IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES

No. CH-2020-000061

NEUTRAL CITATION No: [2021] EWHC 1017 (Ch)

On appeal from the order of His Honour Judge Lochrane, dated 3 February 2020, sitting in the County Court at Central London

Rolls Building
Fetter Lane
London EC4A 1NL

Thursday, 18 March 2021

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

B E T W E E N :

PREM NATH PASRICHA Appellant
(First Defendant in the proceedings below)

- and -

BHAVISHA PASRICHA Respondent
(Claimant in the proceedings below)

MR MARK O'GRADY appeared on behalf of the Appellant.

MR BENJAMIN CHANNER appeared on behalf of the Respondent.

A

A P P R O V E D J U D G M E N T

(remotely, via Microsoft Teams)

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MR JUSTICE MARCUS SMITH:

1 I have before me the appeal of an order of His Honour Judge Lochrane dated 3 February 2020. By that order, Judge Lochrane ordered that there be no order as to costs. That order was made in the context of an abortive trial which was due to be heard for three days, commencing on that date (3 February 2020). In the same order, the Judge gave directions as to the hearing of the trial. He directed that the matter would commence on 4 May 2020 and it would be marked for hearing before His Honour Judge Gerald and marked, "Do not bounce". The reason it was marked, "Do not bounce" is because the fixture on 3 February was adjourned because of the unavailability of a trial judge, and Judge Lochrane did not want another adjournment.

2 I should note, however, that the trial scheduled for 4 May 2020 has not, in fact, taken place, because of the Covid-19 pandemic.

3 In any event, the order made by Judge Lochrane was "no order as to costs". The Appellant before me (the First Defendant below, the Second and Third Defendants not being before me and being immaterial to this appeal) sought recovery from the Respondent before me (the Claimant below) of the brief fee incurred for first day of the trial, that brief fee being in the amount of £6,500. It is in relation to that particular cost that the Judge made no order as to costs and it is that order which is now sought to be appealed before me.

4 I shall refer to the parties as the Appellant and the Respondent.

5 Mr Justice Morgan gave permission to appeal on 23 July 2020. The underlying dispute which was due for trial on 3 February 2020 concerned the Appellant's right to occupy a property at 768 Great West Road, Middlesex. That trial, as I have said on a couple of occasions now, was adjourned. Having had a fixed date, it was adjourned due to a lack of judicial availability. It is necessary to go into the background of this case in order to understand why this lack of judicial availability is so significant.

6 There was an order, unsurprisingly given the nature of this case, that the costs budgets be filed seven days before a CCMC. None of the Defendants complied with this direction and, as a result, their costs were limited to the court fees incurred pursuant to CPR 3.14. CPR 3.14 provides as follows:

> "Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees."

7 The order that costs be limited to court fees was made by Deputy District Judge Jacobs, and there was an attempt to appeal that order to His Honour Judge Luba. That appeal failed, so at the time of the trial, on 3 February 2020, the limited costs budget of the Defendants, and specifically the First Defendant, was, as it were, set in stone pursuant to CPR 3.14.

8 The Respondent – the Claimant below – was, in the meantime, obliged to pay a trial fee and, unless that was paid by 3 January 2020, certain consequences followed. It is appropriate that I refer to the notice of trial date that was issued on 7 October 2019 out of the County Court at Central London. That notice of trial date, unsurprisingly, notified that the trial would take place on 3 February 2020 in the County Court at Central London. It indicated that the time allowed for trial was three days. Most importantly, the notice said:

"Unless the claimant does by 4.00 p.m. on 3 January 2020 pay to the court the trial fee of £1,090, or file a properly completed application, i.e. one which provides all the required information in the manner requested, for help with fees, then the claim will be struck out with effect from 3 January 2020 without further order, and unless the court orders otherwise you will be liable for the costs which the defendant has incurred."

It goes on to make the point:

"If your claim has been struck out, it will no longer exist. The hearing will be vacated unless a counterclaim survives the claim being struck out."

9 The consequences of a failure to comply with the payment of a court fee were thus explicitly and clearly set out in this notice, and there is no room for any ambiguity.

10 The court fee was not paid on or by 3 January 2020 and it seems to me unarguable – and indeed Mr Channer, who appeared for the Respondent, did not seek to contend otherwise – that the automatic consequences identified and set out in the notice of trial date followed, viz the claim was struck out.

