IN THE COUNTY COURT AT CHELMSFORD E00CM832

AND IN THE MATTER OF AN APPLICATION FOR COMMITTAL

B E T W E E N

THE CHIEF CONSTABLE OF ESSEX POLICE

Claimant

and

ROLAND DOUHERTY

Defendant

JUDGMENT OF HIS HONOUR JUDGE LEWIS
DATED 6 JULY 2020

COSTS

The Claimant was represented by Eve Robinson of Counsel, instructed by the Force Solicitor

The Defendant was represented by Stephen Fidler, Solicitor-Advocate

HIS HONOUR JUDGE LEWIS:

1. On 27 May 2020 I heard a committal application within these proceedings and gave judgment on 9 June 2020: ***Essex Police v Douherty*** [2020] EW Misc 4 (CC). There is now a dispute about the principles that should be applied in respect of costs. I am grateful to both parties for their written submissions.

2. The Claimant seeks a costs order against the Defendant following a civil committal for breach of what is commonly known as a "gang injunction", namely an injunction made by the County Court pursuant to Part 4 of the Policing and Crime Act 2009.

3. The Claimant says that costs should be approached in the same way as any other civil case, namely in accordance with CPR Part 44. It says that I should not take account of how the Defendant is funded, nor the Defendant's means, although it also suggests that this is a case in which the costs protection regime under s.26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") applies.

4. The Defendant says that whilst these are technically civil proceedings, they are run and managed as if they are criminal proceedings, and he is in receipt of criminal legal aid. He says the court should approach costs in the same way that a criminal court would do, taking account of his means and ability to pay. His position is that given he is on benefits, I should make no costs order at all. He says that if a costs order is made, it should not be enforced without leave. He does not dispute the reasonableness of the Claimant's costs.

Legal Aid

5. Gang injunction cases brought against adults are civil proceedings. They are heard in the County Court by judges authorised to hear civil cases. They are conducted in accordance with the Civil Procedure Rules, see for example PD 2B.8.1(c)(iv), Part 65 Section VIII and PD 65 Section I. Civil legal aid is potentially available to respondents to injunction applications, see Schedule 1, Part 1, para 38 of LASPO.

6. Committal proceedings for breach of a gang injunction are also technically civil proceedings, although they share characteristics with criminal process. As with the injunction proceedings, they are heard in the County Court by judges authorised to hear civil cases, and they are conducted in accordance with the Civil Procedure Rules. The primary rules are set out in CPR Part 81 and its Practice Direction. Defendants to civil committal applications can also apply for legal aid.

7. The statutory basis for legal aid is set out in Part 1 of LASPO. Section 1(2) defines legal aid as "(a) civil legal services to be made available under section 9 or 10 or paragraph 3 of Schedule 3 (civil legal aid), and (b) services consisting of advice, assistance and representation required to be made available under section 13, 15 or 16 or paragraph 4 or 5 of Schedule 3 (criminal legal aid)".

8. The regimes for civil and criminal legal aid are distinct and mutually exclusive: "civil legal services" are defined broadly as "any legal services other than the types of advice, assistance and representation that are required to be made available under sections 13, 15 and 16) (criminal legal aid)", see s.8(3).

9. When LASPO came into force, there was considerable confusion about whether defendants to civil committal applications should apply for civil or criminal legal aid. A series of cases has established that these applications fall within the definition of "criminal proceedings" under s.14(h) and so respondents to them are entitled to 'criminal legal aid' rather than 'civil legal aid'. See, for example, ***King's Lynn and West Norfolk Council v Bunning*** [2015] 1 WLR 531; ***Brown v London Borough of Haringey*** [2015] EWCA Civ 483, in respect of a committal application brought in the County Court for breach of an anti-social behaviour injunction; and ***All England Lawn Tennis Club (Championships) Ltd v McKay (No. 2)*** [2019] EWHC 3065.

10. The Legal Aid Agency accepts this position and has produced guidance, the most recent version of which was issued in February 2020: "Apply for legal aid in civil contempt – committal proceedings". This guidance confirms that criminal legal aid

for civil contempt proceedings heard in civil venues is not means tested, a position consistent with the decision in ***All England Lawn Tennis Club*** (supra): "In criminal proceedings other than those in the magistrates' court or Crown Court, the relevant authority must make a determination that the individual's financial resources are such that he or she is eligible: see reg. 39 of the Criminal Legal Aid (Financial Resources) Regulations 2013 (SI 2013/471)", per Chamberlain J.

