, or at the very least that his dominant motive in writing the words complained of was to injure the Claimant's

reputation (rather than serving the legitimate purpose for which the law accords qualified privilege).

5. There is also a plea of justification alleging that the Claimant was indeed negligent in certain respects and, for what it is worth, that an admission had been made on his behalf to this effect in October 2005. It will be necessary to return briefly, and in general terms, to the nature of the negligence alleged because it is one of the aspects of the Claimant's conduct that Mr Speker, on the Defendants' behalf, relies to buttress his application for costs to be awarded on the indemnity basis.

6. Despite attempts at persuasion on the Defendants' behalf, in particular on the basis that the claim was doomed to failure because it would prove impossible to establish malice against Mr Ford, the Claimant continued to press ahead for another 15 months after the Master upheld the defence of qualified privilege. Eventually, on 9 December 2008, following supplemental disclosure on 3 December 2008, it was recognised by the Claimant that he did not wish to proceed to trial in January of this year. He did not simply discontinue, however, but rather made an application dated 22 December to the effect that he should be permitted to accept, as he purported to do by letter of 9 December, what was alleged to be an outstanding offer to settle the action made on the Defendants' behalf on 14 August 2008. Mr Speker characterised this as a last-minute attempt to avoid the consequences of his pursuing litigation which he was bound to lose. In a letter of 5 January of this year, the Claimant's solicitors stated that if the application of 22 December failed, the Claimant would indeed discontinue the action (with the usual costs consequences).

7. As to the merits of the contractual dispute, it is necessary to consider the terms of a sequence of letters, commencing with one from the Defendants' solicitors dated 30 June of last year. This was headed "Without prejudice save as to costs" and sought to capitalise not only on the Claimant's weak position so far as malice was concerned but also on admissions contained in the amended reply concerning the plea of justification (i.e. as to the allegations of negligence).

8. The relevant parts of the letter of 30 June were in these terms:

> "Your client will not succeed on defeating (*sic*) the plea of justification and his efforts to blame others, including the lay client who he charged for his advice, are very unattractive.
>
> Further, we have already made our views plain on your decision to persist with the malice allegations against Mr Ford and do not intend to repeat them here. Your client will not succeed on that issue and should not be persisting with it.
>
> It is time your client saw some sense and discontinued this litigation.
>
> Accordingly, we make this further offer to you now before considerable costs are incurred preparing witness statements and proceeding to trial:

1. Your client withdraws the allegation of malice he has made against Mr Ford and apologises to him personally in writing for having made it;

2. Your client pays our base costs (including all disbursements and VAT) to date.

In return we are prepared to waive our success fees (counsel is now on conditional fee agreements as this firm has been from the outset of the litigation) and your client would not incur any further costs going forward. If you client does not accept this offer we will, as we have already said, proceed to trial. If successful, our firm and counsel will be entitled to success fees and will also seek a costs order on the indemnity basis because (a) your client has made and persisted with improper allegations of malice against a professional man; (b) your client has chosen to blame his conduct on a blameless third party; and (c) he has ignored sensible offers to settle made throughout the litigation.

It is only your client's intransigence that is keeping this case running. We strongly suggest your client takes this reasonable offer very seriously. Please do not respond by making demands for your own costs or any other remedies. They are not on the table at this stage."

9. After some chasing, there was a response dated 18 July in these terms:

"We refer to your Without Prejudice letter dated 30th June 2008. We disagree strongly with your assertions that the drafting of the Deed of Variation was negligent but see no point in further debating the merits of our respective cases in correspondence.

In any event, as I am sure your client will recall, the defamatory statement that he made in the letter to Crellins used the words 'admitted negligence'. The suggestion that our client, or someone apprised of the matter and acting with his authority or on his behalf, had made an admission of negligence is an aspect of the allegation which has caused our client very real distress and damage to his reputation. It is also an aspect of the allegation which, as you must realise, you have no hope of justifying.

As your client appears to show a willingness to negotiate we suggest the following:-

- That your client apologises in writing for the allegation that our client, or someone acting with his authority or on his behalf, had admitted negligence;

- That our client withdraws the allegation of malice and apologises to Mr Ford for having made it;

- That your client gives an undertaking in words to be agreed that he will not defame our client any further;

- That each party bear their own costs subject to costs already reserved.

