



[2023] EWCA Civ 1127

Case No: CA-2022-002231

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE,**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**BUSINESS LIST (Ch D)**  
**MRS JUSTICE BACON**  
**BL-2022-001827**

The Royal Courts of Justice  
Strand, London, WC2A 2LL

Wednesday, 19 July 2023

**Before:**

**LADY JUSTICE ASPLIN**  
**LORD JUSTICE NUGEE**  
**LADY JUSTICE WHIPPLE**

**Between:**

**UDDIN AND ANOTHER**  
**- and -**  
**HUSSAIN AND ANOTHER**

**Applicant**

**Respondent**

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**MRS J ISHAK** appeared as McKenzie Friend on behalf of the **Applicant**

**MR J GALE** (instructed by Jacobs Law) appeared on behalf of the **Respondent**

**Judgment**  
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## **LADY JUSTICE WHIPPLE:**

### Introduction:

1. This is an appeal brought by Mr Hussain and Mrs Islam, the defendants in the underlying action. They appeal against the costs order made by Bacon J on 1 November 2022 ordering the defendants to pay the costs of an interim relief application brought against them by Mr Uddin and Mrs Begum, the claimants in the underlying action. The claimants' costs were summarily assessed in the amount of £44,784.30. Lewison LJ granted permission to appeal on the papers.

### Background:

2. The background to this dispute is taken from the papers currently before the Court. That dispute has yet to be resolved. The following is intended as a neutral description of the facts leading to the present appeal.
3. The claimants are the parents of the first defendant, Mr Hussain, who is married to the second defendant, Mrs Islam. The claimants and the defendants live at an address in Cobden Street, Walsall in the West Midlands ("the property"). The claimants have lived there since 1987, originally as tenants of the local authority. In 1990, the claimants exercised their right to buy the property and secured a mortgage to enable them to do so. They were at that point the registered owners of the property. On or around 4 September 2014, the first defendant became the registered owner of the property in circumstances which are now disputed.
4. On 24 October 2022, the claimants applied for an injunction preventing the defendants from disposing of the property. They were at that time represented by Enoch Evans LLP. Informal notice of that application was given to the defendants. The application was supported by witness statements from each claimant, as well as from their solicitor. That application was granted by Joanna Smith J on 25 October 2022, on an interim *ex parte* basis which means that only the claimants were present at the hearing. The claimants

were represented by counsel at that hearing, the defendants were not present or represented. Joanna Smith J directed a return date of 1 November 2022. Her order provided that costs should be reserved.

5. The claim form was issued on 26 October 2022. The Particulars of Claim accompanying the claim form disputed the transfer of the legal title to the property to the first defendant and claimed rectification of the register, alternatively damages of £320,000. Mrs Islam was named as a defendant in that action, although it is her husband who is the registered owner of the property.
6. On 26 October 2022, Enoch Evans wrote to the defendants informing them about the return date on 1 November 2022. On the same date, 26 October 2022, the Court is told that the claimants, by their solicitors, served what has been referred to as “the pack of documents”. That pack contained, so we understand, the original application for the injunction, the supporting evidence, the order of Joanna Smith J, the claim form and the Particulars of Claim. It was in those documents – specifically in the Particulars of Claim - that the claimants first formulated their claim; it was on receipt of those documents that the defendants say they first understood the nature of the claim they were to face.
7. By a notice of application dated 28 October 2022, which was a Friday, the claimants, via Enoch Evans, applied to the court for the return date to be listed. On the same date, they served notice of that application on the defendants and that was the date, 28 October 2022, that the defendants first instructed solicitors, namely Jacobs Law Solicitors Ltd. On that same date, 28 October 2022, Jacobs Law were in contact with Enoch Evans confirming their instructions and indicating that they were reviewing the documents that had been served. Jacobs Law told Enoch Evans that Mr Hussain had confirmed that he would not sell the property whilst the dispute was ongoing with his father and they indicated that an undertaking to that effect would be provided by him.
8. On 31 October 2022, the following Monday, Jacobs Law sent Enoch Evans a document which was entitled "Undertaking", which was signed by Mr Hussain, at least on the copy that was provided to this Court. By that undertaking, Mr Hussain undertook not to dispose of the property. Jacobs Law notified the Court and Enoch Evans that they would

not be attending the hearing which was fixed for the next day, Tuesday, 1 November 2022, in part at least to conserve costs.

