[2022]GCA090

IN THE GUERNSEY COURT OF APPEAL
ON APPEAL FROM THE ROYAL COURT

CIVIL DIVISION APPEAL No. 556

28 June 2022

Before:

George Bompas QC, Presiding
Jeremy Storey QC
James Wolffe QC

Between:

SHERBORNE CORPORATE SERVICES LIMITED
(Seychelles company no.012277)

KENILWORTH CONSULTANTS INC
(Seychelles company no. 012316)

Appellants

and

The Public Trustee

Respondent

The Appellants represented themselves.

Counsel for the Respondent: Advocate S. Davies

Bompas JA:

1. This is the judgment of the Court dealing with the question of costs following our judgment handed down on 10 May 2022 ([2022] GCA024). In that judgment we gave our reasons for dismissing the Appellant companies' appeal from the judgment and Act of Court of the Bailiff given on 23 December 2021.

2. On 17 May 2022 the Respondent Public Trustee, by her lawyers, proposed that the request for costs of the appeal she wished to make should be dealt with by us on the papers after a round of submissions by the Respondent (on 31 May 2022), submissions by the Appellants within 14 days thereafter, and further submissions by the Respondent within 7 days thereafter.

3. After giving the Appellants an opportunity to respond to and comment on the Respondent's proposal, on 25 May 2022 we directed that the costs request should be dealt with in the manner proposed. Although the Appellants have argued many matters before us, they have not argued

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that there should be an oral hearing of the costs application, which we have therefore decided on the papers in the interests of expedition and economy.

4. When the Respondent served her initial submissions, along with an application notice, on 31 May 2022 she asked for her costs of the appeal, the costs to be taxed on the indemnity basis, with an interim payment to be ordered. She asked, as to this interim payment, that the amount to be ordered should be £117,000 if the taxation was to be on the indemnity basis, or £97,500 if the taxation was to be on the ordinary recoverable basis.

5. The following week, on 7 June 2022, the Respondent provided a schedule explaining in outline the amount of costs and disbursements which the Respondent would be seeking on any taxation of her costs. The total in this document was £149,866.56. The covering email with the schedule indicated that this involved a reduction in what had previously been calculated, and that in the event the amount being sought by way of interim payment was reduced to £90,000 or alternatively £75,000 (depending on the basis of costs taxation ordered). The covering email explained also that insofar as necessary it should be treated as an application to amend what was sought in the application.

6. In order to give the Appellants further time to consider and respond to the Respondent's costs schedule, we at once directed that the Appellants' time for their responsive submission should be extended to 21 June 2022, with the Respondent having until 28 June 2022 for any reply submission. The Greffier subsequently, on behalf of the Court, confirmed this timetable to the Appellants. The Appellants can have been in no reasonable doubt that if they wished to address the applications made by the Respondent, they were required to do so according to that timetable.

7. This timetable was complied with, the Appellants serving on 21 June 2022 a Submission of over 70 pages entitled "Rejection of the Respondent's application in respect of costs in the Court of Appeal of Guernsey", along with a further email of 28 June 2022 following the Respondent's reply submission. In addition to their Submission of 21 June 2022 the Appellants had sent previously many emails and letters to the Court containing contentions about these proceedings, notably contentions that it was premature for us to make any order for costs of the appeal, or even to entertain any application for costs. This correspondence started in earnest with a letter of 25 May 2022, but continued thereafter in particular with a letter of 1 June 2022 and then the 21 June 2022 Submission.

