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No. CH-2018-000186

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
CHANCERY DIVISION

Royal Courts of Justice

Tuesday, 27 November 2018

Before:

MR JUSTICE MORGAN

B E T W E E N :

GULIO TONNA — Appellant

- and -

MR KATERJI — Respondent

MR N. TOWERS (instructed by Downs Solicitors) appeared on behalf of the Appellant.

Owen, White and Catlin appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE MORGAN:

1 This is an appeal against part of an order made by Her Honour Judge Raeside sitting in the County Court at Guildford on 14 June 2018. The appeal is brought with permission granted by Mr Justice Arnold.

2 The underlying litigation, which I am told has now been settled, was litigation of a familiar but also an unfortunate character. It was a dispute between neighbours about works being done on the boundary between their properties. The two properties are 17 and 19 Ellington Road. The claimant, Mr Katerji, is the freehold owner of 17 Ellington Road and Mr Tonna, the defendant, is the leaseholder of 19 Ellington Road.

3 The order which is challenged related to the costs of a committal application made by the claimant, Mr Katerji, against the defendant, Mr Tonna. The judge made the following order:

> "There shall be no order for the costs of the committal application save that the costs of attendance (and not preparation) for today shall be costs in the case".

4 During the early part of this litigation Mr Tonna and Mr Katerji were in person. Mr Katerji issued the proceedings using a part 8 claim form. I have not seen the part 8 claim form, but there is reason to believe that it was not as helpful as it might have been in defining the basis of the claim. Mr Katerji, having issued his claim form, wanted an immediate interim injunction against Mr Tonna. He appears to have wanted to proceed *ex parte*. I say that because there is apparently a note on the file from the judge in the county court saying that the matter should be heard on notice.

5 The matter was heard before Judge Coulthard sitting in the County Court at Lewes on 18 August 2017. Mr Katerji attended that hearing in person, Mr Tonna did not attend. I am not wholly clear whether there was valid service of the application for the injunction on Mr Tonna. I will deal with the circumstances in which Mr Tonna did not attend later in this judgment. At any rate Judge Coulthard made the following order:

> "1. The defendant Mr Gulio Tonna shall repair all damage caused to the wall, fill the trench and replace the boundary fence, also allow a court ordered surveyor to ensure structural repairs in boundary wall is satisfactory;
> 2. The defendant Gulio Tonna is forbidden, whether by himself or by instructing or encouraging or permitting any other person to do any work against this wall or further breach, The Party Wall etc. Act 1996, until further order".

6 The order also provided that it would remain in force until further order, but it then went on to say that there was to be a return date for a hearing on 19 September 2017 at Guildford County Court. It is possible to be critical of the drafting of that injunction. There are ambiguities as to precisely what work had to be done as the subject of this mandatory order. However, those points that might be made have not been central to what later ensued.

7 What is significant about the order is it did not specify a time for compliance with the mandatory part of the order. That does not make the order inherently defective, but it does have implications, as we shall see, for an attempt by the claimant who had obtained the order to commit for a breach of the order.

8 The order provided for a return date of 19 September 2017 and the matter did come back before the court, this time the county court sitting at Guildford, before Her Honour Judge Raeside. On that occasion Mr Katerji attended in person and Mr Tonna did not attend. The judge ordered that the earlier order should continue. The judge also had before her an application on paper from Mr Tonna to set aside the earlier order. She dismissed that

application. As she later explained, she dismissed it on the ground that Mr Tonna had not attended the hearing to present the application.

9 So far as the court proceedings are concerned, matters remained in that position until the next year. On 3 April 2018, the proceedings started up again. By this time, Mr Katerji had gone to solicitors, Owen, White and Catlin LLP, and the particular solicitor acting was a Mr Soper. On 3 April 2018, Mr Katerji, acting through those solicitors, made an application for the committal of Mr Tonna. The standard form application notice, at paragraph , stated that it was an application for committal on the ground that Mr Tonna had failed to do an act required by a judgment or an order within the time fixed by that judgment or order.

10 One might have thought that statement, which the solicitors had no doubt copied out from the Civil Procedure Rules, would have caused the solicitors to ask themselves: what was the time fixed by the judgment or order? I think if they had applied themselves to that question and in particular had considered the terms of the rule and the notes in the **White Book**, they would have seen at once that it was inappropriate to apply to commit for a breach of the earlier order given that it was a mandatory order which did not fix a time for compliance. There is an easy and obvious step which must be first taken before any application for a committal for such a breach and that is to ask the court to insert a time for compliance and then, if that time limit is not complied with, an application for committal may be made.

