

Neutral Citation Number: [2020] EWCA Civ 1409

Case No: A2/2019/0553

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION,
MEDIA & COMMUNICATIONS LIST

Nicklin J

[2019] EWHC 1893 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 October 2020

Before :

LORD JUSTICE LEWISON

and

LORD JUSTICE ARNOLD

Between :

(1) RAMKARUN BUSHAN DEEPCHAND

(2) LAMBETH SOLICITORS

- and -

ANBANANDEN SOOBEN

Appellant

Respondent

Joshua Monro (instructed by **Lambeth Solicitors**) for the **Appellants**

Andrew Roy (instructed by **MDL Solicitors**) for the **Respondent**

Hearing date : 22 October 2020

Judgment Approved

Lord Justice Arnold:

Introduction

1. This is an appeal by Ramkarun Deepchand and Lambeth Solicitors from an order of Nicklin J dated 18 February 2019 refusing an application by Anbananden Sooben for a non-party costs order against the Appellants, but making no order as to costs. The Appellants contend that, since the application was refused, Mr Sooben should have been ordered to pay their costs of resisting the application.

Factual background

2. The factual background to the appeal is on any view extraordinary, involving a bitter dispute between two solicitors of Mauritian heritage, and therefore it needs to be set out in a little detail.
3. Mr Sooben is a solicitor. He was born in Mauritius, but came to live in the UK in 1964. He qualified as a solicitor after working for 23 years as a civil servant.
4. Mr Deepchand, who also has a Mauritian background, is now also a solicitor, having been admitted in September 2017. Mr Deepchand had worked in the legal sector for many years before that, however. On 21 October 2013 at Southwark Crown Court he was given a Conditional Discharge for 12 months on three counts of illegally providing immigration advice and services in 2009.
5. In November 2013 Mr Deepchand gave an interview to *Mauritius Now*. This was an English newspaper with a circulation of around 1,000 aimed at the Mauritian community in the UK. An article based on the interview by the editor, Eshan Badal, was published in the newspaper. Mr Deepchand used this interview to protest his innocence. As part of this, he alleged that Mr Sooben had attempted to suborn or procure him to commit perjury to support Mr Sooben's claim against Mr Sooben's former partner in an English solicitors' firm.
6. Mr Sooben issued proceedings against Mr Badal just before expiry of the limitation period in November 2014. In March 2016 Mr Sooben applied to join Mauritius Now Ltd, the publisher of the newspaper, and Mr Deepchand as defendants to the claim. The application for joinder was dismissed by Master McCloud in April 2016 because it was made well outside the limitation period.
7. Mr Badal was represented by Lambeth Solicitors. The fee earner at Lambeth Solicitors with conduct of Mr Badal's case was Benjamin Abu, a solicitor and a partner in the firm. Remarkably, Mr Deepchand was a trainee solicitor at Lambeth Solicitors at the time. Even more remarkably, Mr Deepchand worked on the case from time to time.
8. Mr Badal defended the claim on the bases of (i) the words complained of not being defamatory, (ii) justification, (iii) fair comment and (iv) *Reynolds* privilege. Mr Deepchand made a witness statement in support of Mr Badal's defence of justification.
9. The action came to trial before Nicklin J in October 2017. On the first day of the trial Mr Badal made an application that the claim should be dismissed under CPR Part 24

and/or section 8 of the Defamation Act 1996 on the grounds that (a) the words complained of were not defamatory and/or (b) the justification defence was bound to succeed. The judge dismissed this application.

