Neutral Citation Number: [2024] EWHC 1376 (Admin)

Case No: AC-2021-MAN-000054
CO/1109/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

Friday, 7th June 2024

Before:
FORDHAM J

- -

Between:

THE KING (on the application of PAUL BLACK)	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -

- -

The **Claimant** appeared in person (by video link)
James Williams (instructed by GLD) for the **Defendant**

- -

Hearing date: 21.3.24
Written submissions: 16.4.24
Draft judgment: 20.5.24

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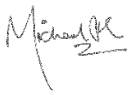
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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FORDHAM J

FORDHAM J:

Introduction

1. This case is about setting-off a new county court damages liability against an old judicial review costs entitlement. Mr Black is a prisoner at HMP Wymott. In 2021, he commenced a claim for judicial review against the SSJ. The reference was CO/1109/2021. The judicial review claim alleged that the SSJ had acted unlawfully in November 2020, in requiring Mr Black to pay the postage for sending a letter to the United States. On 25 August 2021, HHJ Sephton refused permission for judicial review and certified the claim as totally without merit, ordering Mr Black to pay – by 4pm on 3 September 2021 – the SSJ's costs of the SSJ's acknowledgement of service and summary grounds of resistance, assessed in the sum of £2,856. Mr Black was given the opportunity to object, which he did, and that costs order was confirmed by Judge Sephton on 23 September 2021. That is the SSJ's old judicial review costs entitlement. A year later, on 29 September 2022 Mr Black commenced a damages claim against the Ministry of Justice in Preston County Court. The reference was J32YJ180. The claim alleged that the MOJ had acted unlawfully in February 2022, in destroying a legal letter rather than passing it on. The letter was said by the prison to have tested positive on an itemiser machine. On 27 April 2023, DDJ Mitchell (Judge Mitchell) allowed the county court claim and ordered the MOJ to pay damages assessed at £150 "within 42 days". That was the MOJ's new county court damages liability.

The Application

2. On 5 June 2023 the SSJ's solicitors GLD issued an application in this Court, using Form N244. The application was issued in the 2021 judicial review proceedings, which had been determined two years earlier in September 2021 under the reference CO/1109/2021. A new CE file reference number was allocated for the application. It is AC-2021-MAN-000054. That is the application with which I am now dealing. But I am dealing with this matter, and giving this judgment in the 2021 judicial review proceedings. The SSJ's June 2023 application was accompanied by a draft order, a witness statement and a set of exhibited documents. The SSJ is seeking an order for the SSJ's county court damages liability (the £150) to be set-off against the SSJ's High Court costs entitlement (£2,856). There is also an application for costs, in circumstances where a letter of 16 May 2023 had asked Mr Black to agree to the set-off, and he had declined to agree to that course. The witness statement, filed in support of the June 2023 application, states that the intention to seek a set-off was orally notified to Mr Black and to Judge Mitchell at the hearing on 27 April 2023, and that the "42 days" had been allowed as a timeframe for the SSJ to make an application to the High Court for an order for set-off. The intention to apply for the set-off was notified by the letter to Mr Black on 16 May 2023.

3. The SSJ's application of 5 June 2023 also sought an interim order. It was expressed as an extension of time, or alternatively a stay, in relation to the obligation to pay the county court damages (£150), pending consideration of the set-off application. This application was granted by Judge Sephton on 8 June 2023. It was acknowledged in the county court by DJ Burrow who vacated a hearing listed there for 1 August 2023.

The Oral Hearing

4. In November 2023, the Administrative Court Manchester (ACM) contacted GLD about a hearing of the application. An order was made by HHJ Bird on 31 January 2024, for the application to be dealt with by way of a remote hearing. The hearing was then listed for 5 March 2024. Unfortunately it did not appear that the notice of hearing was sent to Mr Black, and in any event arrangements were not made for Mr Black to attend by video link. I adjourned the oral hearing to 21 March 2024. The hearing went ahead on that day, and I heard oral submissions by Mr Williams for the SSJ in person and Mr Black by video link.