11. A party in receipt of civil legal aid will have the benefit of s.26 LASPO. This provides that costs ordered against an individual in 'relevant civil proceedings' must not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including (a) the financial resources of all of the parties to the proceedings, and (b) their conduct in connection with the dispute to which the proceedings relate. Where s.26 is engaged, the process to be followed by the court and the parties is set out in the Civil Legal Aid (Costs) Regulations 2013. A legally aided defendant only becomes liable to pay costs once the court has applied the test in s.26 and evaluated financial resources and conduct.

12. Section 26 relates to "costs ordered against an individual in relevant civil proceedings". "Relevant civil proceedings" for this purpose are defined under s.26(2) as "(a) proceedings for the purposes of which civil legal services are made available to the individual under this Part or (b) if such services [ie civil legal services] are made available to the individual under this Part of the purposes of only part of proceedings, that part of the proceedings."

13. As Section 26 of LASPO only applies to civil legal aid, it must follow that it does not apply in civil committal proceedings where the defendant is in receipt of criminal legal aid. There does not appear to be an equivalent provision for criminal legal aid, no doubt because the criminal courts already take account of an offender's means and ability to pay before making a costs order: see ***R v Northallerton Magistrates' Court, ex parte Dove*** [2000] 1 Cr App R (S) 136 (CA) and the ***Criminal Costs Practice Direction (2015)***.

14. There appears to be a lacuna. There are mechanisms in place to protect impecunious parties facing costs orders in the criminal courts, and legally aided parties in the civil courts. The exception seems to be civil committal proceedings. There is nothing to suggest such an omission is intentional, rather it appears to have come about because of the general confusion in 2012 about the type of legal aid that respondents to civil committal applications should receive, as outlined in ***Bunning*** (supra). It does, however, seem unfair to those defendants who are impecunious that in certain respects they are put in a worse position by the decision that they should receive criminal, rather than civil legal aid.

The basis for assessment

15. As these are civil proceedings, the main costs rules are set out in CPR Part 44. The court must also take account of the overriding objective under CPR Part 1. In ***King's***

Lynn and West Norfolk Council v Bunning [2016] EWCA Civ 1037, the Court of Appeal noted the "quasi-criminal" status of civil committal proceedings and that the defendant in that case was in receipt of criminal legal aid. Nevertheless, the court confirmed that CPR Part 44 applies when determining costs, the usual position being that costs follow the event.

16. The main applicable rules appear to be as follows:

    a. CPR 44.2(1) provides that the court has a discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid.

    b. CPR 44.2(2) provides that if the court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party but the court may make a different order.

    c. CPR 44.2(4) provides that in deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including (a) the conduct of all the parties; (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply. Clearly this last point does not apply in respect of civil contempt.

    d. CPR 44.2(5) provides that the conduct of the parties includes (a) conduct before, as well as during, the proceedings; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended its case on a particular allegation or issue; and (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim. Again, some of these factors do not fit well with civil contempt proceedings.

    e. CPR 44.2(6) provides that the orders which the court may make under this rule include an order that a party must pay (a) a proportion of another party's costs; (b) a stated amount in respect of another party's costs; (c) costs from or until a certain date only; (d) costs incurred before proceedings have begun; (e) costs relating to particular steps taken in the proceedings; (f) costs relating only to a distinct part of the proceedings; and (g) interest on costs from or until a certain date, including a date before judgment.

    f. CPR 44.3 sets out the basis of any assessment, and CPR 44.4 the factors to be taken into account.

17. The overriding objective in CPR Part 1 requires the court to deal with cases "justly" and at proportionate cost. This includes so far as is practicable, dealing with the case

in ways which are proportionate to the importance and complexity of the case and "to the financial position of each party". It also includes dealing with the matter fairly.

