Neutral Citation Number: [2020] EWHC 304 (Admin)

Case No: CO/1408/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2020

Before :

MR JUSTICE FREEDMAN

- -

Between :

THE QUEEN on the application of DONALD JOHN KENT

Claimant

- and -

TEESSIDE MAGISTRATES COURT

Defendant

-and-

HJ BANKS AND COMPANY LIMITED

Interested Party

Dr Paul Stookes, Solicitor Advocate (of Richard Buxton Solicitors) for the Claimant
Mr Christopher Knox of Counsel (instructed by **Womble Bond Dickinson**) for the Interested Party

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JUDGMENT

Mr Justice Freedman:

I Introduction

1. Following the judgment given orally on 28 November 2019 that the Aarhus Convention applied, the question of costs falls to be determined. The Claimant contends that its costs should be paid by the Interested Party, failing which his costs should be paid by the Defendant or apportioned between the Defendant and the Interested Party.

2. The Interested Party submits that no order should be made against it. The Defendant, who did not appear in the application, says that there should be no order for costs as between the Claimant and Defendant. It also says that if the court is minded to award costs against the Defendant then it should be given an opportunity to make written submissions.

II Chronology

3. Although the Defendant ticked the box that the Aarhus convention does not apply in its acknowledgment of service, subsequently it has been neutral as to the issue of the application of the Aarhus Convention. The relevant chronology is as follows:

   14.6.19 HH Judge Belcher granted permission to proceed with the claim, directing that the claim is not an Aarhus Convention claim but that the Aarhus direction may be challenged and if so, it should be determined at a hearing.

   8.7.19 The Defendant noted that its costs position is neutral.

   15.7.19 The Claimant renewed his application for costs protection under CPR 45.41.44.

   19.8.19 The Claimant wrote to the court copying the Defendant and the Interested Party seeking that they should indicate that if they consider that CPR 45.45(3) does not apply (that is no order against the Claimant in the event that the Aarhus Convention did not apply), and if so why. The Defendant replied that it remained neutral.

4. The Interested Party said that costs would be in the discretion of the Administrative Court, and that it would be appropriate for the Court to exercise its discretion, to depart from the usual order of no order as to costs and to make an order for costs against the Claimant.

5. The objection of the Interested Party to the Claimant having Aarhus costs protection has been persistent. This has been evident from
   (1) the Interested Party's summary grounds of resistance;
   (2) a letter of 2 July 2019 indicating inter alia that the Interested Party had instructed its solicitors to "oppose any such application";

(3) a letter of the Interested Party of 9 July 2019 that its position was "unchanged" and that it would not agree that the hearing of the application would be on a no order for costs basis;
(4) the Interested Party's submissions of 23 July 2019 in opposition to the Claimant's application;
(5) the Letter to the Claimant's solicitors of 30 August 2019 and 8 November 2019 seeking information on funding;
(6) the Interested Party's skeleton argument of 22 November 2019;
(7) the attendance and submissions of the Interested Party at the hearing of 27 November 2019.

III The hearing

6. The hearing took place on 27 November 2019 and judgment was given on 28 November 2019. There was voluminous evidence and authority cited. The hearing lasted half a day. There were skeleton arguments of the Claimant and the Interested Party who were the only parties before the Court. The costs were then reserved to be dealt with in writing. Detailed written submissions have been made by skeleton arguments from the Claimant and the Interested Party respectively. The parties are agreed in view of the judgment that the order to reflect should be that the claim falls within CPR 45.41-44 as an Aarhus Convention claim and the Claimant is entitled to costs protection limiting his total adverse costs liability to £5,000 with a reciprocal cap of £35,000. However, there are issues as to (a) the power to award costs against the Interested Party, (b) whether costs should be awarded, and, if so, to what extent, and (c) the quantum of costs.

(a) The starting point – power to award costs against the Interested Party

7. The rules provide at CPR 45.45(3) as follows:

"(3) In any proceedings to determine whether the claim is an Aarhus Convention claim—

(a) if the court holds that the claim is not an Aarhus Convention claim, it will normally make no order for costs in relation to those proceedings;

(b) if the court holds that the claim is an Aarhus Convention claim, it will normally order the defendant to pay the claimant's costs of those proceedings to be assessed on the standard basis, and that order may be enforced even if this would increase the costs payable by the defendant beyond the amount stated in rule 45.43(3) or any variation of that amount."