We would be pleased if you could take instructions on this matter and confirm whether or not your client is content for the matter to be settled on this basis. We look forward to hearing from you."

It will be noted, first, that emphasis was being placed on the words "admitted negligence" and that no request was made of the Defendants to withdraw or apologise for the allegations of negligence actually having taken place; secondly, there was a willingness to apologise for having made the allegation of malice (which suggests an acknowledgment that it was wrong to have done so). Nonetheless, the allegation of malice remains on the record to this day and has not, so far, been withdrawn.

10. On 14 August 2008 the Defendants responded:

" … We note that your client has finally retreated from the position set out in your letters dated 17 September 2007 and 15 February 2008.

Whilst our clients welcome parts of this offer it does not go far enough.

We address the points in your letter in turn:

1. Your client is now prepared to drop his demand for an apology in relation to the real sting of the libel (that he was negligent) but is still insisting upon one that says he never admitted to being negligent. At the hearing in December 2007 Gray J said in his judgment,

'Whether or not the second of those two meanings is a defamatory one is open to some doubt in my view however the real sting is the first of those two meanings'

This is a clear warning from an experienced libel judge. Gray J's view makes complete sense.

We note that you do not specify to whom this apology would be published. It would be misleading for Mr Ford to write a letter that your client could publish to the world at large in which Mr Ford accepted that your client never admitted negligence in respect of Mrs

Damle's case without him also making clear in the same letter that he was entitled to conclude that your client was, in fact, negligent in his dealings with Mrs Damle and explain why. It would be surprising if that is what he really wants.

2. Whilst we welcome the offer to withdraw the plea of malice and for your client to offer to apologise to Mr Ford, the allegation of malice is very serious (more serious than an allegation of negligence or admitted negligence) and should never have been placed on the record. You have Mr Ford's witness statement explaining his honest belief. The issue should be withdrawn and judgment entered for our clients. Since you made this allegation in pleadings open to the public and instructed your counsel to allege that this was a serious case of malice in open court proceedings on a number of occasions, Mr Ford must be entitled to publish the apology as he sees fit. We attach some wording.

3. Our client is not prepared to give any undertaking and your client, even if he was successful at trial, would never obtain an injunction as wide as the undertaking sought;

4. We welcome your client's movement on costs but we do not understand your proposal that '*each party bear their own costs subject to costs already reserved*'. We take it to be a walk away which is not acceptable to our clients at this stage. Your client is going to lose the action and costs will follow the event.

As you know, our clients offered many months ago to accept only the payment of disbursements to date and since that time they have incurred considerable costs. Whilst our clients are prepared to consider any sensible offer on costs your client is prepared to make they see no reason to depart from their previous offer that your client pays our base costs to date and, in turn, we will waive our success fee.

Please note that the costs to date (including disbursements and VAT) on this side are in the region of £58,000. That figure is likely to double going forward to trial when witness statements are prepared and trial brief fees incurred. At the conclusion of the case we will be entitled to a success fee on top of our base costs which will wipe out any costs orders you have in your favour at this stage.

We therefore reject your offer and invite your client to reconsider his position."

(I need not set out the terms of the apology to Mr Ford which was enclosed.)

11. Nothing further was heard until a letter of 9 December, as I have said, which purported to accept the "offer" contained in the letter of 14 August. It is important, therefore, to note the emphasis placed by the Defendants' solicitors in that letter upon the fact that they were prepared to accept costs "to date" (i.e. to 14 August or thereabouts). They also emphasised that, if this offer were not accepted, the demands on the Claimant would be correspondingly greater as costs built up towards trial (and the proposed concessions on costs would not be any longer available). It is therefore, in my judgment, quite untenable to construe that letter as making an offer which was to continue indefinitely into the future, such that the Claimant could accept it at any time. Nevertheless, that seems to be his submission.

