



Neutral Citation Number: [2020] EWCA Civ 1378

Case No: C1/2019/2768

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Her Honour Judge Evans-Gordon (sitting as a judge of the High Court)
CO/4445/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2020

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE SINGH
and
LORD JUSTICE POPPLEWELL

Between :

THE QUEEN (ON THE APPLICATION OF EASTER)

First
Respondent

- and -

(1) MID-SUFFOLK DISTRICT COUNCIL

Second
Respondent

(2) DEBENHAM ANTIQUES LTD

Appellant

Mr Timothy Straker QC (instructed by Sharpe Pritchard LLP) for the Appellant
Ms Victoria Hutton (instructed by Attwells Solicitors) for the First Respondent
Mr Robin Green (instructed by The Solicitor, Mid-Suffolk District Council) for the Second Respondent

Hearing date: 13 October 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10 a.m. on Tuesday, 27 October 2020.

Lord Justice Singh :

Introduction

1. This is an appeal against a costs order requiring the Interested Party, Debenham Antiques Limited, to pay the costs of the Claimant from 5 February 2019, which was part way through proceedings for judicial review in the Administrative Court brought by her against the local planning authority, Mid-Suffolk District Council.
2. In the underlying proceedings the Claimant challenged the grant of planning permission by the Defendant to the Interested Party. Those proceedings were ultimately disposed of by way of a consent order approved by the Court, which led to the claim for judicial review being allowed, but that left the issue of costs to be determined.
3. For ease of exposition I will refer to the parties as Claimant, Defendant and Interested Party, as they were in the original proceedings, although it is the Interested Party which is the Appellant before this Court and the other parties are Respondents.

Factual Background

4. On 8 November 2018, the Claimant, Cheryl Easter, applied for judicial review of the planning permission granted to her neighbour, the Interested Party, by the Defendant. Both the Defendant and the Interested Party were deemed to be served on 12 November 2018. The deadline for acknowledgement of service was 3 December 2018. This was not complied with.
5. On 29 November 2018, the Defendant confirmed that it would concede the claim on one ground, which was Ground 4 in the claim and which concerned a breach of the duty to give reasons. On 4 January 2019 the Interested Party contacted the Defendant to confirm that, having taken advice, it would not contest the claim but would not sign a consent order either.
6. Negotiations took place between the Claimant and the Defendant regarding the contents of the consent order. The fact that negotiations were still taking place meant that the order had not been submitted to the Court when the application for permission was considered on the papers by Mr John Howell QC (sitting as a deputy High Court judge) and refused by him on 23 January 2019.
7. The Claimant filed a renewal application on 30 January 2019.
8. On 31 January 2019, the Interested Party's planning consultant wrote to the Court to state that permission for judicial review should be refused and that the planning permission should not be quashed unless agreed by all parties, including the Interested Party, or at a substantive hearing.
9. On 4 February 2019, the Claimant approached the Defendant to sign a consent order to prevent the need for an oral renewal hearing. The Defendant declined to sign, citing that the Interested Party had urged it not to. The Defendant also confirmed that the Interested Party had informed it that it was now defending the claim and the matter could therefore no longer be disposed of by consent between the other parties.

10. On 5 February 2019, the Interested Party applied to the Court for permission to file and serve an acknowledgement of service out of time. The Claimant filed and served a response to that application on 11 February 2019.
11. The Claimant was granted permission to proceed with the claim for judicial review by Holgate J on 26 February 2019 at an oral hearing. It was recommended by Holgate J that the grounds of the claim should be amended. The Defendant did not participate in the hearing. The Interested Party was represented by Mr Timothy Straker QC (who has also appeared before us) and resisted the grant of permission.
12. On 8 April 2019, the Interested Party informed the Claimant that it had decided not to submit Detailed Grounds of Resistance to the claim.
13. On 18 April 2019, the Interested Party confirmed to the Defendant that it would sign a consent order as long as it included provision for there to be no costs against it.
14. On 10 May 2019, the Defendant conceded the claim based on the amended grounds of claim. A consent order was agreed between all parties and sealed by the Court on 24 July 2019, in an order made by Mr David Elvin QC (sitting as a deputy High Court judge). The consent order contained agreement between the parties that the issue of costs would be dealt with on the basis of written submissions.
15. On 13 August 2019 the Claimant filed her costs submissions. She submitted that, in the first instance, her costs should be paid by the Defendant. In the alternative, she submitted that the costs incurred up to 5 February 2019 should be paid by the Defendant and that the costs incurred after that date should be paid by the Interested Party.
16. On 22 August 2019, the Defendant submitted its response to the Claimant's costs submissions, stating that it should only be responsible for the costs which were incurred in pursuit of the claim against it, but not for costs incurred in dealing with the Interested Party.
17. The Interested Party filed costs submissions, in which it stated that at no point had it taken the risk of defending the Defendant's decision. It also submitted, that once permission had been refused by Mr John Howell QC, an oral hearing was bound to follow to allow proper scrutiny of any application to overturn that decision and that it could not be said that the actions of the Interested Party caused an increase in costs.
18. On 16 October 2019, HHJ Evans-Gordon (sitting as a judge of the High Court) ordered that the Defendant should pay the Claimant's costs up to 5 February 2019 and that the Interested Party should pay her costs incurred after that date. Those costs were summarily assessed in the sum of £19,338.84.
19. On 6 February 2020, permission to appeal against that order to this Court was granted on the papers by Lewison LJ.

