Neutral Citation Number:[2022] EWHC 447 (QB)

Case No: QA-2020-000085

**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH APPEAL CENTRE**

**ROYAL COURTS OF JUSTICE**

**ORDER OF MASTER DAVISON 21 FEB 2020**

**CASE NUMBER: QB-2018-000127**

**APPEAL REFERENCE: QA-2020-000085**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 02/03/2022

**Before** :

**MR JUSTICE MARTIN SPENCER**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**Seymour Young**

**App**
**Cla**

**- and -**

1. **The Chief Constable of the Warwickshire Police**

**1st Respon**
**Defe**

2. **The Director of Public Prosecutions**

**2nd Respond**
**Defendant**

- - - - - - - - - - - - - - - - - - - - -

**Mr Rajiv Menon QC and Ms Kirsten Heaven** (instructed by **Tuckers Solicitors**)

for the **Appellant/Claimant**

**Ms Fiona Barton QC** (instructed by **Weightmans LLP**)

for the **1st Respondent/Defendant**

**Mr Alan Payne QC** (instructed by **Government Legal Department**)

for the **2nd Respondent/Defendant**

Hearing dates: 29 October 2021

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**MR JUSTICE MARTIN SPENCER :**

1.
In this matter in which I gave judgment on 21 December 2021 dismissing the appellant's appeal against the order of Master Davison dated 21 February 2020, I am now asked to make an appropriate adjudication in relation to costs. The facts of this matter and the basis upon which the appeal was brought and dismissed appear fully from my judgment dismissing the appeal.

2.
I start by reminding myself that any order for costs which I make is a matter for my discretion. This appears clearly from CPR Rule 44.2 and has been reiterated many times by the courts. CPR 44.2 provides, as relevant, as follows:

"Court's discretion as to costs

44.2

(1) The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) 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"……

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

(6) The orders which the court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before

judgment.

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.

(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

3.
Further, in Straker v Tudor Rose (a firm)[2007] EWCA Civ 368 para.11 - 12, Waller J gave the following guidance on the approach to be taken on costs:

a. First is it appropriate to make an order for costs?

b. Second, if it is, the general rule is that the unsuccessful party will pay the costs of the successful party;

c. Third, identify the successful party,

d. Fourth, consider whether there are any reasons for departing from the general rule, in whole or in part. If so, the court should make clear findings of the factors justifying the departure.

4.
Following this guidance, the first three steps are uncontroversial: it is clearly appropriate to make an order for costs; the appellant is the unsuccessful party so the general rule is that the appellant should pay costs; the successful parties are the respondents. The question for decision is whether there are any reasons for departing from the general rule in whole or in part: if I decide to do so, I should make clear my findings in relation to the factors justifying the departure. It seems to me that the corollary

of this also applies: if, invited to depart from the general rule, I decide not to do so, it is appropriate to identify the reasons for so refusing.

5.
On behalf of the appellant, Ms Heaven submits that I should depart from the general rule by reference to the conduct of the Respondents. This case was about failure to disclose to a defendant accused of murder information to which he was entitled. It was critical to the appellant to know what was disclosed by Warwickshire Police to the CPS and when, and final clarity about this only came during the hearing before me on 29 October 2021. She submits:

“9. At the heart of the Appellant’s case was the meeting said by the First Respondent to be on 18 October 2011, what was disclosed and discussed, and who attended. This was of central relevance to the Appellant’s understanding of who may be the correct Defendant for the proceedings. In the pre-action stage and during the proceedings the Respondents and their legal representatives deliberately and reprehensibly gave inaccurate and misleading information to the Appellant and the court as to this meeting. This forced the Appellant to issue a pre-action disclosure application and thereafter pursue a claim against both Respondents. It was only during the proceedings before Mr. Justice Martin Spencer that final clarity was provided by the Respondents which was immediately followed by an appropriate concession by Mr. Menon QC in respect of R1.”

Ms Heaven, having quoted paragraphs 7-9 of my substantive judgment, then expands on the background and the events following the collapse of the criminal trial including the efforts on the part of the appellant’s lawyers to seek clarity as to the position and the reason why proposed ADR in September 2018 did not go ahead. She also refers to the skeleton argument for the First Respondent which, she submits, clearly implied that it was being said that the First Respondent was not at the meeting which was at the heart of the dispute. She then submits:

“24. No explanation has been provided to the Appellant or to the court as to why both Respondents in various ways, presented misleading evidence to the court and the Appellant’s solicitor over a significant period of time. In doing so both Respondents, but particularly R2, facilitated a significant increase in costs to the parties, all of whom are publicly funded.

25. Once the position was clarified, the claim against R1 was conceded. Had clarity been provided at the outset by both Respondents or very early in the pre action stage, Counsel acting for the Appellant would have been bound to reconsider the merits of the claim and given their duty to the Legal Aid Agency it would have been impossible to proceed against R1.

26. In considering all the circumstance pursuant to CPR 44.2(4) & (5) the Appellant submits that when considering the conduct of the parties, there is ample evidence and a finding of provision of misleading information, there is a finding that it was ‘understandable’ that the claim was pursued against both Respondents until there was clarity (this amounts to a finding that it was reasonable), and there is evidence that the manner in which the claim was defended involved deliberate reliance on misleading information and submissions.”