10. In the event, it was not put to Mr Sooben in cross-examination that the perjury allegation was true. The judge therefore enquired whether Mr Badal was still so contending. It was confirmed that he was not. Justification and fair comment were thus not pursued as defences.
11. Nicklin J dismissed the remaining defences advanced by Mr Badal and awarded Mr Sooben £70,000 in damages for the reasons given in his judgment dated 31 October 2017 ([2017] EWHC 2638 (QB)). As the judge explained, the maintenance and ultimate abandonment of the justification defence were significant aggravating factors in his assessment of damages.
12. Despite this success, Mr Sooben did not pursue Mr Badal for costs. Evidently this was because Mr Badal had limited means.
13. On 6 November 2017 Mr Sooben made an application, without prior notice, for the Appellants to be made jointly and severally liable for Mr Sooben's costs of his claim against Mr Badal pursuant to CPR rule 46.2. Mr Sooben sought £49,860 in costs.
14. The application notice alleged that Mr Deepchand was a "real party" to the claim because: (i) Mr Deepchand was the speaker of the defamatory words in the article; (ii) Mr Deepchand had given a witness statement in support of Mr Badal; (iii) Mr Deepchand had defended, or procured Lambeth Solicitors to defend, the claim on behalf of Mr Badal notwithstanding that the pleaded defences had "no merit whatsoever"; and (iv) Mr Deepchand "therefore stood to benefit personally from causing [Mr Sooben] to incur irrecoverable costs and/or being paid for his work on the case".
15. The application notice alleged that Lambeth Solicitors had advanced Mr Badal's defence in spite of the fact that it had "no merit whatsoever" and "may well have funded the claim in the sense of advancing credit to [Mr Badal] for their work and/or in respect of disbursements and in any event sought to benefit financially from the case by way of their profit costs". No application was made for a wasted costs order pursuant to CPR rule 46.8, however.
16. The Appellants resisted the application. Their position, in summary, was that the application notice disclosed no good grounds for a non-party costs order and therefore the application should be dismissed.
17. The matter came on for hearing before Nicklin J on 14 March 2018 with a time estimate of three hours. At that hearing, Mr Sooben applied without notice for an adjournment of the application. The grounds for the application, as explained orally by counsel for Mr Sooben, were that Mr Sooben wished to obtain a witness statement from Mr Badal. Mr Sooben alleged that Mr Badal had informed Mr Sooben's solicitors that the litigation had been controlled by Mr Deepchand; but that, the day before the hearing, Mr Badal had telephoned them to say that he had been intimidated by Mr Deepchand and doubted that he would attend the hearing. In the event, however, Mr Badal was present in court at the hearing.

18. The Appellants resisted the application for an adjournment. The judge observed that the application on its face, and absent evidence from Mr Badal, appeared very weak, but he nevertheless granted the adjournment, gave the parties permission to file further evidence and reserved the costs.
19. No application was made by Mr Sooben to amend his application notice to allege that Mr Deepchand had controlled the litigation; but nor did the judge require that to be done.
20. Both parties did file further evidence, which in the case of Mr Sooben included a witness statement from his solicitor containing hearsay evidence attributed to Mr Badal that (in addition to what had been alleged at the hearing on 14 March 2018) Lambeth Solicitors had not charged Mr Badal for their work, but only for disbursements. No witness statement from Mr Badal was filed or served by Mr Sooben, however.
21. On 12 April 2018 Mr Badal sent a long letter to Nicklin J which, among other things, disputed Mr Sooben's allegations that Mr Deepchand had controlled the litigation, that Mr Badal had not been charged by Lambeth Solicitors for their work and that Mr Badal had been intimidated by Mr Deepchand. Nicklin J declined to read the letter unless it was copied to the other parties. A copy of the letter was sent to Lambeth Solicitors on about 21 April 2018, but not to Mr Sooben's solicitors. The Appellants decided not to rely on the letter or put it in evidence, and did not refer to it in witness statements filed subsequently.
22. The application was eventually re-listed for a directions hearing before Nicklin J on 18 February 2019. Shortly before the hearing, Mr Badal filed and sent to the parties a witness statement dated 15 February 2019 referring to his letter dated 12 April 2018 and essentially repeating what he had said in that letter, but this time verified by a statement of truth.
23. At the hearing, it was submitted by counsel for Mr Sooben that directions should be given for a trial of up to three days preceded by disclosure and exchange of witness statements. Counsel informed the judge that Mr Sooben's solicitors had recently located digital audio files which, he alleged, demonstrated that Mr Badal's and Mr Deepchand's witness statements were untrue, and that Mr Sooben sought time in which to have these files transcribed for disclosure. It was submitted by counsel for the Appellants that the application should be dismissed.
24. The judge decided that he should "decline to embark on the exercise of determining [Mr Sooben's] application" because "it will not be possible to do so proportionately". His reasons for reaching that conclusion were, in summary, that it was inevitable that at least two people, and more likely four, would have to give oral evidence and be cross-examined, which was not a summary procedure, but a trial; and that the costs of that exercise would be disproportionate to the sum which was in dispute. Furthermore, there was a real risk that the issues in the case would broaden to encompass the question of whether Mr Deepchand's allegations against Mr Sooben were untrue, when Mr Sooben had "surrendered his opportunity to have these issues determined" in the libel claim (i.e. by failing to join Mr Deepchand as a defendant in time), which was "not an appropriate use" of the jurisdiction.

The judgment under appeal

25. The judge articulated his principal reason for deciding to make no order as to costs as follows:

“... this is not a case in which there is an event, so called, for costs to follow: CPR Part 44.2(2)(a). Here, the outcome is neutral. On the one hand, I have accepted that the Court will not hear [Mr Sooben’s] application, but on the other, neither have I determined that that application ought to be dismissed. My first conclusion relevant to the issue of costs is that there has been no winner. As I have said, the Court is not in a position to adjudicate where the truth lies between the two very different accounts that have been given as to what has been going on in these proceedings.”

