Neutral Citation Number: [2019] EWHC 1674 (Ch)

Case No: CH-2018-000135

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS

Royal Courts of Justice
7 Rolls Building, Fetter Lane
London,
EC4A 1NL

Date: 28/06/2019

Before :

MR JUSTICE HENRY CARR

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Between :

Ms SARVENAZ FOULADI	**Claimant/Respondent**
- and -	
(1) DAROUT LIMITED **(2) AHMED EL DERRAMI** **(3) SARAH EL KERRAMI**	**Defendant/Appellants**
(4) ST MARY ABBOT'S COURT LIMITED	**Additional Defendant to the Original Claim (but not a party to the First to Third Defendant's appeal)**

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Edwin Johnson QC (instructed by **BDB Pitmans LLP**) for the **Claimant/Respondent**
Gordon Wignall (instructed by **BLM**) for the **1-3 Defendants/Appellants**

Hearing dates: 27th June 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE HENRY CARR

Mr Justice Henry Carr:

Introduction

1. There are two issues before the court. First, there is an outstanding ground of appeal made against the Order of HHJ Parfitt dated 3 May 2018. This followed a lengthy trial. I am concerned with ground 10. By his judgment on appeal from HHJ Parfitt, Morgan J dismissed nine grounds of appeal. The outstanding ground was adjourned to a separate hearing. Secondly, there is an issue concerning the costs ordered to be paid to the Fourth Defendant by the Claimant, in respect of the Claimant's unsuccessful appeal which was also dismissed by Morgan J. The question is whether that ought to be met by the First to Third Defendants on a *Bullock* basis, the jurisdiction for which is now incorporated into the court general discretion in relation to costs pursuant to CPR Rule 44.2.

Background

2. The judgment which HHJ Parfitt handed down concerned noise nuisance. An order in respect of the costs and remedies was made on 3 May 2018. Morgan J went on to dismiss all nine grounds at a hearing on 19 December 2018. Both judges gave very thorough judgments. The background to the case is set out in full in those judgments, which is unnecessary to repeat.

3. HHJ Parfitt found that the First Defendant was the tenant owner of flat 66 and that it was occupied by the Second and Third Defendants, the Fourth Defendant was the landlord of the flat. He found that works were undertaken to the floor and that after the works the sound insulation in respect of the floor was worse than it had been previously. In respect of the First to Third Defendants he found liability in breach of covenant and in nuisance.

Ground 10 – HHJ Parfitt's decision

4. The first matter before me is whether HHJ Parfitt was right to make a *Bullock* order the effect of which was to transfer liability to the First to Third Defendants to meet the costs ordered to be paid by the Claimant to the Fourth Defendant, as well as the Claimant's costs of her claim against the Fourth Defendant.

5. HHJ Parfitt gave a brief but reasoned judgment in relation the *Bullock* order. He began by considering the law in relation to *Bullock* and *Sanderson* orders and rejected, rightly in my view, a submission that such orders were confined to cases where the Claimant did not know which defendant to sue. Rather such orders are made where it is just to do so, having regard to all the circumstances of the case:

> "24. I was taken to some law in relation to the jurisdiction in this area and what is conventionally referred to as *Bullock* or *Sanderson* orders. I should perhaps say, at the outset, that it was suggested by Mr Wignall that these types of orders are limited in application to negligence or PI-type cases where there is some uncertainty about which particular defendants might be liable and the claimant is in an impossible position not knowing which one to sue when each blame the other, but it seems to me

> that the court's discretion is not so limited. These are simply potential costs orders that can be made in any circumstances where the court considers that it is just and appropriate to do so within its overarching discretion in relation to costs."