Grounds of Appeal

20. **Ground 1:** HHJ Evans-Gordon erred in holding that the oral hearing before Holgate J and preparation for it were consequential on the position taken by the Interested Party.

21. **Ground 2:** HHJ Evans-Gordon erred in determining that costs incurred after the hearing before Holgate J were the result of the Interested Party's actions. The Interested Party agreed to sign a consent order on 18 April 2019, whereas the Defendant did not agree to do so until 10 May 2019.
22. In support of those grounds Mr Straker submits, first, that the issue of whether planning permission should be quashed cannot be consented to by a local planning authority. An order must be made by the Court. He submits that the application for such an order can only be granted at an oral hearing if it has been refused on the papers at first, as occurred in this case. Therefore it was not the opposition of the Interested Party that created the need for an oral hearing and preparation for that hearing.
23. Further, he submits, the Interested Party agreed to sign the consent order on 18 April 2019, whereas the Defendant only consented on 10 May 2019. Therefore, it was not the actions of the Interested Party alone that resulted in the costs that were incurred after the date of 5 February 2019.

Analysis

24. The essential reasoning of the Judge for making the costs order which she did appears at paras. 9 and 11 of her reasons:

“9. In my judgement the Defendant should be liable for the Claimant's costs up until 5th February 2019. As the Claimant points out, there must still be some consequential correspondence about the draft and the costs of dealing with the Court even if a claim is conceded. Further, the Defendant agreed that it was necessary for the Claimant to lodge a Renewal Notice in order to resuscitate the claim so that a consent order could be lodged. I agree that the Defendant should not be liable for the Claimant's costs of dealing with the IP; however, those dealings do not seem to have become significant until 5th February 2019. While there were some costs incurred in relation to the IP prior to 5th February 2019 the Defendant also caused further costs to be incurred after that date when there was correspondence about the basis on which the claim was conceded. Doing broad justice, these may be set off against the costs incurred in relation to the IP prior to 5th February 2019. The Claimant was prepared to settle the claim on the basis put forward by the Defendant on 29th November 2019. It is not correct, therefore, to suggest the Defendant caused further costs to be incurred thereafter by refusing to concede all the grounds of review save those mentioned above, It was not asked to do so until 26th April 2019.

...

...

11. After 5th February it seems to me that the IP should pay the Claimant's costs because, contrary to its submissions, it plainly took on the burden of defending the claim by applying to file an AoS out of time together with summary grounds of

resistance in circumstances where the Defendant was conceding the claim, even following the refusal of permission on the papers. While it is fair to acknowledge the amendments to the grounds following the oral hearing, the fundamental grounds survived – the amendment did not amount to a wholesale replacement of the grounds. Absent the IP’s position, an oral hearing and the preparation for it are unlikely to have been necessary and the subsequent costs would have been very significantly reduced. The IP did not formally abandon its resistance until 18 April 2019. It also contributed to the delay and costs in providing a consent order prior to 23 January 2019. I do not see the relevance of the compromise of a different JR claim without a costs order against the IP as that was a different case about which I know nothing. I do not follow the point made in relation to the Consent Order of David Elvin QC. I cannot see that any part of it gives any indication as to whether or not the IP took the burden of defending the case. On the contrary, the provisions for submissions on costs make it plain that the issue was live. It is not fair to suggest that the Defendant agreed to sign a consent order after the IP as the Defendant was willing to sign the consent order agreed between it and the Claimant for some time and it was not until 26th April that the Claimant sought a different consent order. I am satisfied that the IP should pay the Claimant’s costs incurred after 5th February 2019.”

