Neutral Citation Number: [2024] EWHC 397 (Ch)

Case No: PT-2024-BRS-000009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 23 February 2024

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

COTHAM SCHOOL	**Claimant**
- and -	
(1) BRISTOL CITY COUNCIL	**Defendants**
(2) KATHARINE WELHAM	
(3) BRISTOL CITY COUNCIL	

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- -

Ashley Bowes (instructed by **Harrison Grant Ring**) for the **Claimant**
Douglas Edwards KC and Michael Feeney (written submissions only, instructed by **Bristol City Council Legal Department**) for the **First Defendant**
Andrew Sharland KC (instructed by **Direct Access**) for the **Second Defendant**
Paul Wilmshurst (instructed by **Bristol City Council Legal Department**) for the **Third Defendant**

Consequential matters, dealt with on paper

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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 revised version as handed down may be treated as authentic.

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 12:30 pm on 23 February 2024.

HHJ Paul Matthews :

INTRODUCTION

1. On 2 February 2024 I handed down my judgment following a directions hearing in this matter. This is publicly available, and bears neutral citation number [2024] EWHC 154 (Ch). I had intended to deal with consequential matters at the hand-down, but the parties persuaded me that I should instead deal with them on paper subsequently, and I set a timetable for doing so. I therefore received and considered written submissions from the parties on questions of (i) the costs of the directions hearing, and (ii) an appeal to the Court of Appeal.

2. As I said in my earlier judgment, the claim itself is one brought under CPR Part 8 for an order amending the commons register kept by Bristol City Council ("the City Council"), in its capacity as commons registration authority for Bristol. The purpose of the proposed amendment is to delete the entry relating to land known as Stoke Lodge playing fields ("the land"), in north-west Bristol. This was registered as a town green in August 2023, after an application for that purpose by the second defendant, who is a local resident. The claimant is an academy school, which in 2011 was granted a long lease of the playing fields by the freeholder, the City Council, for school use.

3. My directions dealt with two main matters. The first was the fact that the City Council appeared twice on the record, once in its capacity as commons registration authority, and a second time as freeholder of the land. It had filed two (inconsistent) acknowledgments of service. I decided that it should appear only once, that the two acknowledgments of service should be withdrawn, and that it should file a single acknowledgment in substitution. The second matter was that of limiting the claimant's liability for costs. I decided that the claimant was not entitled to any such limitation, whether under (i) CPR Part 46 (the Aarhus Convention rules), (ii) the protective costs order jurisdiction under section 51 of the Senior Courts Act 1981 and the principle in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600, or (iii) the "costs-capping" rules in CPR rule 3.19.

COSTS

General

4. I deal first with the question of costs. As I have said in other cases, the rules on costs are well known, and they are set out in the legislation and in many court judgments. The following words are therefore largely borrowed from earlier decisions of mine. Under the general law, costs are in the discretion of the court: Senior Courts Act 1981, section 51(1); CPR rule 44.2(1). If the court decides to make an order about costs, the general rule is that the unsuccessful party in the proceedings pays the costs of the successful party: CPR rule 44.2(2)(a). However, the court may make a different order: CPR rule 44.2(2)(b). In deciding whether to make an order, and if so what, the court will have regard to all the circumstances, including conduct of all the parties and any admissible offer to settle the case (not falling under CPR Part 36) which is drawn to the court's attention: CPR rule 44.2(4).

5. If the general rule applies, it requires the court to ascertain which is the "successful party". In *Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd* [2004] 2 Lloyd's Rep 119, Rix LJ (giving the judgment of the Court of Appeal) said (at [143]) that the words "successful party" mean "successful party in the litigation", not "successful party on any particular issue". As a general proposition, the courts prefer to make costs orders covering the entire action (even if then extending only to a proportion of costs), rather than issue-based costs orders. But it is clear that the court may still make an issue-based order if it considers that this better meets the justice of the case.