11 The application notice was supported by a short witness statement of Mr Katerji running to about a page and a half. Mr Katerji referred to the order of 18 August 2017 and the order of 19 September 2017. Mr Katerji asserted that Mr Tonna had not done anything. In particular he asserted that Mr Tonna had not made any attempt to fill the trench. Mr Katerji exhibited some photographs and I have seen the photographs, although I could not myself, without a lot of guidance, form any view as to what they showed about the trench. Mr Katerji submitted that it was evident from the photographic evidence that Mr Tonna had ignored the injunction. He also submitted that his application for a committal was necessary and appropriate.

12 The matter was listed for a hearing before Judge Raeside at Guildford on 14 June 2018. It looks like Mr Tonna went to solicitors and counsel in readiness for the hearing of 14 June 2018, perhaps it was to counsel only, but at any rate Mr Tonna sought advice from, or instructed, Mr Towers of counsel. Perhaps because the instructions were late, a witness statement from Mr Tonna was prepared only shortly before the hearing. I have a copy of the witness statement of Mr Tonna dated 12 June 2018. I understand that it had been sent to the solicitors for Mr Katerji. It was also, I believe, sent to the court but we will see what the judge said about that in her judgment.

13 I need not at this point say any more about the witness statement of Mr Tonna. Before the hearing on 14 June 2018, Mr Towers of counsel had prepared a skeleton argument which was provided to the court. I have not seen a copy of the skeleton argument. I have been told certain things about what it said as to what the judge should have been aware of at the hearing on 14 June. I am told that Mr Towers took the point that the committal application was fatally flawed because the mandatory order on which it was based did not contain a date for compliance. I understand that Mr Towers took other points about the procedural position in relation to the committal. They may or may not have been good points, I think some of the procedural steps taken by Mr Katerji look to me to have been on the inadequate side.

14 I also understand that Mr Towers in his skeleton argument indicated that Mr Tonna would

dispute the allegation as to breach of the order. Whether that point went to every part of the order or whether there was only a point about filling in the trench, I am not clear. I also understand that there was some reference, it may only have been a passing reference, to the reasons why Mr Tonna had not attended the hearings in August and September 2017.

15 I was told a little about what had happened at the hearing on 14 June 2018. I understand that Mr Soper, appearing for Mr Katerji, presented his application to commit Mr Tonna for contempt of court. Then Mr Towers addressed the court and it seems that at quite an early point in his submissions the judge indicated that she accepted the point that the committal application was defective and the committal order could not be made. It seems that during the course of Mr Towers' submissions the judge indicated what she was minded to do on the committal application and she invited the parties to leave court to agree directions in the underlying litigation. They did so and then returned to court. When they returned, their proposals as to the directions were explained to the judge and they seem to have been broadly acceptable and in due course they were incorporated in the court's order.

16 That, then, left the question as to the costs of the committal application. Mr Towers applied for his costs on the grounds that the committal application had been dismissed. He stressed that a committal application is a very serious procedural step to take, with serious consequences, and he criticised Mr Katerji and his legal team for what they had done. There seems to have been reference, perhaps only a passing reference, to the procedural history as to why Mr Tonna had not been at the hearings in August and September, and so on.

17 It seems from what the judge later said that she had not read Mr Tonna's witness statement, I think there was a witness statement from Mr Katerji in response and I proceed on the basis she had not read that either. I do not criticise the judge because these documents may not ever have been put in front of her physically and anyway they were late and they perhaps appeared to have been superseded by the events of the morning.

18 The judge then gave a short judgment and my purpose in looking at the judgment is to see what she said about the costs of the committal application. She set out the procedural history, she referred to Mr Tonna as not attending the hearings in August and September 2017; she did refer to his application to set aside the first injunction. She said at paragraph 9 of her judgment that she had not seen Mr Tonna's witness statement. She referred to Mr Towers' skeleton argument, but she referred to it for the purpose of identifying the defect in the committal application. She said that the claim was unsatisfactory in a number of respects. She said that the defendant did not serve any evidence in response to the part 8 claim form. She then said:

> "It is not a criticism of anyone acting in person, but it was not straightforward litigation which has been conducted without legal advice which has made the whole process go off track".

19 Just commenting on that, true it is that the litigation had not really proceeded at all. As to the committal application, that had been made by Mr Katerji with legal advice. The judge then said that the parties had agreed some directions and she commented on that. Then she turned her attention to the application for costs.

