

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS AT BIRMINGHAM**

33 Bull Street
Birmingham

Before THE HONOURABLE MR JUSTICE MARTIN SPENCER

IN THE MATTER OF

DARREN FERNIE

Claimant/Appellant

-v-

**(1)BURTON WATERS MANAGEMENT LTD
(2)BANKS LONG & CO**

Defendants/Respondents

**THE APPELLANT appeared in person
THE DEFENDANTS did not attend and were not represented**

**JUDGMENT
13th JUNE 2023
(APPROVED)**

MR JUSTICE MARTIN SPENCER:

1. This is judgment on the renewed application for permission to appeal by Mr Darren Fernie in case number KA-2022-BHM-000045.
2. The background to this matter is that on 22 July 2022, Mr Darren Fernie's son, Mr Joshua Fernie, issued proceedings in relation to a claim for negligence and breach of data protection. Joshua Fernie is the leaseholder of a property known as 34 The Quays on a development known as Burton Waters and he entered into a long lease with the first

defendant and Beal Developments Limited, from whom the property was purchased from new.

3. The first defendant to the proceedings is a data controller for the purposes of the General Data Protection Regulations and the second defendant is a data processor. The claimant alleged that he was a data subject, all this being within the meaning of Article 4 of the General Data Protection Regulations brought into English law by virtue of the provisions of the Data Protection Act 1998.

4. By those regulations, the defendants were under a duty to comply with data protection principles in relation to the personal data of which it was either the controller or the processor. Joshua Fernie claimed negligence, breach of Articles 5.1 (a), (b) and (f) of the General Data Protection Regulations, misuse of private information and reasonable expectation of privacy, breach of confidence, and breach of Article 8 of the European Convention on Human Rights, brought into English law by virtue of the Human Rights Act 1998. The claim was that the defendants has breached and invaded his privacy under those provisions and had enacted misuse of private information pertaining to him, such as to cause him purposeful harm and distress.

5. I am told by Mr Darren Fernie that the matter initially came before the Office of the Information Commissioner and that Mr Joshua Fernie's complaints were upheld, but the commissioner declined to take further action against the defendants, hence this action which was brought initially in the small claims court.

6. On 21 March 2021, both defendants issued applications to strike out Joshua Fernie's claims and various orders were made in the course of the proceedings.

7. The background to the claim is complicated and the role of Mr Darren Fernie is not wholly clear to me. But certainly allegations have been made and are reflected in the judgment of Her Honour Judge Coe KC, dated 20 July 2022, that the claimant's father, Mr Darren Fernie, has been a form of "*eminence grise*" or has been in the background and been instrumental in some of the matters of dispute both between his son, Joshua Fernie, and the defendants, and also, I am told, in other proceedings relating to mooring licences enjoyed by some of the properties which form part of the Burton Waters development.

8. In any event, as a result of those allegations about which I say nothing as to their merits, various judges have made orders refusing permission for Darren Fernie to be Joshua Fernie's advocate or litigation friend in these proceedings. The first such order was made by Deputy District Judge Morris on 1 February 2022. An appeal against that order was dismissed by His Honour Judge Godsmark KC in a ruling dated 21 March 2022.

9. On 31 March 2022, Her Honour Judge Coe KC ordered that the strike out applications be listed for hearing on 13 June 2022. Pending that hearing, on 31 May 2022 the first defendant, but not the second defendant, made an application that Mr Darren Fernie be added to the proceedings as a third party for the purposes of costs only, the intention of the first defendant being that if they were successful in the action, that they would make an application for a third-party costs order against Mr Darren Fernie.

10. The matter duly came before Her Honour Judge Coe on 13 June 2022 when she made various orders. She dismissed an application that she recuse herself from hearing the applications. She refused applications by Darren Fernie to be his son's either McKenzie

Friend or advocate at the hearing. She struck out the claim of Joshua Fernie against the defendants. And she ordered Joshua Fernie to pay the costs of the action. Those orders were reflected in a judgment delivered by Judge Coe on 20 July. The formal order which she made arising out of the hearing on 13 June, which, although made on 20 July, was sealed by the court on 11 August 2022.

11. It is against that order that Darren Fernie sought to obtain permission to appeal. And originally, he sought permission to appeal against all the matters dealt with by Judge Coe relating to his son, Joshua Fernie.

12. The application for permission to appeal came before Mr Justice Eyre on the papers on 20 February 2023, when he refused permission to appeal. Insofar as there may have been an issue as to whether the appeal was brought in time, Mr Justice Eyre, in fact, thought that the appeal had been brought in time. He, in any event, granted such extension as was necessary for the appeal to be brought.

13. In his decision, Mr Justice Eyre then dealt with the three grounds of appeal brought by Mr Darren Fernie. Ground one relates to parts of the order affecting Joshua Fernie, the claimant, rather than Darren Fernie, the appellant and he ruled that there is no basis for giving Darren Fernie, the appellant, permission in that regard. He referred to a parallel appeal in case number QA-2022-BHM-00037, where Mr Justice Eyre also refused leave to appeal and ruled that there were no prospects of success in relation to ground one for the same reasons given in the decision relating to the parallel appeal.

14. Similarly, in relation to ground two, Mr Justice Eyre stated that this relates only to matters affecting the claimant, Joshua Fernie and again replicated points made in appeal number 37 and for the same reasons he concluded that ground two equally has no prospect of success, as the same factors related to ground two as related to ground one.

