IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2019] EWHC 3910 (Admin)

No. CO/3329/2018

Royal Courts of Justice

Thursday, 21 November 2019

Before:

MR JUSTICE MOSTYN

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
KUZNETSOV — Claimant

- and -

LONDON BOROUGH OF CAMDEN — Defendant

MR D. BURKITT (instructed by Direct Access) appeared on behalf of the Claimant.

MS T. CONLAN (instructed by the Legal Department of the local authority) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE MOSTYN:

1 This is my judgment on the application made by the claimant for this court to reconsider a decision by Upper Tribunal Judge Markus QC, sitting as a High Court judge, on 27 September 2019 made on paper (that is to say without a hearing) dismissing the claimant's application dated 23 May 2019. That application of 23 May 2019 sought to set aside a costs order made on 16 May 2019 whereby the claimant was ordered to pay the defendant's costs summarily assessed in the sum of £11,614.20.

2 The background to the application is as follows. The claimant had sought judicial review of decisions taken by the defendant, the London Borough of Camden, that he did not qualify for the allocation of housing under Part 6 of the Housing Act 1996.

3 On 11 December 2018 the claimant was given permission to proceed with his application for judicial review by John Bowers QC, sitting as a deputy High Court judge. That was at an oral hearing, permission having been earlier refused on paper. At the oral hearing the defendant was represented by counsel. Counsel addressed the court, and by virtue of her submissions the scope of the permission that was granted was significantly reduced. Permission was granted in fact only on one of the pleaded grounds.

4 The substantive judicial review hearing was listed to take place on 1 May 2019 before Judge Markus QC. On 26th of April 2019, that is a week before the hearing, the defendant served its form N260 schedule of costs in advance of the substantive hearing. That made it clear that an order for costs would be sought if the claim were dismissed, and indeed I have little doubt that the summary grounds of resistance filed by the defendant had also made it clear that it was seeking an order for costs. That statement of costs was incomplete in that it did not include the costs of counsel for preparation for the hearing on 1 May 2019, or for attendance at that hearing. That was by virtue of a note on p.4 of the schedule left blank but was advertised to be provided later. As stated, the hearing took place on 1 May 2019.

5 On 14 May 2019 the learned judge distributed her judgment in draft. In the usual way, the template of the draft judgment contained the endorsement at its head that the judgment would be only handed down on 6 May 2019. It invited, in the usual way, counsel to submit any list of typing corrections and other obvious errors to Judge Markus by the following day, 15 May 2019. Although it does not state on its face that the court would consider on that occasion the question of costs, the convention is that costs would usually be considered, certainly if the matter was agreed and a consent order could be made.

6 No submissions in relation to costs were filed by the claimant and of course the general rule expressed in CPR Part 44, rule 44.2(2)(a) would apply, which is that the general rule is that the unsuccessful party would be ordered to pay the costs of the successful party. That law has been in existence in this country for centuries. My brief researches prior to giving this judgment have revealed to me that that rule first appeared during the reign of Henry VIII in 1531 when Parliament passed a statute entitled: "An Act that the Defendant shall recover costs against the Plaintiff if the Plaintiff be nonsuited or if the verdict passed against him."

7 So, the claimant was obviously facing an order for costs, and an order for costs was made in the sum that I have mentioned, the scale of counsel's fees having been provided on 10 May to the court and to the claimant by a letter of that date. Those fees were stated to be expressed in the sum of £2,150, giving rise to the total figure of £11,614.20, which was duly ordered.

8 On 23 May 2019, as I have previously mentioned, the claimant made his application to set aside the costs order. On 5 June 2019 Judge Markus gave directions for determination of the application. In her order, which was for directions, which was made inevitably without a hearing, she explained, at para.3 as follows:

> "In order to assist the parties I set out the following relevant background to the order which was not made by the court of its own motion. The defendant had made it clear that it sought its costs in the event of the judicial review claim being dismissed. Prior to the substantive hearing, the defendant served its schedule of costs. On 10 May the defendant wrote with an update to the schedule of costs which it confirmed had been served on the claimant. On 14 May the defendant sent the court a draft order which included the proposed costs order and served it on the claimant. No submissions as to costs were made by or on behalf of the claimant. In accordance with the overriding objective, the application can be dealt with on the papers.",

9 On 13 June 2019 the defendant filed and served written submissions on the application pursuant to that directions order. On 17 June 2019, however, the claimant applied to set aside the directions order. However, on 20 June 2019 he filed and served written submissions pursuant to that order.