5. I adjourned that hearing, part-heard. This was to allow Mr Black proper time (28 days) to receive, consider and respond to a skeleton argument and legal materials which GLD had filed. These should have been sent to Mr Black in good time but were not. The course taken involved: (a) Mr Williams making oral submissions and giving an oral summary of his skeleton argument and the legal materials; (b) Mr Black making initial submissions orally; (c) Mr Black receiving the skeleton argument and legal materials; (d) Mr Black having 28 days to respond in writing; and (e) the Court then considering the position on the papers. I ventilated this course as a way forward and Mr Williams and Mr Black each agreed that I should adopt it. I am satisfied that it was necessary, and sufficient, in the interests of justice and in promoting the overriding objective. Mr Black received the skeleton argument and legal materials on 26 March 2024. His written submissions were dated 16 April 2024 and provided to me on 26 April 2024.

Unilateral Communications

6. In the run up to the hearing listed for 5 March 2024, I noticed that there had been communications from GLD with ACM which were unilateral, ie. not notified to the other party. Communications should, in principle, be copied to the other party: see CPR 39.8. I needed to deal with this. I also wanted to know whether any authorities were being relied on for the hearing, regarding the set-off powers which this Court and the county court were said to have. I communicated with GLD and – on the same day – made a Court Order (1 March 2024) requiring GLD to gather all communications with the Court – including with me – into a paginated bundle filed and served on Mr Black. GLD duly prepared, filed and served that bundle in advance of the hearing.

Jurisdiction

7. CPR 40.13A of the Civil Procedure Rules 1998 is headed "County Court set-off of cross-judgments". CPR 40.13A(6)-(8) provide as follows:

> ***(6) Paragraphs (7) and (8) apply where an order is made by the High Court giving permission to set off sums payable under several judgments and orders obtained respectively in the High Court and the County Court.***
>
> ***(7) The High Court will send to the County Court a copy of the order giving permission, and the County Court will deal with any money paid into court in accordance with that order.***
>
> ***(8) The court officer of the County Court will enter satisfaction in the County Court records for any sums ordered to be set off, and execution or other process for the enforcement of any judgment or order not wholly satisfied will issue only for the balance remaining payable.***

These provisions of the rules explicitly recognise that the High Court can give "permission to set off sums payable under several judgments and orders obtained respectively in the High Court and the County Court".

8. Section 72 of the County Courts Act 1984 is headed "set-off in cases of cross judgments in county courts and High Court". Section 72(1) and (2) provide as follows:

> ***(1) Where one person has obtained a judgment or order in the county court against another person, and that other person has obtained a judgment or order against the first-mentioned person in the county court or in the High Court, either such person may, in accordance with rules of court, give notice in writing to the court or the several courts as the case may be, and may apply to the court or any of the said courts in accordance with rules of court for leave to set-off any sums, including costs, payable under the several judgments or orders.***
>
> ***(2) Upon any such application, the set-off may be allowed in accordance with the practice for the time being in force in the High Court as to the allowance of set-off …***

These statutory provisions explicitly recognise that permission (leave) to set-off a judgment or order in the county court against a judgment or order in the High Court can be sought by "either" of the parties and by application to "any" of the relevant courts, specifically including "the High Court".

9. None of these provisions are describing automatic set-off, or a duty on the court to allow a set-off. There is a power, involving an exercise of judgment and discretion. In Fearns v Anglo-Dutch Paint & Chemical Co Limited [2010] EWHC 2366 (Ch) [2011] 1 WLR 366 there was a discussion about the High Court's jurisdiction of equitable set-off (§§17-20) and set-off by judgment (§§36-38). At §75, the Deputy High Court Judge (George Leggatt QC, as he then was) said this:

> ***the earlier authorities that I have mentioned … make it clear that the court has a discretionary jurisdiction to order a set-off between different liabilities in respect of damages or costs for which judgment has been given in the same case, or in different cases, in accordance with its view of what is just in the particular circumstances. While therefore it seems to me that it must be right to order a set-off if the principle of equitable set-off applies, in accordance with these authorities I consider that there is also broader discretion to order a set-off if the court thinks it just to do so.***

He continued (at §76):

> ***In the present case it does not in fact make any practical difference in my view which approach is adopted. Applying the test for equitable set-off or exercising the court's discretion, the connection between the two sums is such that justice plainly requires that they be set off.***