11 Subsequent to 3 January 2020, the court fee was paid. Obviously, that was a late payment. I do not have the letter by which the court fee was paid before me, it is not in the appeal bundle, but it is referred to in an order of 13 January 2020, made by District Judge Fine. What that order notes is:

"Upon reading the letter from the Claimant dated 9 January 2020, with the attached cheque for the hearing fee, it is ordered that the Claimant is granted relief from sanctions in respect of the late payment of the hearing fee."

12 It is important to note that this order, dated, as I say, 13 January 2020, was an order made on the papers and it contains the usual provision in such orders that, because it has been made without a hearing, any party affected by it may apply to have it set aside or varied on application to the court and on notice to the other parties. Entirely unsurprisingly, no such application was made, and the order therefore stands.

13 Mr O'Grady, for the Appellant, quite frankly explained why the Appellant would not have made such an application. It would have been seen as opportunistic, he says, and it would have been a waste of time and costs to make it, because, realistically, the relief from sanction would have been granted or the order of Judge Fine affirmed (which is the same thing), given that the fees had been paid, albeit about a week late.

14 As I have said, it does seem to me that this order must be given effect to. It is effective unless it is set aside or varied. What it states in terms is that there is relief from sanction in respect of the late payment of the hearing fee. That, as it seems to me, is a order for relief from sanction which I cannot go behind. It may be that it was wrong to give relief – that is not a matter I can look into or review – although I am bound to say the decision seems right. The fact is relief was given, the order stands. In particular relief has been given against the draconian consequences set out in the notice of trial date, and the action is no longer struck out.

15 The case proceeds. There is a PTR, at which Judge Lochrane presided, albeit that he did not understand himself to be the trial judge. That, I regret to say, is a common feature of litigation these days. Obviously the judge hearing the PTR ought to be the trial judge but that is, as it seems to me, a rule in most courts in this jurisdiction that is honoured more in the breach. That is regrettable.

16 What did not happen at the PTR is that there was any explicit articulation of availability of a judge or non-availability of a judge for trial; the PTR simply took place without that matter being addressed. I have not been shown a transcript of what was said at the PTR, but neither counsel has indicated that there was any discussion of what might happen if a judge proved to be unavailable on the date of the trial.

17 We fast-forward, then, to the next relevant event, which is the first day of the trial. When the parties arrived at court on 3 February, they encountered Judge Lochrane, who had dealt with the PTR but who was – on that day – the applications judge in the County Court at Central London. He made clear at the outset, after the parties had been waiting for some time at court, that the court had no time for the parties. He said, right at the beginning of the transcript:

> "I'm sorry about that, but I gather this has all arisen because the trial fee wasn't paid or something."

18 The parties obviously had to accept this as a *fait accompli* (the court simply did not have the judicial capacity to fit the trial in) and Mr O'Grady, who then, as now, appears for the Appellant sought to make an application for costs. Rather boldly, he asked, "Would your Honour have time to hear that application now?" Judge Lochrane said, "Not really, no", but undaunted, Mr O'Grady made his application and the Judge heard it. It is fair to say that the application was dealt with – and this is not a criticism of anyone – fairly quickly, given the other commitments that Judge Lochrane had as applications judge. The Judge dealt with the application over the course of three pages in the transcript and came to the conclusion that the appropriate order was that no order for costs be made.

19 However, the process or reasoning by which he came to this conclusion turns on his understanding of the extent to which the Appellant could properly make an order for costs, and it is fair to say that his reasoning was, in material part, based upon a view that he was precluded, even if he wanted to, from ordering costs in favour of the Appellant.

20 It therefore seems to me that this appeal needs to be considered in two stages. First of all, I must ask myself whether the reasoning of the Judge was that he could not, as a matter of jurisdiction, make a costs order in favour of the Appellant. If I find that the Judge erred in his understanding of the rules, then it seems to me I must proceed to a second stage: the Judge having, on that hypothesis, made a material error (the subject matter of stage one), I must reconsider or re-visit the discretion as to costs.

21 If, of course, the Judge got the question as to his jurisdiction right, then the appeal ends there and would have to be dismissed.

