Neutral Citation Number: [2022] EWCA Civ 671

Case No: CA-2021-003286/7

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEENS BENCH DIVISION
Mr Justice Morris
[2021] EWHC 2583 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2022

Before :

LORD JUSTICE COULSON
LORD JUSTICE ARNOLD
and
LORD JUSTICE PHILLIPS

- -

Between :

(1) Mrs Iman Said Abdul Al-Rawas **(2) Mr Thamer Al-Shanfari**	**Appellants**
- and -	
(1) Hassan Khan & Co (A Firm) **(2) The Khan Partnership LLP**	**Respondents**

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Ben Walker-Nolan (instructed by **The Khan Partnership LLP**) for the **Respondents**
The Appellants did not appear and were not represented

Hearing date : 28 April 2022

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Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10.30am on 17 May 2022

LORD JUSTICE COULSON :

1. Introduction

1. On 25 April 2022 the appellants provided a copy of Form 253 in which they requested the dismissal of their appeal, with costs. At a hearing on 28 April, originally fixed to deal with the respondents' application that the appellants pay the outstanding sum of £3.76m into court (together with a further sum by way of security for costs), as a condition of being allowed to continue with their appeal, this court acceded to that request for dismissal of the appeal.

2. The only remaining matter concerned the basis of the assessment of the respondents' costs of the appeal. At the hearing on 28 April, Mr Walker-Nolan reiterated the point previously made in correspondence that the respondents would seek their costs of the appeal on an indemnity basis. Because neither of the appellants, nor their solicitors, chose to attend on 28 April, this court concluded that the best course was to order the respondents to prepare short written submissions setting out why they were entitled to indemnity costs, and to give the appellants the opportunity to put in any written submissions in response.

3. On 3 May 2022 the respondents provided written submissions as to why they were entitled to indemnity costs. Despite this court's order that the appellants respond in writing by 6 May, no submissions in response have been received. The issue, therefore, is whether the respondents are entitled to their costs of the appeal to be assessed on an indemnity basis.

2. The Factual Background

4. The lengthy factual background to this dispute is set out at length in the first contempt judgment of Morris J at [2021] EWHC 2583 (QB). It is unnecessary to repeat the detail for the purposes of this judgment. In short, the respondents are two-interrelated firms of solicitors. The appellants are husband and wife and resident in Oman. Between 2006 and 2009, the respondents acted for the appellants in relation to substantial litigation in the High Court in London. The appellants failed to pay their bills and, on 1 August 2013, the respondents commenced proceedings to recover the sums due.

5. By judgments dated 14 March 2018, the appellants were ordered to pay the respondents a total sum in excess of £1 million. No part of that sum has ever been paid. In addition, the appellants have continued to incur significant costs liabilities to the respondents, and interest has continued to accrue on the sums due. The total indebtedness is now in excess of £3 million.

3. The Two Contempt Judgments of Morris J.

6. By an application dated 15 January 2021 the respondents sought to commit the appellants for contempt of court. There were 14 charges, many of which were made up of more than one individual allegation.

7. The charges covered the whole spectrum of contempt of court in this kind of situation. Accordingly there were charges based on the failure to provide documents in

accordance with court orders; the making of false statements to frustrate the enforcement proceedings and to evade payment of the judgment sums due to the respondents; the failure to disclose shareholdings and other assets; and the failure to provide information or documents in relation to other beneficial interests.

8. In the first contempt judgment, which addressed whether or not there had been contempt, Morris J found all 14 charges proved to the criminal standard, although there were one or two individual allegations within those charges which he did not accept. In particular:

(a) He found at [30(3)] that the defendants had ignored the Part 71 orders, failed to attend court on four occasions, and were twice found to be in contempt of court and made subject to suspended orders of committal;

(b) He found at [30(4)] that, once the appellants had become involved in enforcement proceedings, their approach was to dispute as much as possible "regardless of the merits of the arguments being advanced".

(c) He found at [30(5)] that, although they had undertaken in the course of the Part 71 hearing to supply further documents, the appellants failed to do so and took an obstructive approach in the course of protracted correspondence.

