



Neutral Citation Number: [2018] EWHC 3611 (Admin) Case No: CO/1945/2018

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 21/12/2018

Before:

LORD JUSTICE LEGGATT

- and -

MRS JUSTICE ANDREWS DBE

Between:

ANTHONY BENNETT

Appellant

- and -

**THE CHIEF CONSTABLE OF MERSEYSIDE
POLICE**

Respondent

Mr T Forte (instructed by **DDE Law**) for the **Appellant**
Ms A Whyte QC and **Mr P Sigee** (instructed by the **Merseyside Police Force Solicitor**) for
the **Respondent**

Hearing date: 29 November 2018

Judgment Approved

Lord Justice Leggatt and Mrs Justice Andrews:

1. On 29 November 2018 we heard an appeal by case stated from a magistrates' court in Liverpool against its decision to make no order for costs after the Chief Constable of Merseyside Police withdrew an application under section 298 of the Proceeds of Crime Act 2002 for forfeiture of cash seized from the appellant, Mr Bennett. We dismissed the appeal for reasons given orally at the hearing. We also recorded in the order made that the appeal was totally without merit.
2. The Chief Constable, as the successful party, was awarded his costs of the appeal, which we summarily assessed in the sum of £15,000. We directed, however, that payment of this sum was not to be enforced for the time being, pending consideration

by the court of whether to make an order under section 51(6) of the Senior Courts Act 1981 requiring Mr Bennett's legal representatives to pay those costs. We also directed that there should be a further hearing for his legal representatives to attend and show cause why they should not be personally liable for some or all of the costs incurred by Mr Bennett in pursuing (a) the proceedings in the magistrates' court and (b) the appeal.

3. In relation to the proceedings in the magistrates' court, our concern stemmed from the fact that the bill of costs prepared by Mr Bennett's solicitors amounted in total to £105,260.28. This sum comprised solicitors' profit costs of £36,221, counsel's fees of £43,425 and "other disbursements" (which we understand to have been the fees for work done by a forensic accounting expert) of £8,070.90, together with VAT on these sums. These costs appeared to us wholly disproportionate given (i) that the sole object of the proceedings so far as Mr Bennett was concerned was to seek to obtain the release of a cash amount of £44,789.36 which had been seized from him by the Merseyside Police and (ii) that it was never likely, for reasons explained in our previous judgment, that Mr Bennett would be able to recover his costs of the proceedings from the police. Furthermore, the work which was critical to obtaining the release of the cash was the work done by the expert accountant in showing that the accounting records of Mr Bennett's company were consistent with his contention that the cash seized was generated by that business. After the expert's report was produced and documents referred to in the report had been disclosed, the Chief Constable agreed to withdraw the forfeiture application. We found it difficult in these circumstances to see how substantial legal costs could reasonably have been incurred over and above the disbursements paid to the accounting expert which, as mentioned, amounted to £8,070.90 plus VAT (less than 10% of the total bill).
4. As regards the appeal to this court, as indicated in our earlier judgment, the appeal, both as formulated in the case stated by Mr Bennett's solicitors and as argued (somewhat differently) by his counsel at the hearing, was legally misconceived and had no prospect of success. On the face of it, therefore, the costs incurred in bringing and pursuing the appeal were wasted. A particular item on which costs appeared to have been unreasonably spent was the preparation of an affidavit containing evidence from Mr Bennett in circumstances where there was no basis for introducing fresh evidence on the appeal and where no application was ultimately made even to attempt to rely on the affidavit.
5. As we also observed at the hearing, however, in order to determine whether costs were improperly, unreasonably or negligently incurred such that it might be appropriate to make a wasted costs order, the court would need to know what advice Mr Bennett was given by his legal representatives. Should it be the case – however unlikely this might seem – that all the costs were incurred on his instructions after he had received appropriate advice about the likely costs of the work and the unlikelihood of recovering those costs from the police, then it would not be possible to conclude that the costs had been wasted. A litigant is free, if he chooses to do so, to spend money on legal proceedings which there is little, if any, prospect of getting back; and provided the litigant's choice is an informed one, it cannot be said that his legal representatives have acted improperly, unreasonably or negligently if they carry out instructions given to them in the exercise of such a choice.

6. The advice which Mr Bennett received from his lawyers is protected by legal professional privilege, as indeed are all communications between them which were made for the purpose of obtaining legal advice and/or for the purpose of conducting the proceedings. The privilege is that of Mr Bennett. It is therefore only if he elects to waive privilege that details of the advice given to him by his legal representatives and of his communications with them could be disclosed to the court.
7. Mr Bennett was present in court at the hearing of his appeal. He therefore heard the views expressed by the court about the lack of merit of the appeal and the level of costs incurred in the proceedings in the magistrates' court. The court also explained the nature and significance of his privilege over the advice given to him by his legal representatives, the fact that it was his decision whether or not to waive privilege and the fact that in relation to that decision there was a conflict of interest between himself and his legal representatives. We are satisfied that Mr Bennett understood all these matters. To give him an opportunity to make his election after obtaining independent advice, we directed that he should inform the court and his legal representatives of his decision by 4pm on 14 December 2018.
8. On 7 December 2018 the court received a letter written by Mr Bennett in which he stated that he had sought alternative legal advice from another firm of solicitors and, after a consultation with that firm, had decided not to waive privilege. In the letter Mr Bennett further stated that he is entirely content with the work done by his legal representatives throughout the court proceedings and that all the work was reasonably done and so done on his instructions.
9. We are satisfied that Mr Bennett has made an informed decision not to waive privilege in relation to any of his communications with his legal representatives. Moreover, he has expressed his entire satisfaction with all the work done by his legal representatives and with the reasonableness of the costs incurred and he has done so after having heard the concerns expressed by the court as well as the reasons why the court found the appeal to have been totally without merit. In these circumstances, there is no reason for the court to pursue the matter further.
10. Accordingly, the direction requiring Mr Bennett's legal representatives to attend and show cause why they should not be personally liable for some or all of the costs will be set aside and no further hearing will be listed. In addition, the order for payment of the Chief Constable's costs of the appeal may now be enforced. We will order those costs to be paid within 28 days of the date of this judgment.