Orders sought

6. The second defendant seeks an order that the claimant pay its costs of the costs aspects of the hearing, and an order that the City Council pay its costs of the parties aspect of the hearing. There is a schedule of costs. The sums claimed (exclusive of VAT) are all attributable to the fees of leading counsel instructed by direct access. They amount to £23,000 (£3,000 for drafting a witness statement and £20,000 for the hearing) on the costs aspects, and £5,000 (for the hearing) on the parties aspect. The claimant resists the first application, and the City Council resists the second.

The costs aspects

7. As to the costs aspects, the second defendant says she is the successful party, having defeated the claimant's three applications. In relation to the second and third, dealing with protective costs orders and costs capping orders, she says that the general rule in CPR rule 44.2(2)(a) applies, although "the court may make a different order" (rule 44.2(2)(b)). She says there is no good reason not to apply the general rule.

Aarhus Convention rule

8. The rules are framed differently in relation to the first application, dealing with the Aarhus Convention, because CPR rule 46.28(3)(a) provides that in these circumstances the court "shall make no order for costs in relation to" the application, "except for good reason". So, the default position is the other way round. But the substantive test to be applied for not following the default position is in effect the same, namely that there is a good reason not to do so.

The Lewis case

9. The claimant refers me to the decision of Eyre J in *R (Lewis) v Welsh Ministers* [2022] EWHC 450 (Admin). The claimant sought judicial review of the defendants' planning decision on three grounds. Permission was refused on all three grounds on paper, and then again after an oral renewal of the application. One of the three grounds was held to be a claim within the Aarhus Convention. The question was whether the default costs rule under the Convention applied to all three grounds.

10. The judge said:

> "34. I am satisfied that if the limit imposed by Pt 45.43 applies to a claim then it applies to the entirety of the claim and that it is not open to the court to find that the limit applies to some elements of a claim and not others. Accordingly, I reject the Defendant's contention (adopted as a fall-back position by the Interested

> Party) that Grounds 1 and 2 should be treated differently from Ground 3 and that the costs attributable to those grounds were outside the costs limit. I do so because such an approach would not be compatible with the references in Pt 45 section VII to 'a claim' and 'the claim'. It would also not be compatible with the fact that there is a single claim for judicial review albeit one in which more than one ground is advanced for the granting of that relief."

11. Accordingly, the claimant in the present case says that the Aarhus Convention default costs rule should apply across the board, to all three costs applications. I do not agree. In the *Lewis* case the claimant made a single judicial review claim, in which she sought only one kind of relief, namely that the defendants' decision be quashed. She did so on three grounds, but each of them was directed towards the same relief.

12. In the present case, the claimant made three different applications for three different kinds of relief, namely a costs cap under the Aarhus Convention, a protective costs order under section 51 of the 1981 Act, and a costs capping order under CPR rule 3.19. Each of those is an application for a different kind of relief with a different set of rules and a different extent of protection. The protection of the Aarhus Convention extends to claims argued to fall within the convention. It does not extend to claims argued to fall within the *Corner House* principles or the rule 3.19 jurisdiction.

Disapplying the default rule

13. But there is another point. Here the second defendant says there is good reason *not* to apply the default rule even under the Aarhus Convention jurisdiction, both because the application was bound to fail and because the claimant and its lawyers conducted the case unreasonably. As to the former, the second defendant says that she wrote to the claimant on 6 December 2023, setting out very fully why all three costs capping applications were bound to fail. She further says that these arguments "were subsequently broadly adopted by the court in its judgment". (She does not mention, so I will, that she also made a detailed argument that the claimant was not a "member of the public" for this purpose, which I held was wrong.)

14. Importantly, the letter offered the opportunity to the claimant to withdraw the claim on the basis of no order as to costs, and indicated that, if the opportunity were not taken, the second defendant would seek her costs, notwithstanding rule 46.28(3)(a). This offer was not however accepted by the claimant. It may be noted in passing that the City Council, having received the same letter, wrote that:

> " … we too have reservations concerning the availability in principle of protection under the Aarhus Convention in respect of a claim made under s.14 of the Commons Act 2006, essentially for the same reasons as are set out in your letter."