15. So far as ground three is concerned, this related to the decision of Judge Coe to accede to the first defendant's application of 31 May and join Darren Fernie as a third party for the purposes of making a future third-party costs order against him. The third ground of appeal is set out at page 85 of the appeal bundle, which has been prepared by Mr Darren Fernie for the purposes of the appeal, and states,

“The order of the 11th of August 2022 made the appellant a third party for the purpose of costs only. The appellant has been advised (as he was not in attendance for hearing due to ill-health caused by his brain aneurism) and having read the order (there being no written judgment at all) that there seems to be no basis for such other than wild unsupported conjecture. No proper test was carried out other than to merely grant such application.”

In support of this ground of appeal, Mr Darren Fernie refers to section 51 of the Senior Courts Act 1981 and the jurisdiction of the court to award costs to a non-party. He further refers to Part 46 of the Civil Procedure Rules and the principles as laid down in some of the previous cases, including, for example, *The Creative Foundation v Dreamland Leisure Ltd and Ors* [2016] EWHC 859 Ch. Effectively, what Mr Darren Fernie does is set out his arguments as to why no third-party costs order should be made against him, contending that

he does not come within the category of those against whom, in general, third party costs orders are made.

As it seems to me, what Mr Fernie seeks to argue is that the threshold was not passed for joining him as a third party because there was no or insufficient basis upon which it could be contended that a third-party costs order could be made against him. The best way to deal with that is to refer to what Mr Justice Eyre said about it in his reasons for refusing permission to appeal. What he said was this,

“In respect of ground three, the defendant’s contention was that the claimant had been a cipher or nominee of the appellant with the claim being brought in reality by the appellant and with the latter having been the controller of the litigation. The judge joined the appellant as a party and gave directions so that this contention could be addressed. There was sufficient material advanced in support of the contention such that the judge was entitled not to dismiss it out of hand. The purpose of the joinder of the appellant and other directions was to enable the appellant to have an opportunity to respond and for the court to determine the issue fairly. That was a wholly appropriate course. It is to be noted that the judge did not make a third-party costs order against the appellant but simply gave directions to enable a proper determination of the question of whether such an order should be made. There is no prospect of it being found that she should not have taken that course. The matters set out in the skeleton argument in respect of this ground are in large part directed to the contention that the appellant should not be made subject to a non-party costs order. However, the issue of whether such an order should be made has not yet been determined. And the order which the judge made did not render the appellant liable for costs.”

16. It is only against that aspect of his appeal that Mr Darren Fernie has renewed his application for permission to appeal. He has very realistically and sensibly recognised, as stated by Mr Justice Eyre, that his locus to appeal against orders made against his son is lacking and he is conscious that he would put himself in jeopardy by renewing an application for permission to appeal, which would be arguably deemed to be totally without merit. I note that Mr Justice Eyre did not in fact certify grounds one and two as totally without merit. But he did indicate that the appeal came close to the level of unarguability that would have justified being certified as being totally without merit. But he thought that ground three, by the narrowest of margins, avoided the appeal being so certified.

17. The contention of Mr Darren Fernie on this renewed application is that he has been put in an impossible position by the way in which this matter has been dealt with by Judge Coe. On the one hand, he refers to the fact that Judge Coe struck out his son’s claim against the defendants and, in so doing, referred to and relied upon allegations made against him, Mr Darren Fernie, by the defendants as to his role in the litigation and his part in his son bringing the claim against the defendants. He contends that by striking out the claim in circumstances where he, Mr Darren Fernie, had no right to be heard and no opportunity to gainsay the allegations that were being made against him, Judge Coe has effectively decided certain

matters against him. The impossible position he is in, he says, is that in relation to the application for a third-party costs order, similar matters are to be levelled against him in circumstances where he will have the right of reply and the right to contest what is being said against him. But the difficulty is that that will be in front of a judge who he says has effectively already decided those matters against him by ordering the strike-out of his son's claim, as she did in June and July 2022.

18. It seems to me that whilst on the one hand there is no merit in the renewed application for permission to appeal in that I agree with Mr Justice Eyre, that the threshold, which is a low threshold for joining Mr Darren Fernie as a party, was met; and that he cannot complain that he has been joined as a party in circumstances where he will be given full opportunity to contend that no third-party costs order should be made against him, there is, in my mind, at least an appearance of justice not being seen to be done that the application for the third-party costs order should come before the same judge, that is Her Honour Judge Coe KC, who has already made adverse findings, effectively, against Mr Darren Fernie in circumstances where he was deprived of the right to be heard, whether as an interested party or being allowed to be his son's McKenzie Friend or advocate in the hearing on 13 June.

19. I understand from Mr Darren Fernie that the application for a third-party costs order has already started its process in that there was a hearing on 19 April 2023, which came before Judge Coe but at which Mr Darren Fernie was taken ill and it was not possible for the application to be completed. He tells me that the application has been adjourned to 20 July 2023. No formal application has been made to me in relation to that matter and, therefore, it is with some diffidence that I say other than that I would hope that Judge Coe, as I am sure she will, will take care to ensure that she can properly hear that application when she has previously heard the strike-out claim in relation to Joshua Fernie's claim against the defendants and struck that claim out on the basis of matters which she determined in relation to Darren Fernie. She will therefore need to be careful that the matter has not been predetermined in her mind, or, if there is a chance that it could be perceived as such, whether it would be appropriate for another judge to try the third-party costs application in her place.

20. However, for the purposes of this particular application, the renewed application for permission to appeal is dismissed.

This transcript has been approved by the Judge