



Neutral Citation Number: [2023] EWCA Civ 526

Case No: CA-2022-001378

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT**  
**Anthony Ellera KC sitting as a judge of the High Court**  
**CO/4149/2021**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16/05/2023

**Before :**

**LORD JUSTICE UNDERHILL**  
**(Vice-President of the Court of Appeal (Civil Division))**  
**LORD JUSTICE ARNOLD**  
and  
**LORD JUSTICE EDIS**

-----  
**Between :**

<b>THE KING</b>	<b><u>Appellant</u></b>
<b>(on the application of SO)</b>	
<b>- and -</b>	
<b>THANET DISTRICT COUNCIL</b>	<b><u>Respondent</u></b>
<b>- and -</b>	
<b>(1) KENT COUNTY COUNCIL</b>	<b><u>Interested</u></b>
<b>(2) THE CROWN ESTATE</b>	<b><u>Parties</u></b>
<b>(3) THE JUSTICES AT</b>	
<b>MAIDSTONE MAGISTRATES'</b>	
<b>COURT</b>	

-----  
**Mr Tim Baldwin and Ms Lara Simak (instructed by Watkins and Gunn) for the Claimant**

**Mr Andrew Lane and Mr Jack Barber (instructed by Thanet District Council Legal and Democratic Services) for the Defendant**

**The Interested Parties did not appear and were not represented**  
-----

**Approved Judgment on Costs**

## **Lord Justice Edis :**

1. On 14 April 2023 the court handed down its judgment on the substantive claim, see [2023] EWCA Civ 398. The parties have not been able to agree the order which should be made consequent upon that decision. In this judgment I will deal with the issues which have arisen. The parties have lodged written submissions and there has been no further hearing.
2. The issues concern:-
  - i) The costs order which should be made in relation to the proceedings up to and including the decision of Mr. Elleray KC refusing permission to seek judicial review after a rolled-up hearing. It is agreed that SO's costs of the appeal and the claim for judicial review should be paid by Thanet District Council.
  - ii) The application by SO for a payment on account of costs.
3. When these proceedings were first issued they included a challenge to both section 77 Notices which Thanet District Council had issued in relation to the Land in September and November 2021. The challenge was much more broadly based than the ground on which the court quashed the November section 77 direction. The judgment given on 14 April 2023 records what happened about the September section 77 direction as follows:-

“22. In September 2021 a section 77(1) direction was issued in respect of the land. After some uncertainty as to its scope it has become clear that this related to another group of Travellers who had arrived on the Land without permission after SO and her immediate family had entered with permission. There is no need to say anything more about this, except that it was followed by a complaint under section 78 seeking a removal order which was adjourned on 9 November 2021 to be heard in the magistrates' court on 8 December 2021.”

## **The parties' submissions**

4. SO's position on costs is that she should be treated as the successful party and awarded her costs of the proceedings in the High Court. In the alternative it is submitted that an issue-based order should result in her being awarded 60% of those costs to reflect the costs of issues on which she did not succeed. She contends that if any order is made in favour of Thanet District Council, the Council should not be permitted to set off those costs against the costs due to SO. The authorities on the relevance of the fact that SO has legal aid to the making of costs orders for and against her are relied on.
5. Thanet District Council submits that it succeeded on all pleaded issues in the High Court, and lost on only one issue which was actually raised by Mr. Elleray KC at the hearing before him and was not pleaded at all. It therefore submits that the costs order made by the High Court should stand, and it should have its costs of those proceedings. It further contends that it should be entitled to set off its entitlement to costs against its liability to SO in respect of the proceedings in the Court of Appeal.

## Discussion and decision

6. The original claim contended that both section 77 directions were unlawful on four grounds. These may be summarised as follows:-

Ground 1: unlawful/irrationality of the decision to issue and serve a Section 77 Notice on the Claimant.

Ground 2: unlawful service of Section 77 Notice.

Ground 3: unlawful/irrational failure to conduct welfare inquiries.

Ground 4: failure to provide sanitary conditions in accordance with national guidance.

7. All grounds were refused permission on paper. Grounds 1, 2 and 3 were renewed and refused permission by Mr. Elleray at the rolled-up hearing. Ground 4 was not renewed and remains dismissed. Grounds 2 and 3 have never had permission and remain dismissed. The issue on which SO succeeded was either within ground 1 or was, as Thanet District Council contends, first raised by the judge.

8. Ground 1 relied on the fact that SO had been given consent by Thanet District Council to reside on the Land, and said, correctly, that both directions were in the same terms and applied to “All Occupants” residing in vehicles on the Land. The original Summary Grounds of Opposition sought to uphold both directions and did not say that the September direction was not effective against SO. That had become clear by the time that Mr. Elleray gave judgment, apparently as a result of an order made by Lang J on 4 April 2022 giving directions for the renewed permission hearing. Having read the papers and of her own motion she directed evidence from Thanet District Council which, among other things, should make it clear:-

“...whether it is the Defendant’s case that the directions notice issued on 13 September 2021 was not directed at the Claimant, and if so, explain how that was communicated to the Claimant and other members of the M family.” [SO is part of “the M family”].