25. At the hearing before us Mr Straker subjected that reasoning, in particular para. 11, to a line by line attack. He submits that every part of that paragraph is wrong.
26. The first submission which Mr Straker makes raises a point of law, as to the correct construction of CPR Part 54. Mr Straker submits that, where permission to proceed with a claim for judicial review has been refused on the papers, a hearing on the renewed application for permission is inevitable and required by the rules. He submits that the Civil Procedure Rules do not permit permission to be granted at that stage without a hearing. For that purpose he relies on the provisions in particular of CPR 54.12(3), which provide:

“Subject to paragraph (7), the claimant may not appeal but may request the decision to be reconsidered at a hearing.”
27. Paragraph (7) is immaterial to the present case: that concerns the situation where the Court refuses permission to proceed with a claim for judicial review and records the fact that the application is totally without merit, in which case the claimant may not request that the decision be reconsidered at a hearing.
28. Both Ms Victoria Hutton (who appeared before us for the Claimant) and Mr Robin Green (who appeared for the Defendant) accept that, where permission has been refused on the papers, an application to renew it must be made (within seven days after service

of the reasons for refusal: see CPR 54.12(4)). They dispute, however, the proposition that there must necessarily then be a hearing. I would accept their submissions. There are two ways to reach that result.

29. The first route is through CPR 54.18, which provides:

“The Court may decide the claim for judicial review without a hearing where all the parties agree.”

30. I would accept the submission advanced in particular by Mr Green that the phrase “claim for judicial review”, as defined by CPR 54.1(2)(a), is a broad one: it means a claim to review the lawfulness of (i) an enactment; or (ii) a decision, action or failure to act in relation to the exercise of a public function. It is not necessarily confined to the substantive hearing in a claim for judicial review but refers to every step of the procedure from the time when the claim is first commenced until it is finally disposed of. That construction derives some support from the wording of CPR 54.4, which provides:

“The Court’s permission to proceed is required in a claim for judicial review whether started under this Section or transferred to the Administrative Court.”

That provision envisages that the permission stage is simply a step “in a claim for judicial review”. This supports the proposition that “a claim for judicial review” is not necessarily confined to the substantive hearing in such a claim.

31. Secondly, and in any event, I would accept the submission made in particular by Ms Hutton. She relies on the terms of CPR 40.6. Paragraph (1) provides that that rule applies where all the parties agree the terms in which a judgment should be given or an order should be made. Paragraph (2) addresses the situation where a Court Officer may enter and seal an agreed judgment or order in the circumstances which are then set out in particular at paragraph (3). That does not restrict the generality of Rule 40.6. In particular, paragraph (5) provides that, where paragraph (2) does not apply, “any party may apply for a judgment or order in the terms agreed.” Paragraph (6) then provides that:

“The Court may deal with an application under paragraph (5) without a hearing.”

32. There is no reason to give the provisions of Rule 40.6 a restrictive meaning. On their face they include claims for judicial review. I can see no good reason why they should not permit a consent order to be made in circumstances where, although permission has been refused on the papers, the parties are agreed that permission should be granted without a hearing.

33. That construction of the Civil Procedure Rules is reinforced when one recalls the overriding objective, the need to determine cases justly and at proportionate cost: CPR 1.1. As CPR 1.4(1) makes clear, the Court must further the overriding objective by

actively managing cases. Active case management includes helping the parties to settle the whole or part of the case: CPR 1.4(2)(f); and, where appropriate, dealing with the case without the parties needing to attend at court: CPR 1.4(2)(j).

