Neutral Citation Number: [2010] EWHC 1939 (QB)

Case No: HQ09X01648

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2010

Before :

THE HONOURABLE MRS JUSTICE SHARP DBE

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Between :

	ROBERT DEE	**Claimant**
	- and -	
	TELEGRAPH MEDIA GROUP LIMITED	**Defendant**

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- -

Andrew Caldecott QC and David Sherborne (instructed by Addleshaw Goddard**)** for the **Claimant**
David Price (**David Price Solicitors & Advocates**) for the **Defendant**

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Judgment

Mrs Justice Sharp DBE:

1. By agreement of the parties, the issue of costs which arises following the Defendant's successful application for summary judgment has been dealt with without a hearing, and sequential submissions have now been provided. The relevant findings are fully set out in the judgment ([2010] EWHC 924 (QB)).

2. The Defendant submits it should have all its costs assessed on an indemnity basis because the Claimant and/or his representatives have behaved unreasonably in relation to this litigation, so as to take this case "out of the norm" (see CPR 44.3 and 44.4 and the notes at CPR 44.4.3). Mr Price for the Defendant relies on three matters. First, he submits the Claimant obfuscated in the pleadings and in correspondence on the issue of Spanish tournaments and the circuit. This in turn led to unnecessary significant costs, including those spent on evidence for the hearing, when the issue could have been dealt

with simply, as a matter of construction. Second, the strategy of limiting the complaint to the front page was "tactical, opportunistic and weak". Third, it is said, the Claimant sought huge and obviously unreasonable costs, using the spectre of additional CFA liabilities to put pressure on the Defendant to settle the claim.

3. Mr Sherborne for the Claimant submits assessment should be on a standard basis, and invites the court to make an issue-based order. It is said the Claimant should have the costs of issue two – that is whether the words were capable of a defamatory meaning (where the court found in the Claimant's favour); and the Defendant its costs of issues one and three, where the court found in its favour. Alternatively, I am asked to otherwise reflect what is described as the qualified nature of the Defendant's success at the hearing by making an order that the Defendant should receive 60 per cent of its costs. In any event, the Claimant asks me to deal with the costs of this discrete application for costs separately. As for the three matters relied on by the Defendant to support its claim for indemnity costs, in relation to the first two points, it is said advancing a case which is unlikely to succeed or which fails in fact cannot be sufficient reason for an award of costs on an indemnity basis; *Shania Investment Corp v Standard Bank London Ltd*, November 2, 2001 unreported (see CPR 44.4.3). Similarly, the fact that with the benefit of hindsight the position adopted by the losing party appears to be unreasonable is not sufficient either: *Healy-Upright v Bradley & Another* [2007] EWHC 3161. I am also referred to what is said by Lewison J in *Easyair Ltd (Trading as Openair) v Opal Telecom Ltd* [2009] EWHC 779 at [6]:

> "the fact that a substantial part of a case has failed at the stage of summary judgment does not warrant an award of indemnity costs. The whole point of summary judgment is to stop hopeless cases from going to trial. The giving of summary judgment against a party who has a hopeless case is itself the norm."

4. It is said that the suggestion that costs pressure was put on the Defendant bears little scrutiny when one considers the fact that the Claimant is a private individual of modest means whereas the Defendant is a substantial corporation with a turnover and net profit of many millions which itself had the benefit of solicitors acting under a CFA. Some of the criticisms made under this head by the Defendant are said to be not only unfair but absurd. The fact that (for example) the Claimant's solicitors discussed with the Defendant's solicitors, the correct level of ATE insurance before entering into the policy is not a matter for criticism at all, since parties are encouraged to agree an appropriate level of cover to avoid claimants entering policies with an unnecessarily high level of indemnity. Similarly, no criticism can be made of the Claimant's solicitors for drawing the attention of the Defendant to the fact that they entered into a CFA backed by ATE insurance: it is after all, precisely what the Defendant's solicitors did themselves.

5. I will deal first with the basis of assessment. It would be a rare case where both sides do not feel that the other has acted unreasonably, and unfortunately, an even rarer one, where there would not be at least a measure of truth in such a view. The question is whether there is something out of the ordinary, or which as has been said, takes the case out of the norm. I do not consider there was in this case. Dealing with Mr Price's first point, it would be a disproportionate exercise to unravel the complexities of the pleadings in this case, but the determination to "argue the matter out" in the pleadings which occurred here, is relatively common place in libel litigation; and in my view, what occurred, whether in relation to the pleadings or the evidence prepared for the hearing, is not sufficient to justify making an indemnity costs order (as Mr Sherborne has also pointed out the Defendant has already obtained the benefit of a costs order for the hearing on 19 October 2009 before Eady J where similar criticisms were made of the Claimant). As to the second point, the fact that the Claimant pursued a claim which was struck out is not sufficient on its own for the reasons given by Lewison J in *Easyair*, and it seems to me that the criticisms now made of the Claimant, for example, as to the decision to sue on the front page article only, are made with the benefit of hindsight. As to the third point, in my view, when considering the basis of assessment, care must be taken to distinguish between the consequences of the fact that a CFA has been entered into (and its potential effect on the parties to the litigation) on the one hand and conduct which is sufficiently unreasonable in the particular case on the other. It seems to me that at least some of Mr Price's submissions do not sufficiently distinguish between the two. But in any event, in this case both sides instructed lawyers to act under a CFA, and to that extent there was costs pressure on both sides. It was also necessary for information to be exchanged about the CFAs and ATE insurance for the reasons Mr Sherborne gives. Though the Claimant's costs estimate in the Allocation Questionnaire seems high, there is no evidence that unreasonable costs were ever actually sought from the Defendant when attempts were made to settle (as they were), and it does not seem to me to be a factor on its own which takes this case out of the norm.

6. In my view the Defendant is entitled to its costs of the action on a standard basis to be assessed if not agreed, save that there will be no order for costs in relation to the application for costs on which I have now ruled. I decline to make an issue-based order or reduce the proportion of costs the Defendant should receive, as the Claimant invites me to do. The Defendant was the clear winner overall, and in my view is entitled to its costs in the normal way. My finding on issue two was heavily qualified, and was not made on the basis advanced by the Claimant (see paragraphs 38-59 of the Judgment, in particular paragraphs 57-59). As to the costs of this discrete matter, normally the costs of dealing with costs are swept up in the costs overall. On the other hand, most of the written submissions were taken up with the Defendant's application that the costs should be assessed on an indemnity basis, which I have refused. However, I have also refused the Claimant's application as to the appropriate order. Looking at the matter in the round I have concluded that the fair order on this discrete matter, as I have already indicated is

that there should be no order as to costs.