10 On 27 September 2019 Judge Markus made her order dismissing the application to set aside both the directions order and, more pertinently, the application to set aside the costs order.

11 It was on 21 October 2019 that the claimant, without having actually made a formal application, requested that Judge Markus's decision to dismiss the application be reconsidered at an oral hearing, and that was listed before me today. In his application for reconsideration he somewhat stridently, I have to say, demanded that the matter be listed for an oral hearing and that it be listed before a full-time judge of the High Court. It is not for a claimant to stipulate the level of judge who should hear his application, but as it happens I am a full-time judge of the High Court of long-standing, and so an oral hearing has taken place. So, the two particular procedural objectives that were sought by the claimant have been granted to him.

12 I will come to the learned judge's decisions in her ruling of 27 September in due course. I will not spend any time examining her reasons for refusing to set aside the directions given on 5 June as they have passed entirely into history and are no longer relevant.

13 It is clear that the decision in relation to costs was made without hearing. Ms Conlan has sought to argue that there was a hearing at which the question of costs was advocated, but I am completely satisfied that no such hearing took place. There was, of course, a hearing of the substantive matter but it is inconceivable that there was a discussion during the substantive proceedings of what the costs adjudication would be in the event that the claim either succeeded or failed. It is unheard of, in my experience, in this type of proceedings for costs to be dealt with during the substantive proceedings in an anticipatory manner. In any event, the learned judge would not have formulated her ruling using the language that she did had she received oral submissions. The claimant, who was present during the proceedings, is emphatic that there was no oral hearing on the merits of the costs issue. I proceed, therefore on the basis that there was no such hearing.

14 In such circumstances, it is clear that the learned judge made her costs decision pursuant to CPR rule 23.8(c) which provides that:

> "The court may deal with an application without a hearing if - … (c) the court does not consider that a hearing would be appropriate."

15 In such circumstances Practice Direction 23A para. 11.2 applies. This states:

> "Where rule 23.8(c) applies the court will treat the application as if it were proposing to make an order on its own initiative."

16 This takes the court to rule 3.3(4) which provides:

> "(4)The court may make an order of its own initiative without hearing the parties or giving them an opportunity to make representations."

17 Para (5) provides:

> "(5) Where the court has made an order under para.(4) -
> (a) a party affected by the order may apply to have it set aside, varied or stayed; and
> (b) the order must contain a statement of the right to make such an application."

18 In fact, the order of 16 May does not contain the statement referred to in paragraph (5)(b), but that does not, in my judgment, affect its validity.

19 What are the principles that the court applies when considering an application to set aside or vary or stay an order made pursuant to rule 3.3(4)? Does the court apply the same principle and legal test that would apply if it were hearing an application to set aside a procedural order made following a hearing pursuant to rule 3.1(7)? This provides that -

> "(7) A power of the court under these Rules to make an order includes a power to vary or revoke the order".

20 It has been argued by Mr Burkitt that it would be wrong for a direct analogy to be drawn because an application under rule 3.1(7) would inevitably be dealt with at a hearing at which the court would have the benefit of oral advocacy. He also makes the point that if the test was the same, then there would be no need for there to be a separate rule 3.3(5). It would, if the test was the same, be entirely otiose.

21 The test that is applied on application to set aside or vary a procedural order under 3.1(7) is well known. It originates in the decision of the Court of Appeal in *Tibbles v SIG PLC* [2012] 1 WLR 2591, reiterated in a number of cases but perhaps most succinctly summarised in *Mitchell v News Group Newspapers* [2014] 1 WLR 795 [44] where Lord Dyson MR said:

> "44. The court held that considerations of finality, the undesirability of allowing litigants to have two bites at the cherry and the need to avoid undermining the concept of appeal all required a principled curtailment of an otherwise openly apparent discretion. The discretion might be appropriately exercised normally only (i) where there has been a material change of circumstances since the order was made; (ii) where the facts on which the original decision was made

had been misstated; or (iii) where there has been a manifest mistake on the part of the judge in formulating the order."