15. The allegations of unreasonable conduct of the litigation by the claimant are set out in detail over some three pages of the second defendant's (nine page) original cost submissions. They include allegations that it (i) failed to send a pre-action protocol letter, (ii) failed to set out the basis of the claim in the claim form, (iii) failed to make a proper application for costs protection, (iv) adopted a scattergun approach to costs applications, (v) made wrong assertions as to (a) the scope of CPR rule 5.4C, and (b) the need for a written undertaking to give effect of CPR rule 32.12, (vi) threatened the

second defendant with an adverse costs order if she did not sign a draft consent order sent to her on the afternoon of 19 January 2024 (by which time she had served her skeleton argument and the brief fee had been incurred), and (vii) "claimed what appeared to be very inflated costs for the hearing".

16. The claimant denies all these allegations, again in some detail, over some three pages of the claimant's submissions in answer. The second defendant then returns to the fray by revisiting all these allegations again, over four pages this time, in its reply submissions. This kind of paper arm wrestling is of very little assistance to me. It is obvious that I cannot determine disputed matters of fact in this way, and it is not a particularly good way of dealing with disputed points of law. All it does (on both sides) is put up the costs for the clients. Perhaps they like to see their lawyers shout at each other. I do not. It is a waste of time and money.

The scope of rr 5.4C and 32.12

17. Because the point has been raised, I will however add this in relation to the allegation of wrong assertions as to (a) the scope of CPR rule 5.4C, and (b) the need for a written undertaking to give effect of CPR rule 32.12. As I understand the matter, rule 5.4C is concerned with the rights of a third party to obtain copies of court documents from the court. It is not concerned with the circumstances in which it would be lawful for a party to proceedings to provide a copy of a document filed in those proceedings to a third party.

18. Whether the respondent to an application may pass to a third party a copy of the evidence filed by the applicant in support of the application is a quite different matter, generally governed by CPR rule 32.12. That rule applies to the recipient of a witness statement without the need for him or her to give any undertaking to that effect. The obligation set out in the rule attaches automatically.

Discussion

19. I return to the main question. In my judgment, if any of the allegations made by the second defendant against the claimant were substantiated, it would tend to show that the litigation was not being properly conducted in this or that respect. But it would not automatically follow that the litigation was not being properly conducted at all, or that a good reason would have been shown to reverse the default position on the Aarhus Convention application.

20. These matters are undoubtedly annoying but, in my judgment, with the possible exception of the first, they are of relatively little weight in deciding that a good reason has been shown within the rule to make the claimant pay. They are the kind of thing that regrettably happens time after time in modern litigation practice. Judges do not like it, but I am afraid that we have come to expect it, at least now and again.

21. I said that the failure to send a pre-action protocol letter was a possible exception. This is because the (unnumbered) Practice Direction – Pre-Action Conduct and Protocols emphasises the importance of following the protocols. Moreover, paragraph 13 expressly provides that

> "The court will take into account non-compliance … when making orders for costs (see CPR 44.3(5)(a)). The court will consider whether all parties have complied in substance with the terms of the relevant pre-action protocol or this Practice Direction and is not likely to be concerned with minor or technical infringements … "

22. In the present case, however, there was no applicable protocol, and so the obligation under the practice direction was simply to "exchange correspondence and information to comply with the objectives in paragraph 3, bearing in mind that compliance should be proportionate". It appears that there had been correspondence between the parties, but the second defendant says it was only concerned with the judicial review claim. This seems to me to be a storm in a teacup, and, since I am not satisfied that any material prejudice has occurred, I do not think it is worth taking any further.

23. However, I think the matter is otherwise in relation to the failure of the claimant to heed the second defendant's arguments as to why there could be no Aarhus Convention protection in this case, and to accept the offer not to seek costs if the application was withdrawn. Just as CPR rule 44.2(4) provides that any admissible offer to settle the case (not falling under CPR Part 36) which is drawn to the court's attention may be taken into account by the court in deciding what costs order to make, so I think in principle a failure to accept such an offer may be taken into account in considering whether there is a good reason to order the claimant to pay notwithstanding the general rule in Aarhus Convention cases.

