

ENGLAND AND WALES / JUDGMENT

Simpson v MGN Ltd & Anor

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Neutral Citation Number: [2015] EWHC 126 (QB) IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION Before : MR JUSTICE WARBY

- ----- Between : DANIEL PETER SIMPSON

- and - MGN LIMITED -and- STEPHANIE WARD

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- ----- Case No: HQ14D05513 Royal Courts of Justice Strand, London, WC2A 2LL Date: 27/01/2015 Claimant Defendant/ Part 20 Claimant Part 20 Defendant Manuel Barca QC and Aidan Eardley (instructed by Lewis Silkin LLP) for the Claimant Adam Wolanski (instructed by Simons Muirhead and Burton) for the Defendant/Intended Part 20 Claimant The Intended Part 20 Defendant did not appear and was not represented. Hearing date: 21 January 2015

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Judgment

MR JUSTICE WARBY: 1. 2. 3. On 19 January 2015 I tried the preliminary issue of what defamatory meanings were borne by the words complained of in this action, and heard the claimant's application to strike out the plea of justification, and the defendant's cross-application for permission to amend that plea. I handed down judgment on 21 January 2015, and made an order striking out the plea of justification and refusing permission to amend. Mr Barca QC for the claimant applied for an order for costs in the sum of £24,096.20 inclusive of VAT, as set out in a statement of costs dated 16 January 2015 which had been filed with the court. Mr Wolanski submitted on behalf of the defendant that I should not award the claimant any costs at all. Alternatively, if I was against him on the question of liability for costs, he made submissions as to quantum. Mr Wolanski did not quarrel with the proposition that the claimant was overall the successful party and for that reason would in the ordinary way be entitled to a costs order in his favour. He submitted however that no such order should be made for two

reasons:

- i) ii) The claimant's approved costs budget did not include any sum in respect of the costs of the applications which I determined, and there was no good reason to depart from the budget, with the consequence that no costs at all should be allowed ("the costs budget point"). The claimant had failed to serve a costs schedule on the defendant, with the consequence that no costs order should be made, if it otherwise would be. Alternatively, I should reflect this failure in my approach to what order as to costs should be made ("the costs statement point"). I ruled against Mr Wolanski's first submission and declined to disallow costs entirely on the basis of the second submission. He then took time to review the claimant's costs schedule, provided during the hearing, and to obtain instructions on it. After then hearing argument on quantum I concluded that the claimant should recover: i) ii) 90% of the costs which would have been approved as reasonable had the claimant submitted his budget for approval in advance of the hearing, assessed on the assumption that the Master would have taken the most parsimonious approach possible within the bounds of what is reasonable; less a deduction to reflect the fact that the claimant's failures caused the defendant to incur additional costs, beyond those it would have incurred if the claimant had sought and obtained prior approval from the Master. Those additional costs included in particular those of preparation for and attendance at court by Counsel and solicitors to argue costs at the time of hand-down, which might well have been unnecessary or much shorter, had the claimant obtained prior approval of his proposed budget for the applications. 4. I assessed the total sum due on this basis at £10,500 inclusive of VAT. I gave brief reasons at the time, whilst making clear that I would give fuller reasons in writing later. These are those reasons. Liability for costs
- (ii) The costs budget point 5. 6. This case is subject to the costs management regime set out in Section II of CPR Part 3 and PD3E. Accordingly, in readiness for the case management conference before Master Yoxall in October 2014 the parties prepared and exchanged budgets. The claimant had by then already proposed that there be a trial of the preliminary issue on meaning, and had threatened to strike out the plea of justification, but had made no formal application for that purpose. The suggestion of a preliminary issue trial was at that stage strongly opposed by the defendant, which also opposed the claimant's proposal to apply at the CMC for an order for such a trial. The defendant's budget, dated 21 October 2014, included "Contingent Cost A" in the form of the claimant's preliminary issue application. The sum provided for was £13,060. The defendant's budget was agreed by the claimant. The claimant served a re-amended budget on 29 October 2014, the day of the CMC. This included three contingencies, the first two being mediation and specific disclosure. The third was the preliminary issue, designated as "Contingent Cost C" with a figure of £20,575. A breakdown of this figure was given in the budget. The claimant's budget was contested. 7. The Master declined to direct a preliminary issue, but paragraph 2 of his order envisaged there might be such an order in future: "The Claimant's application for an order that there be a trial of a preliminary issue on meaning is refused at this stage. The Master will give trial directions at the next CMC. For the avoidance of doubt, this direction does not preclude