6. HHJ Parfitt then referred to the leading cases of *Moon v Garrett* and *Irvine v Commissioner of the Police*. He cited Waller LJ in *Moon v Garrett*, who said:

> "25. It seems to me that the above citation *from Irvine and Commissioner of the Police* demonstrates that there are no hard and fast rules as to when it is appropriate to make a *Bullock* or *Sanderson* order. The court takes into account the fact that, if a claimant has behaved reasonably in suing two defendants, it will be harsh if he ends up paying the costs of the defendant against whom he has not succeeded. Equally, if it was not reasonable to join one defendant because the cause of action was practically unsustainable, it would be unjust to make a co-defendant pay those defendant's costs. Those costs should be paid by a claimant. It will always be a factor whether one defendant has sought to blame another.
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> The fact that cases are in the alternative so far as they are made against two defendants will be material, but the fact that claims are not truly alternative does not mean that the court does not have the power to order one defendant to pay the costs of another. The question of who should pay whose costs is peculiarly one for the discretion of the trial judge."

7. HHJ Parfitt then applied the law, which he had correctly set out, to the facts of the case before him:

> "26. So the starting point can be was it reasonable for the claimant here to join both sets of defendants or as Mr Wignall, helpfully put it, was it a case of setting up two bulls' eyes and trying to hit both and then if you miss one then you should pay the consequences.
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> 27. I consider the solution here is really a question about whether or not the claims against both defendants are bound up with each other. It seems to me that they are. It seems to me that there are a number of illustrations of that but one, perhaps, relatively easy illustration are the 2016 settlement offers that I've been shown. All the defendants made on the same day complementary offers designed to be considered together. And one can understand why they did that because both defendants had a role to play, both in terms of how the dispute came about, but also in terms of the potential resolution of that dispute."
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> 28. The - the claims were not in the alternative, they had separate legal bases, but this was a case where the first to third defendants were asserting that they were licenced to do what they had done by the fourth defendant. It's also the case that the court found that they were not licenced to do what they'd done which meant that they were in breach of their lease and that that finding was at the heart of the

> reasons both why the claimant was successful against the first to third defendants, but also why the claimant was unsuccessful as against the fourth defendant. So that was a factual assertion made by the first to third defendants upon which they lost, but was an issue which pointed toward the practical necessity, from the claimant's perspective of suing the first to third defendants and the fourth defendant.
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> 29. I agree with Mr Johnson for the claimant, that it is a case where it is appropriate and meaningful to step back and look at the overall position. And the overall position, it seems to me, without any doubt at all, is that it is the first to third defendants' conduct, both prior to these proceedings and indeed during the course of them, in particular conduct in relation to not making what I regard as reasonable actual offers, that has led to the dispute and led to the litigation happening in the way that it has done. If permission had been properly obtained none of this would have occurred.
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> 30. In those circumstances, I think that a *Bullock* order is appropriate. I don't think that a *Sanderson* order is appropriate, because it seems to me that that's not a proper reflection of the lack of success as between the claimant and the fourth defendant, but I think that the claimant is entitled to, and will be able to, recover sums payable by them to the fourth defendant and sums incurred by the claimant in respect of the claim against the fourth defendant from the first to the third defendants.
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> 31. And finally, the fourth defendant wanted their costs on the indemnity basis as against the claimant. This isn't a case that's sufficiently far removed from the norm to justify an indemnity order. In fact I can frankly say I can see no basis whatsoever, for any indemnity order. I don't believe, I don't think, sorry, that the case even comes close to that."

8. Mr Wignall did not identify any error of law in the judge's analysis. Rather, he submitted there has been an error in the weight to be attached to the relevant factors considered by HHJ Parfitt, including the question of whether the decision to add the Fourth Defendant to the proceedings was reasonable.

The role of an appellate court in costs appeals

9. Mr Johnson QC pointed to the authorities concerned with errors in the exercise of a discretion as to awards of costs, which shed light on the function of an appeal court in an appeal of this nature.

10. It is well-established that it is extremely difficult to challenge the exercise of a discretion in relation to costs. In *Re MTI Trading Systems Ltd* [1998] BCC 400 at 404 D-F, Lord Saville said that if costs appeals are to succeed, then the appeal court has to be persuaded that no judge who was properly instructed as to the law with regard to the relevant facts could have reached the relevant conclusion.

