IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2019] EWHC 1423 (Admin)

No. CO/5191/2018

Royal Courts of Justice

Thursday, 9 May 2019

Before:

THE HONOURABLE MR JUSTICE SUPPERSTONE

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
NOTTING HILL GENESIS — Applicant

- and -

CAMBERWELL GREEN MAGISTRATES' COURT — Respondent

- and -

HOLLY SMITH — Interested Party

MR M. MULLIN (instructed by Glazer Delmar) appeared on behalf of the Applicant.

THE RESPONDENT did not appear and was not represented.

THE INTERESTED PARTY did not appear and was not represented.

J U D G M E N T

(Transcript prepared without the aid of documentation)

MR JUSTICE SUPPERSTONE:

1 On 22 March 2019, Murray J granted the claimant, Notting Hill Genesis, formerly Notting Hill Housing Trust, permission to apply for judicial review of the order made by the defendant, Camberwell Green Magistrates' Court, dated 25 October 2018, awarding prosecution costs against the claimant in the sum of £21,052.80 in favour of Clarke Barnes Solicitors.

2 On the 20 December 2018, the claimant filed a claim form by which it challenged the refusal of Camberwell Green Magistrates' Court to state a case for the consideration of the High Court in the case of *Holly Smith v Notting Hill Genesis*, case number 01800222534.

3 Murray J made the order he did following the guidance given by Simon Brown LJ in *Sunworld Ltd v Hammersmith & Fulham LBC* [2000] 1 WLR 2102 at 2016. The judge decided that the correct course was to grant permission for the judicial review directly challenging the costs order, given that the Magistrates' Court had given its written reasons dated 5 December 2018 for refusing to state a case and justifying its order. Therefore, in his view, there existed sufficient material from the Magistrates' Court to enable this court to deal with all of the properly arguable issues in the case.

4 At this hearing Mr Michael Mullen appears for the claimant. I have a statement on behalf of the defendant from Mr Michael McMahon, who was the legal adviser in the case of *Ms Holly Smith v Notting Hill Genesis*, on 25 October 2018.

5 The defendant does not appear and is not represented today. Ms Holly Smith, the interested party, has not participated in these proceedings since filing written submissions in relation to the application for a case stated.

6 The factual background to the present claim is as follows: the underlying Magistrates' Court proceedings were a prosecution brought by Ms Holly Smith, the prosecutor, against the claimant for the alleged failure to a abate a statutory nuisance pursuant to s.82 of The Environmental Protection Act 1990 ('the EPA').

7 The prosecutor commenced those proceedings by laying an information at the court on 17 January 2018. The proceedings related to 62B Hitherfield Road, Streatham, SW16 (the "property"). The information alleged that a mouse infestation, caused by disrepair to the fabric of the property, had rendered the property prejudicial to health since the end of August 2017. Following a number of interim hearings, the proceedings were compromised by an agreement dated 20 June 2018 that was made shortly before the listed trial. In essence, the Magistrates' Court proceedings, and any associated civil proceedings, were settled on the basis that Ms Smith would be rehoused and receive damages in the sum of £2,500 compensation.

8 Notting Hill Genesis also agreed

> "... to pay Clarke Barnes reasonable fees of the prosecution, to be assessed by the Magistrates Court if not agreed" para.5(a).

Clarke Barnes were the solicitors acting for Ms Smith.

9 The claimant and Ms Smith were not able to agree a figure for the solicitors' reasonable fees of the proceedings, and so the matter was listed before the court on 25 October 2018 for a hearing to determine the issue of cost. The claim form, at para.7, records that:

> "At that hearing the prosecutor was represented by her solicitor and the claimant was represented by counsel. The court heard lengthy submissions and were referred to skeleton arguments and a number of authorities by the parties".

Mr Mullin appeared for the claimant.

10 At the conclusion of the hearing, the magistrates ordered the claimant to pay £21,052.80 to Clarke Barnes Solicitors, which appears to have represented the entirety of the costs sought by Ms Smith without any deductions on assessment. The magistrates gave their reasons by way of an oral judgment. There is a verbatim note of that judgment.