22 Is that the test that should be applied to an application to set aside or vary under rule 3.3(5)? It is surprising that there is absolutely no authority on the point, notwithstanding that this rule has been in existence since 26 April 1999. Twenty years have passed and there has been no decision as to what legal standard the court should apply in considering an application to set aside an order made without a hearing and on the papers.

23 I agree with Mr Burkitt that the test cannot be so high as that which applies on an application to set aside under rule 3.1(7). I agree with him that if one aligned the test, then rule 3.3(4) becomes entirely otiose. So, the test must be lower. Is the test that the court should be satisfied that the decision was wrong, that is to say appealably wrong? Again, Mr Burkitt says that would be to set the standard much too high. If it is appealably wrong, then there is no point in having the rule because you would of course inevitably be able to succeed on an appeal. So, I agree that one has set the test a little lower. Having considered the matter carefully, I have drawn some inspiration from the well-known decision given long ago by the President of the Family Division, Sir Jocelyn Simon, in *Samson v Samson* [1966] P52 when he identified the standard that was needed for an appeal to succeed from a decision of a registrar to a judge. He emphasised that the decision was primarily that of the judge, but the judge should give due weight to the decision of the registrar. He should be slow to disturb a decision on a mere question of quantum and he concluded by saying that the court should be able to identify a reason for disagreeing with the order of the registrar.

24 In my judgment, I would formulate the test as follows, that the court should give due weight to the decision of the judge who dealt with the matter without a hearing and should be able to identify a good reason for disagreeing with his or her decision. That is the standard I shall apply in judging this application.

25 In his written materials, the claimant, over many pages, advanced seven reasons why the decision should be set aside or varied. However, he instructed Mr Burkitt late in the day and Mr Burkitt wisely abandoned six of those seven grounds, and confined his submissions solely to the one that the sums claimed, namely £11,614.20, breached the indemnity principle. The indemnity principle is very long-standing and reflects the obvious principle that when making an order for costs there should not be a windfall for the payee; nor should there be a penalty imposed on the payer. The costs can never exceed the value of the work done.

26 The claimant has particularly focused on the hourly rate claimed by the in-house solicitor of the London Borough of Camden of £317. The solicitor who has had the conduct of this case, principally Mr Reihill, has claimed £317 being a standard hourly rate which has been formulated in circumstances which I will describe. No particular complaint is made as to the number of hours or units, because his hourly rate is divided into 10 units of six minutes at £31.70 per unit. No particular complaint is made about the number of hours, subject to one point. No particular complaint is made about the sums claimed in respect of counsel's fees. Rather the focus of the objection has been on the hourly rate of £317.

27 The claimant made a Freedom of Information request of the London Borough of Camden to discover the annual payroll budget of the London Borough of Camden and the pay grades and annual and hourly cost to the taxpayer of the employees of each pay grade. He discovered that the maximum hourly rate paid to an in-house lawyer of the London Borough of Camden is £41.75, which he points out is a very much lesser amount than the £317 which was claimed in the form N260. The Freedom of Information request shows that on

employed lawyers the London Borough of Camden spent, in 2017/18, just under £2 million and that the annual payroll budget for legal services was £3 million - giving £1 million of payroll for ancillary staff. Mr Burkitt accepts that there would be appreciable further costs of an infrastructural nature but he says that even when those are taken into account it cannot inflate the base figure of £41.75 to anywhere near the sum claimed of £317.

28 The figure of £317 is a suggested rate from the Supreme Court costs office, which is printed in the *White Book*, the Supreme Court Practice, at p.442 giving, for London pay grade A, £317 for Central London which is London W1, WC1, WC2 or SW1. I cannot help but observe in passing that it is surprising that the rates have not been increased since 2010. However that is where the figure of £317 comes from.

29 Mr Burkitt argues that even though that may be the guideline rate for summary assessment as promulgated by the Supreme Court costs office that for that to be awarded it would breach the indemnity principle, having regard to the evidence which he had obtained.

30 Ms Conlan has referred me to the decision of *Re Eastwood (deceased)* [1975] Ch, 112 where the Court of Appeal held, allowing an appeal from Brightman J, that the appropriate method of taxation of a bill of costs where party was represented by a salaried solicitor was to treat it as though it were the bill of an independent solicitor assessing the reasonable and fair amount of a discretionary item, having regard to all the circumstances of the case and the principle that the tax costs should not be more than an indemnity to the party against the expense he had incurred in litigation.