Analysis

10. I am satisfied of three things. First, that I have jurisdiction, on the SSJ's application to this Court, on notice to Mr Black, to give permission to set-off the sum of £2,856 payable to the SSJ by Mr Black under Judge Sephton's order, and the sum of £150 payable by the SSJ to Mr Black under Judge Mitchell's judgment and order. Secondly, that the test I should apply is whether it is just in all the circumstances to give permission for the set-off. Thirdly, that the jurisdiction remains extant, notwithstanding that the judicial review claim was – in one sense – at an end when Judge Sephton refused permission for judicial review and certified the claim as TWM. As to the third point, it is familiar that parties may make applications under proceedings where the file has been closed. Examples are applications for permission to obtain documents from the court records; or applications

to reopen a decision. Permission to set-off a judgment or order is another such example. Otherwise, permission for set-off could in practice only ever be made to the court who gave the latest judgment or order, and at the time of doing so. That could seriously undermine the utility and effectiveness of set-off. It would be inconsistent with the provisions to which I have referred.

11. I am also satisfied that it would be just to allow a set-off, so that the £150 damages are taken off the £2,856 costs. The justice of allowing the set-off is, in my judgment, very strong. Yes, these were distinct proceedings in the High Court and in the county court. But both sets of proceedings alleged illegality relating to correspondence. Yes, it is the SSJ who is sued in judicial review proceedings and the MOJ in county court proceedings, but the substance of the position is that this is the same litigant, as is seen by the fact that both cases were about actions of the prison and either act could in principle have been impugned in either court. The High Court had made a costs order which has gone unfulfilled by Mr Black. Within a year he had commenced his new proceedings seeking damages from the person to whom he still owed that unmet costs liability. It would in my judgment be unjust if Mr Black were entitled to insist on the payment of the £150 damages to him from the MOJ, while at the same time leaving intact the larger unmet costs liability owed to the SSJ. That is a 'double standard'. It is having it both ways. It undermines the interests of justice and the public interest. Added to all this is the fact that the SSJ actively pursued the stay, and secured the stay. That means, unlike Mr Black and his costs liability, the SSJ has not been in ongoing default. Non-payment, in the interim period up to this judgment, has been sanctioned by the Court.

12. Mr Black submitted that I should dismiss the SSJ's application and strike it out. I will deal here with the main points. Mr Black says a set-off is inappropriate and wholly unjustifiable, because these were totally separate claims with no sufficient connection, and set-off cannot be for an unrelated matter. I cannot accept that it is inappropriate or unjustifiable. Nor, for that matter, would I accept that there is an insufficient connection between the claims. I have applied the question identified in Fearns. Mr Black also submitted that there can be no set-off in respect of unliquidated damages. But this question does not arise. This was a county court order for damages assessed at £150 and a High Court order for costs assessed at £2,856. Mr Black says that the costs order should never have been made, and should now be set aside, because he was a "publicly funded litigant" entitled to costs protection. There is no basis for setting aside a costs order made in September 2021, to which Mr Black had and took the opportunity to object; still less on a new point unsupported by any material. The court documents describe Mr Black as having acted in person and I have seen no reference anywhere to his having had legal aid.

13. Mr Black says the SSJ has proceeded in the wrong forum. The MOJ could and should have had set-off dealt with, promptly, in the county court. Set-off was raised by the MOJ's advocate (Miss Coulson) at the county court hearing on 27 April 2023 before Judge Mitchell. It should have been pursued in that court on that occasion. That was the correct forum. An application should be made where the claim was started (CPR 23.2). I agree that set-off could have been pursued in the county court. In my 1 March 2024 email sent to GLD, a copy of which was provided to Mr Black as I directed, I referred to this question. Mr Williams accepts that an order for set-off could have been sought and made in the county court on or after 27 April 2023, under s.72(2) of the 1984 Act. But I am satisfied, in the particular circumstances of the present case, that this does not undermine

the basis for this Court making the order now. The SSJ promptly notified Judge Mitchell, and Mr Black, of the course being taken. Mr Black did not say it should be dealt with in the county court. He has resisted any set-off.