9. The hearing took place on 1 November 2022 before Bacon J. The Court has been provided with a full transcript of that hearing. The claimants were represented by Mr Ahmed of counsel, the defendants were not present or represented. Mr Ahmed drew the court's attention to Mr Hussain's undertaking, but submitted to the judge that the undertaking was deficient for various reasons: first, it was from Mr Hussain only and not from Mrs Begum, who was also named as a defendant on the claim form; second, it was not dated; third, it was not addressed to anyone; fourth, it was not the original, it was just a photocopy; and fifth, it was served late.
10. Having heard Mr Ahmed's submissions, Bacon J ruled that it was appropriate to continue the order. She did not refer to the *American Cyanamid* test, but it is clear her intention was to hold the ring by this injunction, pending resolution of the underlying dispute. She then invited submissions on costs.
11. It appears that Mr Ahmed, or perhaps his solicitors, had by then prepared a version of the order for injunction which provided for the claimants' costs of the application to be paid by the defendants and to be assessed if not agreed. This version of the order was before the judge. On considering it, the judge suggested that it would be better if she summarily assessed the costs. She had a schedule of costs from the claimants before her and that schedule set out costs of £44,783.30.
12. After questioning certain aspects of that schedule, she asked the claimants' counsel if there was anything he should draw to the court's attention in terms of the statement of costs because, as she noted, there was no one in Court representing the defendants. In answer, Mr Ahmed said there was nothing he wished to say except to note that there had been a need for an interpreter, which was one of the reasons why things had taken so long and costs were high. Bacon J made the order for costs in the claimants' favour, which she summarily assessed in the amount claimed of £44,784.30. In her short ruling, she said this:

"In the circumstances, given that you did need to come here today, given the ambiguity in the undertakings and the urgent nature of the application and the fact that not even one ambiguous undertaking was given until late in the day after your brief fee had become incurred for this hearing, it seems to me that the costs are reasonable, and I will summarily assess in the amount claimed."

13. The order was drawn up in the terms that had been discussed at the hearing and was approved by the judge that day and served on the defendants.
14. This appeal is against the costs that were ordered at paragraph 2, namely "the defendants shall pay the claimants' costs of the application summarily assessed in the sum of £44,754.30".

Grounds of appeal:

15. The appellants' notice was dated 28 November 2022. The accompanying grounds of appeal, drafted by Jonathan Gale of counsel, set out six grounds which can be summarised as follows:
  - (1) the judge failed to have regard to relevant case law on costs when interim relief was granted;
  - (2) the judge took account of an irrelevant consideration; namely the alleged lateness of Mr Hussain's undertaking;
  - (3) the judge ignored a relevant consideration, which was that without sight of the Particulars of Claim, Mr Hussain's failure to give an undertaking was not so unreasonable as to amount to a "special factor";
  - (4) there was a serious procedural irregularity in that: (a) Joanna Smith J had already ordered costs to be reserved; (b) no costs schedule had been served on the

defendants in advance of the hearing; (c) the application on notice of the return date gave no indication that the claimants would be seeking their costs of that hearing in contrast to "reserved costs";

(5) alternatively, the judge erred in summarily assessing costs when in the absence of the costs schedule the correct order would have been detailed assessment;

(6) alternatively the judge erred in failing to consider reasonableness and proportionality of the costs claimed which she should have done as part of the approach to the assessment of costs on the standard basis.

16. The grounds of appeal are supported by a skeleton argument and we received oral submissions from Mr Gale, who appeared for Mr Hussain on the appeal today.

17. Enoch Evans, who had acted for the claimants, applied to come off the record on 13 July 2023. The claimants are therefore not represented on this appeal. Mr Uddin appeared in person before this court, assisted by his daughter, Mrs Jubaida Ishak, as his McKenzie friend. Mr Uddin submitted that Bacon J's order should be upheld because it lay within her discretion and disclosed no error of law.

18. We are grateful to all parties for the submissions we have received.

#### Discussion:

#### *Legal Principles*

19. The court has a wide discretion on costs under Civil Procedure Rules part 44. Specific to this case, the White Book 2023 notes at 44.2.15.1 that:

"Where the purpose of an interim injunction is to 'hold the ring' until trial, the cost of the application will usually be reserved

*(Richardson v Desquenne et Giral UK Ltd [1999] CPLR 744; [2001] FSR1, Picnic at Ascot v Kalus Derigs [2001] FSR2)*. The *Desquenne* principle overrides the usual rule that the unsuccessful party bears the costs because, in a case where the injunction is granted on the balance of convenience, at that stage there is no winner or loser (*Wingfield Digby v Melford Capital Partners (Holdings) LLP [2020] EWCA Civ 1647*). Where however the injunction is granted not merely on the balance of convenience, the issues considered on the application will not be revisited in the substantive proceedings, if there is a winner and a loser on those issues, the loser should pay the winner's costs (*Koza Ltd v Koza Altin Isletmeleri AS [2020] EWCA Civ 1263*."

20. This note states the position in law accurately. It is not necessary to go to the cases, save to note that *Picnic At Ascot* provides guidance on what amounts to a "special factor" which might justify departure from the usual rule on costs that is called the *Desquenne* principle in this note (see paragraphs 7 to 16 of *Picnic At Ascot*).

#### *The judge's approach*

21. Bacon J was not taken to the note in the White Book or to any of the authorities mentioned in it. She did not consider whether the costs should be reserved on the basis that this was an injunction to hold the ring until trial. She did not identify any special factors which might justify departure from the usual order.