20 She summarised the basic submissions of both sides. Mr Towers is recorded as saying that costs should follow the event, essentially because the committal application had been dismissed, and he is recorded as saying that the committal application was a very serious application. He is recorded as arguing that Mr Tonna was not to be criticised because he was under no obligation to do anything. The claimant, Mr Katerji, through Mr Soper,

resisted the application for costs. I do not know if there was an application by him for the claimant's costs. I am told today that Mr Soper appeared to be pressing the committal application and was ready to say that there was no procedural defect in it.

21 Then the judge said this - and I will read the last few paragraphs of her judgment:

> "This is a very unsatisfactory situation. I have to say I am wholly unsympathetic to the defendant who has failed to take any steps whatsoever to engage with this process either by responding to the claim or attending either of the two hearings that have been listed. He has sat back and allowed the situation to drag on and then comes to court and criticises the claimant in his actions. The claimant's actions have not been perfect procedurally or legally, but that has certainly not been helped by the inactivity of the defendant.
>
> I accept the principle that usually the successful party to an application is entitled to his costs, but in exercising my discretion today, I do not intend to award the defendant his costs. Both parties come here and have at last cooperated in agreeing directions going forward, which is what should have happened some time ago.
>
> I find the conduct of the defendant in failing to engage in the court process to have been conduct which I take into account in dealing with the matter of the costs of today. I do not consider it appropriate to award the defendant his costs for his contribution to the very sad situation that procedurally we find ourselves in today. The only costs order that I am prepared to make is that the costs of each party's attendance today will be costs in the case. That is the attendance costs only and not any preparation for today or any other of the matters relating to the today".

22 Mr Tonna now appeals the order for costs which was made. The grounds of appeal referred to in the appellant's notice run, I think, to some nine grounds. The first of the grounds considers the position of Mr Katerji and Mr Katerji's shortcomings in particular in relation to the committal application. The grounds then consider the criticisms made by the judge of Mr Tonna's conduct procedurally and possibly otherwise. The grounds of appeal refer to why it was Mr Tonna had not attended the hearings in August and September 2017. It is then said that his non-attendance at the hearings and the fact he had not filed a defence to the part 8 claim form was not causative of the costs resulting from Mr Katerji's committal application which was described as being misconceived. There was then a point about the fact that case management directions were agreed at the hearing.

23 The approach of an appeal court to an appeal against costs is well-known and is summarised in the **White Book** at note 52.1.14, beginning at page 1807. One of the cases cited is *Islam v Ali* [2003] EWCA Civ 612. I was taken to paragraph 20 of the judgment of Lord Justice Auld where he referred to the circumstances in which a court may intervene and alter an order for costs made by the lower court. The lord justice acknowledged that what he was saying was not new but was taken from a number of previous statements as to the correct approach. I will read the quotation from paragraph 20 in these terms:

> "The court should only intervene where 'the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that [the exercise of] his discretion is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale'".

24 Before turning to the judge's reasons, I acknowledge and indeed accept the force of the

point made by Mr Towers that this committal application was fatally flawed and was bound to fail. It should have been obvious to Mr Katerji's solicitors that an application for committal could not be made at that point, no matter how badly Mr Tonna had behaved or allegedly behaved. It was necessary, so far as the mandatory order was concerned, to have a fixed time specified. That could have been done without difficulty and then a committal application would have been considered on its merits. But in April, when the application was made, still in June, when the hearing took place, it was inevitable that this application would fail.

25 It is also right that the court should regard an application to commit as very much a last resort. The applicant for committal is wielding, or attempting to wield, a big stick with potentially very serious consequences. It is not something to be done lightly, it is only to be done after very full consideration and when it fails, one would normally expect that costs would follow the event. So before looking at the judge's reasons, the starting point really has to be that the court in the ordinary way should have inclined to awarding costs to Mr Tonna.

26 Turning to the reasons given by the judge, I have read them out. I will now look at one or two of the reasons a little more fully. At [18], the judge said that the situation was very unsatisfactory. It will be seen that she regarded Mr Tonna as being the principal reason why the situation was very unsatisfactory. For myself, I do not see that the judge really had the material on which to apportion blame to one side or the other in that respect. Mr Katerji had brought the proceedings, he had applied for and obtained an order, there was no requirement that Mr Tonna had to file evidence in support if he did not want to, nor that he had to attend hearings at which orders were made against him if he did not want to.

27 The judge was not dealing with the underlying litigation. Certainly the application to her was not about the underlying litigation, although she then went on to refer to it in a perfectly sensible way and promoted the idea of directions being given. The matter which was before her and the matter where she could deal with the costs was the application to commit. That was an unsatisfactory situation, but the shortcomings which led to the dismissal of the application could only be laid at the door of Mr Katerji.

