



Neutral Citation Number: [2022] EWHC 2952 (KB)

Appeal No: QA-2021-000227

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM:
THE MAYOR AND CITY
OF LONDON COURT
HHJ BACKHOUSE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2022

Before :

MR JUSTICE FREEDMAN

Between:

RUTA KERSEVICIENE

Appellant/Claimant

- and -

(1) MIDE QUADRI
(2) ROYAL & SUN ALLIANCE
LIMITED

Respondents/Defendants

and four other appeals

CUCEN v ALI & ANOR
YILMAZ v EUI LTD
KELES v TAYLOR & ANOR
MARDARE v OFFER & ANOR

QA-2021-000229
QA-2021-000232
QA-2021-000228
QA-2021-000233

Philip Coppel KC (instructed by Ersan Solicitors) for the Appellants/Claimants

Anya Proops KC and Richard Paige (instructed by DWF Group) for the Respondents/Defendants

Hearing date: 11 July 2022

Approved Costs Judgment

This judgment was handed down remotely at 4.00pm on 21 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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MR JUSTICE FREEDMAN

MR JUSTICE FREEDMAN :

Introduction and submissions

1. Consequential upon handing down in draft a judgment in this case to dismiss an appeal from an order of HH Judge Backhouse (“the Judge”) refusing to debar the Defendants from relying on a statement of Mr James Stevens (“Mr Stevens”), submissions in writing have been made about costs. The Claimants accept that the order should be that the Claimants should pay the Defendants the costs of the appeal. This is consistent with the general rule as set out in CPR 44.2(2). That reads as follows:

“If the court decides to make an order about costs -

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.”

2. The Defendants submit that the costs should be reserved so as to enable the Defendants, if appropriate, to make an application that there be a wasted costs order against Ersan & Co Solicitors for the Claimants. I shall set out shortly the procedural background against which that application is made and the summary of the submissions of the Defendants in support of that order.
3. This judgment is to be read alongside the judgment which I have given, dismissing an appeal against the Judge, where in five claims she refused to debar the Defendants from relying upon a witness statement of Mr Stevens.

Procedural background

4. On 5 October 2021, the Judge gave detailed reasons for refusing to debar the Defendants from relying upon a witness statement of Mr Stevens. She dismissed the debarring application save for requiring that certain words be deleted from the statement of Mr Stevens. She ordered that the Second Defendant be debarred from adducing or relying on the first statement of Mr Johnstone. She refused permission to appeal. She ordered that the Claimant should pay the Defendants their costs of and occasioned by the debarring application and the permission application. She also ordered as follows:

“Ersan and Co shall show cause as to why the Court should not make a wasted costs order against them in respect of the insurer defendant’s costs of both the debarring application and the permission application, pursuant to CPR46.8.”

5. In that regard, she gave directions as to the filing of evidence in response to the application for wasted costs and ordered that it should be heard on 15 March 2022 before herself. The application for wasted costs was vacated then and later when listed in September 2022 pending my decision on the appeal. The intention of the Defendants is now to restore the hearing for the application for a wasted costs order.
6. This is not the only wasted costs application that has been considered in this matter. Earlier in the year on 1 July 2022 I heard an application in connection with permission to appeal. The history here was that on 15 February 2022, Sir Stephen Stewart considered on paper five grounds in respect of which permission to appeal was sought from the order of the Judge. He granted permission to appeal in respect of two only of the grounds, namely:
 - (i) Ground one, that the evidence was expert, and not factual, evidence.
 - (ii) Ground two, that the statement was unreliable by reason of its ‘skewed selective nature’.
7. The Claimants did not renew the application for permission in respect of two of the other three grounds, but did, before me, seek to renew orally the other ground, namely that the Judge “*wrongly failed to take into account the contraventions of the UK GDPR by Mr Stevens (a qualified solicitor), in identifying by name the accidents, injuries, medical treatments and requirements of hundreds of other individuals. Being the unlawful processing of personal data (including special category personal data) within the meaning of the UK GDPR.*” I refused the oral renewal.
8. Unusually, the permission to appeal hearing was attended by Leading and Junior Counsel for the Defendants and the solicitors for the Defendants. After judgment had been given refusing permission to appeal on the additional ground, Leading Counsel for the Defendants submitted that the costs of the renewal application be paid by Ersan and Co, the solicitors for the Appellant. The costs were contained in the costs schedules. They contained a total sum of £67,095.78. I gave a judgment, neutral citation number [2022] EWHC 1757 (QB) refusing the application for a wasted costs order.
9. The instant application that the costs should be reserved was contained in an email to the Court dated 8 November 2022. The Defendants’ case is that “*the applications with which the appeal was centrally concerned (“the Applications”) were pursued by Ersan and Co: (a) with scant reference to their clients and (b) to the cynical and improper purpose of preventing the lower court considering evidence, raising serious questions as to their conduct.*”
10. Reference is made to the show cause order and the anticipation that a hearing will take place in the near future, following the County Court’s receipt of the judgment which I am due to hand down on the appeal. In the submission of the Defendants “*...this appellate process is similarly tainted: it is, in effect, the poisoned fruit of Ersan’s cynical conduct with respect to the applications.*”