22 I turn then to the question whether, in these circumstances, the Judge had (as he appeared to think he did not) the power to make an order for costs, if he was inclined so to do. The answer to that question turns on the interrelationship between two costs rules in CPR Part 3. The first of those is a rule I have already referred to, that is to say CPR 3.14. That provides that a party who fails to file a costs budget is limited, or is deemed to be limited, to having filed a budget comprising only the applicable court fees. That is indicated as being the applicable rule unless the court otherwise orders.

23 It is entirely fair to say that the question of whether the Appellant was so limited in terms of costs was a matter that was aired prior to this question of adjournment, but it does seem to me that CPR 3.14 is widely drafted in terms of the discretion of the courts to "order otherwise" and that a court can order otherwise even if an application to file a costs budget late has been made and rejected. A further application to vary the costs budget can be made under CPR 3.14 if there has been a material change of circumstance. I refer to the well-known jurisdiction in

Tibbles v SIG plc, [2012] EWCA Civ 518, which indicates the cases in which an order previously made can be revisited by a judge of the same standing as the judge making the earlier order. One of those cases is where there has been a material change in circumstance. It seems to me that it would be absurd to say that because something utterly unexpected, like the unavailability of a trial judge, took place, the costs budget in those circumstances was writ in stone and could not be varied by the judge if so advised. So it seems to me that CPR 3.14 in itself contains an ability in the court to say, "Yes, your costs budget was deemed to be zero but the circumstances have changed; I'm going to order otherwise and regard your costs budget as including" – for the sake of argument, and to take a hypothetical in this case – "the first day's brief fee and I will vary your budget accordingly".

24 I turn to the next relevant provision, which is CPR 3.18. CPR 3.18 deals with the assessing of costs on the standard basis where a costs management order has been made. Rule 3.18 provides as follows:

> "In any case where a costs management order has been made…"

Pausing there, I include in this the case where a costs management order has been deemed to be made pursuant to CPR 3.14. Continuing:

> "…when assessing costs on the standard basis, the court will:
>
> (a) have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings;
>
> (b) not depart from such approved or agreed budgeted costs unless satisfied that there is a good reason to do so; and
>
> (c) take into account any comments made pursuant to rule 3.15(4) or para.7.4 (Practice Direction 3E) and recorded on the face of the order."

25 This provision, as it seems to me, is one that applies at any stage in the process where a costs order is sought and where costs are being assessed on the standard basis. Obviously, it will primarily apply at the end of proceedings when, as is trite, costs are generally speaking ordered and generally speaking sent for assessment, but I see no reason why CPR 3.18 cannot apply in a case where a judge is being invited to make an order for costs and is being invited to assess those costs summarily on the standard basis.

26 It seems to me that, in those circumstances, a judge, if invited to make a summary costs order, assessed on the standard basis without a detailed assessment, must have regard to the costs budgeting question, and should not depart from it unless satisfied that there is good reason to do so. This, in my judgment, provides a further route for a judge to do justice, as appropriate, where costs are at large.

27 In this case, it seems to me that, on the basis of CPR 3.18 alone, it was open to Judge Lochrane to re-consider the agreed budgeted costs, or the approved budgeted costs (here the ones deemed to be in place pursuant to 3.14) and, if satisfied, to depart from them. So it seems to me that viewed both in combination and separately, CPR 3.14 and CPR 3.18 do provide an ability in a judge to make a costs order of the sort that was sought by the Appellant in this case and, to the extent that the Judge considered that he was unable to make such an order, I consider that he erred.

28 It is fair to say that the judgment of the Judge, as I indicated earlier, is very *staccato* and it seems to me that reading what is an *ex tempore* and very short judgment of the Judge,

produced under significant pressure as the applications judge dealing with a myriad of other matters, that he actually allied the question of jurisdiction and discretion. I cannot be sure that he was actually saying he had no jurisdiction. That said, the point has obviously been argued before me and I say that, to the extent that the Judge did hold that he was constrained as a matter of jurisdiction from making a costs order, he erred. To that extent, the appeal has to be allowed.

29 The question then is, the Judge having made, on this basis, an error, what I should do with the discretion that is now open to me. I am moving now to the second stage of the process described in paragraph 20 above. Having found that the judge erred in the exercise of his discretion, or in the making of his decision, I must re-exercise that discretion and I must do so as if I was the trial judge or the judge below. It is to that point that I now turn.

