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[2002] 2 All ER 242

## Kiam v MGN Ltd (No 2)

[2002] EWCA Civ 66

**COURT OF APPEAL, CIVIL DIVISION**

**SIMON BROWN, WALLER AND SEDLEY LJ**

**28 JANUARY, 6 FEBRUARY 2002**

*Costs – Order for costs – Indemnity costs – Circumstances in which refusal of offer to settle would attract indemnity costs under court's general discretion on costs – CPR 44.3(4).*

The defendant appealed unsuccessfully against an award of damages of £105,000 by a jury in a libel case. On the dismissal of the appeal, the successful claimant applied for the costs of the appeal on an indemnity rather than standard basis. The essential ground of the application was that the claimant's solicitors, by letter headed 'Without Prejudice Save as to Costs', had made a pre-appeal offer to accept £75,000 and to return to the defendant £30,000 plus appropriate interest, an offer which the defendant had simply ignored. The claimant relied on a Court of Appeal decision which held that indemnity costs could be awarded, under the court's general discretion on costs in CPR Pt 44, where litigation was conducted in a way that was unreasonable, even though the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation. CPR 44.3(4)<sup>a</sup> required the court, when deciding what order to make about costs, to have regard to all the circumstances including any admissible offer to settle made by a party which was drawn to the court's attention, whether or not made in accordance with CPR Pt 36. Under CPR 36.21<sup>b</sup>, the court was required, where that provision applied, to make an order for indemnity costs against a defendant unless it considered it unjust to do so. The purpose of that provision was to encourage claimants to make offers, but there was no counterpart to that rationale with regard to defendants. On the application, the Court of Appeal considered the circumstances in which it was appropriate to award indemnity costs under Pt 44 in respect of the refusal of a settlement offer.

<sup>a</sup> Rule 44.3, so far as material, is set out at [3], below

<sup>b</sup> Rule 36.21, so far as material, provides: '(1) This rule applies where at trial—(a) a defendant is held liable for more; or (b) the judgment against a defendant is more advantageous to the claimant, than the proposals contained in a claimant's Pt 36 offer ...

**Held** – It would be a rare case where the refusal of a settlement offer would attract, under CPR Pt 44, not merely an adverse order for costs, but an order on an indemnity rather than on a standard basis. Although conduct, falling short of misconduct deserving of moral condemnation, could be so unreasonable as to justify an order for indemnity costs, such conduct would need to be unreasonable to a high degree, not merely wrong or misguided in hindsight. An indemnity costs order made under Pt 44, unlike one made under Pt 36, did carry at least some stigma. It was of its nature penal rather than exhortatory. It should not be

*[2002] 2 All ER 242 at 243*

understood that under the CPR it was now generally appropriate to condemn in indemnity costs those who declined reasonable settlement offers. In the instant case, it was quite impossible to regard the defendant's refusal of the claimant's offer as unreasonable, let alone unreasonable to so pronounced a degree as to merit an award of indemnity costs. Accordingly, the application would be refused, and the claimant would instead be awarded his costs of the appeal on a standard basis (see [12], [13], [16]–[18], below).

*Reid Minty (a firm) v Taylor* [2002] 2 All ER 150 explained.

*McPhilemy v Times Newspapers Ltd (No 2)* [2001] 4 All ER 861 considered.

### **Cases referred to in judgments**

*McPhilemy v Times Newspapers Ltd (No 2)* [2001] EWCA Civ 933, [2001] 4 All ER 861, [2002] 1 WLR 934.

*Petrotrade Inc v Texaco Ltd* [2001] 4 All ER 853, [2002] 1 WLR 947, CA.

*Reid Minty (a firm) v Taylor* [2001] EWCA Civ 1723, [2002] 2 All ER 150.

### **Cases also cited or referred to in skeleton arguments**

*John v MGN Ltd* [1996] 2 All ER 35, [1997] QB 586, CA.

*Kiam v Neil (No 2)* [1996] EMLR 493, CA.

### **Application for costs**

The respondent, Victor Kermit Kiam II, applied for an order under CPR Pt 44 requiring the appellants, MGN Ltd, to pay on an indemnity basis his costs of an appeal brought by the appellants from the jury's award of damages of £105,000 in an action for libel brought by the respondent against the appellants, such appeal having been dismissed by the Court of Appeal on 28 January 2002 ([2002] 2 All ER 219). The facts are set out in the judgment of Simon Brown LJ.

*Desmond Browne QC* and *Lucy Moorman* (instructed by *Peter Carter-Ruck & Partners*) for the respondent.

*Andrew Caldecott QC* (instructed by *Olswang*) for the appellants.