either party from issuing an application before a Judge for a ruling on meaning.” 8. 9. The Master’s directions on costs and costs budget recorded that “It is noted that the Defendant’s costs budget is agreed and a further sum of £7200 be allowed for the further CMC.” This paragraph of the order reflects the provisions of CPR 3.15(2)(b) and PD3E paragraph 7.3. Under those provisions the court only “approves” budgets or parts of budgets which are not agreed; if they are agreed to any extent, the court records the extent of the agreement. The Master’s order recorded that the claimant’s costs budget was “approved as shown in the Table annexed hereto”. The Table contained a list of Phases and, against all but two of those phases, a figure. Against the Phase “Contingencies” the Master wrote “N/A”. The effect was that the defendant’s contingent figure for the preliminary issue was agreed but not approved; the claimant’s was neither agreed nor approved. The claimant’s figure was not disapproved either, and Mr Wolanski did not suggest as much. Paragraph 12 of the order gave permission to restore for further directions. 10. The claimant’s application notice seeking an order for the trial of meaning as a preliminary issue, the trial of that issue, and an order striking out the plea of justification was issued on 26 November 2014. It was accompanied by a draft order which included an order for payment by the defendant of the claimant’s base costs of the application. On 5 December 2014 the defendant’s solicitors served their client’s draft Amended Defence, seeking consent, and wrote in response to the claimant’s application. In doing so they raised a point about Master Yoxall’s costs directions. Practice Direction 3E paragraph 7.6 provides for the revision of budgets upwards or downwards “if significant developments in the litigation warrant such revisions”. A revised budget should be submitted for agreement or, failing agreement, submitted to the court for approval. By letter of 9 December 2014 the claimant’s solicitors served an amended budget. This was in the form of the Table used by Master Yoxall, but with the addition against “Contingency” of “Preliminary Issue: £20,575” (the same figure as provided for in the claimant’s re-amended budget of 29 October). The claimant’s solicitors invited comments by 12 December 2014, stating that they would then submit the amended budget to the court for approval. The defendant’s solicitors did not respond by 12 December. Their reply did not come until over a month later. The claimant’s solicitors did not submit the amended budget to the court. The claimant’s meaning and strike-out application was listed for hearing on Monday 19 January 2015. On 12 January 2015 the claimant’s solicitors wrote with a draft index for the hearing bundle. The following day the defendant’s solicitors served their client’s application for permission to amend, and notified the claimant that the defendant now consented to the determination of meaning as a preliminary issue. This was done under protest however. They wrote that “The costs to be incurred on this application are wholly disproportionate, and entirely avoidable. However, you have refused to agree to have the meaning application dealt with on paper.” They went on to say that they would contend that regardless of the outcome of the meaning application, the defendant should not have to pay the costs of the hearing, “which are being unnecessarily incurred and are wholly disproportionate.” It was on Wednesday 14 January 2015 that the defendant’s solicitors replied to the claimant’s solicitors’ letters dated 9 December 2014. The letter stated that “Your client’s proposed costs budget is not agreed. The proposed costs of your client’s

preliminary issue contingency are excessive and unjustified.” The letter went on to note that it had previously been indicated that the claimant would be writing to the court regarding the budget and noted that no such correspondence had been seen, asking for confirmation of the position. On Friday 16 January the defendant’s skeleton argument was filed with the court and exchanged. In paragraph 4, there was reference to the claimant’s initial costs budget for a preliminary issue of £35,500, and a footnote recorded that “Before Master Yoxall the Claimant’s budget for a preliminary issue hearing was reduced to some £20,000. The Master did not order any budget for the Claimant’s costs of the preliminary issue.” At the hearing on 21 January 2015 matters unfolded in the way described in paragraphs 1 and 2 above. There had been no prior notice of the point that Mr Wolanski then took. 11. 12. 13. 14. 15. 16. CPR 3.18 provides: “Assessing costs on the standard basis where a costs management order has been made 3.18 In any case where a costs management order has been made, when assessing costs on the standard basis, the court will

- (a) have regard to the receiving party’s last approved or agreed budget for each phase of the proceedings; and
 - (b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so.”
17. Mr Wolanski’s principal submission was the simple and straightforward one that I have already mentioned: that there was no good reason to depart from the approved budget for the claimant; and that since that budget included no provision for the preliminary issue it followed that there should be no costs order in favour of the claimant. Mr Wolanski highlighted aspects of the sequence of events that I have outlined above, and contended that here the claimant had failed without good reason to submit for approval his revised costs budget in respect of the preliminary issue application, having been expressly prompted by the defendant’s solicitors. It mattered not, he submitted, that the defendant’s solicitors had replied late to the claimant’s amended budget proposal. The onus was on the claimant’s solicitors. He invited the court to take a firm stand.
18. Mr Barca submitted that the defendant’s stance represented rank opportunism. The defendant had failed to reply to the claimant’s solicitors’ letter of 9 December 2014 for over a month. They had left it until just 2 working days before the hearing, by which time it was too late for the claimant to submit its budget for approval by the Master. If the defendant’s submission was upheld it would result in an unwarranted windfall for the defendant, which had fought and lost the applications. The hearing had been beneficial for the litigation as a whole, indeed beneficial for the defendant itself, potentially saving many tens of thousands of pounds compared with a full trial. 19. 20. It is clear that if costs management is to work conclusions reached upon reviewing costs budgets must be adhered to, and not second-guessed at a later stage. The wording of CPR 3.18(a) focuses attention on budgets for phases of the litigation. It is clear from CPR 3.18(b) that if a figure has been agreed or approved for a particular phase of proceedings the amount recoverable by the receiving party in respect of that phase will be capped at that figure, unless there is good reason to depart upwards. (If