12. The letter of 9 December contained the following passages:

> " … our client recognises the difficulties involved in pursuing a case on malice to trial and has no wish to subject your client to the public embarrassment involved in the same. Neither does our client wish to spend more time and money pursuing this litigation.
>
> In view of the above, our client is prepared to accept the offer contained in your letter dated 30 June 2008 and reiterated in your letter dated 14 August 2008. The precise wording of our client's apology can be the subject of further discussion but our client can indicate now that he substantially agrees to the terms of the draft you provided. A version with some amendments marked is attached for your consideration.
>
> On the question of costs, we understand your offer to be made subject to the costs Orders already in place. In other words:
>
> (a) our client would be entitled to set off those costs which were ordered in his favour in relation to the striking out of the original justification defence and of and occasioned by the re-amendment of the defence.
>
> (b) your clients would not be entitled to their costs of the same.
>
> (c) your clients would not be entitled to the costs of the appeal (where the Costs Order was the claimant's costs in the case).
>
> Our client accepts your offer on this basis."

It is clear that even at this stage the plea of malice was being held out as a threat – notwithstanding the expressed willingness to apologise back in July.

13. I have already indicated that I do not believe that there was any such offer outstanding on 9 December, capable of acceptance, and for that reason alone the Claimant's

construction must fail. In any event, the parties were not *ad idem*, since the Defendants were plainly intending in the letter of 14 August to indicate that the Claimant could "buy out" of the litigation at that stage at a price. They were not suggesting that the Claimant would be entitled to set off costs orders in his favour, although that is how his solicitors chose to interpret it in the letter of 9 December. Moreover, the terms of the apology were (albeit in minor respects) to be re-negotiated.

14. In these circumstances, having ruled against the Claimant's construction, I must move to the next submissions which relate to the basis upon which costs should be paid following the anticipated discontinuance.

15. Mr Speker asks for costs on the indemnity basis because of a number of aspects of the Claimant's conduct. As I have already shown, this was foreshadowed in correspondence. Generally, he puts his argument on the footing that this is a case which should never have been brought, since the Claimant knew perfectly well that he had been negligent. Still less should it have been persisted in for so long in the teeth of the persuasive arguments adduced in correspondence. At least, for example, when the Master upheld qualified privilege in September 2007, it is said that he should have bowed to the inevitable. Mr Eardley argues for the Claimant that it was reasonable for him to hold on in the hope of obtaining an apology relating purely to the "admission" question. That is unrealistic, however, since it was always inconceivable that any such apology would be offered without it being made clear that the allegation of actual negligence was well founded.

16. I turn to Mr Speker's more specific points.

17. Ordinarily, following a discontinuance, the costs would be payable on the standard basis but the court has a power to award indemnity costs in what are regarded as exceptional circumstances: see CPR 38.6(1). The following test was suggested by Waller LJ in *Excelsior Commercial and Industrial Holdings v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879:

> "The question will always be: is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?"

18. The learned editors of *Gatley on Libel & Slander* (11th edn) observe:

> "Following the introduction of CPR the threshold for an assessment on an indemnity basis has been lowered. It does not require a finding of some lack of moral probity or conduct deserving of moral condemnation on the part of the paying party. It is sufficient if the litigation has been conducted in a way which is unreasonable, though the unreasonableness must be of a high degree, not merely wrong or misguided."

19. Two aspects of the Claimant's behaviour, albeit linked, that are relied upon by Mr Speker are his pleading and persistence in the allegation of malice against Mr Ford

and his stubborn refusal to accept reasonable proposals of settlement as the case has progressed.

20. There is a connection in the sense that the Claimant has from time to time cited the strength of his case in malice as a reason for turning down a proposal of settlement.

21. There is no need for me to recite all that the parties have said in witness statements, in pleadings and in correspondence on the subject of malice, but I would cite two matters in particular. A full explanation was given in a letter from the Defendants' solicitors of 26 September 2007 (shortly after the Master's ruling on qualified privilege) as to why the Claimant was likely to fail. Of course, in general terms one can often take arguments in solicitors' correspondence with a pinch of salt, but the arguments advanced in that letter are particularly compelling and should not have been ignored. As I have already noted, the explanation for rejecting the offer of settlement was that the Claimant was holding out for an apology over the "admission" issue. That was unreasonable. Also, I particularly deprecate the continued reliance upon malice (and indeed using it as a threat in the letter of 9 December) after it had been acknowledged on 18 July that an apology would be appropriate. Although the offer was made on a without prejudice basis, when addressing the question of costs at this stage I can naturally take it into account.