34. This also accords with what is clearly good practice in the Administrative Court. Although Mr Straker focuses his submissions understandably on a situation like the present, where there is an interested party, typically the beneficiary of the grant of some permission or licence by a public authority which is then challenged by a third party, his submissions about the correct construction of CPR Part 54 would apply equally to the more routine case, where there is no interested party but only the person who is the immediate subject of a decision by a public authority. I can see no good reason why, in such a case, the parties should not be able to agree that permission should be granted even though it has been refused on the papers without the need for a hearing. Indeed, in practice, an agreement that a substantive claim for judicial review should be allowed without a hearing, which on any view Mr Straker accepts can be done under CPR 54.18, will have to include the grant of permission. This is because the substantive claim for judicial review requires permission to be granted: see section 31(3) of the Senior Courts Act 1981, which provides (still using the original terminology, which pre-dates the linguistic changes made by the Civil Procedure Rules in 1998) that “[n]o application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court ...”.
35. Next, I would refer to the fact that the discretion which is enjoyed by a Judge when dealing with costs applications under CPR Part 44 is a broad one. In deciding what order (if any) to make about costs, the Court will have regard to all the circumstances, including the conduct of the parties: CPR 44.2(4)(a). The conduct of the parties includes the manner in which a party has pursued or defended its case or a particular allegation or issue: CPR 44.2(5)(c).
36. Furthermore, it is clear that an appeal against the exercise of discretion in making a costs order will only succeed if there has been an error of principle or the result is unjust or perverse. The task of this Court is not to substitute its own opinion for that of the Judge at first instance when determining matters of costs. This has been confirmed in many cases by this Court. For present purposes it will suffice to refer to the recent judgment of Males LJ in *R (Parveen) v Redbridge LBC* [2020] EWCA Civ 194; [2020] 4 WLR 53, at paras. 23-30 and 38-42, in which earlier decisions of this Court were reviewed and summarised. Importantly, as Males LJ also said, at para. 42, a judge determining a costs issue is entitled to express her reasons shortly and an appellate court should not interfere unless it is clear that she has gone wrong. As he continued: “For rulings to become too elaborate or formulaic in an attempt to make them appeal-proof would be contrary to the interests of justice.” As it happens, in the present case, I consider that the Judge gave reasons which were more detailed than one often sees and were commendable but it is important that the task of busy judges dealing with costs applications should not become over-complicated or technical.
37. In the circumstances of this case I am unable to accept Mr Straker’s submission that the Judge either went wrong in principle or that the result was unjust or perverse. This is for the following reasons.
38. First, in my judgement, the Judge was entitled to take a common sense and realistic view of the situation. As she put it at para. 9 of her reasons, this inevitably involved

doing “broad justice” but she was well aware of the circumstances. The key point, as it seems to me, is that the Defendant was prepared to concede the case on 29 November 2018. The Claimant was prepared to settle the claim on the basis then put forward by the Defendant, which was essentially that the claim should succeed on Ground 4. Although that would not have conceded all of the grounds in support of the claim for judicial review, that did not matter in practice. At that stage, of course, the Court had not yet refused permission on the papers: that only occurred on 23 January 2019.

39. Secondly, although it is true that that decision required the Claimant to renew her application for permission, as I have said earlier that did not necessarily require a hearing to take place. It would still have been possible at that stage for the parties to agree a consent order. The representatives of the Claimant and the Defendant participated in correspondence in late January and early February 2019 with a view to achieving precisely such a consent order. The reason why it was not possible to reach agreement at that time was because the Interested Party would not agree.
40. Thirdly, on 5 February 2019 the Interested Party made an application (out of time) to file an acknowledgment of service and attached summary grounds of resistance. This was not merely a formal document. It was a substantive document, which took issue with the grounds which the Claimant wished to advance in support of her claim for judicial review. The Judge was perfectly entitled to conclude that, from this point in time, in substance it was the Interested Party which had taken on the burden of defending the claim, since the Defendant never filed an acknowledgement of service and indeed was prepared to concede the case.
41. Fourthly, in my view, the Judge was entitled to reach the conclusion (at para. 11 of her reasons) that “the fundamental grounds survived” the process of amendment which followed after Holgate J granted permission at the hearing on 26 February 2019. The original grounds were not abandoned, although to some extent they were merged and an additional ground was added.
42. I also bear in mind that, at that hearing, only the Interested Party appeared, in order to resist the application for permission. Mr Straker himself appeared on its behalf and vigorously contested the grounds for judicial review. He failed. It is just in those circumstances that the Interested Party should have to take the risk that it would be ordered to pay costs. I would observe in that context that it was reserving a right to claim its own costs in the event that the claim failed.
43. I am conscious that not all of the steps which were required after the grant of permission by Holgate J necessarily concerned the Interested Party. There was undoubtedly some correspondence which took place between the Claimant and Defendant, in particular in relation to the amended grounds and whether the claim for judicial review would be conceded on all of those grounds. Eventually it was decided that it would be and that was the order made by Mr David Elvin QC on 23 July 2019. That does not detract, however, from the fundamental point that the Claimant had at all material times, since late November 2018, been prepared to settle the claim on the basis then put forward by the Defendant, albeit limited to Ground 4.
44. Furthermore, it is important in this context to bear in mind that the Judge was well aware that there were some costs which were incurred as a result of the Claimant having to deal with the Interested Party even before 5 February 2019. In doing what she

described as “broad justice”, at para. 9 of her reasons, she was entitled to “set off” those costs against the ones which were incurred after 5 February 2019 but did not concern the Interested Party.

Conclusion

45. For the reasons I have given I would dismiss this appeal.

Lord Justice Popplewell :

46. I agree.

Lord Justice Moylan :

47. I also agree.