the receiving party has incurred costs less than budgeted there will be good reason to depart downwards.) If significant developments have taken place which increase the cost of a phase, or add an element of cost, a revised figure should be discussed, and if not agreed submitted for approval, if time allows: PD3E paragraph 7.6. Time may not allow. Equally, if a party's budget for a particular phase has been reviewed and assessed at nil, there would need to be good reason to award any costs at all. The application of the wording of CPR 3.18(b) is not so straightforward in the circumstances of this case, where (a) the receiving party has put forward a budget for this phase of the litigation but one that is not agreed or approved, or disapproved but considered inapplicable; and (b) the paying party has prepared a budget for this phase which has been agreed. I am inclined to think that the wording of CPR 3.18 was not aimed at such a situation, but rather at ensuring that once the court has reached a decision on what it is reasonable for a party to spend on a given phase that conclusion should be final in the absence of some good reason. However, that was not a point addressed in argument and I reach no conclusion on it. Assuming that I am wrong in this it seems to me that on the facts of this case there is good reason to depart from the budget approved by Master Yoxall for this phase of the litigation, by allowing recovery of some costs by the claimant. 21. It is true that the claimant failed to comply with PD3E paragraph 7.6 by submitting a revised budget for the court's approval prior to the hearing. However, having regard to the wording of CPR 31.18 it seems to me that what the defendant seeks, strictly speaking, is that by way of a sanction for this failure the claimant's recoverable costs of success on the applications should be assessed at nil. That is not a sanction prescribed by the Practice Direction or the rule. The order sought would in my judgment be an unjustly disproportionate sanction, not sufficiently justified by the overriding objective, the need to enforce compliance with rules, practice directions or orders, or any of the other specific aims listed in CPR 1.1(2). 22. It is not enough in my view for the claimant to point to the beneficial impact of the applications' outcomes on the overall cost of this litigation. In reaching my conclusion I am influenced by the following factors in particular. i) ii) iii) iv) v) vi) The claimant did budget for this phase before the CMC and his final proposed figure was known from 29 October 2014 onwards. The Master did not disapprove that figure. He reached no conclusion on what it would be reasonable for the claimant to incur on this phase if, contrary to his decision, this phase took place at all. He simply and quite properly put this issue to one side as regards the claimant, on the footing that it was then inapplicable because of his decision that there should not be a preliminary issue. On the other hand the defendant's budget for this phase was agreed by the claimant, and accordingly noted by the Master in the order made at the CMC. There was therefore an imbalance between the parties from that point on as regards this phase. The claimant did submit a revised budget for agreement, albeit prompted by the defendant to do so. It did so within three weeks of issuing its application and some six weeks before the hearing. The defendant's solicitors failed to respond to the letter enclosing that budget until very shortly before the hearing, when it clearly was too late to ask for prior approval. That is not a co-operative approach. The defendant never suggested, nor would the court ever have concluded, that the claimant's budget should be set at nil. Nor did any of the defendant's

several combative letters on the question of costs suggest that it would be submitted that the claimant should recover no costs at all because no budget had been approved. There is therefore force in Mr Barca's windfall point. vii) The claimant's failure to comply has had only a modest impact on the efficient dispatch of this litigation, and no appreciable impact on the efficient conduct of litigation overall. It was never likely to have any substantial impact on either. 23. The approach I took to the assessment of costs, as described in paragraph 3 above and further detailed later in this judgment involves a sanction for the claimant's failure to comply with the Practice Direction which is in my judgment just and proportionate in the circumstances of this case, and one which in more general terms provides a sufficient incentive to parties to comply. That approach involves an assessment which makes every assumption against the party which has failed to submit an amended budget, and properly compensates the defendant for the additional costs involved. (ii) The costs statement point 24. PD44 paragraphs 9.5 and 9.6 provide: "Duty of parties and legal representatives 9.5

