Neutral Citation Number: [2022] EWHC 988 (QB)

Case No: QB-2020-602526

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 May 2022

Before:

DARRYL ALLEN QC
(Sitting as a Deputy Judge of the High Court)

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Between:

(1) ASHFORD BOROUGH COUNCIL (for and on behalf of itself, its current and former officers, employees, councillors and agents) **(2) Mrs TRACEY KERLY (for and on behalf of the current and former officers, employees, councillors and agents of the First Claimant (pursuant to CPR 19.6))**	**Claimant**
- and -	
MR FERGUS WILSON	**Defendant**

- -
- -

Mr Adam Solomon QC and Mr Samuel Davis (instructed by **the First Claimant**) for the **Claimants**
The Defendant (in person)

Hearing dates: 1 and 2 February 2021

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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.
DARRYL ALLEN QC

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 5 May 2022.

Mr Darryl Allen QC:

Background

1. This judgment deals with the issue of costs. It follows my substantive judgment in these proceedings which was handed down on 22nd September 2021 [***Ashford Borough Council and Another v Wilson*** [2021] EWHC 2542 (QB)]. The background to the proceedings and the relief granted to the Claimants are set out in that judgment. In summary, the Claimants obtained a final injunction restraining the Defendant from harassing the Claimants and those that they represent in these proceedings. The Claimants succeeded on all issues.

2. At trial, the Claimants were represented by Mr Adam Solomon QC and Mr Samuel Davis. The Defendant was represented by Mr Alexander Deakin who was instructed under the Direct Access Scheme.

3. As is routine practice with reserved judgments, on 10th September 2021, a draft judgment was circulated to all parties inviting them to identify typing corrections or any other obvious errors. At the same time they were asked to agree an order, including an order for costs, in the light of my findings. The draft judgment and my request for an agreed order were sent to all counsel, including Mr Deakin. At that stage there was no suggestion whatsoever that Mr Deakin was no longer instructed by or authorised to represent the Defendant.

4. On 15th September 2021, I received an email from Mr Davis, junior counsel for the Claimants, with a list of suggested corrections and a proposed draft order which he said the Claimants were seeking to agree with the Defendant. Mr Deakin, specifically identified as "*counsel for the Defendant*", was copied to that email.

5. Later on 15th September 2021, I received a second email from Mr Davis, again copied to Mr Deakin. That email stated,

> "*I can now confirm that the parties have agreed the attached final injunction and the final costs order in this matter. I have attached an email from Mr Deakin, counsel for the Defendant, confirming his agreement.*"

6. The final orders were attached as was the email from Mr Deakin to Mr Davis dated 15th September 2021, in which Mr Deakin stated,

> *"As discussed on the phone just now. These are agreed."*

"*These*" refers to the two proposed orders which had been sent by Mr Davis to Mr Deakin.

7. Whilst it is clear from Mr Deakin's email that as at 15th September 2021 he was employed DWF Advocacy Ltd, he was still identified as a barrister and there was no suggestion whatsoever that he was not instructed by the Defendant, that he was not authorised to agree orders with the Claimants or that he did not have instructions to agree the orders which the Claimants had in fact proposed.

8. Accordingly, as at 15th September 2021, counsel for both parties had agreed the terms of the final injunction and the final costs order.

9. The costs order which had been agreed by Mr Davis and Mr Deakin provided that the Defendant was to pay the Claimants' costs of the action, including the costs of various interlocutory hearings, on the standard basis up to 26th September 2020, and on the indemnity basis thereafter. The reason for the indemnity costs order was, as set out in the recital to the draft order, that the Claimants had obtained a judgment which was equal to or more advantageous than the terms of a Part 36 Offer they had made in writing on 4th September 2020. The proposed costs order also dealt with interest on costs, additional interest on costs and a payment on account of costs in the sum of £125,000.