9. This resulted in a witness statement from Katherine Turner dated 3 May 2022 which did make it clear that the September direction was intended only to cover the people who had entered the Land without permission in August 2021 and had not been served on SO and her group. The challenge to the September 2021 direction fell away because it was now conceded that it did not apply to SO. Had that been clear from the terms of the direction (which expressly stated the opposite) no challenge would have been brought to it in the first place. Thanet District Council is the sole author of this confusion, from which it was rescued by judicial case management.
10. It is not, in my judgment, true that the issue on which SO succeeded was first mentioned by the judge at the hearing on 28 June 2022. While it had not been clearly stated in terms in the Amended Statement of Facts and Grounds, it is inherent in Ground 1 that SO was relying on the fact that she entered the site with permission and she resisted the

contention of the Thanet District Council that the permission had lapsed. Ground 1 was summarised as follows:-

“The decision to issue a s 77 CJPOA 94 is unlawful as the Claimant and all other occupiers of the Land entered it with the consent of the owner and the Defendant has misdirected itself to its powers under section 77 CJPOA 94 and has failed to have any regard to relevant guidance and circulars as to managing and evicting Travellers from the Land. The Land is owned by the Government and there is no evidence that the relevant Secretary of State has been consulted with or has withdrawn any consent to occupy the Land. It is submitted the service of the direction on or around the 28 September 2021 and the 30 November 2021 is unlawful and irrational as no reasonable Defendant properly directing itself to its powers, circulars and guidance would have served any such s 77 CJPOA 94 direction on all occupiers on the Land in all the circumstances of this claim.”

11. That summary would be improved if a full stop were inserted immediately after the second reference to section 77 CJPOA 94.

12. Paragraphs 53 and 54 of the very long Amended Statement of Facts and Grounds say this:-

“53. The unlawfulness of the Defendant’s action is that the Land appears owned by the Crown and in respect of the Claimant and her extended family she was permitted to occupy the Land with the consent of the occupier. (see s 77(1)(c) CJPOA 94.

54. It is submitted it is unlawful for the Defendant to give a direction under s 77 CJPOA 94 when the Claimant and other occupiers of the Land has been given the consent of the occupier to reside in vehicles on the Land. It is submitted this is the case here. It is clear the Claimant and her family would not be present on this Land but for the actions of the Defendant relocating them there and failing to provide an alternative suitable site.”

13. The response alleged that the consent had been temporary and had now lapsed, but said nothing about whether SO had been told this, and whether that mattered.

14. A Reply was served on behalf of SO which did not take matters further, but reiterated that SO was an authorised occupier and claimed that section 77 directions could not be issued against authorised occupiers.

15. For these reasons I consider that the legal effect of the consent to occupy the Land as at the date when Thanet District Council decided to issue the section 77 directions was clearly in issue, although it is true that SO’s representatives did not clearly articulate the point on which they later succeeded.

16. It is true that SO raised a number of unsuccessful (indeed unarguable) challenges, and it is also true that her documents are not as clear and focussed as they should be.

However, she did establish that Thanet District Council had failed to issue any effective section 77 direction against her and therefore that her continued occupation of the Land after November 2021 was not a criminal offence. This makes her the successful party and she is entitled to a costs order in her favour. This should be an order that she is entitled to 60% of her costs in the High Court in addition to her costs of the proceedings in the Court of Appeal. The deduction reflects the issues on which she failed.

17. That being so, no issue as to set-off arises. I would have made this order whether she was privately or publicly funded and it is not necessary to consider any of the authorities cited.
18. There should be an order for a payment on account of costs, but the order proposed by SO is a blank cheque. It is an order for payment of a proportion of whatever sums her lawyers choose to insert on a schedule which they have, apparently, yet to draw up. This is not satisfactory. Instead, the order will be as follows:-

5. The court will make an order for a payment on account of costs in favour of the Appellant pursuant to CPR 44.2(8) and gives directions at (i)-(iii) below for the determination of the amount.

- i) The Appellant will serve and lodge with the court two costs schedules, one covering the costs in the High Court and the second the costs in the Court of Appeal within 7 days of receipt of this Order.
- ii) The Respondent may file and serve comments on the schedules within 7 days of their receipt.
- iii) In default of agreement as to the payment on account of costs, the court will consider the schedules and comments without a hearing and will direct the amount of the payment on account and the date by which it must be made.

**Lord Justice Arnold**

19. I agree.

**Lord Justice Underhill**

20. I also agree.