11. The Defendants submit that the High Court should await the outcome of the County Court's adjudication on wasted cost and then determine at that stage "*on a fully informed basis*" whether the just order is for the Appellants to pay the costs or for Ersan and Co to show cause why a wasted costs order should not be made against it.
12. The Defendants submit that any findings made by the County Court in response to the wasted costs application "*are likely to prove substantially illuminating on the question of whether Ersan and Co was indeed cynically driving the applications for their own self-serving purposes and, by extension, on the question of whether this appeal was, on the balance of probabilities, also being cynically driven by Ersan in their own self-interest.*"
13. The Defendants submit that for the Court to decide now that the Claimants should be held liable for the costs, effectively prejudices the question of who has ultimate responsibility for the failed appeal, that is, the Claimants or Ersan and Co.
14. Submissions were then made as to the prejudice that would ensue to the Defendants if no order were made and to Ersan and Co if an order were made. In short, the following submission was then made: "*a "costs reserved" order is the just order as it does not prejudice the issue of wasted costs either way. Instead it simply leaves open the possibility that where the CCWC application succeeds, an application for wasted costs can be made against Ersan in respect of the appeal costs, rather than this issue being foreclosed in a manner that is likely to be seriously and unfairly injurious to the Respondents' interests.*"
15. In response, the Claimants submitted that the judge who had heard the appeal was best placed to adjudicate upon the merits of the appeal rather than delaying the matter and devolving it to another person who did not hear the appeal. They submit that there is no reason to depart from CPR44.2(2).
16. The Defendants replied on 8 November 2022 saying that their approach was part of a wide discretion as to costs and that the Court must ensure that the order which it makes is consistent with the overriding objective and the overall justice of the situation. They rely also on the fact the County Court was satisfied that there was a case of Ersan and Co to answer in respect of the applications that were central to the appeal. They also wrote that it is peculiar that the legal advisors for the Claimants should wish their clients to pay the costs rather than support an outcome that might lead to no costs being payable by them because Ersan would be ordered to pay the costs.

Discussion

17. The personal liability for legal representatives for costs arises from section 51(6) of the Senior Courts Act 1981. There are procedural rules set out in CPR46.8. These are amplified under 46PD at para. 5. This reads as follows:

"5.2 Rule 46.8 deals with wasted costs orders against legal representatives. Such orders can be made at any stage in the proceedings up to and including the detailed

assessment proceedings. In general, applications for wasted costs are best left until after the end of the trial.

...

5.5 It is appropriate for the court to make a wasted costs order against a legal representative, only if—

(a) the legal representative has acted improperly, unreasonably or negligently;

(b) the legal representative's conduct has caused a party to incur unnecessary costs, or has meant that costs incurred by a party prior to the improper, unreasonable or negligent act or omission have been wasted;

(c) it is just in all the circumstances to order the legal representative to compensate that party for the whole or part of those costs.”

18. In my judgment, the relevant considerations in this case are as follows:
- (i) the costs are in the discretion of the Court. That includes the incidence of costs and the timing of when any determination of costs is to take place. The court is at all times guided by the overriding objective including a duty to deal with cases justly and at proportionate cost.
 - (ii) Subject to that overall discretion, the costs of an appeal are governed by the starting point to which I have referred in CPR 44.2(2) above, namely that the unsuccessful party is ordered to pay the costs of the successful party, but that the Court may make a different order.
 - (iii) It is the usual practice for the Court to decide those costs upon the conclusion of the appeal, although a different order may be made.
 - (iv) It is often the case that the Judge who has heard the appeal is in the best position to judge the merits of any costs application. Those merits are often best decided whilst the matter is still fresh in the mind of the Judge.
 - (v) In this case, the appeal has been dismissed. There is a successful party, namely the Defendants, and an unsuccessful party, namely the Claimants. The clear starting point therefore is an order that the Defendants pay to the Claimants the cost of the appeal.
19. The Court at this stage has sufficient material before it upon which to make that decision. It has heard the appeal. There is no criticism to be made based on that which the Court has observed that would trigger consideration of a wasted costs order. In particular, I make the following findings, namely:
- (i) the appeal was brought following permission being granted by Sir Stephen Stewart in respect of the two grounds which I heard;
 - (ii) there is nothing to indicate that Sir Stephen Stewart was misled in respect of the application for permission;