10. On 20th September 2021, I received an email from Mr Deakin in which he stated,

> "*I have recently been contacted by Fergus Wilson (Defendant) who has informed me that I am no longer instructed and he does not agree to the order in respect of costs on account.*
>
> *I am without further instructions and unfortunately cannot add more.*"

11. At that stage it appeared that the only part of the draft costs order to which the Defendant objected was the proposed payment on account of costs. In a subsequent email Mr Deakin clarified his understanding of the Defendant's position,

> "*My understanding is that he disagrees with both the principle and the amount [of the payment on account].*
>
> *In terms of the rest of the costs order, he is aware of the implications of Part 36 offers, and he hasn't raised an objection to it to me*."

12. At my request, the Defendant was asked to confirm which parts of the draft costs order he agreed and which parts he did not agree. By email dated 20th September 2021, he informed the Claimants that,

> "*I would like the issue of costs dealt with by the Judge at the Royal Courts of Justice in person*."

13. By a letter dated 20th September 2021, addressed to Mr Mortimer, the First Claimant's Director of Law and Governance, the Defendant wrote,

> "*I would point out that Mr Deakin ceased to be my Barrister on 30th April 2021 when he walked out on Stour Chambers. All outstanding files etc were collected from Stour Chambers some time later. The fees were returned on 11th June 2021. Hence when you say 'Your Barrister' that is not actually the case.*
>
> *I do dispute all seven points of the [costs] Order.*

> *I do not believe there should be any Order for costs and I wish the opportunity to address the Judge in Person at the High Court. This matter could and should have been dealt with by an Application to the County Court at a cost of under £2,000.*
>
> …. ….
>
> *I turn to your second page where you say you do not accept that I am able to withdraw the agreement given by my barrister! Well, he was not my barrister after 30th April, 2021. He was not instructed! I think he should simply have said 'I am no longer instructed*.' "

14. In light of the fact that the Defendant disputed the proposed costs order, contending that Mr Deakin never had authority to agree the terms of that order, I directed that the parties were to file written submissions and any documentary evidence upon which they wished to rely in order for me to determine the following issues:

    i) Whether a costs order had been agreed?

    ii) If so, were the parties, in particular the Defendant, bound by it?

    iii) If not, what order for costs should be made?

15. I will now deal with those issues.

(1) Had a costs order been agreed?

16. Plainly the answer to that question is yes. Mr Davis and Mr Deakin had agreed a proposed order for costs on 15th September 2021. The agreed order was emailed to me to be sealed and issued. It is clear from Mr Deakin's emails that the order had been agreed by him. The real issue is whether the Defendant is bound by that agreement.

(2) Are the parties, in particular the Defendant, bound by the terms of the agreed order?

17. The Defendant has provided written submissions. They do not address this issue. The Defendant has not provided any evidence that Mr Deakin was no longer instructed by him as at 15th September 2021. He has provided no evidence that he terminated Mr Deakin's Direct Access instructions/retainer prior to 15th September 2021.

18. The high point of the Defendant's position is set out in his letter to Mr Mortimer dated 20th September 2021, quoted above. In essence, the Defendant considers that Mr Deakin was no longer "*his barrister*" after he left his Chambers at the end of April 2021.

19. The Defendant equates Mr Deakin leaving his Chambers to take up a position as an employed barrister to terminating the Direct Access instructions. That does not follow. There is no evidence that the Direct Access agreement provided that the instructions would be terminated in the event that Mr Deakin left his Chambers. There is no evidence that the Defendant terminated Mr Deakin's instructions. There is certainly no evidence that Mr Deakin considered his instructions to have been terminated. Indeed,

his participation in agreeing a list of typographical corrections and the draft orders demonstrates that he considered himself still instructed to represent the Defendant.

20. A brief to represent a client at a hearing includes receiving the judgment and drafting/agreeing any orders that flow from it. Mr Deakin's instructions/retainer extended to considering the judgment and agreeing the orders that flowed from it in this case. I have no doubt that the Defendant would have been the first to complain had Mr Deakin ignored the Court's requests for an agreed list of corrections and agreed orders.