(d) He found at [60] that the appellant's persistence in advancing unmeritorious arguments showed that "their objective remains to disrupt, frustrate and protract the proceedings rather than to participate in them in any meaningful fashion".

9. In his second contempt judgment which addressed sentencing ([2021] EWHC 3229 (QB)), Morris J sentenced the first appellant to 24 months imprisonment and the second appellant to 15 months imprisonment. They have not returned to the UK to serve their sentences or to purge their contempt. They have not even apologised, as the judge noted at [36]. At [33] of that same judgment, Morris J described the appellants' "serious, persistent and deliberate breaches of court orders and false statements [which]….are continuing. Their objective throughout, and over a considerable number of years, has been to disrupt, frustrate and protract proceedings and to avoid compliance with court orders and ultimately to evade payment of the judgment sums properly due [to the respondents]". Amongst other things, he concluded that the respondents were entitled to their costs of the contempt proceedings on an indemnity basis.

4. The Appeal

10. On 29 December 2021, the appellants appealed against the findings of contempt and subsequent committal orders of Morris J. They claimed to be entitled to bring the appeal as of right without the need to seek permission, on the basis that appeals in contempt cases are in a special category. The appeal was based on a 25 page document which sought to take issue with the details of Morris J's judgment. The document is not signed. I shall call it "the grounds document".

11. I address the grounds document in greater detail in paragraphs 27-30 below. However, I should say at once that, in my view, it is a further manifestation of the approach which Morris J referred to at [33] of the second contempt judgment, namely a further

attempt to disrupt, frustrate and protract proceedings and to avoid compliance with court orders and ultimately to evade payment of the judgment sums properly due. To the extent that the appellants needed permission to argue their appeal, I am entirely confident that, on the basis of the grounds document, such permission would not have been granted.

5. The Security Application

12. On 22 February 2022, the respondents issued an application that the court order that the appellants' pursuit of the appeal should be made conditional upon the payment into court of the sum of £3.76m (said to be the full amount of the appellants' indebtedness, including costs and interest) together with security for costs in the additional sum of £225,000. The application made plain that the court could order lesser sums to be paid if it considered that that was appropriate. It was supported by a witness statement of Lucy Vials dated 9 February 2022 which ran to 35 pages.

13. The respondents produced a lengthy skeleton argument in support of their application. The appellants produced a 9 page skeleton in response, prepared by counsel. However, the appellants did not seek to put in any evidence to contradict the statement of Lucy Vials or to support the grounds document.

14. It appears that the making of this application forced the appellants to reconsider their appeal. On 22 April 2022, less than a week before the hearing of the application fixed for 28 April, they indicated to the CoA Office that they wanted to withdraw the appeal. They eventually produced the correct Form on 25 April which led to the dismissal of the appeal in the circumstances set out in paragraph 1 above. As indicated there, although the respondents did not object to the dismissal of the appeal, they maintained throughout that they were entitled to have their costs of the appeal paid on an indemnity basis.

6. The Relevant Principles

6.1 Contempt Appeals

15. Section 13 of the Administration of Justice Act 1960 provided that "an appeal shall lie under this section from any order for decision of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt)…". The section is unusual because it goes on to provide that it will have effect "in substitution for any other enactment relating to appeals in civil or criminal proceedings". This would appear to mean that Parliament would have to legislate expressly if this right was to be modified in any way.

16. Thus, although permission to appeal is required in almost all other criminal or civil appeals, section 13 appears to bestow an unqualified right to appeal against committal orders for contempt. This is reflected in CPR 52.3 which makes plain that an appellant requires permission to appeal "except where the appeal is against …a committal order".

17. This unqualified right to appeal has, unsurprisingly, been the subject of some judicial criticism. In *Thursfield v Thursfield* [2013] EWCA Civ 840, Jackson LJ said:

> "It is repugnant to the proper administration of justice that a contemnor can flout orders of the court then absent himself from the committal hearing, then avoid serving whatever prison sentence is imposed and then finally avail himself of the procedures of the Court of Appeal, whilst enjoying the shelter of some safe haven overseas…it may be thought that persons committed to prison for contempt should only be entitled to appeal with permission…I would suggest that at the very least there should be a permission requirement in case where the appellant has refused to submit to the jurisdiction of the court."