22. In my judgment, her approach was wrong in law. Bacon J had a wide discretion on costs under Part 44 of the Civil Procedure Rules, but she was bound to exercise that discretion in accordance with established principles. Because she did not do so, her order on costs and the reasons for supporting it must be set aside.

Remade order:

23. This court has all the powers of the lower court, including the power to make a costs order (CPR 52.20). In exercising discretion on costs afresh, I have had regard to the note in the White Book and to the authorities cited there. This was an interim order to hold the ring pending trial. I conclude that the usual rule on costs in those circumstances should apply. In my judgment, the costs of the application for the interim injunction should be reserved pending the outcome of the substantive challenge.
24. There are no special factors, in my judgment, which might or should justify departure from that position. Specifically, none of the points identified by Bacon J in her short judgment amounts to a special factor, whether alone or in combination.
- a. First of all, she referred to the ambiguity of the undertaking that was given. However, *Picnic At Ascot* makes clear that a person who gives an undertaking should not be in a worse position than somebody who does not give an undertaking, so that lateness and alleged deficiency in the undertaking is not, in most cases at least, a special factor. But in any event, the undertaking given by Mr Hussain was in precisely the form that had been requested by the claimants' solicitor in a letter dated 19 October 2022. It is therefore difficult to understand why any ambiguity in the undertaking could or should be held against Mr Hussain.
  - b. Secondly, she had regard to the urgency of the application. But applications for injunction are routinely made on an urgent basis. This was not, in this case at least, a factor which could justify deviating from the usual order on costs.
  - c. Thirdly, she referred to the lateness of the undertaking that was offered. As I have noted, the precise form of that undertaking was suggested in a letter from Enoch Evans on 19 October 2022. However, at that stage, the claimants had not given any explanation of the basis on which they sought that undertaking. Mr Hussain had asked for an explanation, but I am satisfied that by reference to the correspondence before this Court, that no full explanation had by that date been offered. The information which set out the detail of the claimants' claim was disclosed with the pack on 26 October 2022. It was at that point that Mr Hussain



first knew the case that was made against him and the context in which an undertaking was sought. He instructed solicitors within two days after that, by 28 October, and had offered an undertaking in the form sought within the next working day, 31 October 2022. Therefore, in context, in my judgment, the undertaking was not particularly late in being offered to the claimants.

25. That, then, is the end of this appeal which succeeds on ground 1. It is not necessary to determine the remaining grounds. I would, however, wish to record my view that there are a number of problems with the costs order the judge made. First, the defendants were not properly and satisfactorily on notice of the claimants' application for costs. The original application for interim relief had sought an order for costs to be reserved. That was the order made by Joanna Smith J. The claimants' application, as it was served on the defendants, sought a continuation of that order. Although Enoch Evans suggested in correspondence over the weekend preceding the hearing that the claimants would be seeking their costs if the hearing had to go ahead, that suggestion was, it turns out, overlooked by Jacobs Law. The point is that the amended version of the injunction, in which the claimants claimed their costs against the defendants, was not served on the defendants in advance of the hearing on 1 November 2022. Regardless of any correspondence which passed between the parties, the defendants were not satisfactorily on notice of what the claimants were seeking by way of costs order.

26. Secondly, and in any event, the judge should not have proceeded to assess costs summarily without first ensuring that the claimants' schedule of costs had been served on the defendants and their solicitors, and ensuring that the defendants had had a proper opportunity to make objections to the order sought and to the costs claimed. In fact, it now appears that the claimants' schedule of costs first came to the defendants' attention *after* the hearing on 1 November. If the defendants had understood that the claimants (one or other or both) were claiming nearly £45,000 in costs from them, I daresay the defendants, both or either, would have attended the hearing to dispute that outcome; and in that event, of course, the costs at issue would have been even greater.

27. Thirdly, the court should not have accepted the figure claimed for costs as reasonable without considering proportionality. This was an application for interim relief to protect

a residential property worth £320,000, some of which value we understand was mortgaged. The claim for costs of £45,000 at an interim stage, in order to hold the ring up to trial, raised obvious issues of proportionality, especially in circumstances where an undertaking had been offered.

Conclusion:

28. I would allow this appeal. I would quash the order for the defendants to pay the claimants' costs summarily assessed in the sum of £44,784.30 at paragraph 2 of that order. I would substitute an order that the costs of the application for interim relief should be reserved pending the resolution of the claim or further order of the court.

29. Finally, I would say this: this is a troubling case. Even at this stage, I would hope that the parties could find a way to resolve this dispute without resort to law and without the incurring of yet further legal costs.

**LORD JUSTICE NUGEE:**

30. I agree.

**LADY JUSTICE ASPLIN:**

31. I also agree. I consider that the appeal should be allowed for the reasons given by my Lady, Lady Justice Whipple, and that an order in the form she proposes should flow. I, too, urge you to seek to settle this matter as soon as possible and, if it would be helpful, to seek the assistance of a mediator.

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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