8. The first and final three paragraphs of the Appellants' Submission explain the direction taken in the Submission:

> "*1.1 The Appellants reject the hearing in respect of costs orders (pursuant to Section 18(1) of the Court of Appeal (Guernsey) Law 1961 and Rule 3(4) of the Court of Appeal (Civil Division) (Costs and Fees) (Guernsey) Rules 2012 as premature given that case 556 remains unaddressed given that no legal authority has been cited by the Court of Appeal concerning the attachment of a formal complaint against the Bailiff to case number 556.*
>
> ...
>
> *9.1 The Appellants are of the firm conviction that the COA hearing, dated 25th/26th April 2022, was subject to considerations outside the realm of justice and therefore any consideration to a costs hearing would be premature. The Appellants are considering their redress of grievance options.*
>
> *9.2 Given the position stated in paragraph 9.1 above, the Appellant will not make any comment as to the Respondent's application until such time as an independent authority has made known its findings on the Appellants' redress of grievance.*

9.3 Respectfully, the COA should diligently read this document and attempt to find fault with its stark conclusion that the appearance of bias and prejudice is a common occurrence to these non-Guernsey based entities."

Is consideration of costs premature?

9. It should be noted that the Appellants have not addressed any argument at all concerning the following questions as to costs, questions which would ordinarily arise immediately on and as a result of a judgment ordering the dismissal of an appeal, namely (a) whether the unsuccessful appellant should be ordered to pay the successful respondent's costs, or whether some different order should be made; (b) if costs are to be ordered, the basis of taxation; and (c) whether it is open to the Court to order an interim payment on account and, if so, whether the Court should so order and, if so, what the amount should be? In other words, the Appellants have not addressed any argument as to the detail of what has been sought.

10. Before dealing with these questions, as they arise in the present case and have been explained by the Respondent, we explain briefly why we do not agree with the Appellants that it is premature to deal now with the costs of the appeal. In essence, the Appellants have been unsuccessful in their pursuit of their appeal, which we have dismissed. The grievances which the Appellants seek to ventilate at length in their Submission have no bearing on the question whether we should now determine the costs of the appeal.

11. The principal objection is one we shall call, for simplicity, "the Complaint Objection". This objection was articulated in the documents referred to at the end of paragraph 8 above. It arises by reason of the Appellants' letter of 3 January 2022 referred to in paragraphs [28] and [29] of our judgment. As we explained in our judgment, the letter contained various complaints about the Bailiff's conduct of the Account Application, and further that at the direction of the Bailiff it had been placed before us. We explained further that we treated the letter as a supplement to the written submission filed in support of the appeal, and also that four of the matters put forward in the letter corresponded with four of the grounds of appeal (thus making those matters relevant for us to take into account in support of the appeal).

12. In the course of the preparations for the appeal, which had been started at the end of January 2022, on 7 April 2022 an email was sent on behalf of the Appellants to the Court making reference to their complaint concerning the Bailiff, explaining that this had been placed before this Court, explaining (rightly) that this Court was not exercising some disciplinary function, and asking "*would the Court kindly email the Appellants a copy of the policy procedure to be undertaken where a complaint is made against a sitting Guernsey judge*". In reply, the Deputy Greffier explained as follows: "*The last part of your email refers to the Appellant Companies' complaint concerning the Bailiff and his conduct of the hearing which has given rise to this appeal. This complaint is before the Court of Appeal as part of appeal 556, insofar as the complaint raises matters which, if correct, may affect the judgment under appeal. To this extent the complaint, and what is said in the complaint, is by the Bailiff's direction to be taken into account on the Appellant Companies' appeal as part of their contentions in support of their appeal. The appeal is not, however, the occasion of a disciplinary proceeding and should not be viewed as such.*"

13. From this message the Appellants must have known, at the time the appeal was heard on 25 and 26 April 2022, and at the time judgment was given on 9 May 2022, that the appeal was not a disciplinary hearing. This Court was not dealing substantively with a complaint against the Bailiff to which the Bailiff was a party as a person under consideration. As must have been obvious at the hearing of this appeal, we were concerned only with an appeal from the Bailiff's judgment in which the grounds of appeal included the alleged unfairness of the hearing before the Bailiff and alleged bias on the part of the Bailiff. Insofar as we considered the merits of the

complaint about the Bailiff articulated in the letter to which we have referred, we did so because and to the extent that it overlapped with the Grounds of Appeal and was relevant to the disposal of those grounds. For the reasons given in our judgment, we concluded that the complaints were unfounded and did not provide any support for the setting aside of the Bailiff's judgment and order.

