



Neutral Citation Number: [2018] EWCA Civ 2963

Case No: B6/2016/3210

IN THE COURT OF APPEAL (CIVIL) DIVISION
ON APPEAL FROM THE CENTRAL FAMILY COURT
(RECORDER CUSWORTH QC)

The Royal Courts of Justice
Strand, London WC2A 2LL

Tuesday 27, November 2018

Before :

LORD JUSTICE DAVID RICHARDS

and

LORD JUSTICE MOYLAN

Between:

RENIER LEMMENS

- and -

BARBARA BROUWERS (EX LEMMENS)

Appellant

Respondent

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The Appellant appeared in Person

The Respondent appeared in Person

Approved Judgment

LORD JUSTICE MOYLAN:

INTRODUCTION

1. The husband (as I will call him) appeals from an order for costs made by Recorder Cusworth QC sitting at the Central Family Court as long ago as 23 February 2016. Permission to appeal was given to the husband on 15 December 2016 and it is not clear to me why this appeal has taken so long to be determined.
2. The costs order required the husband to pay the wife £30,000 as a contribution towards her costs of £127,000. The order was made at the conclusion of the hearing determining the husband's application for a variation of periodical payments.
3. At this hearing both parties appear in person. At the hearing below the husband appeared in person while the wife was represented by counsel.

Background

4. It is only necessary to set out a very brief summary of the background.
5. On 11 April 2014 District Judge Reid made a consent order which required the husband: (a) to pay the wife periodical payments at the rate of €7,728 per month; and (b) to pay the two children of the family periodical payments at the combined rate of €6,440 per month until the elder child completed secondary education, when it would reduce to €4,830 per month.
6. The husband issued his variation application on 2 October 2014. The application followed a somewhat tortuous path until its determination at the hearing on 7 January and 19 February 2016, followed by judgment which was handed down on 26 February 2016.

The Judgment

7. The periodical payments order of 11 April 2014 was varied because, simply stated, the husband's financial circumstances had changed. The then current global amount of €12,557 per calendar month was reduced to €9,045. The judge allocated this sum between the wife and the younger child in proportions which seem to be much closer to those proposed by the wife than those proposed by the husband.
8. The costs were dealt with at the end of the judgment. The judge referred to rule 28.3 of the Family Procedure Rules 2010 and quoted sub paragraphs (5), (6) and (7).
9. The wife sought an order that the husband should pay her costs. The judge rejected that application but decided that he should pay, as I have described, a contribution of £30,000. The judge considered that the husband could be:
 - i. "... fairly criticised [in] that he failed to explain the situation clearly to the [wife] or her advisers, such that they understood properly either his concerns about the viability of the business or its ability to produce any significant value for him over his income. Had he done so, he surely would have reduced the costs which the wife then incurred as she sought to understand how he justified

continuing with his application, although his income appeared not to have altered since the beginning of 2014.”

10. The judge then continued in paragraph 35:

- i. "Right up to the commencement of the listed final hearing before me on 7th January 2016, [the wife] had still not been afforded a fully intelligible explanation, as I find, of the situation in relation to [then he names a business], and [the husband] bears responsibility for a share of the costs run up in pursuing that issue. I have said a share - I have to say that costs in excess of £127,000 incurred by [the wife] in a case such as this are not properly proportionate to the issues being investigated, and cannot be nearly recoverable in any event. Overall, I will order that [the husband] should make a contribution to [the wife's] costs in the sum of £30,000, which I consider properly reflects the extent to which [the husband] has increased the costs which [the wife] might properly have incurred had he been appropriately forthcoming about his situation."

11. The judge gave more details in the earlier parts of his judgment including, in particular, that the husband's Form E of 8 December 2014 "undoubtedly gives a deliberately misleading impression". The judge also said:

- i. "[The husband] in fact was now repenting of his bargain, in that he was paying maintenance based upon receipt of the loan monies, as he now no longer believed that in due course these would be absorbed into a significant capital gain. That was the change of circumstances which he should have specified and he should have made clear that for the time being the loan was still being received."