26. The judge went on to criticise the Appellants’ conduct in (a) failing to send a copy of Mr Badal’s letter dated 12 April 2018 to Mr Sooben prior to 15 February 2019 and (b) failing to provide any explanation for not having done so.
27. The judge concluded that, principally for the reason that there was no winner, but reinforced by his view as to the Appellants’ conduct, the appropriate order for costs was no order.

The appeal

28. The correct approach of an appellate court to appeals on costs is that described by Stuart-Smith LJ in *Roache v News Group Newspapers Ltd* [1998] EMLR 161 at 172 and cited with approval by Lord Woolf MR in *AEI Rediffusion Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507 at 1523:

“Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the Court is forced to the conclusion that he has not balanced the various factors fairly in the scale.”

29. Counsel for the Appellants submitted that the judge had made a clear error of principle in holding that there was no winner on the application. Mr Sooben had attempted to make the Appellants liable for nearly £50,000 in costs, but he had failed. Accordingly, the Appellants were plainly the winners. Accordingly, CPR rule 42.2(2)(a) indicated that they were entitled to their costs:

“If the court decides to make an order about costs –

- (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
- (b) the court may make a different order.”

30. In addition to emphasising that the judge had had a wide discretion, particularly given his familiarity with what was a very unusual case, counsel for Mr Sooben submitted that the correct analysis was that the judge had decided that he was not in position to make an order about costs, and thus rule 42.2(2) was not engaged. He argued that, although this was not a case in which the parties had settled the claim bar costs, the principles stated by Chadwick LJ in *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2003] EWCA Civ 939, [2004] FSR 9 in relation to such cases were applicable by analogy:
- “22. The power to make an order as to the costs of civil proceedings is conferred by section 51(1) of the Supreme Court Act 1981. It is in the discretion of the court whether, in any particular case, that power should be exercised. That is made clear by CPR 44.3(1)(a). It finds expression in the opening words of CPR 44.3(2) – ‘If the court decides to make an order about costs –’. The first question for the court – in every case – is whether it is satisfied that it is in a position to make an order about costs at all.
23. In addressing that question the court must have regard to the need (if an order about costs is to be made) to have a proper basis of agreed or determined facts upon which to decide, in the light of the principles set out under the other provisions in CPR 44, what order should be made. The general rule, if the court decides to make an order about costs, is that the unsuccessful party will be ordered to pay the costs of the successful party – CPR 44.3(2)(a). But the court may make a different order – CPR 44.3(2)(b). Unless the court is satisfied that it has a proper basis of agreed or determined facts upon which to decide whether the case is one in which it should give effect to ‘the general rule’ - or should make ‘a different order’ (and, if so, what order) – it must accept that it is not in a position to make an order about costs at all. That is not an abdication of the court’s function in relation to costs. It is a proper recognition that the course which the parties have adopted in the litigation has led to the position in which the right way in which to discharge that function is to decide not to make an order about costs.”
31. I should make it clear before proceeding further that the judge did not have the advantage of having the *BCT* case cited to him. It seems likely, however, that, if it had been cited to him, he would have regarded it as supportive of his conclusion.
32. Thus the first question which arises on the appeal is whether the correct characterisation of the judge’s decision is that there was no winner, or rather that he was not in a position to decide who the winner was. In my judgment the answer to that question is the latter. Although the judge twice said that there was “no winner”, it is clear that he did not mean that the outcome was a draw and that his reason for making that assessment was that the court was unable to determine where the truth lay, and hence whether to make a non-party costs order, at proportionate cost.