6.
For the First Respondent, Ms Barton QC also refers to the collapsed ADR and submits that the court should take into account the reason for the collapse, namely the Appellant’s decision not to attend. Although the First Respondent had indicated that it was not willing to make an offer of financial settlement, ADR is not simply about financial settlement but presents an opportunity for the parties to narrow the issues and set out facts and arguments which enable the other party is better to

understand and reflect on the strengths and weaknesses of the parties' respective cases. She submits that had the proposed ADR taken place, the issues and merits of the First Respondent's defence to the claim would have been discussed as intended and would have been clear to the Appellant. Although she does not say so, the implication is that she believes that the Appellant would have abandoned the claim against the First Respondent at that stage. However, given that, as submitted by the Appellant, clarity as to the position only first appeared at the hearing before me, it has to be queried whether such clarity would have appeared at the ADR and led to the decision made in the course of the hearing before me not to pursue the case against the First Respondent.

7.
Ms Barton further submits that, from 12 March 2019 at the latest, it was clear that there was no dispute between the respondents as to the fact of a meeting having taken place at which the relevant intelligence was disclosed to the Second Respondent, reinforced by the Agreed Statement of Facts produced to Master Davison. The only remaining issue was as to the date upon which the relevant meeting took place. However, in my judgment, this obscures the significance of the date given that it was being suggested that the meeting took place on a date before Mr Reader, the Crown Prosecutor who took the non-disclosure decision, was even involved in the case.

8.
More fundamentally, Ms Barton submits that the claim against the First Respondent has always been without merit, as the response to the letter before action clearly demonstrated. She further takes a jurisdictional point: she submits that, the appeal having failed, the Master's order as to costs stands and only the issue of the costs of the appeal is open for determination at this stage.

9.
For the Second Respondent, Mr Payne QC also takes the jurisdictional point: he submits that insofar as the Appellant is seeking an order that there should be no order as to the costs of the claim, as opposed to the costs of the appeal, this is misconceived: there is no appeal against the costs order made by Master Davison and, as such, no basis for interfering with the costs order in favour of the Respondents.

10.
So far as the merits are concerned, he submits that whilst it is accepted that there was confusion as to the date and events of the relevant meeting, there is no basis for asserting that the Respondents deliberately provided inaccurate information with a view to misleading the court, such an allegation being inconsistent with the steps taken by the Respondents to clarify the position. In any event, he submits that, by the time of the hearing before Master Davison, it was common ground that there had been a meeting at which the relevant intelligence had been provided to the Second Respondent and, as such, the appeal was brought after any confusion as to the meeting had been resolved and in the knowledge of the fact that the court considered the date of the meeting to be irrelevant. Again, more fundamentally, he observes that the claim was struck out on the grounds that, inter alia, the pleaded case was defective and the Appellant took no steps to remedy the deficiency which meant that the appeal was doomed to failure and this provides a compelling justification for a costs order to be made in favour of the Respondents. He also observes that the majority of the allegations made in the Particulars of Claim were unrelated to the meeting so that there is no justification in the court not awarding to the Respondents the costs of responding to those allegations.

**Discussion**

11.

Dealing first with the jurisdictional point, this was an appeal against an order striking out the Appellant's claim. Had the appeal been allowed, the claim would have been reinstated and the costs of the claim would have been at large. Thus, in my view, it was unnecessary for the Appellant to appeal separately against the Master's costs order, and it is open to the court to make such order as to costs, including the costs of the action, as it sees fit.

12.
Having considered the respective arguments of the parties, in my discretion I have decided that this is not a case in which it is appropriate to depart from the general rule that the unsuccessful party should pay the costs of the successful parties. I have in mind, in particular, the point made by Mr Payne QC that the claim was doomed by reason of the failure on the part of the Appellant to plead his case in relation to the fourth element of misfeasance, namely foresight of damage, which, as I made clear in the main judgment, was not a technicality but a serious omission: see paragraph 28 of the judgment. Thus, the Titanic was destined to sink and the arguments about the Meeting, when it took place and what was disclosed by the First Respondent to the Second Respondent represent, to some extent, the re-arrangement of the tables. Even if, given clarity earlier, the Appellant would have allowed the First Respondent to abandon ship earlier, I consider that it is right and just that the Appellant should bear all the costs of this doomed voyage. I also take into consideration the ill-judged decision on the part of the Appellant not to engage in ADR. In making this adjudication, I do not resile from the criticisms I made of the Respondents at paragraphs 5-9 of the main judgment. However, I do not consider that the basis of those criticisms amounts to such reprehensible conduct that I should depart from the general rule. Although the Meeting was at the heart of the Appellant's case, as I stated at paragraph 5 of the main judgment, clarity in relation to that Meeting would not have caused the Appellant to abandon the claim altogether, only potentially the claim against the First Respondent but the incurring of the First Respondent's costs was part of the risk incurred by the Appellant in bringing a claim such as this: this was high-risk litigation with very serious allegations being made against professional bodies and individuals whose reputations were at stake.

13.
In the circumstances, the costs order made by the learned Master shall stand and in addition the Appellant is ordered to pay the Respondents' costs on the appeal.