11. Lord Fraser in *G v. G* [1985] 1 WLR 647 at 652E said that in the exercise of a discretion it must be established that the judge has exceeded the generous ambit of the discretion available to him. This is why costs appeals are relatively rare. See *The*

Queen (on the application of Eyers) v Uttlesford District Council [2010] EWCA Civ 48 at paragraph 15, where Mummery LJ said:

> I can tell Mr and Mrs Eyers from many years of experience, not just in this court but in other courts, that appeals against costs hardly ever succeed, for the reason that it is the judge who is dealing with the case to decide what is fair about costs. This court would only interfere with the appeal court if there has been an error of law, and there has been no error of law in this case.

12. I also bear in mind *English v. Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605 [2002] 1 WLR 2409 where it was said that it is necessary for a judge to give reasons, but that the reasons do not need to be given in full.

13. The reason why costs appeals rarely succeed is relatively easy to understand. An appeal court cannot put itself in the position of the trial judge, who, as in this case, heard a trial lasting several days, and inevitably knew much more about the progress and conduct of the case than can possibly be learnt on an appeal. Counsel on appeal can do no more than show to the court selected highlights or soundbites, which appear to favour their case. Only the trial judge will have sufficient feel for the overall conduct of the case fairly to deal with costs.

14. Mr Johnson QC drew my attention, by way of analogy, to the principles to be applied in relation to appeals on fact, as set out by Morgan J in the present case at paragraphs 15 to 17. Whilst not precisely analogous, there is a helpful summary of the relevant principles in *Fage UK Ltd v Chobani UK Ltd* [2014] ETMR 26 at [114], provided by Lewison LJ. Most pertinent to the present case is the following:

> (iv) in making his decisions the trial judge will have regard to the whole sea of evidence presented to him where whereas an appellate court will only be island hopping.
> (v) the atmosphere of the court room cannot, in any event, be recreated by reference to documents including transcripts and evidence
> (vi) thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

15. Mr Johnson cautioned the court against the' island hopping' in the present case – as an appeal court could not possibly acquire the overall knowledge of the case possessed by HHJ Parfitt when making his costs decision.

16. In this case ground 10 faces a double hurdle. First, there is the difficulty that costs appeals are appeals from the discretion of the judge. Secondly, Mr Wignall explained that the complaint concerning the costs order depended on the question whether the judge wrongly weighed the relevant factors, when concluding that the decision to join the Fourth Defendant was reasonable. That is a challenge to a multi-factorial value judgment. There are many warnings in case law, at the highest level, that an appellate court should not interfere, not only with findings of fact by trial judges unless compelled to do so, but also with the evaluation of those facts and inferences to be drawn therefrom; see for example *Biogen v Medeva plc* [1997] RPC 1 *per* Lord

Hoffman. A decision as to whether a course of action was reasonable is a typical example of a multi-factorial evaluation.

Mr Wignall's submissions

17. Even though an appeal of this nature faces particular difficulties, the submissions made by Mr Wignall as to why the judge's order was wrong require careful consideration. His points may be summarised as follows:

    i) the real problem is that the judge's decision is unbalanced. This is a case where the court should intervene as the end result is not just;

    ii) in weighing the various factors before him, the judge gave insufficient weight to the basis for the joinder of the two sets of defendants and too much weight to matters as they developed during the course of the litigation, in particular to matters of conduct;

    iii) as to joinder, the Claimant had made a claim at the commencement of the proceedings for breach of covenant and nuisance against the Fourth Defendant. HHJ Parfitt rejected the claims in both contract and nuisance at paragraphs 198 - 199 of his judgment as did Morgan J. The Claimant argued before Morgan J that the Fourth Defendant had participated in a nuisance, but Morgan J held that HHJ Parfitt had been right to hold that that the Fourth Defendant was liable neither a nuisance nor for a breach of covenant; see in particular paragraphs 116 - 118, 124 - 125 and 132 - 133

    iv) The Claimant also joined the Fourth Defendant to the proceedings in order to ensure that an appropriate remedy would be obtained on success as against the First to Third defendants. This joinder was strictly speaking unnecessary at the commencement of the proceedings, because Fourth Defendant could have been expected to provide the appropriate licence.