18. I respectfully agree. There can be no justification in requiring all criminals and civil litigants to seek permission to appeal, yet allowing contemnors the right to circumvent such a filter. This anomaly has led to two specific strands of authority.

19. The first is that this court will distinguish between the committal order, on the one hand, and ancillary orders on the other: see for example *Masri v Consolidated Contractors International Co SAL* [2011] EWCA Civ 898; [2012] 1 W.L.R. 223, in particular at [21]. The automatic right to appeal has been limited to the former, not the latter, and has been restrictively applied. It is not clear to me - and it is not necessary to decide for the purposes of this judgment - whether the appellants in the present case were entitled to appeal on all of the 14 grounds of contempt in circumstances where they had deliberately chosen not to challenge many of them before Morris J.

20. The other way in which the automatic right to appeal in contempt cases can be policed is through the imposition of conditions. Such a course is plainly open to the court in principle: see for example *X Limited v Morgan-Grampian (Publishers) Limited* [1991] 1 A.C.1 and *JSC Bank v Ablyazov* [2012] EWCA Civ 639. In the latter case, Moore-Bick LJ pointed out that the imposition of such conditions would be rare.

6.2 Indemnity Costs

21. The leading case on the principles guiding the discretion to award indemnity costs is *Excelsior Commercial and Industrial Holdings Limited* [2002] EWCA Civ 879; [2002] C.P.Rep 67. This court summarised its earlier decisions and held that the making of an order for costs on the indemnity basis would be appropriate in circumstances where i) the conduct of the parties or ii) other particular circumstances of the case (or both) were such as to take the situation "out of the norm" in a way which justified an order for indemnity costs.

22. In *Esure Services Limited v Quarcoo* [2009] EWCA Civ 595, this court clarified that an order for indemnity costs would not be limited to the situation where there was a lack of probity or conduct deserving of moral condemnation, and that the Lord Woolf's "norm" was intended to reflect "something outside the ordinary and reasonable conduct of proceedings".

7. The Respondents' Application for Indemnity Costs

23. The application for indemnity costs was supported by written submissions prepared by Mr Walker-Nolan. His principal points were: that the appellants had sought to avail themselves of the procedures of the Court of Appeal whilst fugitives from

justice and whilst in open defiance of the courts' previous Orders; that despite the fact that their appeal was predicated on the need for fresh evidence, they had never provided such evidence or even indicated what it might say; that the appellants never had any intention of participating in any meaningful fashion in the appeal proceedings; that in the circumstances it was unreasonable for the appellants to pursue the appeal; and that abuse, misuse and manipulation of the appeal process whilst sheltering behind the entitlement to appeal as of right "is particularly corrosive and harmful to the administration of justice".

24. Notwithstanding the fact that, in the absence of an alternative address for service within the UK, the appellants' solicitors remain on the record, and despite the order requiring such submissions to be served, no material of any kind has been provided on behalf of the appellants to suggest that this court should not order them to pay the respondents' costs of the appeal on an indemnity basis.

8. Analysis

25. At the end of the contempt hearings, Morris J found that the appellants' conduct had been out of the norm and ordered them to pay the respondents' costs on an indemnity basis. In my judgment, any consideration of the appellants' conduct of this appeal can only lead to the same conclusion. There are three principal reasons for that conclusion.

26. First, I consider that the appellants have endeavoured to take advantage of the automatic right of appeal, referred to above, in order to prolong the proceedings and delay payment of the sums due. What is more, they have done this whilst in open defiance of numerous court orders. The automatic right to appeal is a rare exception to the usual rule that an appellant requires the permission to bring an appeal. This court must police that right carefully and be swift to mark its disapproval if it considers that its procedures are being abused. Awarding indemnity costs is one mechanism by which that can be achieved.

