Costs Law Brief

The costs team at Kings Chambers reports on the two recent high profile costs cases—Campbell and its impact on the availability of CFA funding, and Garbutt which deals with estimates, or the lack of them.

Campbell v MGN Ltd

■ [2005] UKHL 61, [2005] All ER (D) 215 (Oct)

Background

Naomi Campbell sued the Daily Mirror (the Mirror) over an article that purported to describe her attendance at Narcotics Anonymous. An accompanying photograph purported to show her outside the venue of such a meeting.

In essence, Miss Campbell's claim was for compensation for breach of confidence. Those who represented her put the information published by the Mirror into five categories:

(i) the fact of Miss Campbell's drug addiction;
(ii) the fact that she was receiving treatment;
(iii) the fact that she was attending Narcotics Anonymous;
(iv) the details of the treatment; and
(v) the visual portrayal of her leaving a specific meeting with other addicts.

Prior to the publication of the article Miss Campbell had made public claims that she did not take drugs. Those claims were untrue. Miss Campbell's representatives conceded that the Mirror was entitled to put the record straight. Accordingly, it was conceded that there had been no breach of confidence in the publication of information falling into categories (i) and (ii).

Once one appreciates that Miss Campbell accepted that she could not complain of the publication of information falling into categories (i) and (ii), but nonetheless maintained that publication of information falling into the remaining categories constituted a breach of confidence, one can appreciate just how risky her claim was.

At first instance, Justice Morland found for Miss Campbell. He awarded her £3,500.

The Mirror appealed to the Court of Appeal and won. Miss Campbell was ordered to pay the costs. She appealed to the House of Lords. Up until then, she had proceeded on a private retainer. For the appeal to the House of Lords, however, Miss Campbell's solicitors and counsel acted on conditional fee agreements (CFAs). Miss Campbell won in the House of Lords and the Mirror was ordered to pay the costs of both appeals.

Recoverability of costs

Miss Campbell's solicitors served three bills of costs, the total coming to just over £1m. The success fee for the House of Lords appeal amounted to £279,981. The Mirror disputed the recoverability of the success fee, and a petition was presented to the House of Lords for a ruling on the matter. (It should be noted that the House of Lords dealt with the matter as a court of first instance rather than as an appellate court.)

The Mirror argued that the situation was akin to that in *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442, in which the European Court of Human Rights considered that £1.5m damages for a persistent libel upon a respected public figure was so disproportionate that it infringed the right to freedom of expression guaranteed by Art 10 of the European Convention on Human Rights (the Convention). It argued that the threat of liability to pay a large sum by way of costs is just as likely to inhibit freedom of expression as the threat of liability to pay a large sum by way of damages.

The Mirror went on to argue that no part of the success fees should be permitted on the ground that, in the circumstances of the case, such a liability was so disproportionate as to infringe its right to freedom of expression under Art 10 of the Convention. It was

said that in the circumstances of the case an award of costs increased by a success fee was disproportionate for two reasons. First, it was necessarily disproportionate because it was more than (and up to twice as much as) the amount which ordinarily would be considered reasonable and proportionate. Second, it was not necessary to give Miss Campbell access to a court by way of a CFA because she could have afforded to fund her own costs.

The House of Lords judgment

Lord Hoffman gave the first opinion (with which the others agreed). He noted that the challenge was based on the special position of the media as defendants to actions for defamation and wrongful publication of personal information. He drew a distinction between this sort of litigation and litigation arising out of road traffic accidents; he pointed out that there is no human right to drive a vehicle up on the road free of the cost of litigation arising from road accidents, but that there is a human right to freedom of expression with which the imposition of an excessive cost burden may interfere.

Lord Hoffman found that the Mirror had confused two different concepts of proportionality. The issue was not whether the success fee was "proportionate" in the way that that word is used in the Civil Procedure Rules (CPR), but whether the funding arrangement was a proportionate measure to provide access to justice, having regard to its effect on the Art 10 right to freedom of expression.

Lord Hoffman found that in so far as Art 10 is concerned, a rule which requires unsuccessful defendants not only to pay the reasonable and proportionate costs of their adversary in the litigation but also to contribute to the funding of other litigation is a proportionate measure to provide those other litigants with access to justice.

As to the argument that Miss Campbell's financial resources meant that she did not need the assistance of a CFA and that therefore to permit a success fee was disproportionate, Lords Hoffman and Carswell both made the point that it would be impracticable to subject the availability of CFAs to some form of means testing. Parliament had been entitled to lay down a general rule that CFAs were open to everyone.

Accordingly, the Mirror's petition was dismissed. However, the House of Lords was clearly concerned by recent cases such as *Turcu v News Group Newspapers* [2005] EWHC 799 QB, [2005] All ER (D) 242 (May) and *King v Telegraph Group Ltd* [2004] EWCA Civ 613, [2004] All ER (D) 242 (May). The view was expressed that problems caused by defamation litigation being brought under CFAs gave rise to a concern that freedom of expression might be seriously inhibited.

Lord Hoffmann concluded by expressing the hope that judges in lower courts would control costs by applying the CPR concept of proportionality and by costs-capping. He acknowledged that costs-capping is only a palliative and that neither capping costs at an early stage nor assessing them later deals with the threat of having to pay the claimant's costs at a level which is up to twice the amount which will be reasonable and proportionate.

Campbell is an important case because it has put to bed the argument that a well-funded litigant, such as a large corporation, cannot enter into a CFA.