33. That takes to me to the key question, which is whether the judge was correct to conclude that, because he had decided that it would be disproportionate to allow the application to proceed to a determination on its merits, therefore he was not in a position to decide who the winner was. The conclusion I have reached is that the judge was in error. My reasons are as follows.
34. The first point is that it is clear that Mr Sooben did not achieve what he sought to achieve when he launched the application, namely an order that the Appellants pay his costs. In that sense, Mr Sooben was indisputably the unsuccessful party and the Appellants were the successful parties.
35. Secondly, whilst I fully accept that the reason why Mr Sooben did not achieve what he sought to achieve was that the court concluded that the application could not be determined in a proportionate manner, rather than that the court determined the application on its merits, I do not consider that this meant that the court was not properly able to make an order as to the costs of the application. An application for a non-party costs order, and in particular an application for such an order against the opposing party's lawyers, should only be made if it can be determined proportionately by means of a summary procedure: see *Symphony Group plc v Hodgson* [1994] QB 179 at 193 (Balcombe LJ), *Re Freudiana Holdings Ltd* (*Times*, 4 December 1995), *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120 at [24] (Lord Bingham of Cornhill), *Sims v Hawkins* [2007] EWCA Civ 1175, [2008] CP Rep 7 at [57] (Rix LJ), *Systemcare (UK) Ltd v Services Design Technology Ltd* [2011] EWCA Civ 546, [2011] 4 Costs LR 666 at [65] (Lloyd LJ) and *Kagalovsky v Balmor Invest Ltd* [2015] EWHC 1337 (QB), [2015] 3 Costs LR 531. If the application cannot be determined proportionately, then it should not be made. This supports, rather than undermines, the proposition that Mr Sooben should be responsible for the costs of making an abortive application.
36. Thirdly, I accept that the position might be different if the applicant for the non-party costs order could show that some unexpected defence raised, or evidence filed, by the respondent had transformed the application from one that could be determined proportionately into one that could not be. This is not such a case, however. On the contrary, the grounds relied upon by Mr Sooben in his application notice were always ones that were likely to raise disputed factual questions which could not be dealt with summarily.
37. Fourthly, as the judge held in his substantive judgment on the application, the grounds originally relied upon by Mr Sooben for the application were in any event "unpromising" ones. The grounds relied upon against Mr Deepchand amounted in effect to a collateral attack on Master McCloud's decision not to permit the joinder of Mr Deepchand as a defendant. As the judge said, that was not a proper use of the non-party costs jurisdiction. As for the grounds relied upon against Lambeth Solicitors, advancing defences of no merit on behalf of their client would not justify a non-party costs order. Even if it is true that Lambeth Solicitors extended credit to Mr Badal (which they dispute), extending credit to a client is not a ground for a non-party costs order against a solicitor: *Floods of Queensferry Ltd v Shand Construction Ltd* [2002] EWCA Civ 918, [2003] Lloyds' Rep IR 181 at [81] (Hale LJ). The judge might have added that the fact that the Appellants were not warned by Mr Sooben during the course of the libel proceedings that an application might be made was an additional factor pointing against an order being made against them, although not necessarily

determinative: see *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2004] 1 WLR 2807 at [31] (Lord Brown of Eaton-under-Heywood).

38. Fifthly, although, as the judge also held, the allegations that Mr Deepchand had controlled the litigation and not charged Mr Badal any fees were ones that were capable of supporting a non-party costs order, those allegations were first made on (in the case of controlling) or after (in the case of not charging) 14 March 2018, were never supported by evidence from Mr Badal and were contradicted by Mr Badal.
39. Sixthly, although counsel for Mr Sooben prayed in aid the conduct of Mr Deepchand in working as a trainee solicitor on a case in which he had a personal interest and was a witness, that was not a factor relied upon by the judge in support of his decision on costs. Furthermore, I consider that the judge was right not to do so. It did not bear on the question of who was successful on the application or on the costs incurred by the Appellants in defending the application. As the judge observed in his substantive judgment, Mr Deepchand's conduct in that regard was properly a matter for Mr Sooben to raise with Mr Deepchand's regulator if he so desired.
40. For the reasons given above, it seems to me that the present case is to be distinguished from the kind of case contemplated by Chadwick LJ in the *BCT* case, where the settlement by the parties of their substantive dispute leaves the court with no proper basis for deciding who the winner is. I would add that, even in that context, it may be possible for the court to identify the winner in order to determine the incidence of costs: see e.g. *Powles v Reeves* [2016] EWCA Civ 1375, [2017] 1 Costs LR 19.
41. Accordingly, I consider that the judge should have concluded that he was in a position to determine who was the successful party and that the Appellants were the winners. Counsel for Mr Sooben realistically accepted that, if that were the case, then it would follow that the judge's order could not stand and that the starting point for this Court when re-exercising the discretion would be the principle encapsulated in rule 44.2(2)(a).
42. It only remains for me to deal with the Appellants' conduct in not sending a copy of Mr Badal's letter dated 12 April 2018 to Mr Sooben's solicitors. The judge only relied upon this as a secondary factor supporting his decision. In my view it cannot justify depriving the Appellants of their costs of the application standing on its own, since even without receipt of a copy of the letter Mr Sooben knew, or should have known, that (i) he would be in difficulties without supporting evidence from Mr Badal and (ii) he had not obtained such evidence.
43. I would therefore allow this appeal and order Mr Sooben to pay the Appellants' costs of the application. In the circumstances it would seem appropriate for this Court summarily to assess those costs, and I would invite written submissions from the parties as to the sums claimed.

Lewison LJ:

44. I agree.