14. Mr Black says the application was not made promptly. Judge Mitchell's order did not set a deadline of 8 June 2023 for an application. The order simply said the damages were "payable within 42 days" (which deadline expired on 8 June 2023). The order said "within". An application should be made promptly. And Judge Sephton's order for a stay (7 June 2023) was not received by Mr Black until the end of June 2023 or early in July 2023. I have not been persuaded by these points. The application was prepared and made before the costs order became due, and an application for a stay was made and granted. The set-off application had been foreshadowed by a letter to Mr Black. He has resisted it. No prejudice was caused to him by the fact that that application was not filed earlier in the 42 day period.

15. Mr Black says the application did not plead s.72 or CPR 40.13A and the accompanying witness statement referred to authorities, but not Fearns, without filing them. These authorities were unserved "evidence", which was not served promptly (CPR PD23A §§7.1-7.2). GLD did not serve the papers promptly, even when directed to do so, and this "conduct" is also relevant to costs (CPR 44.4(3)). I have not been persuaded by these points. Legal authorities are not evidence. The Fearns case was cited in the witness statement. The rule and statutory provision were identified at the hearing. The whole point of adjourning part-heard with 28 days for a written response was to ensure no prejudice or unfairness to Mr Black from the fact that these and the skeleton argument came late and were not – as they should have been – prepared and despatched in good time to be provided to him to consider ahead of the hearing.

16. Mr Black had initially submitted that after Judge Sephton's costs order he was never approached by GLD, and the SSJ made no attempt to recover the costs. Mr Black accepted that, in his letter of objections to Judge Sephton asking for the costs order not to be confirmed, he said he could not pay costs and that they would take years to pay. In his written submissions, Mr Black has accepted that GLD did engage with him on the question of costs, but that the position as to payment of the costs order was never agreed. In my judgment, there was no relevant lack of pursuit of the costs; still less inaction which could undermine the basis for now ordering set-off.

Order

17. As to whether the order is permission (or leave) – as described in CPR 40.13A(6) ("permission") and section 72(1) ("leave") – or an "order" for set-off (Fearns §75), I do not think anything turns on the precise formulation. I propose to make an Order in these terms:

> ***(1) The judgment debt due to Mr Black from the MOJ under the judgment of the Preston County Court on 27 April 2023 in claim J32YJ180 in the sum of £150 shall be set-off against Mr Black's liability to the SSJ of £2,856 under the costs order made by the High Court on 23 September 2021 in claim CO/1109/2021.***
>
> ***(2) Permission is hereby granted pursuant to CPR 40.13A(6) for the set-off described in paragraph (1).***

> ***(3) Pursuant to CPR 40.13A(7), this Court will send to Preston County Court a copy of this order for the purposes of the court officer of Preston County Court then discharging the duty in CPR 40.13A(8) to enter satisfaction in the County Court records.***

Costs

18. An order for costs is sought in the application, if successful. The application, which Mr Black has resisted, has succeeded. My confidential draft judgment (20.5.24) said this:

> ***I have taken the view that there should be an opportunity for further brief written submissions on costs to be filed, followed by a decision which I can record at the end of the judgment when handed down.***

To that end, I gave a timetable whereby:

> ***… any costs submissions and any submissions on any other consequential matter said to arise must be filed and served as follows: (1) SSJ by 10am 24 May 2024; and (2) Mr Black by 10am Tuesday 4 June 2024. GLD shall ensure that all submissions are promptly forwarded to the Judge's clerk, by 10am Wednesday 5 June 2024 at the latest…***

In the event, this mechanism did not – for whatever reason – work. For its part, GLD told me (5.6.24): that Mr Black had confirmed receiving GLD letters of 21.5.24 (with the draft judgment) and 24.5.24 (with the SSJ's costs submissions); that he was understood to have indicated that he had responded to the Court; but that GLD had not (yet) received his submissions. After enquiries (6.6.24), nor had the Court (6.6.24). In the circumstances, I decided to hand down the Judgment, but to defer the making of the Order, to allow any submissions from Mr Black – as to costs and any other consequential matter – to be received, located and considered. At that point I will make a further brief written determination, explaining what I decided and why.