8. The point is taken by the Interested Party that the reference to the defendant in CPR 45.45(3)(b) means that the starting point in the event that the court holds that it is an Aarhus Convention claim, is that the costs should be paid by the defendant. There is no reference to the interested party. That point has been dealt with by the Court of Appeal in the case of *Campaign for the Protection of the Rural Environment Kent Branch v Secretary of State for Communities and Local Government* [2019] EWCA Civ 1230 (*"CPRE"*). Coulson LJ held at [46-48] that the reference to a defendant only in CPR 45.41-45.44 was not material. In that case, the question was about the liability of the claimant for the interested party's costs. Coulson LJ held that

"47. I am in no doubt that the absence of any express reference to interested parties in CPR Pt 45 is of no consequence. It was probably deemed unnecessary by the draftsmen

to refer to "and/or interested parties" after the reference to "defendant" every time the latter was mentioned. But in any event the omission makes no difference to the application of the Aarhus cap. That is because, as Ms Lean pointed out, rule 45.4.3 limits the costs exposure to the claimant; it is the claimant who "may not be ordered to pay more than ..." It does not spell out to whom the claimant might be paying the costs up to the limit of the cap. The obvious answer is: any defendant or interested party who is otherwise entitled to their costs.
48. Accordingly, I do not consider that interested parties are outside the provisions relating to the Aarhus cap; nor do I consider that different rules relate to an interested party's ability to recover their reasonable and proportionate costs, up to the limit of the cap, in the appropriate case."

9. This applies to the case where the Claimant has established that the Aarhus Convention applies and seeks an order against the Interested Party. The submissions of the Interested Party do not refer to the above judgment, which is dispositive of the point. There is a reference by the Interested Party to an order in the case of *R (Halebank PC) v Halton BC* CO/1023/2019. It is not immediately apparent what is the effect of the order in respect of this case: if it is contrary to the above reasoning of *CPRE*, this Court will and must follow *CPRE*.

(b) If there is power, should costs be ordered, and if so, to what extent?

10. The starting point is CPR 44.45(3)(b) as quoted above, namely that if the court holds that the claim is an Aarhus Convention claim, the Claimant will normally recover its costs. Further, CPR 44.2(a) applies in that *"the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party"* subject to the ability of the Court to make a different order. In this case, the Interested Party has been the unsuccessful party in that whereas the Defendant has been neutral, the Interested Party has been the active party, and its case about the non-application of the Aarhus Convention has been rejected.

11. The Interested Party submits that the costs would not have arisen but for the Defendant's initial objection and the decision of HH Judge Belcher that it was not an Aarhus Convention claim. That then required a hearing for the Claimant to argue that it was an Aarhus Convention claim. At highest, the Claimant should only be awarded the extent, if any, to which its costs were increased by reason of the opposition of the Interested Party.

12. In my judgment, it was available to the Interested Party not to oppose the application of the Claimant. It could have gone further than this. It could have accepted that the Aarhus Convention costs regime should be treated as applying. In those circumstances, an agreed order could have been provided to the Court (if that required the consent of the Defendant, the inference is that this would have been forthcoming in view of its neutrality). It is theoretical in those circumstances that the Court would have been able to require to be satisfied that the Aarhus Convention applied. Provided that there was no declaration of right and it was just for the purpose of this case to be treated as if it did apply, a Court would in the ordinary course have permitted this course: see by way of analogy the practice of an appeal court of allowing unopposed appeals or applications on paper at CPR PD 52A.6.4.

13. Whilst the Defendant did originally tick the box in its Acknowledgment of Service that the Aarhus Convention did not apply, it has by contrast maintained sustained neutrality thereafter. It is therefore artificial and/or historic to regard the Defendant as the cause of the costs being incurred. If the Interested Party had agreed the position, then the Claimant would not have needed to have convinced the Court about the application of the Aarhus Convention. The argument of the Interested Party is as unrealistic as that of a party who resists an appeal and submits that the costs of the appeal would have been incurred in any event because the appellant had lost at first instance.