22. Mr Speker reminded me of certain observations I had made in the case of *McKenna v MGN Ltd* on the risks attaching to casual or formulaic pleas of malice. The ruling was given on 16 July 2007 and, at [11], I commented:

> "There are numerous examples of libel actions in which the fact that malice has been pleaded causes delay and increased cost out of all proportion to its ultimate utility in furthering the overriding objective or arriving at a just result. There need to be available, therefore, in the modern era of civil litigation, suitable disciplinary mechanisms for discouraging unrealistic or tactical pleas of malice. People need to think carefully before alleging bad faith against journalists, newspapers groups or any other defendant just for the sake of it. If such allegations lead to additional cost, but ultimately do not stand up to scrutiny, it is quite right that this should be reflected in determining who should pay."

Correspondingly, unreasonable reliance on a plea of malice would clearly be a relevant factor in determining whether or not costs should be payable on the indemnity basis.

23. Mr Speker also points to the Claimant's conduct in relation to the example of negligence pleaded by way of justification. What is said is that the Claimant had, in relation to a client called Mrs Damle, plagiarised or copied a precedent deed of variation and an accompanying note from specialist Chancery counsel relating to a different person entirely. The essence of the negligence was that the Claimant merely copied the documents, more or less word for word, without applying his mind to the appropriateness of the drafting to the case in hand.

24. Mr Speker has described the exercise as "mindless"; so much so that the Claimant had actually gone to the extent of sending the document off to Mrs Damle without deleting the paragraph whereby the Chancery counsel had invited *her* client to make contact, if necessary, at her chambers address (which obviously had no application to the Claimant). He also copied certain passages which were relevant to two properties in the case of the other client, whereas there was only one property to consider in relation to Mrs Damle. The consequence was that, so far as she was concerned, the deed contained inconsistent paragraphs.

25. What is said is that the Claimant must have known that he had done this and that it was accordingly quite inappropriate for him to be suing over an allegation of negligence which could be justified. It is inherent in this submission, of course, that the costs should be on the indemnity basis throughout.

26. In a letter to Mr Wills, a partner in the firm of solicitors for whom he had been working in relation to Mrs Damle, he asserted that the trust was drafted by counsel and that a note was supplied with the draft and sent to Mrs Damle (stating that the trust may not be effective with regard to inheritance tax if the clause allowing her to live in the house remained in the deed). This clearly gave the impression that the trust had been drafted by counsel *with Mrs Damle in mind and acting on her behalf*. In fact, of course, although the documents had been drafted by counsel, they related to a completely different client. These untrue statements, therefore, are also relied upon by Mr Speker as relevant to the issue of indemnity costs.

27. It was admitted in the amended reply, on 22 May 2008, that paragraph 5 of the plagiarised note contradicted paragraph 4. The explanation was that paragraph 5 was "included in error" and that it would have been evident "to any competent solicitor (and indeed anyone who read the draft deed and note)" that paragraph 5 had been included in error. I do not find this very compelling.

28. My attention was also drawn to the witness statement of Mrs Damle prepared for the purposes of this litigation, in which she made the comment:

> "I find it outrageous that, having relied upon Mr Wakefield to advise me properly and to ensure that the work done on my behalf was to my benefit, he now claims that I am responsible for the negligent preparation of the deed of variation."

Mr Speker is relying not only upon the negligence itself but upon the fact that the Claimant sought to blame an innocent third party, namely Mrs Damle, by asserting that she had given him conflicting instructions.

29. It is perhaps worth clarifying that Mr Speker is not arguing that the Claimant should, in some way, be punished for his conduct before this litigation began but rather, in view of his earlier behaviour, that it was completely unreasonable for the Claimant to launch and persist in this litigation and to claim vindication which was clearly unwarranted.

30. I do find the conduct of the Claimant in the course of this litigation to have been unreasonable and I see no reason why the Defendants should be out of pocket for

having had to defend it for so long. Accordingly, I accede to the submission that the costs should be awarded on the indemnity basis throughout.

31. I am asked to order a payment on account of costs, which is nowadays becoming the standard practice. I think the right order, in all the circumstances, is that the Claimant should pay £45,000 by 13 March 2009.