18. The ability of a person to pay costs is not usually considered during civil costs assessment. Where there are policy reasons for managing costs exposure, rules or regulations either limit the level of costs (eg small claims, possession cases with fixed costs, etc), refer in explicit terms to means (eg CPR 52.19) or introduce an alternative assessment procedure (eg s.26 LASPO). So far, no such rules have been made in respect of civil committals.

19. In this case, I am asked to take account of the Defendant's means without reference to any legal authority, in circumstances where it is unclear whether the relevant rules and caselaw support such an approach. We also do not know if the Defendant would even have qualified for costs protection under s.26 if he had been in receipt of civil legal aid. His solicitors point out the court does not currently have sufficient information on which to reach a decision, and to be fair to the Defendant, if s.26 had applied in this case, he would have had more time in which to collate information.

20. I need to decide what to do in this case. I note that the Defendant's fall-back position is that I should make the costs order, but stay enforcement. If I do that, I need to be clear about the basis upon which the matter can be brought back. It seems to me that the fairest and most consistent way to approach this specific gang injunction case is as follows:

    a. Costs will be assessed summarily in accordance with usual principles.

    b. I will stay the costs order pursuant to CPR Part 3.1(2)(f) for three months.

    c. From what I have heard, it seems likely that the Claimant in this case will be content to leave the stay in place beyond this three-month period. If so, the parties should liaise and submit a consent order.

    d. In the absence of agreement, if the Defendant wishes to make an application in respect of the continuation of a stay, he shall issue an application notice and produce evidence in support, including all the information that he would be expected to provide under the s.26 process. The application will need to make clear, by reference to law and the relevant rules, what the Defendant is asking the court to so, and the legal and procedural basis for doing so. On receipt of such an application, I will need to give directions for any evidence in response, and will then most likely take a decision on paper.

21. This is very much a case specific solution, which is much more involved than I would have liked. At the hearing before me, the legal position was unclear and the evidence of means was not available. Ordinarily, if a party raises these sorts of points I would expect them to be able to provide the required evidence at the hearing itself, and be able to address the detail of the law, so that all aspects of the application can be

considered at the same time, without the need for any subsequent "on paper" exercise. That is not a criticism of the Defendant's lawyer in this case, who would have been unaware that this issue was going to arise in the way that it did.

The costs decision

22. I need to identify the successful party.

23. On 27 May 2020, the court considered three separate N244 applications for committal. Only one of these applications had been listed to be heard that day. The other two had been listed for a later date. On the day, however, the parties had discussions and agreed that all three applications should be dealt with, on the basis of six agreed counts. I was then provided with the bundles for the second and third applications, which I needed to consider before sentencing.

24. As part of the agreement reached, the Claimant did not pursue some of the counts on the first and second applications:

    a. On the first application, the Claimant pursued one count in respect of which I declined to impose a penalty, and dropped the other. I note that the Defendant had in fact issued an N244 to strike out the second count, on the basis that it had no prospect of success.

    b. On the second application, the Claimant pursued one count relating to the video and dropped the other.

    c. On the third application, the Claimant pursued all four counts.

25. I am clear that the Claimant was the successful party in respect of the second and third applications. I do not think either party was successful in respect of the first application.

26. As the real focus was on the second and third applications, I am satisfied that the starting point is that the Defendant should pay the costs. In terms of whether I should depart from this position, the Defendant raises the issue of means, which I have already considered above.

27. I am satisfied that the claimant is entitled to an order that the defendant pay its costs, to be assessed on the standard basis.

28. The Claimant only seeks an order in respect of some of its costs, namely £1,050. It is not seeking the cost of the three N244 application notices, nor for any of the time spent on this matter by the in-house Solicitor with conduct. The only costs sought relate to the attendance of counsel at the hearings on 21 May (following arrest), 27 May (the committal application), 8 June (for judgment, when the Defendant did not attend) and 9 June 2020 (for judgment). I am satisfied that the costs sought were

proportionately and reasonably incurred, and proportionate and reasonable in account and summarily assess them at £1,050.

29. I make an order in the following terms:

    a. The Defendant shall pay the Claimant's costs of the N244 applications to commit Roland Douherty dated 19 February 2020, 6 May 2020 and 21 May 2020 which are summarily assessed at £1,050.

    b. This costs order is stayed pursuant to CPR Part 3.1(2)(f) until 4pm on 6 October 2020.