Appeal

12. Turning to this appeal. The husband's case in support of his appeal has been set out in detailed written submissions. Today, in his oral submissions, he has advanced his case, if I might say so, attractively and with commendable focus. I propose only to summarise his submissions in this judgment but I have taken all the matters raised by him into account when determining this appeal.

13. The grounds of appeal advanced by the husband fall into two categories. First, he challenges the procedure and secondly, he challenges the judge's determination.

14. As to the former, he submits that the process was unjust due to serious procedural irregularities. These comprise in summary: (a) that the wife did not provide him with a copy of her Form H costs schedule until just before he was due to make his final

submissions at the end of the hearing; (b) that the court should not have summarily assessed the costs or his liability for costs but should have provided for a detailed assessment; and (c) that the judge failed to establish a reasonable and proportionate base for his assessment of costs. This third element also features in the husband's second substantive challenge to the order.

15. The husband submits that the judge did not respond in a proportionate manner to the wife's failure to serve her costs schedule. He submits that he was prejudiced by this because he had no real opportunity to analyse the detail. Further, the judge dealt with costs too quickly and in too broad-brush a manner and in a manner which was also rushed. Given the circumstances, including the length of the hearing and the issues of substance which he sought or wanted to raise, the costs should have been subject to a detailed assessment.
16. In respect of the exercise of the judge's discretion, the husband contends, again in summary: (a) that the judge failed properly to consider the rules when making the order for costs; and (b) that the judge's consideration was inadequate leading to a flawed determination and, in particular, that the amount the judge ordered the husband to pay was disproportionate.
17. The husband contends that he did, in fact, provide information in a timely fashion and that, even if his, or to the extent to which, his disclosure was deficient the order made by the judge "bears no relationship to the actual" additional costs caused by this. He submits, as I have indicated, that the judge adopted an approach which was too "broad brush" and did not adequately consider what the husband should pay by reference to those costs which the wife had proportionately and reasonably incurred and which were proportionate and reasonable in amount, in accordance with the Civil Procedure Rules 1998 (rule 44.4).
18. The husband has identified those areas which, he submits, the judge did not sufficiently take into account. These include, the impact of the wife's conduct during the proceedings, both her repeated refusal to accept the veracity and authenticity of documents he disclosed and her unwillingness to engage in settlement discussions.

Legal Structure

19. Family Procedure Rules 2010 rule 9.27 requires each party to produce an estimate of costs at every hearing or appointment. Subparagraph (2) requires a "statement giving full particulars of all costs in respect of the proceedings" which has to be filed and served not less than 14 days before the final hearing.
20. Rule 28.3 of the FPR provides that the general rule in financial remedy proceedings is that the court will make no order as to costs. Subparagraph (6) provides that the court may make an order for costs when it is "appropriate to do so because of the conduct of a party in relation to the proceedings". Subparagraph (7) sets out the factors to which the court must have regard, as quoted by the judge in this case.

21. Practice Direction 28A paragraph 4.4 provides:

- i. "In considering the conduct of the parties for the purposes of rule 28.3(6) and (7) (including any open offers to settle), the court will have regard to the obligation of the parties to help the court to further the overriding objective (see rules 1.1 and 1.3) and will take into account the nature, importance and complexity of the issues in the case. This may be of particular significance in applications for variation orders and interim variation orders or other cases where there is a risk of the costs becoming disproportionate to the amounts in dispute."

22. CPR 1998 Practice Direction 44 paragraph 9.1 provides that:

- i. "Whenever a court makes an order for costs ... the court *should* [emphasis added] consider whether to make a summary assessment..."

23. By paragraph 9.2, as applied to family proceedings, the general rule is that the court should summarily assess costs at the conclusion of a hearing which has not lasted more than one day unless there is good reason not to do so.

24. It is also relevant to refer to the overriding objective which, among other matters, requires the court, so far as practicable, to deal with a case in a manner which saves expense.