31 In his judgment, Russell J stated, at p.132:

> "There might be special cases in which it appears reasonably plain that the principle will be infringed if the method of taxation appropriate to an independent solicitor's bill is entirely applied. But it would be impracticable and wrong in all cases of an employed solicitor to require a total exposition and breakdown of the activities and expenses of the Department with a view to ensuring that the principle is not infringed, and it is doubtful to say the least whether by any methods, certainty on the point could be reached. To adapt a passage from the judgment of Sterling J in *Re Doody* [1893] 1 Ch. 129, 137,
>
> > 'To make taxation depend on such a requirement would, as it seems to us, simply be to introduce a rule unworkable in practice and to push abstract principle to a point at which it ceases to give results consistent with justice.'"

32 *Re Eastman* has survived the advent of the Civil Procedure Rules. That is clear from the decision of *Cole v British Telecoms PLC* [2002] Costs LR, 310. In that case Buxton LJ at para.9 stated:

> "9. The judgment of this court in *In Re Eastwood* establishes that the conventional method appropriate to taxing the bill of a solicitor in private practice is also appropriate for the bill of an in-house solicitor in all but special cases where it is reasonably plain that that method will infringe the indemnity principle. Such a special case will arise where some can be identified different from that produced by the

> conventional approach which is adequate to cover the actual cost incurred in doing all the work done. Such a sum may be identified by concession or presumably by the factual assessment of the taxing tribunal itself. But that possibility does not justify a detailed investigation in every case."

33 Mr Burkitt is candid enough to acknowledge that it would be highly exceptional for the court to depart from the suggested hourly rate from the Supreme Court costs office applicable to summary assessments involving solicitors in private practice. However, he says that there is good evidence deriving from the Freedom of Information request to show that the figure of £317 wildly exceeds the maximum possible costs that have been incurred by the London Borough of Camden, and that therefore the indemnity principle is being breached.

34 Although the argument has been very persuasively put, I do not agree with it. The £317 encompasses a great deal more than just the costs, the payroll costs, of the people sitting in the offices of the London Borough of Camden. It extends to a contribution to the infrastructural costs of the borough itself. Certainly, it extends to the costs of maintaining not only all the equipment, utilities and all other office costs, but the capital costs of the building in which the legal department is itself housed. So, one would be reasonably expected to apply figures for notional rent for example. I cannot see that this case is, by virtue of the evidence that is before me, a special case allowing an exception to the general rule. I concur with Russell J that to investigate this matter would be unworkable in practice and to push abstract principle to the point where it ceases to give results consistent with justice.

35 I therefore reject the challenge to the bill of costs, specifically to the hourly rate component of the statement of costs.

36 The other aspect which is challenged is the costs of counsel at the hearing for permission. This was £950. I do not disallow that because it is clear that counsel on that occasion did not attend merely as a watching brief, but was an active participant at the permission hearing and succeeded in persuading the judge not to grant permission on a number of grounds. It is true that the normal rule would be to disallow costs on attendance on a permission hearing but the court can, exceptionally allow them and on the facts of this case, having read the transcript of the hearing before Mr Bower QC, I am satisfied that the participation was substantial and that those costs are justifiably claimed.

37 For these reasons, giving due weight to the decision of the judge, I conclude that I agree with it. I cannot identify any good reason for departing from it. This application is therefore dismissed.

L A T E R

38 In relation to the costs of today, the hearing being listed for one hour (possibly shorter but definitely not more than a day), the London Borough of Camden should have been well aware that the court would endeavour, as is its duty under CPR PD 44 para.9.2(b), to summarily assess, and it cannot summarily assess unless Form N260 is filed 24 hours beforehand. Paragraph 9.5 says:

> "(1) It is the duty of the parties ... to assist the judge in making summary assessment of costs in any case for which para.9.2 above applies, in accordance with the following sub-paragraphs."

Then it says what it must do. Then it says:

> "(3) The statement of costs should follow as closely as possible Form N260..."

That has not happened.

39 It is my practice in such circumstances, where the court is charged with a duty to bring closure by summary assessment, and where there is a positive duty to file a Form N260, the legal advisers having failed to do so they, having made that bed, must lie in it and they will not get an award of costs. In relation to today there will be no order as to costs.

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This transcript has been approved by the Judge.