24. Here, the grounds on which the second defendant considered that the application would fail were set out in some detail in the letter sent to the claimant to which I have referred above. In broad terms, in my judgment I reached the same conclusion in relation to the main point, that this was not a "review under statute which challenges the legality of any decision" within CPR rule 46.24(2)(a). (I bear in mind that I held that the second defendant was wrong in her second argument, asserting that the claimant was not a "member of the public".)

25. The second defendant then made an offer which, with the benefit of hindsight, at least, was a generous one. This was to permit the application to be withdrawn without any requirement to pay her costs. In my judgment, the combination of that detailed explanation and the failure to accept the offer amount to a good reason why the claimant should pay the second defendant's costs of the Aarhus Convention component of the hearing. Accordingly, I reach the conclusion that the claimant should pay the second defendant's costs of all three of the costs aspects of the hearing.

Assessment

26. As I have already said, the second defendant claims £23,000 plus VAT from the claimant, comprising £3000 for the witness statement and £20,000 in respect of the relevant part of the hearing. Since the matter occupied less than one day in court time, it is appropriate for me to assess the costs summarily: see CPR PD 44 para 9.2. I was not asked to assess them on the indemnity basis, and will therefore assess them on the standard basis.

27. In assessing the costs on the standard basis, CPR rule 44.3 relevantly provides

> "(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –
>
> (a) on the standard basis; or
>
> (b) on the indemnity basis,
>
> but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.
>
> (2) Where the amount of costs is to be assessed on the standard basis, the court will –
>
> (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
>
> (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party."

28. Thus, the court will assess the costs as being those which were reasonably incurred and reasonable in amount. But, even if the costs pass those two tests, they must also pass a third, separate test, which is that they must be proportionate to the matters in issue.

29. The first question is whether it was reasonable and proportionate to incur the increased costs associated with retaining leading counsel for the purposes of this directions hearing. In my judgment it was not. That does not mean that the second defendant is not allowed to engage and pay for leading counsel. It is simply that, when it comes to assessing the costs that may be charged *to the paying party*, those costs should be assessed on the basis of counsel of appropriate seniority, and in my judgment they do not include leading counsel at all, let alone of the seniority of Mr Sharland KC. In my judgment, it would have been reasonable and proportionate for the purposes of this directions hearing to retain junior counsel of approximately 6 to 10 years call.

30. The witness statement which leading counsel drafted for the second defendant is 19 pages long, and is accompanied by an exhibit of some 24 pages. In my judgment, a reasonable sum for such junior counsel to charge for preparing such a witness statement would not exceed £1,500 plus VAT. The fee for the one-day hearing would in my judgment not exceed £6,000 plus VAT. Accordingly, I will summarily assess the costs to be paid by the claimant to the second defendant as £7500 plus VAT

The parties aspect

Interest as taxpayer

31. I turn now to consider the application of the second defendant for a costs order as against the City Council. Here I declare that I pay council tax to the City Council, and therefore potentially have a (very minor) pecuniary interest in its financial affairs.

Ordinarily even a slight pecuniary interest in the result of legal proceedings would disqualify a judge from sitting.

32. But the Senior Courts Act 1981, section 14(1), relevantly provides:

> "A judge of the [Senior Courts] … shall not be incapable of acting as such in any proceedings by reason of being, as one of a class of ratepayers, taxpayers or persons of any other description, liable in common with others to pay, or contribute to, or benefit from, any rate or tax which may be increased, reduced or in any way affected by those proceedings."