*Cur adv vult*

**6 February 2002. The following judgments were delivered.**

**SIMON BROWN LJ.**

**[1]**

Upon the handing down of our judgments on 28 January 2002 ([2002] EWCA Civ 43, [2002] 2 All ER 219), dismissing by a majority MGN Ltd's appeal against the jury's award of £105,000 damages to the late Mr Kiam (the appeal ultimately being argued on the sole ground that the award was excessive), Mr Browne QC for the successful respondent applied for the costs of the appeal on an indemnity rather than standard basis. The essential basis for the application was that on 27 June 2001 Mr Kiam's solicitors, by letter headed 'Without Prejudice Save as to Costs', had offered to accept £75,000 and to return to the appellants £30,000 plus appropriate interest, an offer which the appellants simply ignored.

**[2]**

The application seemed to me to raise an important point of principle and we had the advantage of both written and oral submissions upon it.

**[3]**

The question of indemnity costs orders following upon offers of settlement has recently been explored in a trilogy of Court of Appeal decisions: *Petrotrade Inc v Texaco Ltd* [2001] 4 All ER 853, [2002] 1 WLR 947, *McPhilemy v*

*[2002] 2 All ER 242 at 244*

*Times Newspapers Ltd (No 2)* [2001] EWCA Civ 933, [2001] 4 All ER 861, [2002] 1 WLR 934, and *Reid Minty (a firm) v Taylor* [2001] EWCA Civ 1723, [2002] 2 All ER 150. The first two of these cases dealt specifically with the claimant's position under CPR Pt 36 and decided that an order for indemnity costs under r 36.21(3) was not penal and carried no stigma or implied disapproval of the defendant's conduct and so ought generally to be made where a claimant recovers in court more than he has previously offered to take. The two cases are fully reported and I need not further summarise them. The *Reid Minty* case, however, has broken new ground. To some extent it appears to suggest that the Pt 36 approach may allow defendants too, by way of CPR 44.3, to claim indemnity costs when they defeat a claim having previously made a settlement offer which the claimant has declined. The most directly relevant part of r 44.3 is para 4 which reads:

'In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including—(a) the conduct of all the parties; (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).'

**[4]**

The leading judgment in the Court of Appeal was given by May LJ (and to this I shall return) but Kay LJ pithily added:

'The approach of the CPR is a relatively simple one: namely, if one party has made a real effort to find a reasonable solution to the proceedings and the other party has resisted that sensible approach, then the latter puts himself at risk that the order for costs may be on an indemnity basis. What would be a reasonable solution will depend on all the circumstances of the case ...' (See [2002] 2 All ER 150 at [37].)

**[5]**

It is principally upon the *Reid Minty* case that Mr Browne relies in submitting that the unsuccessful appellants here, having refused the 'reasonable solution' and 'sensible approach' represented by Mr Kiam's offer (to take reduced damages of £75,000), should accordingly pay the costs of the appeal on an indemnity basis. Mr Browne does not go so far as to suggest that the respondent is in the same position as a first instance claimant who beats his own Pt 36 offer. He submits, however, and with this I agree, that he is in a comparable position to that of a first instance defendant whose position was explored in the *Reid Minty* case.

**[6]**

The reason why I regard this application as raising an important point of principle is this: the underlying rationale of r 36.21—to encourage claimants to make offers—has simply no counterpart with regard to defendants. As Chadwick LJ pointed out in *McPhilemy's* case, the provision in Pt 36 that, where it applies, the court will order indemnity costs 'unless it considers it unjust to do so' is—

'intended to provide an incentive to a claimant to make a Pt 36 offer. The incentive is that a claimant who has made a Pt 36 offer (which is not accepted) and who succeeds at trial in beating his own offer stands to receive more than he would have received if he had not made the offer.' (See [2001] 4 All ER 861 at [19].)

**[7]**

I myself put it thus:

**[2002] 2 All ER 242 at 245**

'The judge below, without the benefit of this court's judgment in *Petrotrade Inc v Texaco Ltd* [2001] 4 All ER 853, wrongly directed himself that an indemnity costs order under CPR 36.21 is of a penal nature and implies condemnation of the defendant's conduct and so would be unjust unless the defendants had behaved unreasonably in continuing the litigation after the offer. That misunderstands the rationale of the rule. It is not designed to punish unreasonable con-

duct but rather as an incentive to encourage claimants to make, and defendants to accept, appropriate offers of settlement. That incentive plainly cannot work unless the non-acceptance of what ultimately proves to have been a sufficient offer ordinarily advantages the claimant in the respects set out in the rules.' (See [2001] 4 All ER 861 at [28].)