27. Secondly, on a proper analysis of the matters put in issue in the grounds document, it can safely be concluded that the appeal was hopeless. Those matters divide broadly into three categories:

(a) Matters of fact which were carefully considered and rejected by Morris J;

(b) Matters of fact and other arguments which were never suggested to Morris J; and

(c) Matters which required new evidence.

There is some overlap between these categories. But all are, in my view, equally untenable in the circumstances of this case.

28. As to category (a), namely matters of fact already considered and rejected by Morris J, there can be no basis for seeking to reargue them in this court. To borrow the words of Lewison LJ in *Fage UK Limited v Chobani UK Limited* [2014] EWCA Civ 5 at [114], the hearing in front of Morris J was not a dress rehearsal. It was the first and last night of the show. Findings of fact made by the judge below will not generally be reopened by this court. Moreover, there has been no attempt by the appellants to

grapple with the judge's reasoning for his detailed conclusions. Although the grounds document contained a number of denials and assertions that the judge had been wrong to make particular findings, the absence of any explanation for such denials and assertions – the absence of anything remotely resembling a positive case - is telling.

29. As to category (b), that is to say matters of fact and other arguments which were never raised before Morris J, the appellants' position is even more untenable. The hearing before Morris J was the time when all points, if they were relevant and had any merit, should have been raised. They were not. Some were not even in the material provided by the respondents after the end of the original hearing of the contempt applications, addressed by Morris J at [55]-[66] of the first contempt judgment. No excuse is offered as to why they were not, or why the appellants were choosing to address the detail only after the proceedings in the High Court had been concluded. It is an abuse of the process of this court to raise arguments for the first time on appeal, in circumstances where those arguments could and should have been raised before the judge below.

30. As to category (c), that is to say the matters which required fresh evidence, the appellants' conduct has been deliberately evasive. Although their solicitors suggested that they would adduce new evidence, when they were chased for it by the respondents in correspondence, the appellants' solicitors kept back-tracking and refused to engage in any sort of detailed analysis of what that evidence might be and when it would be provided.

31. It is for those reasons that I have concluded that the appellants never had any genuine intent to advance this appeal in a legitimate fashion. It was a sham from start to finish. Such conduct is a long way outside the norm, and it justifies an order for indemnity costs.

32. If the appellants had complied with the court's order to explain why they should not pay costs on an indemnity basis, the only argument they might have endeavoured to run was that the respondents' application for security was not straightforward because (as I have indicated) the authorities suggest that the imposition of conditions is rare. That led me to wonder whether it was appropriate to include the respondents' costs of that application in the wider order that their costs of the appeal would be assessed on an indemnity basis. But for two reasons, I have concluded that those costs should be included.

33. First, I consider that, such was the reprehensible nature of the appellants' conduct, this may well have been one of those cases where an order making the appeal conditional on, for example, the payment into court of the sums due and owing (or at least some part of them) may have been appropriate.

34. Secondly, as I have already pointed out, this court needs to police contempt applications properly so as to ensure that the automatic right of appeal is not abused. Depending on the facts, the making of the type of conditional orders sought by the respondents in this case may well be an appropriate way to achieve that.

35. For all these reasons, therefore, I consider that the appellants must pay the entirety of the respondents' costs of the appeal on an indemnity basis, including the costs of the

respondents' application for conditions to be imposed on the appellants' pursuit of this appeal.

9. Payment on Account

36. It would not be appropriate for this court to make a summary assessment of all of the respondents' costs of the appeal. It is however appropriate to order a payment on account of those costs, and order that the costs thereafter be the subject of a detailed assessment.

37. The costs claimed are in the sum of £217,482.53. The respondents seek 70% of that by way of a payment on account of costs, namely £152,237.77. In my view, having ordered costs to be assessed on an indemnity basis, 70% is a fair estimation of the minimum level at which the respondents' costs will eventually be assessed. Thus I consider that the sum of £152,237.77 is a reasonable amount to order to be paid on account of the respondents' costs of the appeal.

LORD JUSTICE ARNOLD

38. I agree.

LORD JUSTICE PHILLIPS

39. I also agree.