21. Importantly, there is no suggestion or evidence that the Defendant notified the Claimants that Mr Deakin was no longer instructed, prior to sending his letter of 20th September 2021. As far as the Claimants were concerned, Mr Deakin was still instructed to represent the Defendant: all of his actions dealing with the judgment and the list of corrections, and discussing the draft orders were entirely consistent with that being the case; his email correspondence with me was also entirely consistent with that. There was no reason whatsoever for the Claimants or their counsel to suspect or question whether Mr Deakin was authorised to act on behalf of the Defendant.

22. There is no evidence that the Defendant instructed Mr Deakin not to enter into discussions or any agreement regarding the costs issues or that his authority to reach agreement on the costs issues was limited in any way.

23. The Claimants submit:

    i) it is well established that counsel has a broad general authority to bind a client;

    ii) that counsel is presumed to have authority without limitation (within the scope of the litigation);

    iii) counsel may do anything which he considers is in the best interests of his client, even if he lacks specific instructions, so long as it is directly related to the dispute before the Court;

    iv) if counsel enters into an agreement under the auspices of his apparent authority then his client is bound by that agreement.

24. They acknowledge that that analysis is subject to qualification. First, they accept that counsel's apparent authority does not extend to collateral matters not concerned with the main action. Second, they accept that counsel cannot bind his client where he has been expressly instructed not to enter into an agreement in relation to a particular issue as his actions would be *ultra vires*.

25. In my judgment, the exceptions to the general rule are a little wider than the Claimants suggest.

26. In ***Shepherd v. Robinson* [1919] 1 K.B. 474**, counsel for the defendant, believing he had full authority to do so, consented to what he considered was a favourable settlement for his client. In fact, unbeknown to counsel, the defendant had given instructions to her solicitor that the claim was to be contested. The solicitor was awaiting the defendant's instructions on the proposed compromise. Before the defendant's instructions to reject the compromise were received, counsel for the defendant had

consented to the compromise. Before judgment was drawn up and entered, the defendant applied to have the action restored. In that case, counsel had not been expressly instructed not to enter into an agreement: he was completely unaware of any restriction on his authority to do so.

27. The Court of Appeal in ***Shepherd*** upheld the Judge's decision to restore the action. Bankes LJ referred to two relevant lines of authority [477-478],

> "It is clear that counsel has an apparent authority to compromise in all matters connected with the action and not merely collateral to it; and if he acts within his apparent authority and the other party has no notice of any limitation or restriction on that authority, the client will be bound by the agreement made by his counsel and embodied in some order or judgment of the Court. If Mr. Powell could bring this case within that line of decisions I should agree that this compromise must stand.
>
> But there is a second and different line of cases which decide that before a consent order has been drawn up and perfected the consent given by counsel or solicitor may be withdrawn by the client if the counsel or solicitor gave it under a misapprehension. In such cases the Court will not proceed further with the drawing up and perfecting of the order, and will not lend its authority to compel observance of an agreement arrived at through a mistake. This is the line represented by *Holt* v. *Jesse* and by *Neale* v. *Gordon-Lennox*, where Lord Halsbury L.C. said: 'The Court is asked for its assistance when this order is asked to be made and enforced that the trial of the cause should not go on ; and to suggest to me that a Court of justice is so far bound by the unauthorized act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard.' "

28. Bankes LJ held [478-479],

> "The only question here is whether the order never having been drawn up, the facts bring the case within the class of authorities of which *Holt* v. *Jesse* is an example. In my opinion they do. Counsel acted under a misapprehension. It is immaterial whether the mistake was as to some particular matter forming part of the basis of the settlement or whether it was as to his authority to make a settlement. No order has been drawn up. The Court has been asked to give effect to a compromise consented to under a misapprehension and not yet effective. The order of Darling J. was right, and this appeal fails."