**[8]**

If the claimant thought that, even if he were to make and then beat an offer, he was going to get no more than his costs on the standard basis, why would he make it? It would afford him no advantage at all. He would do better simply to claim at large and recover his costs whatever measure of success he gained. His position is, in short, quite different from that of the defendant who plainly has every incentive to make a settlement offer, generally by way of payment into court, irrespective of the basis on which any costs order will be made. Take any ordinary damages claim. A defendant wishing to protect himself will pay money into court. The incentive to do so is self-evident. The incentive does not need to be created or stimulated by raising the defendant's expectation as to the level of costs he will recover. And, consistently with this, where payments in are not beaten, defendants routinely recover their costs on the standard basis; I know of no rule or practice in such cases for making indemnity costs orders.

**[9]**

With these thoughts in mind, I return to the *Reid Minty* case in which the central issue arising was whether the trial judge had been right to direct himself 'that indemnity costs should only be awarded on an indemnity basis if there has been some sort of moral lack of probity or conduct deserving of moral condemnation on the part of the paying party' (see [2002] 2 All ER 150 at [9]).

**[10]**

In holding that to be a misdirection, May LJ referred to the following passage in my judgment in *McPhilemy's* case [2001] 4 All ER 861 at [29]:

'When dismissing the principal appeal, we left over for decision whether Times Newspapers Ltd should pay the claimant's costs of that appeal on a standard or an indemnity basis. Clearly rather more of a stigma attaches to an indemnity costs order made in this context than in the context of a r 36.21 offer, although even then no moral condemnation of the appellants' lawyers is necessarily implied ...'

**[11]**

May LJ's essential approach to the question of indemnity costs for unreasonable conduct appears from the following two paragraphs:

'[28] As the very word "standard" implies, this will be the normal basis of assessment where the circumstances do not justify an award on an indemnity basis. If costs are awarded on an indemnity basis, in many cases there will be some implicit expression of disapproval of the way in which the litigation has been conducted. But I do not think that this will necessarily be so in every case. What is, however, relevant to the present appeal is that litigation can readily be conducted in a way which is unreasonable and which justifies an award of costs on an indemnity basis, where the conduct could

not properly be regarded as lacking moral probity or deserving moral condemnation ...

[32] There will be many cases in which, although the defendant asserts a strong case throughout and eventually wins, the court will not regard the claimant's conduct of the litigation as unreasonable and will not be persuaded to award the defendant indemnity costs. There may be others where the conduct of a losing claimant will be regarded in all the circumstances as meriting an order in favour of the defendant of indemnity costs. Offers to settle and their terms will be relevant and, if they come within Pt 36, may, subject to the court's discretion, be determinative.'

**[12]**

I for my part, understand the court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, *can* be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under Pt 44 (unlike one made under Pt 36) does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory. The indemnity costs order made on the principal appeal in *McPhilemy's* case was certainly of that character. We held ([2001] 4 All ER 361 at [29]) that the appeal involved an abuse of process on the footing that 'to have permitted the defendants to argue their case on perversity must inevitably have brought the administration of justice into disrepute among right thinking people'.

**[13]**

It follows from all this that in my judgment it will be a rare case indeed where the refusal of a settlement offer will attract under Pt 44 not merely an adverse order for costs, but an order on an indemnity rather than standard basis. Take this very case. No encouragement in the way of an expectation of indemnity costs was required for him to make his offer to accept £75,000: its object was to protect the respondent against a standard costs order were the court, say, to reduce the damages to that level. Where, as here, one member of the court considered the jury's award 'wholly excessive', and thought that £60,000 would have been the highest sustainable award, it seems to me quite impossible to regard the appellant's refusal to accept the £75,000 offer as unreasonable, let alone unreasonable to so pronounced a degree as to merit an award of indemnity costs. It is very important that the *Reid Minty* case should not be understood and applied for all the world as if under the CPR it is now generally appropriate to condemn in indemnity costs those who decline reasonable settlement offers.

**[14]**

I recognise, of course, that under an indemnity costs order the receiving party only recovers the amount of costs actually incurred. But those costs may well be disproportionate (proportionality not being an issue under an indemnity order). In any event, the greater the disparity between the settlement figure offered and that achieved (and prima facie, therefore, the more 'unreasonable' the rejection of the offer) the more the receiving party will be in pocket as against what he was prepared to accept/pay so as to be in a position to meet any costs shortfall.

**[15]**

I add only this. Mr Browne sought to bolster his application by reference to a second submission, namely that time and costs were wasted in preparing both written and oral arguments upon two other grounds of appeal

which in the event were abandoned at the outset of the hearing. I think it unnecessary to deal with this in detail. Suffice it to say that it would be generally undesirable to

*[2002] 2 All ER 242 at 247*

penalise by indemnity costs a decision not to press particular points in the interests of the expeditious disposal of the appeal. I can see no good reason for departing from that policy here.

**[16]**

I would accordingly refuse this application and award the respondent his costs of the appeal on the standard basis.

**WALLER LJ.**

**[17]**

I agree.

**SEDLEY LJ.**

**[18]**

I also agree.

*Order accordingly.*

Dilys Tausz Barrister.