Garbutt v Edwards

[2005] EWCA Civ 1206, [2005] All ER (D) 316 (Oct)

Garbutt deals with the following issue: can a paying party claim that his liability to the receiving party under an order for payment of costs is discharged, or that it should be reduced, if the solicitor for the receiving party has failed to give his client an estimate of costs in accordance with the Solicitors Costs Information and Client Care Code 1999 (the Code)?

Costs estimates

The dispute arose out of a boundary dispute. The claim was settled by a *Tomlin* order on the basis that the defendant would pay the claimant's costs. These were assessed, but during the course of that assessment the defendant learnt that the claimant's solicitor had apparently not provided the claimant with costs estimates. The defendant sought to raise this argument on appeal, but was refused permission to appeal because the application was brought out of time. There were, however, further disputes between the parties, and these resulted in two modest bills being assessed on 12 May 2004. The defendant once again raised the issue of estimates, but the District Judge rejected these arguments. The defendant issued an appeal, and this came before HHJ O'Brien on 25 October 2004. That hearing was conducted on the basis that the claimant had not been given any estimates of costs. HHJ O'Brien dismissed the appeal. Mummery LJ gave the Defendant permission to bring a second appeal.

The defendant emphasised the importance of estimates, which helps to ensure there is some limit on legal costs. The defendant went on to submit that a breach of the obligation to give an estimate renders the retainer unlawful. It was argued that the applicable test should be derived from *St John Shipping Corp v Joseph Rank Shipping Ltd* [1957] 1 QB 267, [1956] 3 All ER 683: is the contract a contract which, as performed, prohibited by statute? The defendant submitted that the obligation to give an estimate is at the heart of the Code. It was said that a retainer in which no estimate has been given is, absent justification, not a contract performed in a way permitted by law. The force of the Code would be undermined if there were not sanction for not giving an estimate.

As an alternative to these submissions, the defendant said that that the court should limit the recovery of costs to take account of the failure to provide an estimate. It was argued that the indemnity principle entitles the paying party to stand in the shoes of the receiving party vis-à-vis his solicitor. Accordingly, said the defendant, the court could take into account any reduction that could have obtained through the regulatory process. Alternatively, a tariff could be applied, or a sanction could be imposed pursuant to CPR r 44.14.

The Court of Appeal

The Court of Appeal rejected the defendant's principal argument. Arden LJ (giving the judgment of the court) said:

"The fact that statute imposes a requirement to take some step, as here the making of a costs estimate, is not of itself sufficient to render the performance of a contract in disregard of that step unlawful and unenforceable."

Arden LJ went on to consider whether breaches of the Code would result in a breach of r 15 of the Solicitors' Practice Rules. As if to echo *Hollins v Russell* [2003] EWCA Civ 718 [2003] 4 All ER 590, she found that:

"It is clear from [the notes to the Code] that not every breach of the Code will result in a breach of Rule 15. It has to be a serious breach of the Code, alternatively there have to be persistent and material breaches. In my judgment this Note is an indication that a breach of the Code does not of itself render the contract of retainer unenforceable."

Arden LJ

As to the defendant's alternative submissions, Arden LJ said:

"I conclude that it is a question for the discretion of the judge assessing costs in any particular case whether to take into account any failure by the receiving party to provide an estimate in the circumstances and of the kind required by the Code."

The Court of Appeal rejected the argument that the costs judge should make a deduction for the amount of any reduction that the client would have obtained if he challenged his solicitor's costs. The Court of Appeal also rejected the suggestion that some sort of tariff should apply. Instead, Arden LJ had the following to say:

"… [The] paying party can, if he has grounds to do so, submit that, if the receiving party's work had been estimated in accordance with the requirements of the Code, a lower amount of costs would have been incurred. In those circumstances, he can ask the costs judge to require the receiving party to prove that such an estimate was given. … [The] costs judge must be satisfied that the absence of an estimate, or proper estimate, as to costs could have had both a calculable effect, and a not immaterial effect, on the costs claimed. … If, exceptionally, the receiving party is required to prove that there was a proper estimate, and fails to satisfy the court on this, the court must take that information into account in deciding the amount of … costs."

Arden LJ went on to give the following guidance:

"Where there is simply no estimate at all…, then the guidance that I would give is that already indicated, namely that the cost judge should consider whether and if so to what extent the costs claimed would have been significantly lower if there had been an estimate given at the time when it should have been given. If the situation is that an estimate was given, but not updated, the first part of the guidance given in [*Leigh v Michelin* [2004] 1 WLR 846, [2004] 2 All ER 175] can be applied here. The guidance was as follows:

"'[First,] the estimates made by solicitors of the overall likely costs of the litigation should usually provide a useful yardstick by which the reasonableness of the costs finally claimed may be measured. If there is a substantial difference between the estimated costs and the costs claimed, that difference calls for an explanation. In the absence of a satisfactory explanation, the court may conclude that the difference itself is evidence from which it can conclude that the costs claimed are unreasonable."

The Court of Appeal then went on to stress that the aforesaid guidance was given only at a very general level. Arden LJ concluded by saying that it would not generally be necessary to have to resort to CPR r 44.14.

The importance of *Garbutt* goes well beyond the issue of estimates. This is because from 1 November 2005 onwards, the Conditional Fee Agreement (Revocation) Regulations 2005 (SI 2005/2305) will sweep aside most of the delegated legislation relating to CFAs. This will result in much greater emphasis being placed on solicitors complying with their professional obligations under the Code. It is significant that the Court of Appeal have not ruled out the notion that paying parties can refer to alleged breaches of the Code on between-the-parties assessments.

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