29. Warrington LJ held [480],

> "In the present case if the Court had known the facts, that the authority of counsel was limited and that counsel thought it was unlimited, the consent order would never have been made; and so the Court, having been asked, before that order has taken its final form, to restore the case to the list, is bound to grant the application. This appeal must therefore be dismissed."

30. Duke LJ held [481],

> "It is clear that counsel would never have consented to the compromise if he had known that his client had given instructions that there should be no settlement without her consent. Fortunately, the consent judgment was not drawn up and entered before that mistake was discovered. Then it follows beyond all doubt or question that the Court stays the drawing up of the order. Otherwise the Court would allow itself to be made an instrument of injustice in giving form and effect to a compromise which the parties concerned have never agreed to."

31. With reference to ***Shepherd v. Robinson***, the authors of ***Chitty on Contracts*** state [§31-013],

> "… if the consent was given under a misapprehension then it may be withdrawn before a consent order is drawn up."

32. In that case there was clear evidence that the defendant, Ms Robinson, had given clear instructions that the case was not to be compromised. The misapprehension of her counsel was his belief that he had authority to compromise the case.

33. In the instant case there is no evidence at all that the Defendant had issued instructions that Mr Deakin was not authorised to agree the draft orders or that there was any restriction at all upon what could be agreed. There is no evidence that his instructions or retainer had been terminated. As already set out above, at no stage did the Defendant notify the Claimants or the Court that Mr Deakin was no longer acting for him.

34. In my judgment, Mr Davis and Mr Deakin agreed the costs order which was entirely consistent with and within the ambit of their apparent authority. The parties are bound by that agreement. This is not a case in which the Court should exercise its discretion to permit the Defendant to withdraw from that agreement.

(3) What order for costs should be made?

35. This issue only arises if I am wrong on issue (2). For completeness and in light of the fact that the Defendant has addressed this issue at length, I will give my decision as to what costs order I would have made had I been required to do so.

Defendant to pay the Claimants' costs or no order for costs?

36. The Court has a discretion as to what order to make in relation to costs. That discretion is exercised taking all relevant circumstances into account. In this case those circumstances include the following:

    i) The Claimants have succeeded on all of the key issues.

    ii) The Claimants have obtained the relief they sought. The only relief not obtained was an additional restriction upon the Defendant issuing proceedings against the Claimants in the Magistrates Court without the permission of a High Court Judge. That was only sought at the hearing and did not form part of the original claim.

iii) The Claimants made a Part 36 Offer on 4th September 2020, by which they offered to accept undertakings restraining the Defendant from harassing the Claimants together with payment of their costs up to that date.

iv) Those undertakings mirrored the terms of the final injunction which the Claimants obtained following my judgment. The judgment and order obtained by the Claimants were at least as advantageous as the terms of their Part 36 Offer.

v) At that stage, the Claimants' costs were estimated to be £56,000, with a prediction that they would be in the region of £126,000 at the conclusion of a trial.

vi) The Claimants' letter of 4th September 2021, explained very clearly the potential consequences if the Defendant rejected the offer but the Claimants obtained a judgment which was equal to or more advantageous than their offer. The letter enclosed Part 36 of the Civil Procedure Rules and expressly encouraged the Defendant to take "*immediate*" legal advice about the offer.

vii) Prior to the commencement of proceedings the Claimants had repeatedly warned the Defendant that his conduct amounted to harassment and invited him to (i) end the harassment, and (ii) adopt the suggested single point of contact mode of communication. Had he done so then these proceedings and the legal costs would have been avoided. The Defendant unreasonably failed to agree to either proposal.

viii) The Claimants' case was strong, clearly pleaded and fully explained from the outset.

ix) Although acting without solicitors, the Defendant instructed counsel to represent him at an early stage and at the final hearing. He has had the benefit of legal advice and representation during the proceedings.