30 It seems to me that there are a number of factors that are in play here. Clearly, I cannot depart from, or should not vary, the deemed costs budget unless there is a good reason to do so. The question, as it seems to me, is whether there is a good reason. I was taken to various authorities which articulate what does and what does not constitute a good reason, but I do not think it is particularly helpful to refer to these. The question is obviously a fact-specific one.

31 It seems to me that, in this case, what I would have to be satisfied with was that the reason for the adjournment was something which could so clearly be laid at the door of the Respondent in this appeal that it would be wrong not to cause the costs thrown away by the Appellant to paid by the Respondent so that (at least to a degree) the Appellant would be held harmless against the costs he had so incurred.

32 So the question, as it seems to me, is whether it can be said, with a degree of clarity, that the Respondent was responsible for the ineffective trial. It seems to me that that cannot be said in this case. The fact is that the Respondent had the benefit of the order that I have referred to relieving her from sanctions. The consequences, therefore, of the notice of hearing, swingeing though they were, were ameliorated by that relief. It cannot be said that the relief from sanctions was unjustified, and certainly I cannot look behind it. It seems to me that the Respondent was entitled and the Appellant obliged to take that order at face value unless and until it was varied or set aside.

33 As a counsel for perfection, it may be that concerns about the trial date could have been aired at the PTR. I anticipate that they were not, because everyone, including Judge Lochrane, was assuming that the trial would take place as expected on 3 February and it was, unfortunately, a surprise to everyone that there was no judge available on that date.

34 It seems to me that in those circumstances it is entirely wrong to cause any party to pay the other party's costs in this case. It is, of course, a matter of deep regret that there was no judge available on this date, but it seems to me that the fault, to the extent there is fault, does not lie with either party but simply rests with the court administration and I am afraid that the natural consequence of that, the proper order to make in those circumstances, is that each party bear their own costs and that there be no order as to costs.

35 So it seems to me that, although I come to the conclusion that the judge did it by a rather different route, his order (that is to say, to make no order as to costs) was absolutely the right order to make in the circumstances and is the order that I make now in relation to the adjourned trial.

36 That brings me to the final question which I must address and I do so on a provisional basis, because I have not yet heard the parties on the question of the costs of the appeal. It is an

unfortunate situation that the values at risk on this appeal is just under £8,000, if one accumulates the costs of both parties. Each party is seeking costs of between £3,000 and £4,000. Each party has to an extent succeeded. Mr O'Grady has succeeded on the law: I have found that there was, contrary to what the Judge considered, a discretion to make the costs order that Mr O'Grady wanted him to make. On the other hand, I have found that had the Judge properly directed himself, he would have made the order that he actually did, and to that extent Mr Channer has succeeded. It seems to me, and I speak provisionally here, that the appropriate order hereto is to make no order as to costs. But I say that in order to focus the parties' submissions in relation to costs rather than to make any final ruling.

37 My final ruling on the matter that is actually before me at this instant is to dismiss the appeal, for the reasons that I have given.

[After hearing submissions on the costs of the appeal.]

38 I have before me the question of the costs of this appeal. I gave a provisional indication that I was minded to make no order as to costs on the appeal. Mr O'Grady has not sought to dissuade me from that course; Mr Channer has, and I can understand why he would wish to do so. The problem is that this is a case where the rules – no doubt drafted with the best of intentions – have created more costs than they have solved. The fact is that the Judge, as I found, was misdirected by those rules into making an order on a basis that was incorrect, and that has been corrected on this appeal. That has been, really, the reason why this appeal was given permission by Morgan J.

39 The unfortunate fact is that the Judge's instincts to order no order as to costs below were, if wrongly articulated, entirely right in the event, and that means that in terms of outcome, Mr Channer has been successful. Ordinarily, the costs of an appeal will follow the event, but this is a case which is, for the reasons I have given, entirely exceptional and it seems to me that I must make the order, similar to the one made by the Judge below, that there be no order as to costs, and the costs lie where they fall because – and I am very sorry to say this – neither party is at fault for the losses they have sustained, it is simply that a date for trial which they both were ready for and wanted to have was ineffective for reasons that neither can be blamed for.\

40 It seems to me that the appropriate order is no order as to costs both below and here. So that is the order that I will make, and I make it with some regret but it seems to me it is the best I can do in these circumstances.

CERTIFICATE

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