14. What should be perfectly apparent from what we have just said is that the appeal before us is now finally disposed of so far as we are concerned, save only in relation to costs. And such grievances as the Appellants may have articulated provide no reason for our deferring dealing with costs.

15. Another objection made by the Appellants to our dealing with costs now concerns the fact that the Respondent's email of 7 June 2022, which provided the Schedule, referred to the possibility of the 31 May 2022 application being amended insofar as it specified amounts to be sought for the interim payment in order to reduce those amounts. The Appellants have asserted that before we can deal substantively with the Respondent's application for costs we need to take time to deal with an application to amend the application.

16. This objection is without any substance. The Respondent has no need to amend the application. The statement of the amount sought by way of interim payment in the application notice is no more than an indication of the maximum which the Respondent is asking for: it would be perfectly normal for the Court to consider submissions in which varying contentions were made by both sides about the amount (if any) to be ordered, and for the Court to conclude on the amount, without the need for any amendment to the application. The application form would naturally be understood to ask for such sum as may be determined. In any event, the request in para 3 of the application notice for "further or other orders as the Court may consider necessary or appropriate" encapsulates sufficiently the making of an order for a different (and lesser) sum to that specified in para 2 of the application notice. Yet further, there could be no possible prejudice to the Appellants in the Respondent inviting us to order a sum less than that originally asked for. It was not necessary for the Respondent to amend the application to make such an invitation.

What costs orders are appropriate?

17. If, as we have decided, the question of costs is to be resolved now and not to be deferred, we have no hesitation in acceding to the Respondent's submission that the Appellants as the unsuccessful party should be ordered to pay the Respondent's appeal costs, that is the costs of and occasioned by the appeal. The ordinary rule is that an unsuccessful party should bear the costs of the successful party, and there is no reason why that rule should not apply in this case.

18. We are satisfied that we have power to direct that the costs are to be taxed on the indemnity basis. This is because this Court has, besides the general power to order costs in the widest terms by section 18 of the Court of Appeal (Guernsey) Law, 1961, by section 14(2) of that Law the power of the Royal Court in rule 83 of the Royal Court Civil Rules, 2007 ("the RCCR"). By this rule indemnity costs may be ordered where in the special circumstances of the case the Court is of opinion that they should be awarded on that basis, or where a party has brought or pursued a claim unreasonably, scandalously, frivolously or vexatiously or has otherwise abused the process of the Court.

19. We have been referred to the judgment given by Lieutenant Bailiff Hazel Marshall QC in Broadhead v Spread Trustee Company (Judgment 10/2015). In her judgment the Lieutenant Bailiff referred to previous Guernsey authority for the propositions: (a) that the Guernsey Court may find useful guidance in English authorities on the applicable principles on which indemnity costs may be ordered; and (b) that what may lead to indemnity costs being ordered is some element of conduct by the paying party which takes the case out of the norm in a way

which justifies indemnity costs. Plainly, of course, this conduct has to be in relation to the proceedings in respect of which the costs are to be paid. But it is clear from the language of rule 83 of the RCCR that unreasonable pursuit of a proceeding will take the case out of the norm.

20. In this regard, the Respondent has submitted that the conduct of the Appellants fits the description given by Tomlinson J in Three Rivers DC v Bank of England [2006] EWHC 816 (Comm), [2006] 5 Costs LR 714 of examples of unreasonable conduct meriting an award of indemnity costs. This example is where a paying party "*advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time*", and "*despite the lack of any foundation in the documentary evidence for those allegations and maintains the allegations, without apology, to the bitter end*" (see Three Rivers at [25]).