    v) The Claimant could only succeed against the Fourth Defendant if she succeeded in her case against the First to Third defendants. So it was not necessary to make claims in nuisance and in contract against the Fourth Defendant as well as against the First to Third defendants. In making those claims, the Claimant should have reckoned that the ordinary instance of costs would mean that she could not expect to recover the costs incurred in the claim against the Fourth Defendant from the other Defendants.

    vi) The decision to make a claim in nuisance added substantially to the costs, since, as HHJ Parfitt found it was reasonable for the Fourth Defendant to have participated in the challenge that they had in fact been a nuisance. Therefore, it is said that it is unfair for the First to Third defendants have to meet these costs, which need not have been incurred, even if joinder had been restricted to adding Fourth Defendant as a party for the purposes only remedy

    vii) As to matters as they developed during the course of litigation, it is said that the learned judge gave too much weight to these issues, namely the fact that the two claims were bound up with each other and issues relating to the requirement for a licence.

viii) Finally, Mr Wignall suggested that, whilst there are no hard and fast rules when it is appropriate to make a *Bullock* or *Sanderson* order, there must be a principled approach, otherwise that would be a lack of restraint as joinder of defendants. It is said that HHJ Parfitt failed to assess the relevant facts with sufficient rigour.

18. In my view, and having carefully considered all of the judgments in this case, I should not interfere with the *Bullock* order made by Judge Parfitt. HHJ Parfitt said, rightly, that it was appropriate and meaningful to stand back. In my view, he was entitled, and indeed obliged not only to take into account the reasonableness of the initial decision by the Claimant to join the Fourth Defendant as a party to the action, but also the entire conduct of the proceedings. Had he not done so, he could potentially have ignored factors of relevance to the order that he was asked to make.

19. Furthermore, it is worth reiterating what HHJ Parfitt said at paragraph 29 of his judgment on costs.

> "29. I agree with Mr Johnson for the claimant, that it is a case where it is appropriate and meaningful to step back and look at the overall position. And the overall position, it seems to me, without any doubt at all, is that it is the first to third defendants' conduct, both prior to these proceedings and indeed during the course of them, in particular conduct in relation to not making what I regard as reasonable actual offers, that has led to the dispute and led to the litigation happening in the way that it has done. If permission had been properly obtained none of this would have occurred."

20. The Judge was entitled to reach that conclusion. I have been shown extensive material including the Opening and Closing Submissions of counsel for the First to Third Defendants and the First to Third Defendants' Defence to a Part 20 Claim brought by the Fourth Defendant where the First to Third Defendants sought to blame the Fourth Defendant.

21. In circumstances where the First to Third Defendants sought to blame the Fourth Defendant, it was perfectly reasonable to have joined the Fourth Defendant and to head off the possibility that the arguments of the First to Third Defendants might succeed.

22. I recognise that this is a very important case for the First to Third Defendants. I have been told that the costs of the Fourth Defendant amount to about £400,000, although I say nothing about the quantum of costs that will be recovered on a detailed assessment. In my judgment it is not appropriate to interfere. The judgment was well within the reasonable ambit of the judge's discretion. I therefore dismiss the appeal on Ground 10.

The Claimant's appeal

23. I turn to the Claimant's application for a *Bullock* order in respect of the costs of her own appeal.

24. Mr Johnson submits the Claimant chose to appeal on a 'protective' basis. Had the First to Third Defendants succeeded in blaming the Fourth Defendant, and had the appeal court accepted this attribution of blame, then without such a protective appeal, the Claimant would have lost.

25. I do not accept this. The Claimant could have chosen to rely upon the reasoning of HH J Parfitt, which was compelling, and was supported in its entirety by the judgment of Morgan J. Not to do so, and to launch its own appeal was a decision which I understand, but which nonetheless carries with it costs consequences. The Claimant's appeal was unsuccessful. This is not a case where a *Bullock* order should be made. Costs should follow the event, as decided by Morgan J.