28 Then the judge said she was wholly unsympathetic to the defendant who had failed to take any steps to engage with the process. Again, Mr Tonna was not required to take steps, but anyway the steps were his failure to deal with the underlying litigation. He had turned up to answer the committal application and he had succeeded. It might also have been said that the judge was not really in a position to make positive findings about the procedural history, she had been told certain things by Mr Towers, perhaps only by way of passing reference, and she knew that she did not have before her the witness statement that Mr Tonna had belatedly prepared. I think it would have been better to be cautious before coming to any view about the actions taken by the parties in the procedural course of this litigation.

29 She also said that Mr Tonna allowed the situation to drag on. Now given that Mr Towers had said in his skeleton argument that he would challenge the assertion that nothing had been done and the judge had not gone into the merits of that, it would not be right to say that the situation had dragged on by reason of what Mr Tonna had done. He then came to court and criticised the claimant, so he did, but the criticism was of a fundamental character and was correct.

30 Perhaps the clearest reason for the judge's decision on costs is when she said that the conduct of the defendant in failing to engage in the court process is conduct she took into account. She found that his conduct in failing to engage in the court process disentitled him

in effect to his costs of succeeding in defeating the committal application.

31 With the guidance in *Islam v Ali* before me, I would say that the judge had erred in principle in her approach to her decision. She made decisions about blame and fault which she was not in a position to make on the material before her. She may have speculated, she may have wondered, she may have expected, but if she were to go into the matter and make findings, she would have to have relevant material before her, but she can be criticised, with respect, for forming conclusions where she really did not have the material.

32 The other error of principle I can detect is that there was no causative link between the conduct she was criticising, rightly or wrongly, and the incurring of costs in resisting successfully the committal application. Mr Towers was not minded to put the case that way, although I think it can well be put that way. His submission instead was, adopting the formulation in *Islam v Ali*, that this was a case where I should come to the conclusion that the judge below had not balanced the various factors fairly in the scale.

33 Having taken the view I have of her decisions about conduct, blame and causation, I do take the view that she did not balance the factors fairly. I do not think it was fair to make such adverse findings against Mr Tonna as to disentitle him to the costs of the committal application. The judge did not take the view, which I think is the fair view, that a committal application which has a fatal defect which is dismissed should normally result in the successful party having his costs. Of course, if the judge had gone into the merits of the underlying allegation and had found that the respondent to the committal application was guilty of serious wrong-doing but was escaping by reason of technicalities, that would be one thing, but I do not see that as being the appropriate approach to this case and I think an appeal court could reverse a judge who saw this case that way.

34 It follows that I have to decide for myself what should happen in relation to the costs of the committal application. I am not in a position to decide the degree of blameworthiness of the parties to this dispute, either as regards the underlying dispute or even very much as regards the procedural history. I also think that I should put those matters where I cannot make any fair decision on one side and look at the committal application as a free-standing application. Mr Tonna is entitled to say he has succeeded and Mr Katerji has failed. I do not know enough about the underlying merits of the committal application to say whether this is a case of Mr Tonna escaping on a technicality or whether the case is different from that. I think the only safe order to make, subject to one possible qualification I will mention, is to say that Mr Tonna should have his costs of the committal application.

35 I have considered whether to qualify that award of costs by indicating that some of the costs incurred by attending on 14 June 2018 should be costs in the case. I have decided not to make that qualification. The purpose of the hearing was to deal with the committal application. Mr Tonna's counsel had suggested in his skeleton argument that the day could be used to give directions. If that was not in Mr Towers' skeleton argument, it was in Mr Tonna's witness statement, which was, of course, available to Mr Katerji. Mr Katerji does not appear to have engaged with that suggestion until the day itself and, because everyone was there, directions were agreed. I do not think it would be right to take from Mr Tonna a part, it would only be a small part, of his costs of attending through his legal team on 14 June on that count.

36 I have not, in coming to my decision, found it necessary to rely upon the evidence in Mr Tonna's witness statement, so I will not rule on the application whether that should be admitted as evidence on this appeal. I will, for reasons I have given, allow the appeal, I will set aside the order for costs in the court below and in its place I will make an order that

Mr Katerji pay to Mr Tonna Mr Tonna's costs of successfully defeating the committal application.

37 I am asked to assess costs on the indemnity basis. I have not heard argument on that. I would suggest that if I am asked to do a summary assessment today, that probably nothing will turn upon whether the costs are on the standard basis or the indemnity basis, so I would not encourage any lengthy exchanges about an indemnity basis.

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