21. In our judgment the Respondent's submission is to be accepted. First, the grounds advanced for the appeal were, save in one respect which arose only during the course of oral argument, without any merit at all, while nevertheless occupying a completely disproportionate bulk in terms of volume of submission and time. Second, the correspondence from the Appellants in the space of five months from the giving of the Bailiff's judgment down to the hearing of the appeal was largely unnecessary and altogether obstructive. Third, the contentions put forward by the Appellants included unjustified attack, couched in unrestrained language, on the integrity of individuals involved in public office or the administration of justice.

22. We also consider that this present case is one in which the making of an order for an interim payment on account of costs is appropriate.

23. As to this, we are satisfied that we have power to make such an order. Again, this power arises by reason of section 14 of the Court of Appeal (Guernsey) Law, 1961 which confers on this Court the same powers as the Royal Court. Contrary to the submission of the Respondent, we do not consider that rule 84 of the RCCR is in point: that rule is concerned with summary assessment of costs. We are not being invited to make a summary assessment of the costs of the appeal. On the other hand, the Royal Court certainly does have power to order an interim payment. This power was considered by Lieutenant Bailiff Marshall QC in the Broadhead case (at [63]) to arise under either the court's inherent jurisdiction or Rule 82 of the RCCR. An alternative view is that the power arises under section 1(1) of the Royal Court (Costs and Fees) (Guernsey) Law, 1969, this being the view of Lieutenant Bailiff James McNeill QC in Pirouet v The States of Guernsey (Judgment 25/2017). But either way, there is power for the Royal Court to order an interim payment, and hence for this Court to do so.

24. In the Broadhead case (at [69]) Lieutenant Bailiff Marshall QC expressed the view that: "*It is a principle of common fairness, based on the proposition that it is not fair for a successful party to be too much delayed in receiving money which he will already have expended, and which he will undoubtedly be entitled to receive from the unsuccessful party, merely because determination of the precise total amount payable is pending*". She also expressed the view that there should be a presumption in favour of ordering an interim payment on account of costs which have been awarded as part of a final order.

25. We can well see that the present might be a case in which the presumption in favour of making an interim payment ought to apply. The costs order we are making in the present case is in connection with the final disposition of the appeal brought to this Court by the Appellants. But even if that is wrong, and it is relevant that the Respondent's application of 24 June 2020 out of which this appeal arose is technically still pending, still we believe that the present is a case in which an interim payment should be ordered: this is because the burden of this present litigation is falling ultimately on assets which were to support individuals' pensions, and also because we can see no realistic basis on which properly the Respondent could be prevented

from having the appeal costs taxed and ordered to be paid. It cannot be fair from the point of view of the beneficiaries of the pension funds for the Appellants to be able to prosecute an appeal which has no merit, inflicting expense on the pension funds, without having to pay promptly when the appeal is dismissed.

26. In our judgment the amount of the interim payment should be £50,000, payable jointly and severally by the Appellants. We are not ourselves conducting the taxation of the Respondent's costs. Although we have had no submissions from the Appellants concerning the detail of what is claimed, we can envisage that on a taxation there might be points of detail to be considered, as regards, for example, time spent, hourly rates and the justification for particular disbursements such as those on English lawyers, bearing in mind always that we have directed the costs to be taxed on the indemnity basis with the result that in principle costs are to be allowed except insofar as unreasonable (rule 3(6) of the Court of Appeal (Civil Division) (Costs and Fees) (Guernsey) Rules, 2012). But we consider that the £50,000 figure is one that we can be confident is less than the minimum which will be ordered to be paid by the Appellants following a taxation of the Respondent's costs.

27. Finally, in our judgment the Appellants should be ordered to make the interim payment of £50,000 within 28 days from the date of this judgment, rather than the 14 days proposed by the Respondent. That should allow the Appellants sufficient time to make whatever administrative arrangements may be needed for the £50,000 to be remitted to Guernsey to the Respondent.

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