Assessment

33. The second defendant seeks £5000 plus VAT from the City Council, on the basis that about one fifth of the day's hearing was devoted to the parties aspect of the matter. On that basis, since I have held that the reasonable and proportionate fee for the hearing in relation to the costs aspects should have been £6,000 plus VAT, and those aspects occupied four fifths of the day, the reasonable and proportionate fee for the hearing in relation to the parties aspects should be £1,500 plus VAT.

34. Accordingly, I will order the claimant to pay the second defendant £7,500 plus VAT, and I will order the City Council to pay the second defendant £1,500 plus VAT. Overall therefore, the second defendant will receive £9000 plus VAT, which I consider to be a reasonable and proportionate sum for the work which her counsel did for the purposes of the directions hearing. I see no reason not to apply the usual rule in CPR rule 44.7, so that the sums are payable within 14 days.

PERMISSION TO APPEAL

General

35. The next question is permission to appeal. Any appeal from my decision on 2 February 2024 requires permission to appeal: CPR rule 52.3(1)(a). Under CPR rule 52.6, in a first appeal (such as this is) the court may not grant permission to appeal unless *either* there is a real prospect of a successful appeal *or* there is some other compelling reason why an appeal should be heard. The phrase 'real prospect' does not require a *probability* of success, but merely means 'not unreal': *Tanfern v Cameron-MacDonald* [2001] 1 WLR 1311, [21], CA; *Re R (A Child)* [2019] EWCA Civ 895, [31]. If the application passes that threshold test, however, the court is not *obliged* to give permission to appeal; instead it has a *discretion* to exercise.

36. So the test for permission to appeal depends to an extent on the test for a successful appeal. The test for a successful appeal is set out in CPR rule 52.21, which provides (in part):

> "(3) The appeal court will allow an appeal where the decision of the lower court was—
> (a) wrong; or
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

In the present case there is no suggestion of paragraph (b)'s being engaged.

This case

37. The claimant seeks permission to appeal against my decisions on (i) CPR Part 46 (Aarhus Convention costs protection) and (ii) protective costs orders under section 51 of the Senior Courts Act 1981. (It does not seek permission to appeal against my decision on (iii) the "costs-capping" rules in CPR rule 3.19.) The claimant says that, not only is there a real prospect of success on the appeal, but in any event there are compelling reasons for an appeal. The second defendant opposes the grant of permission. The City Council has expressed no view on this question.

Discussion

38. So far as concerns the Aarhus Convention, the claimant says that I was wrong to find that (a) this claim was not a "review under statute" within CPR rule 46.24(1), and (b) the decision of the City Council did not fall within Article 2 of the Convention because it was one taken in a judicial capacity. As to (a), I followed existing authority (at both first instance and appellate level) on the meaning of this phrase. As to (b), I did not decide (contrary to the submission of the claimant) that the City Council was a "judicial body". But in any event my decision on (b) was secondary, because the matter is concluded by (a).

39. In my judgment there is no real prospect of success on either (a) or (b). But even if I had thought that there were, I would have considered that it was better for the Court of Appeal to decide whether this is a matter which it wished to hear. The claimant says that there are compelling reasons for an appeal in any event, in that I have in effect found that the UK had failed to transpose international obligations into domestic law. But, on that basis, it is a matter for the legislator, and not for the judges, to resolve. This is not a compelling reason for an appeal.

40. As to the protective costs order jurisdiction, the claimant says I was wrong to say I had no power to make such an order. I consider that I was bound by the Court of Appeal's reasoning in *Venn*. It follows that I consider that there is no real prospect of success on this point, short of a decision of the Supreme Court overturning *Venn*. It would not be appropriate for me sitting here to give permission on such a speculative basis. If the Court of Appeal sees more point in it than I do, then it may decide to give permission.

41. I therefore dismiss the application for permission to appeal. This can of course be renewed before the Court of Appeal.

CONCLUSION

42. For the reasons given above, (i) I order the claimant to pay the second defendant £7,500 plus VAT, and the City Council to pay the second defendant £1,500 plus VAT, and (ii) I dismiss the claimant's application for permission to appeal. I should be grateful to receive an agreed minute of order to reflect this judgment.