14. The above points are stronger still because the Interested Party was contending that the Court should in the event that the Aarhus Convention did not apply depart from the usual order (CPR 45.45(3) as quoted above) and make an order for costs in its favour. This was not based simply on the technical issue as to whether the Convention applied to this kind of action, but it involved an attack on the merits of the claim, the motivation of the Claimant and the contention that the Claimant was simply a front for others and was indemnified by others. All this formed part of the contentious argument of the Interested Party in the substantive hearing. This adds to the point that this was a controversy between the Claimant and the Interested Party, and that the Interested Party was the unsuccessful party.

15. For all these reasons, I conclude that the costs should be ordered in favour of the Claimant and against the Interested Party. It follows from the reasoning above that the submission that some of the costs would have been incurred because the hearing would have gone on in any event has been rejected. Accordingly, the entirety of the costs, subject to reasonableness, are awarded to the Claimant. I am also satisfied that there should be no order as to costs as between the Claimant and the Defendant.

(c) Quantum of costs

16. The Claimant claims a sum of £25,292.42 inclusive of VAT in addition to the reciprocal cap amount which is to be the first paragraph of the order. The Claimant did not seek any additional costs in respect of its preparation of the submissions.

17. The Interested Party makes the following submissions:
    (1) the costs are disproportionate and excessive overall;
    (2) the costs include the costs of legal research which is not recoverable between the parties, relying on the case of the *Crown and Legal Aid Board, ex parte Bruce* [1991] 1 WLR 1231.

18. In my judgment, the costs were not disproportionate and excessive overall. The Interested Party's costs schedule is a sum of £33,620 (almost a third higher than those of the Claimant, and higher still when taking into account that the Interested Party's costs do not include VAT, whereas the Claimant's costs do include VAT), despite the Claimant having to prepare the bundles. Save as appears below, there is no specific point in respect of individual items where there is a challenge to the reasonableness of the sums claimed.

19. As regards the costs of research, this is a sum of £1,044 plus VAT of £208.80. Whilst it is usually the case that research cannot be claimed, each case had to be decided on

its facts and fees for legal research were not excluded where a case was unusual: see *Perry v The Lord Chancellor* Times Law Reports (26 May 1994).

20. The case cited by the Interested Party, *Crown and Legal Aid Board ex parte Bruce* [1991] 1 WLR 1231 was about the cost incurred of a disbursement in respect of legal research carried out by a person other than a barrister or solicitor. In that case, Lord Donaldson MR did say *"…knowledge of the law, however acquired or recalled, is their stock in trade just as the professional ability to ascertain and record physical features involved in a boundary dispute or to ascertain how a builder has done his work and whether this is in accordance with good practice is a surveyor's. In so far as expense is involved in adding to or replenishing this stock in trade, it is an overhead expense and not something which can be charged to the client or the Legal Aid Board as a disbursement."* However, this was in the context of the disbursement of obtaining advice other than from solicitor or barrister. Staughton LJ made clear that the case turned upon the application of legal aid regulations to a disbursement of a person who was neither a solicitor nor a barrister. This case is not authority for the proposition that there can never be recovered on an assessment of costs, money spent on legal research by solicitors or barristers. Indeed, it was acknowledged in *Johnson v Vaulks* [2000] 3 WLUK 410 at [18] that counsel could not be expected to be a "walking library".

20. I am satisfied that the instant case is unusual and that it required an unusual amount of legal research of national and international law and procedure, as is apparent from the substantive judgment itself. The legal research is not disallowed in principle.

21. However, I shall make a modest reduction to reflect the fact that although legal research is not disallowed, there is a question (raised by the Interested Party) as to whether the legal research and the skeleton and the preparation might involve some duplication and further, whether in its totality the sum of £6,334 plus VAT for these items is excessive. I cannot embark upon a detailed examination of this at a summary stage. However, to the extent that it is excessive, it is only a little excessive. I shall reflect this by a small deduction from the sum claimed and award costs in the sum of £24,000 inclusive of VAT to be paid by the Interested Party. It follows that paragraph 2 of the Order will read: "the Interested Party to pay the Claimant's costs of this renewed application in the sum of £24,000 inclusive of VAT. Pursuant to CPR 45.45(3)(b) this amount is in addition to the reciprocal cap amount in paragraph 1."