25. In Q v Q [2002] 2 FLR 668 Wilson J (as he then was) considered whether he should summarily assess the costs at the conclusion of a 10 day hearing. He referred to the overriding objective and to the "steer" given by the rules "towards summary assessment even of the costs of longer hearings" (paragraph 33). At the end of his judgment he referred to some of the advantages which would follow from a summary assessment.

26. It is well established that appeals from the exercise by a judge of his discretion when making an order for costs will only succeed if it is demonstrated that the judge has exceeded the generous ambit within which reasonable disagreement is possible. There is no need to cite authority for this proposition. I would refer simply to Malialis v Malialis [2013] 2 FLR 1216 in which Thorpe LJ said, in respect of financial remedy proceedings, that a judge has "a particularly wide discretion" (paragraph 13).

Determination

27. I deal first with the husband's procedural challenge.

28. The wife should have served her costs schedule on the husband in accordance with the rules. If a party fails to do so, this will be taken into account by the court when determining what order to make. There is no direct reference in the judgment to the late

service of the schedule. However, the judge cannot, in my view, have been unaware of this. Further, despite the husband's submissions, I can see no real prejudice to him arising from the late service of the Form H in the manner in which the judge dealt with costs. The issues were relatively simple and, in my view, the husband did not need more time to enable the costs to be determined fairly to him. In particular, the husband has not persuaded me that there were any substantial grounds on which he sought to dispute the costs claimed which meant that the costs could not be dealt with summarily.

29. There were, as there will be in many, if not most, financial remedy proceedings, good reasons for the costs to be assessed summarily at the conclusion of the final hearing. At the end of such a hearing a judge will typically be very well placed to make such an assessment, a step which, in my view, would also be in accordance with the overriding objective. In this I agree with what Wilson J said in Q v Q. In particular, as I have said, the husband has not persuaded me that there were any substantial grounds for disputing the sum claimed which could not be dealt with summarily.
30. Accordingly, I consider that the judge was entitled to decide to assess the costs summarily. There were no, let alone any serious, procedural or other irregularities which undermine the judge's decision to do so.
31. Turning next to the exercise by the judge of his discretion. The judge clearly considered the provisions of rule 28.3. The question is whether he failed properly to apply them or whether he otherwise came to a decision which was wrong. The husband has focused, in particular, on the issue of whether the judge's assessment of the impact of his conduct on the level of the wife's costs was inadequate and/or flawed.
32. In my view, it is clear first that, contrary to the husband's submissions, the judge made his order by reference to *his* assessment of the wife's proportionate and reasonable costs. As set out in paragraph 35 of the judgment, his order was made by reference to "the costs which [the wife] might properly have incurred".
33. Secondly, in my view, the judge was clearly entitled to decide that the sum of £30,000 reflected the extent to which the husband's conduct had increased the wife's costs. The husband has sought to analyse the wife's costs to demonstrate that that sum bears no reasonable and proportionate relationship to the costs which could have been caused by him. He referred to his Form E as being a matter which was "*de minimis*".
34. Again, I have to say that none of the husband's arguments persuade me that the judge's assessment was insufficient or based on any errors. The judge was very well placed to assess the impact of the husband's conduct on the course of the proceedings. He clearly balanced this against the wife's conduct because he decided that the wife's costs were disproportionate to the issues in the case.
35. I do not find it surprising that the judge attributed significant weight to the fact that the husband's Form E was deliberately misleading. This cannot be lightly dismissed as *de minimis*. Even if, as the husband submits, the inaccuracy was corrected within a

relatively short space of time, the failure to give full and frank disclosure at the outset of proceedings can have continuing consequences. The judge further identified that the husband had not provided the wife with a “fully intelligible explanation” until the final hearing. These are findings which the husband cannot sensibly dislodge.

36. In my view, the judge has sufficiently explained his summary assessment. None of the husband's arguments persuade me that the judge's decision exceeded the “particularly wide discretion” which, to quote Thorpe LJ, he had.

Accordingly, if my Lord agrees, this appeal must be dismissed.

LORD JUSTICE DAVID RICHARDS:

37. I agree.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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