x) As set out in my substantive judgment, the Defendant breached the terms of the interim injunction issued by HHJ Auerbach prior to and following the trial [see §105 and §114].

xi) The Defendant issued two applications which were deemed to have been totally without merit [see judgments and orders of Master Cook and Mr Justice Martin Spencer].

xii) The Defendant made no proposals to resolve the proceedings to avoid the cost of a trial.

xiii) The Defendant's conduct of these proceedings has already resulted in two orders for indemnity costs against him [see judgments and orders of Master Cook and Mr Justice Martin Spencer];

xiv) The Defendant failed to pay the costs which Master Cook ordered him to pay.

37. The general rule is that the unsuccessful party pays the successful party's costs [see CPR 44.2(2)(a)]. Clearly the Claimants were the successful party. All of the factors

and circumstances set out above strengthen the argument that the Defendant should pay the Claimants' costs. However, the Defendant submits that he should not be required to do so; he says there should be no order for costs. His reasons are as follows:

i) The Claimants could have issued these proceedings out of the County Court at substantially lower cost.

ii) The case did not require the instruction of Leading Counsel.

iii) The proceedings were "*motivated by spite and vexatious*".

iv) Preparation of the First Claimant's case has been undertaken by Ms Clarke and, according to the Defendant, she is not allowed to charge for her work. He continues to make the allegation that Ms Clarke cannot conduct litigation and that it is a criminal offence for her to do so.

v) The Claimants cannot have considered these proceedings to be urgent given their delay in commencing them.

vi) The Claimants have taken "*a Sledge-Hammer to knock in a Tin Tac*".

vii) Any order for costs should be stayed until after the appeal which he intends to bring.

38. The vast majority of the Defendant's submissions go to the amount of costs, not what costs order should be made. In my judgment the Defendant's submissions are without foundation. My findings are:

i) These proceedings were not "*motivated by spite*" or "*vexatious*". They were perfectly proper proceedings designed and intended solely to protect the welfare of the First Claimant's current and former officers, employees, councillors and agents.

ii) Had the Claimants not issued these proceedings then they could have been vulnerable to criticism or complaint from those officers, employees, councillors and agents for failure to take necessary action.

iii) The Claimants' delay in issuing proceedings is to their credit rather than a criticism. They warned the Defendant on numerous occasions of their concerns about his behaviour and correspondence, they invited him to desist and offered a method for him to communicate with them using the single point of contact. They issued proceedings as a last resort, having failed to persuade the Defendant to stop.

iv) It is a significant step for a public body, particularly a local council, to seek an injunction restraining the behaviour of one of its residents. In my judgment it is was appropriate to issue proceedings in the High Court and to instruct Leading Counsel. In any event, those factors go to the level of costs, not the incidence of costs.

39. In my judgment the correct order for costs in this case is for the Defendant to pay the Claimants' costs of the action.

Part 36 consequences

40. As set out above, the Claimants have obtained a judgment which is at least as advantageous as the terms of their Part 36 Offer dated 4th September 2021. CPR 36.17 provides that in those circumstances,

> (4) Subject to paragraph (7), …. …, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—
>
> (a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
>
> (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
>
> (c) interest on those costs at a rate not exceeding 10% above base rate; and
>
> (d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—
>
> (i) the sum awarded to the claimant by the court; or
>
> (ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

Amount awarded by the court	Prescribed percentage
Up to £500,000	10% of the amount awarded
Above £500,000	10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure.

> (5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—
>
> (a) the terms of any Part 36 offer;
>
> (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
>
> (c) the information available to the parties at the time when the Part 36 offer was made;

(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and

(e) whether the offer was a genuine attempt to settle the proceedings.

