Neutral Citation Number: [2018] EWHC 554 (Admin)

Case No: CO/5977/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2018

Before:

THE HON. MRS JUSTICE NICOLA DAVIES DBE

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Between:

THE QUEEN (on the application of PAUL RUPERT LEWIN)	**Claimant**
- and –	
(1) THE FINANCIAL REPORTING COUNCIL LIMITED (2) THE CONDUCT COMMITTEE OF THE FINANCIAL REPORTING COUNCIL LIMITED (3) THE DISCIPLINARY TRIBUNAL (CONVENED UNDER THE FRC'S ACCOUNTANCY SCHEME) IN THE MATTER OF THE EXECUTIVE COUNSEL OF THE FRC AND (1) DELOITTE LLP AND (2) JOHN CLENNETT	**Defendants**
- and -	
(1) DELOITTE LLP (2) JOHN CLENNETT	**Interested Parties**

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Mark Vinall (instructed by **Brown Rudnick LLP**) for the **Claimant**
Rebecca Loveridge (instructed by **The Financial Reporting Council**) for the **First and Second Defendants**
Jamie Smith QC (instructed by **Clyde & Co LLP**) for the **Interested Parties**
No appearance or representation by the Third Defendant

Hearing date: 8 March 2018

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Judgment Approved

Mrs Justice Nicola Davies:

1. The first and second defendants apply for their costs against the claimant pursuant to CPR 44.2(2)(a) namely that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. The defendants rely on the words of Jackson LJ in *Fox v Foundation Piling Ltd* [2011] 6 Costs LR 961 CA at [62]:

> "There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in rule 44.3 (2) (a) too far and too often."

2. Ms Loveridge has appeared on behalf of the first and second defendants in this application. Mr Allen represented the first and second defendants at the substantive hearing but was unable to attend the costs hearing.

3. The first and second defendants rely on the following points, namely:

   i) The first and second defendants are the successful parties in these proceedings, the claimant's claim for judicial review having been dismissed;

   ii) The FRC accepts that the Court has made a finding that the Tribunal acted unfairly in not including a disclaimer within the Report (judgment paragraph 62), however this does not constitute success for the claimant but should properly be regarded as an issue decided in his favour "along the way": *R (Viridor Waste Management Ltd) v The Commissioners for HM Revenue and Customs* [2016] EWHC 2502 (Admin). It does not justify departure from the general rule on costs.

4. The general rule is not displaced by the fact that the Court has ordered that the Explanatory Memorandum should be provided by the second defendant as part of the electronic document containing the Report. In her written submissions Ms Loveridge made a number of points in respect of "offers" by the FRC to publish an Explanatory Memorandum. I do not repeat them because they do not reflect the reality of how matters progressed, not least at the hearing. This is not to be interpreted as a criticism, Ms Loveridge has not previously been involved in the conduct of this matter.

5. The claimant seeks the exercise of the Court's discretion on the issue of costs as between himself and the first and second defendants pursuant to CPR 44.2(4)(b). The claimant contends that there were three issues in the judicial review proceedings, namely:

   i) Did the Tribunal act unlawfully?

   ii) Did the Committee act unlawfully?

   iii) What remedy should be granted?

6. The claimant contends that he has succeeded on issue (i), failed on issue (ii) and save in respect of the positioning of the Explanatory Memorandum failed on issue (iii). I accept that assessment. Pursuant to the discretion of the Court contained in CPR 44.2(4)(b), namely in deciding what order if any to make about costs, the Court will have regard to all the circumstances including whether a party has succeeded on part of its case even if that part has not been wholly successful. The claimant contends that the order should reflect its success on (i) and the fact that it was not until the hearing that any real concession was made by the defendants as to the positioning of

the Explanatory Memorandum within the electronic document containing the Report. The challenge on the first ground was important in its own right, it was a public law wrong and was identified by the Court as being such. It took up one-third of the hearing. It was an issue which the FRC chose to fight and having fought it lost.