11 The claimant challenges the decision on four grounds:

(1) the magistrates' decision that the total amount payable was reasonable and properly incurred in the proceedings was one that no reasonable court could have reached;

(2) that the magistrates erred by not properly considering whether the legal costs sought were proportionate to the compensation obtained. Instead, they made a finding that there is no "necessary direct correlation" between the compensation paid to Ms Smith and the costs being sought;

(3) the reasons provided by the magistrates were inadequate and demonstrate that they had not properly considered the submissions made by the claimant orally and in writing;

(4) the defendant avers that the power to order payment, under s.82(12) of EPA, is limited to an order that the defendant pay the person bringing the proceedings; the court ordered that the costs be paid to Clarke Barnes. The defendant avers that that was outside their jurisdiction. I shall consider these grounds in turn.

12 On ground one, Mr Mullin submits that the magistrates erred in ordering costs that were obviously grossly disproportionate. The vast majority of the work done by Ms Smith's legal representatives was undertaken by extremely experienced solicitors. This was a relatively low-value, entirely run-of-the-mill matter that would normally be handled by a paralegal or trainee under the supervision of a junior solicitor. Mr Mullin submits that the use of Grade A fee-earners for the vast majority of the work is unreasonable and improper.

13 Of course, the grade of fee-earner is a matter for the person instructing them as they are liable for the fee, but where that fee is to be recovered from another party as costs the appropriateness of the grade of fee-earner is only a relevant factor on assessment.

14 Mr Mullin contends that a particular feature of the unreasonable use of Grade A fee-earners are the sums expended on attendance at hearings. Rather than use junior counsel at a fraction of the price, and who do not charge for travel within London, the solicitor attended the hearings himself and charged waiting time and travel time at £300 per hour. The magistrates' failure, Mr Mullin submits, to consider, recognise or refer to this when it was expressly raised in argument by the claimant was irrational. Mr Mullin further submits that

the prosecutor's legal representatives spent a grossly disproportionate amount of time on the case.

15 Mr Mullin relies in particular on the decision of this court in *Taylor v Walsall and District Property & Investment Company Ltd* [1998] 30 HLR 1062 where it was said:

> "Clearly s.82(12) calls for an essentially broad brush approach. It requires only the crudest form of taxation process but, that notwithstanding, whereas here a substantial sum is claimed by way of cost, the Justices must, in my judgment, take proper steps to investigate just how that claim is arrived at and the detailed grounds upon which it is sought to challenge it.
>
> What they must ask is the basis upon which any time or head of cost is said by the respondents not to have been properly incurred, whether wholly or in part. If items of expenditure result from unreasonable conduct of any sort on the complainant's part, it is not disputed by Mr Singleton that those items can properly be deducted from the bill by the Justices."

16 In summary, the magistrates noted in Mr Mullin's submissions as recorded at para.5 to para.8 of the note of judgment. At para.9 it is noted that the magistrates stated:

> "We have taken time to go through the charges in detail and after some initial clarification of how the hours are denoted on the schedules, we have considered the total hours charged over the six month period to the trial date and then on to today's hearing. Having done so we find the costs claimed are properly incurred and reasonable. We therefore make an order for costs in the sum of £21,052.80 to Clark Barnes from Notting Hill Housing Trust"

17 Mr Mullin criticises this analysis on the basis that the magistrates appear to have focused exclusively on the number of hours charged – but they have not considered the claimant's challenge to the level of fees on the basis that a Grade A fee-earner was used throughout the proceedings, rather than a more junior solicitor or trainee.

18 Mr McMahon, in his statement at para.6, says in response to the point about Ms Smith's use of Grade A solicitors: "The Notting Hill Housing Trust legal team he dealt with were of an equivalent level." Mr Mullin submits that this is no answer to the claimant's point when it comes to assessment of costs.

19 I agree with these criticisms of the Magistrates' Court decision. In my judgement, the defendant erred in not dealing with the detailed submissions made to it on an individual basis. In particular, I consider the defendant erred in failing properly to consider the submission that the use of Grade A fee-earners for the majority of the work was unreasonable.