- (1) It is the duty of the parties and their legal representatives to assist the judge in making a summary assessment of costs in any case to which paragraph 9.2 above applies, in accordance with the following subparagraphs.
- (2) Each party who intends to claim costs must prepare a written statement of those costs showing separately in the form of a schedule –
 - (a) the number of hours to be claimed;
 - (b) the hourly rate to be claimed;
 - (c) the grade of fee earner;
 - (d) the amount and nature of any disbursement to be claimed, other than counsel's fee for appearing at the hearing;
 - (e) the amount of legal representative's costs to be claimed for attending or appearing at the hearing;
 - (f) counsel's fees; and
 - (g) any VAT to be claimed on these amounts.
- (3) The statement of costs should follow as closely as possible Form N260 and must be signed by the party or the party's legal representative.
- (4) The statement of costs must be filed at court and copies of it must be served on any party against whom an order for payment of those costs is intended to be sought as soon as possible and in any event –
 - (a) for a fast track trial, not less than 2 days before the trial; and

- (b) for all other hearings, not less than 24 hours before the time fixed for the hearing. 9.6 The failure by a party, without reasonable excuse, to comply with paragraph 9.5 will be taken into account by the court in deciding what order to make about the costs of the claim, hearing or application, and about the costs of any further hearing or detailed assessment hearing that may be necessary as a result of that failure.” 25. 26. 27. The claimant prepared a statement of costs and filed it at court, but failed entirely to serve it on the defendant. Thus it was that when Mr Wolanski rose to make submissions on costs he still did not know that there was a claimant’s costs schedule. He pointed out that there had been a manifest failure to comply with PD44 paragraph 9.5 for which there was no excuse (and none was offered on behalf of the claimant.) Once he had seen the costs schedule Mr Wolanski pointed out that it was not in form N260, though he did not place great weight on that point. He did submit that paragraph 9.6 indicates that it is open to the court in its discretion to decline to make any costs order, if no costs schedule is served. I accept that this is so, and that in an appropriate case the court might conclude that a successful party which is in principle entitled to costs should not recover any, by reason of a failure to serve a costs schedule. But the Practice Direction does not prescribe such a sanction. Rather, it obliges the court to take the default into account in exercising its discretion as to costs, including its discretion whether to make any order at all. This is not a case in which the making of no order for costs would be a just and appropriate sanction for what I must assume was an oversight in failing to serve the schedule as well as filing it at court. The schedule was not in form N260 but it did not depart very significantly from that form, and it enabled a sufficiently detailed scrutiny of the sums claimed. There is no doubt, however, that the failure to serve the statement of costs led to unnecessary delay and cost in the process of resolving the amount of costs that it would be just for the claimant to recover and for the defendant to pay. I rose for a short while to allow Mr Wolanski to review the statement and to take instructions. The result of this and the additional time spent in dealing with Mr Wolanski’s first submission is that the hearing before me was prolonged, by my estimate, by at least an hour. That hearing was attended on the defendant’s side by Counsel, a partner of, and an associate in the defendant’s solicitors. Amount of costs 28. I accepted Mr Wolanski’s submission that a deduction should be made from the costs recoverable by the claimant to reflect the fact that the defendant succeeded in persuading me that references to the claimant’s previous infidelity meant that it was somewhat overstating the matter to suggest that his family relationship with Ms Ward and their daughter was portrayed in the article as a ‘stable’ and ‘secure’ one. I did not accept, however, that this was a matter of as much significance as Mr Wolanski 29. 30. 31. 32. suggested, and therefore concluded that I should allow 90% of reasonable standard basis costs. I assessed what was reasonable on the basis indicated in paragraph 3(ii) above. For this purpose Mr Wolanski invited me to have regard to the defendant’s costs schedule, which was lower than the agreed budget figure, and I did. The defendant’s total costs for all the applications were, according to their schedules, £15,435.60. I had reviewed the claimant’s costs schedule before the hearing. The hourly rate of the partner involved on the claimant’s side was said to be high, and the time spent was criticised. I made deductions from the time claimed for attendances on the defendant and counsel, disallowed entirely attendance on

‘colleagues/others’, cut the time spent on documents by approximately half to 6 hours, and reduced the time spent at court to 2.5 hrs. Allowing for the 10% deduction indicated above I allowed total profit costs of £3,600 inclusive of VAT against a claim for £5,841.60. The major reduction I made was in Counsel’s fees. I accepted Mr Wolanski’s submission that from the perspective of costs between the parties it was not reasonable for the claimant to instruct two counsel on applications of this kind. Although Mr Barca QC was right to say that the applications had important consequences for the action as a whole, they were not legally or factually complex and one Counsel would have sufficed. I assessed 90% of a reasonable fee for a single Counsel of appropriate experience at £6,000 plus VAT. I added disbursements of £200 to arrive at a total of £11,000. From this sum I made a deduction to reflect the additional costs referred to in paragraph 3(ii) above. This was on the assumption that Counsel’s fee included attendance at the hand-down, but bearing in mind that the hourly rates for the solicitors present at that hearing were £300 and £235 per hour, which are reasonable rates for the grade of solicitor involved. Thus I arrived at a final sum of £10,500 inclusive of VAT for all the applications.

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