41. CPR 36.17 states that the Court "*must*" make the specified order unless it considers it "*unjust to do so*". In my judgment it would **not** be unjust to do so:

i) The Claimants' Part 36 Offer was clear. The potential consequences of rejecting that offer were fully explained and the Defendant was encouraged to take independent legal advice.

ii) The offer was made well in advance of the trial at a time when the Defendant was fully aware of the strength of the case against him. The Claimants had already obtained the interim injunction from HHJ Auerbach.

iii) At no stage did the Claimants withhold, refuse or fail to give information which would enable the Defendant to consider the offer. In fact, the Claimants warned the Defendant of the potential costs which would be incurred if the case went to trial, which could be avoided if the offer was accepted.

iv) The offer was an entirely genuine attempt to settle the proceedings. Its only purpose was to reach an acceptable outcome which prevented the Defendant from harassing the Claimants.

v) All of the factors identified at §36 and §38 strengthen the argument that the consequences set out in CPR 36.17(4) should be applied.

vi) I see no basis upon which to criticise the conduct of the Claimants or their representatives.

42. For the reasons given, all of the consequences under CPR 36.17 apply in this case. They are:

i) Costs on the indemnity basis from 26th September 2020[1] [per CPR 36.17(4)(b)];

ii) Interest on those costs at a rate not exceeding 10% above base [per CPR 36.17(4)(c)];

iii) An additional amount of 10% of the sum awarded to Claimants in respect of costs [per CPR 36.17(4)(d)(ii)].

43. In my judgment the appropriate rate of interest would be 10% above base rate

44. Costs should be subject to detailed assessment. This is not a case in which a summary assessment is appropriate.

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[1] Costs up to 26th September 2020 would be payable on the standard basis.

Interest on costs prior to 26th September 2020

45. Enhanced interest under CPR 36.17 only applies to the costs to be paid on the indemnity basis from 26th September 2020 onwards. The Claimants seek an order for interest on costs incurred prior to that date, which are to be paid on the standard basis, at the judgment rate of 8% per annum.

46. I agree. The First Claimant is a public body. It has been required to fund this litigation and devote resources to the same. The litigation has been brought about solely as a result of the Defendant's conduct. As I have already found, he was given numerous opportunities to stop harassing the Claimants. He elected not to do so. In my judgment it is appropriate in this case to make an order for interest on the Claimants' costs incurred prior to 26th September 2020 at a rate of 8% per annum.

47. Had it been necessary for me to do so, I would have made the same costs order as that which Mr Deakin agreed. In my judgment, the only areas which might have been the subject of discussion were (i) whether an order for interest on costs incurred prior to 26th September 2020 was appropriate, and (ii) the amount of the payment on account of costs. For the reasons given, I would have made the orders proposed by the Claimants which Mr Deakin agreed back on 15th September 2021.

Payment on account of costs?

48. Where the Court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, "*unless there is good reason not to do so.*" [see CPR 44.2(8)].

49. The Defendant has not provided a good reason as to why I should not make that order. In the light of my findings I cannot see any good reason why I should not do so. A payment on account of costs is appropriate.

50. I am told that the Claimants' costs are approximately £170,000. I have no doubt that those costs reflect the manner in which the Defendant, rather than the Claimants, have conducted the litigation. That figure does **not** include the interest, the additional interest or the additional amount of 10% of the costs awarded which I have ordered are to be paid under CPR 36.17.

51. The Claimants argue that £125,000, just under 75% of their estimated costs of £170,000, represents a reasonable sum. I agree. The majority of the Claimants' costs are to be assessed on the indemnity basis. Had it been necessary to do so I would have ordered a payment on account of costs in the sum of £125,000.

The Defendant's request to stay any costs order pending appeal

52. It is a matter for the Defendant whether to appeal my judgment. He has not applied to me for permission to appeal. In my judgment, there is no realistic prospect of an appeal succeeding. On that basis I see no justification for staying the costs order. In the unlikely event that the Claimant successfully appeals my judgment or the costs order then the Claimants will be in a position to repay the payment on account or any other costs paid by the Defendant.

Final costs order

53. A copy of the final costs order is attached to this judgment.