20 On ground two, Mr Mullin submits that the magistrates' finding that there need not be any correlation between the amount of any compensation and the costs is an error of law. In support of this submission, he has referred me to the relevant authorities of *Whalley, Holden, Fohmann* and *Dove*.

21 The magistrates considered Mr Mullin's representations regarding compensation paid to Ms Smith and that costs should be awarded in a similar vein, as recorded at para.5 of the note of

judgment. The magistrates stated: "We do not find any direct correlation between these sums." They went on to say: "This was a lengthy issue which result in the family being rehoused."

22 Mr Mullin accepts that the magistrates were entitled to take into account the non-financial element of the agreement between the parties – but it does not follow, he submits, that there is no need for any correlation between the level of costs and the level of compensation. He submits that the modest level of compensation indicates the level of infestation was not high and, further, it cannot be inferred from the fact that Ms Smith is to be rehoused that that was solely as a result of the mouse infestation. The compromise agreement refers to the settlement of any claim she may have "for disrepair, nuisance or breach of tenancy", not just arising out of the infestation.

23 I accept Mr Mullin's submission that it is at least arguable that an analogy can be drawn with the position in civil proceedings where CPR 44.3(2) and CPR 44.3(5) operate. By sub-section (5) costs incurred are proportionate if they bear a reasonable relationship to:

> "(a) the sums in issue in the proceedings;
> (b) the value of any non-monetary relief in issue in the proceedings;
> (c) the complexity of the litigation;
> (d) any additional work generated by the conduct of the paying party; and
> (e) any wider factors involved in the proceedings, such as reputation or public importance."

24 In my judgment, the magistrates erred in finding, as they appear to have done, that there was no need for any direct correlation between the costs and the damages and the non-financial compensation. If they did consider these matters, they have not properly explained the reasons for the decision that they reached in relation to this matter.

25 On ground three, Mr Mullin submits that the magistrates did not address in their reasons a significant number of the issues raised by the claimant orally and in writing. The magistrates were not required to address each and every point raised by the claimant; however there were two specific matters that were raised that do not appear to have been considered.

26 First, Murray J, granting permission, noted that the order made by the Magistrates' Court refers to s.17 of the Prosecution of Offences Act 1985, but that it was in fact made on the basis of s.82(12) of the EPA. At para.16 and para.17 of his skeleton argument for the hearing before the magistrates, Mr Mullin submitted that the prosecutor is limited to recovering an amount reasonably sufficient to compensate her for any expenses properly incurred by her in the proceedings (s.82(12)). He submitted therefore that the court had no power to award sums in relation to expenses incurred prior to the issue of these proceedings, or indeed for costs incurred after the trial date. The magistrates do not appear to have dealt with this jurisdiction point.

27 Second, the prosecutor engaged her legal representatives under a CFA. Mr Mullin accepts that, in the ordinary way, a court would not be required to consider the terms of a CFA. However, in circumstances where the costs are so high, he submits that they should have done so. He made that point to the magistrates, but they have failed to deal with it.

28 As for ground four, this seems to me to be largely academic. Nevertheless, Clarke Barnes are not a party to the litigation and it is therefore unclear on what basis monies can be ordered to be paid directly to them. The compromise agreement expressly states that the

claimant agrees to pay Clarke Barnes' reasonable fees for the prosecution, to be addressed by the Magistrates' Court, if not agreed.

29 In summary, in my judgment, the magistrates have erred by not considering the individual items challenged, in particular by not dealing with the point made by the claimant as to the use of a Grade A fee-earner throughout the proceedings; by failing to consider the jurisdiction point, and by failing to consider the CFA. If they did consider any of these points, they have failed to give their reasons for any decision they reached in relation to them.

30 For the reasons I have given, the decision of the magistrates will be quashed. I do not accept Mr Mullin's submission that I should retake the decision myself and carry out the summary assessment of costs, or that I should direct the Magistrates' Court to assess the costs in a certain figure without the need for a further hearing. I do not have the material before me which would warrant me adopting any such approach.

31 For the reasons I have given, the decision of the magistrates will be quashed and the matter remitted back to the magistrates to be heard by differently constituted Bench.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
admin@opus2.digital

This transcript has been approved by the Judge.