



Neutral Citation Number: [2023] EWHC 2089 (Fam) [No.2]

Case No: FA-2022-000333

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2023

Before :

SIR JONATHAN COHEN

Between :

SP
- and -
DM

Appellant

Respondent

Dr C Proudman (instructed by **Spencer West LLP**) for the **Appellant**
Mrs E Anstey (instructed by **Miller Parris Solicitors LLP**) for the **Respondent**

Hearing date: 10 August 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 6 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives in due course.

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SIR JONATHAN COHEN

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Sir Jonathan Cohen :

1. I now have to deal with the issue of costs following my dismissal of the mother's appeal against the order of Recorder Wood KC. Following the handing down of my substantive judgment I asked for written submissions which I have now received.
2. The father applies for an order that the mother pays his costs of resisting the appeal. His main and strongest ground is that he has been successful in all respects. In reply, the mother argues that there should be no order as to costs on the basis that her conduct in the course of the litigation has been reasonable and, in particular, she relies on the fact that Mostyn J granted permission on four of the grounds of her application for permission to appeal.
3. It is important to remind myself exactly what Mostyn J did say in granting permission. He said that in respect of grounds 1, 3 and 5 of the application he was doubtful that they would succeed. He granted permission on ground 2 on the basis that there was a failure to hold a ground rules hearing. He refused permission on ground 7 but did not describe it as being totally without merit, thus permitting the mother the opportunity, which she took, to apply for her appeal to be heard on that ground in addition.
4. In my judgment [see: [2023] EWHC 2089 (Fam)] I made it clear that I regarded Mostyn J as having been deprived of important information in respect of ground 2 as he was not shown the full order made at the pre-trial review which made it clear that the ground rules had been considered at that hearing and would be further considered at trial.
5. This appeal was not a finely balanced matter. A proper examination of the transcript of what happened at the hearing demonstrated that there was no ground of complaint properly to be made by the mother. I was of the clear view that there was nothing of substance in the grounds which Mostyn J felt were unlikely to succeed.
6. Dr Proudman rightly referred me to the case of re S (A Child) (Costs: Care Proceedings) [2015] UKSC 20. The most material paragraph is paragraph 29 which reads as follows:

29 Nor in my view is it a good reason to depart from the general principle [that it is inappropriate as a general rule to make costs orders in children's cases] that this was an appeal rather than a first instance trial. Once again, the fact that it is an appeal rather than a trial may be relevant to whether or not a party has behaved reasonably in relation to litigation. As Wall LJ pointed out in EM v SW, in re M (A child) [2009] EWCA Civ 311, there are differences between trials and appeals. At first instance, "nobody knows what the judge is going to find" (para 23), whereas on appeal the factual findings are known. Not only that, the judge's reasons are known. Both parties have an opportunity to "take stock" and consider whether they should proceed to advance or resist an appeal and to negotiate on the basis of what they now know. So it may well be that the conduct which was reasonable at first instance is no longer reasonable on appeal. But in my view that does not alter the principles to be applied: it merely alters the application of those principles to the circumstances of the case.
7. I do not accept that the fact of the grant of permission to appeal is in any way conclusive of the issue as to costs. The grant of permission is an exercise that is normally carried out on paper, often without any submissions on behalf of the respondent. It is an exercise which, when compared with the substantive hearing, is cursory and cannot be

subject to the same sort of judicial scrutiny as a contested appeal. If the judge granting permission had had the opportunity of hearing from both sides, I suspect that he would have gained a very different impression to that which he received from only having before him the application of the mother.

8. The mother chose to continue her appeal despite the judge's warning of the low prospects of success on three of the grounds, the fourth being ground 2, about which I have already commented. I do not consider that the fact that the judge granted permission as being persuasive of the outcome of the application for payment of costs. She should have taken the warning into account.
9. I do not accept that this case raised issues of important public interest. It did not. When subjected to a full analysis I found that there was no proper substantive criticism of the judgment that could be made by the applicant.
10. This brings me on to the issue properly raised by the mother that she has significant financial difficulties of her own and that the resources that she has are needed to make provision for the child who was the subject of the litigation and a subsequent child. She adds that an order for costs made against her might sour the relationship which she will inevitably have to have with the father in respect of the child who has been at the centre of the litigation.
11. There is an extraordinary disparity between the level of costs incurred between the parties. The father had spent on the appeal inclusive of VAT just under £17,200. The mother, on the other hand, had spent on the appeal just under £50,000 pounds before VAT, that is just under £60,000 inclusive of VAT. I am told that the mother's costs have largely been funded by her parents.
12. I do not have a complete picture of either party's finances. However from the detail with which I have been provided, it appears that the mother earns about twice what the father earns. Each has heavy financial commitments in terms of loans and mortgage payments, and it is likely that each is running at a modest monthly deficit.
13. I recognise the force of the points made by the mother that she will need to work with the father in the future and that having had her appeal dismissed she has accepted the result of the litigation and restarted contact by the father to the child.
14. However, I am of the clear view that a far greater feeling of injustice would rightly be felt by the father if he was left having to bear all his own costs in opposing an unmeritorious appeal by the mother. It is right and proper in the light of my judgment that the mother should make a significant contribution to the costs of the father.
15. For the avoidance of doubt, I am not moved in this context by the father's arguments in respect of the conduct of the appeal by the mother. Whilst the criticisms may have some validity, I do not find that they go to the application of the principles which I must apply. In particular I sympathise with his complaint that he has lost 9 months of contact with his son while the hearing of the appeal was repeatedly delayed through no fault of his own, but this does not go to the issue I have to determine.
16. There can be no criticism as to the modest level of costs he has incurred. On a summary assessment I see no proper scope for reducing them. In my judgment he should receive

the sum of £10,750 (inclusive of VAT), which corresponds to 62.5% of the costs he has incurred. The reduction gives credit to the general principle but reflects my view of the merits of the appeal as set out in both this and the substantive judgment.

17. I do not propose to make any further order in respect of the costs of the transcript. I am concerned about how the judge was persuaded to make an order for 6 days of evidence to be transcribed at public expense but without a transcript of the arguments put before Mostyn J, it would not be right for me to surmise.