- (iii) at no stage did it appear to the Court that the application was hopeless or obviously ill-founded. On the contrary, it required a significant argument and the Court reserved its judgment to a written rather than oral judgment;
 - (iv) it is apparent from the terms of the judgment that the Court was concerned about the possibility that the evidence did amount to expert evidence and/or that it was unreliable: see the “serious reservations” at paras 29-31 of the judgment.
20. It therefore follows that in connection with the appeal, there is no basis upon the information that is currently before the Court that a legal representative has acted improperly, unreasonably and negligently. The application to reserve the costs appears to be predicated upon the following matters, namely:
- (i) the belief the appeal has been brought *“with scant reference to (the) client”* and *“to the cynical and improper purpose of preventing the lower court considering the evidence raising serious questions as to their conduct.”*
 - (ii) The Defendants seek to answer the above by saying that the determination of the wasted costs application may give rise to material indicating that a show cause order for wasted costs may be appropriate in respect of the appeal. They submit that *“...any findings made by the County Court in response to the CCWC application are likely to prove substantially illuminating on the question of whether Ersan and Co was indeed cynically driving the applications for their own self-serving purposes and, by extension, on the question of whether this appeal was, on the balance of probabilities, also being cynically driven by Ersan in their own self-interest. The Respondents position is that these two issues very much hang together.”*
21. I have considered this submission and taken account of it. The Court does not know the precise reasons for the Judge making the order to show cause. There are a number of features here to note. First, the Judge was dealing with the matter before her, but I have been dealing with a discrete appeal and the considerations relevant to costs before this Court are not necessarily the same as before the County Court.
22. Second, matters have moved on since the decision of the Judge, and they are relevant to my decision in respect of costs. They include the following, namely:
- (i) the decision of Sir Stephen Stewart to grant permission to appeal in respect of the grounds of expert evidence and unreliability, showing that he regarded the appeal as potentially well founded;
 - (ii) my consideration of the application for wasted costs following my refusal of permission to appeal on another ground, and my reasons for not

acceding to a wasted costs order;

- (iii) my consideration of the substantive appeal where, whilst dismissing the appeal, I expressed serious reservations, as noted above.

23. Third, and in any event, a determination by the County Court will not necessarily throw any light on the determination which this Court should make. By way of example only:

- (i) the Judge may decide not to make a wasted costs order;
- (ii) the Judge may decide to make an order, but for reasons which might not throw any or much light on the decision to be made by this Court;
- (iii) In any event, having an appellate jurisdiction and having considered a discrete appeal, the High Court is not bound by any determination of the County Court about wasted costs.

24. The case alleges fundamental dishonesty in relation to the claims. It remains to be seen at trial whether fundamental dishonesty will be established. If fundamental dishonesty is established at trial, it remains to be seen who is responsible for that. This does not show that the Court has before it at this stage evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made or show or tend to show that the conduct of Ersan and Co in respect of the appeal has been improper, unreasonable and negligent. In the judgment which I gave about wasted costs, I found that the renewal application in respect of the additional ground that was not evidence or other material which was likely unless answered to amount to unreasonable or improper conduct such as to give rise as to a wasted costs order: see para. 28 of the judgment.

25. The Defendants refer to the fact that I was concerned on the earlier wasted costs application about the timing of the application. They rely upon that to the effect that any wasted costs or show cause application should be advanced before the Court only when the full facts of the situation can be appraised. My observations about timing were primarily directed to the dangers of an earlier application distracting the lawyers from pursuing their clients' interests and instead defending themselves: see para. 33 of my judgment. At para. 35, I said: "*The difficulty about having a hearing about wasted costs at the early stage is that such an application is capable of driving a coach and horses between legal representative and client.*"

26. The adjournment sought is not so as to postpone the application until the end of the case so as to avoid these mischiefs: rather it is to postpone it until after a hearing before the Judge about wasted costs and to consider in the light of that judgment whether the appellate court (in the case, the High Court) should make a wasted costs order in respect of the costs of the appeal. That is inconsistent with the starting point in CPR46 PD5.2 that "*in general, applications for wasted costs orders for wasted costs are best left until after the end of the trial.*"

27. In refusing to adjourn the application for costs, I take into account the concern about dealing with wasted costs before the trial of this case and the attendant mischiefs to which I referred in my judgment, and which underlie the timing point in CPR46 PD5.2 and which were of concern to Sir Thomas Bingham MR in the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205 at 237-238.
28. In my judgment, the considerations which prevail are that:
- (i) costs should follow the event,
 - (ii) the Court should usually decide the incidence of costs at the conclusion of the application,
 - (iii) whatever the suspicions and language used on behalf of the Defendant directed against the Claimant's lawyers, this is not a case where there is evidence in connection with the appeal of unreasonable or improper conduct for the reasons which I have stated above.
29. I am exercising a discretion taking into account the above matters and all the matters prayed in aid of the submission that the Court should reserve costs. In the exercise of my discretion, I do not regard a postponement of a costs order (whether until after the decision of the Judge on the wasted costs application or until a later stage still such as after trial) as appropriate. It is better that I should make the adjudication at this stage rather than postpone the decision, perhaps to myself, perhaps to some other Judge, at a later indeterminate time.
30. For all these reasons, I reject the invitation to reserve the costs, but I make the order that the costs of and occasioned by the appeal shall be paid by the Claimants to the Defendants.