Conclusion

7. The first challenge of the claimant in these proceedings was to the conduct of the Tribunal in that it breached its duty of fairness to the claimant in, amongst other respects, failing to include in the Report a disclaimer relating to the fact that the claimant had played no part in the proceedings, had given no evidence nor had he been asked to comment on any of the findings in the Report. It was one of two identified grounds of challenge and one in respect of which I found there was a breach of the Tribunal's duty of fairness to the claimant. The claimant's challenge was separate and specific to the Tribunal proceedings, it was dealt with separately in the written grounds, skeleton arguments and oral submissions of the claimant and the first and second defendants. It took up a significant amount of the Court's time, both in terms of the law, the duty of a Tribunal to act fairly to a non-party, and as to the facts. It required a determination from the Court which was wholly separate from any finding made as to the proposed publication of the Report by the Committee. To describe the Court's finding as being "along the way" does not begin to reflect the nature of the specific challenge nor the findings of the Court which provided the basis for the Court's ruling as to the Explanatory Memorandum. It was a self-standing ground of public law challenge brought by the claimant, fought by the first and second defendants who lost. Pursuant to the provisions of CPR 44.2(4)(b) the claimant is entitled to an order of costs which reflects his success on the first ground of challenge.

8. The remedy sought by the claimant in these proceedings was to prevent publication of the Report or, if it was to be published, to ensure publication in a redacted form. In that the claimant has failed. The Explanatory Memorandum will now be a part of the electronic document containing the Report in form and terms now agreed between the parties. During the hearing the Court indicated that it viewed the incorporation of the Explanatory Memorandum as a way through in these proceedings and allowed time for the parties to discuss the matter. The first and second defendants and the interested parties were willing to include the Explanatory Memorandum in the electronic document. Insofar as the claimant has achieved anything in the publication of the Explanatory Memorandum it is something which in my view could have been sorted between the parties at the hearing. It does not represent a self-standing success for this claimant who sought to stop the publication of the Report. It does not provide a basis for a costs order favouring the claimant.

The proportion of costs to be awarded

9. The claimant relies upon the authority of *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No. 3)* [2012] EWCA Civ 843. At [45] Davis LJ noted that it is a feature of CPR 44 that it encourages, where appropriate, the departure (from the general rule) and facilitates an award of a proportion of costs. At [47] he noted that the rules impose no requirement of exceptionality should such a course be taken. The claimant contends that such awards can be made not only on the basis of disallowing the successful party's costs of an issue but also making a further deduction to reflect the other party's costs of that issue without it being necessary for the Court to decide that allegations have been made improperly or unreasonably made and without any requirement of exceptionality. Upon that basis the claimant seeks an order that the

claimant is to pay 33 per cent of the costs of the FRC and the Committee assessed on a standard basis. Mr Vinall on behalf of the claimant accepted that the issue of double deduction is entirely within the discretion of the Court.

10. On the issue of double deduction Ms Loveridge relied on the authority of *R (Viridor Waste Management Ltd) v HM Revenue and Customs* [2016] EWHC 2502 (Admin) in which Nugee J at [10] citing *Aspin v Metric Group Ltd* [2007] EWCA Civ 922 stated that "*the Court may conclude that the case merits depriving the successful party of his costs on an issue, but does not merit taking the further step of making him pay the unsuccessful party's costs on that issue*". Mr Vinall observed that the authority of *F&C Alternative Investments* does not appear to have been before the Court in *Viridor*.

11. The claimant's first ground of challenge to the Tribunal's findings was contained both as to the relevant law and as to the facts and reflected in the impressive submissions of the parties to the Court. In my view the claimant is entitled to the exercise of the Court's discretion pursuant to CPR 44.2(2)(b) namely an apportionment of costs to reflect his success on this issue. In terms of the oral and written submissions I believe an apportionment of one-third in respect of this specific challenge is fair, this would be reflected in an order that the claimant is to pay two-thirds of the costs of the first and second defendants on a standard basis subject to detailed assessment. The double deduction or any increased proportion sought by the claimant would not fairly represent the outcome of these proceedings in which the claimant sought to prevent the publication of the Report alternatively publication in a redacted form. In that the claimant failed.

The costs of the interested parties

12. The interested parties seek their costs against the claimant. They recognise that pursuant to CPR 44.2 the Court has a wide discretion as to costs. The interested parties' case is that the claimant is the losing party. The Court should be guided by the authority of *Bolton Metropolitan District Council & Others v Secretary of State for the Environment (Practice Note)* [1995] 1 WLR 1176 in which Lord Lloyd, in considering the issue of a developer's costs in respect of an unsuccessful challenge to the Secretary of State's decision granting planning permission to the developer, found that:

> "The developer will not normally be entitled to his costs unless he could show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary of State; or unless he has an interest which required separate representation. The mere fact that he is the developer will not of itself justify a second set of costs in every case."

13. The interested parties accept that following *Bolton* the normal rule is that the Court does not order two sets of costs but contend that there are powerful factors in this case justifying an exercise of discretion, namely:

    i) It was plain that the interested parties had a special interest in the judicial review application, the relief sought by the claimant had the potential to impact upon the Article 8 and 10 rights of the interested parties and cause them professional and personal harm. In the Court's judgment it was accepted that the claimant's challenge to the publication of the Report and the

injunction it obtained by consent "has caused harm, professionally and on a personal level, to the interested parties" (judgment paragraph 67);

ii) The interested parties' special interest in the remedies potentially to be granted by way of relief was separate and distinct from all of the defendants, there was always a risk of conflict in the attitude the defendants might take to redaction and/or a redrafting of the Report and the interested parties' interests. This was a point upon which particular reliance was placed by Mr Smith QC in his submissions to the Court;

iii) The interested parties were able to provide particular evidence of their personal position and submissions on the events relating to the disciplinary proceedings which the defendants could not provide;

iv) The initial and ongoing involvement of the interested parties was more than justified by the relief which the claimant was seeking. It was only in his Reply that the claimant made clear that he was not looking to secure an entitlement to reopen the substantive disciplinary hearing and give evidence and only during the hearing itself that the claimant clarified that he was pursuing only process rather than substantive rights. In his claim and skeleton argument to the Court the claimant persisted in demanding redactions to the Report of considerable scope and significance;

v) The conduct of the interested parties has been appropriate, they have never contested or interfered in the key legal issues as between the claimant and the first and second defendants, they have focused their submissions on the impact of the relief sought by the claimant and made it clear that the Explanatory Memorandum was a satisfactory means of resolving the dispute;

vi) The claimant must have known what he was taking on and that the application would necessitate separate representation on behalf of the interested parties.

14. In response the claimant cites the authority of *Bolton* and also that of *R (Bedford) v London Borough of Islington* [2002] EWHC 2044 (Admin) at [296] to [297] Ouseley J stated:

> "296. I do not propose to make an order in favour of Arsenal FC. This is a case in which of course Mr Elvin's presence was something to which Arsenal FC were entitled. He does have a separate interest, but it was not at the time a conflicting interest. But the entitlement to separate representation, and an interest separately to protect, does not of itself warrant the grant of a second set of costs. It is, if I might say so, almost inevitable that the interested party, in instructing counsel in relation to these matters, will be able to make a significant contribution to the argument and that the interested party will be able to make significant contribution to the evidence. …
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> 297. …the key, in my judgment, to the award of a second set of costs is a separate interest with separate arguments that have to be promoted. ..."

15. The claimant accepts that the interested parties have separate interests to protect and that they provided a relevant contribution to the evidence and arguments. That is said to be insufficient to justify the award of a second set of costs. The interested parties'

central point that fairness to them required full publication of the Report was a matter set out in the Committee's letter justifying publication of the Report, the position of the interested parties and the prejudice to them was relied upon in the detailed Grounds of the first and second defendants and in their skeleton argument. No conflict in fact arose between the position of the first and second defendants and the interested parties. The fact that there was an unrealised potential for conflict is not of itself sufficient for a separate award of costs. Thus, while the interested parties had a separate interest, it was not one which required separate representation so as to justify a second order for costs.

Conclusion

16. I accept that the interested parties had separate interests. I understand why they chose to obtain separate representation. The contained contribution which Mr Smith QC made in writing and to the Court was of real assistance in providing greater detail of the factual conflict as between the Executive Counsel and the interested parties at the Tribunal hearing and as to the personal and professional circumstances of the interested parties. However, as to the latter, this was a matter which was covered by the submissions of the first and second defendants. As to the particular point upon which Mr Smith QC relies, namely that the first and second defendant could, prior to or at the hearing, have agreed redactions which would prejudice the interested parties, I accept the claimant's argument. The Committee, in deciding to publish the Report in full, gave as one of its reasons fairness to the interested parties and their expectation that there would be presentation of the entirety of the Tribunal's decision so as to allow other members and member firms of the accountancy profession to fully appreciate the findings. That stated position was maintained in these proceedings.

17. The interested parties were entitled to obtain separate representation. They had separate interests but these were understood by the first and second defendants and included by them as part of the defendants' case. There were no separate arguments which were referable only to the interested parties. There was no conflict of interest. Accordingly, grateful as the Court is to the manner in which Mr Smith QC prepared and conducted the case on behalf of the interested parties, there are no grounds to depart from the general rule in *Bolton* above. There will be no order as to costs as between the claimant and the interested parties.