Neutral Citation Number: [2020] EWHC 3244 (Ch)

Case No: BL-2019-001909

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION (BUSINESS LIST)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 November 2020

Before :

MR JUSTICE TROWER

- -

Between :

ASTRID-CAROLINE COLE	**Claimant**
- and -	
(1) SEAN AVRAM CARPENTER	**Defendants**
(2) LAUREN SARAH CARPENTER	
(3) DAVID AARON CARPENTER	

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ANDREW LOMAS (by **Direct Access**) for the **Claimant**
YASH BHEEROO (instructed by **Trower & Hamlins LLP** for the **Defendants**

Written submissions: 23 November 2020

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Approved Judgment

I direct that 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 TROWER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email. The date and time for hand-down is deemed to be Friday 27 November 2020 at 2 pm

Mr Justice Trower:

1. This judgment is concerned with the parties' applications in respect of the costs of the defendants' application for permission to make a contempt application against the claimant ("the Application"). My judgment on the Application has Neutral Citation Number [2020] EWHC 3155 (Ch) ("the Main Judgment"), and its contents are to be treated as incorporated into this judgment.

2. The parties have made written submissions in light of the conclusions I reached in the Main Judgment. I determined that it was not necessary to hear oral argument on costs, and neither party suggested that I should do so.

3. The claimant submitted that, as the Application was dismissed, costs should follow the event. She therefore seeks an award of costs in her favour to be summarily assessed on the standard basis.

4. The defendants disagree. They seek an order, either reserving the costs of the application to the trial judge or for costs in the case. The second alternative would of course mean that the party in whose favour the court makes an order for costs at the end of the proceedings will be entitled to their costs of the Application (PD 44 paragraph 4.2).

5. The claimant relied on the fact that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party (CPR 44.2(2)(a)). She said that she was plainly the successful party because the Application was dismissed as premature, disproportionate, not in line with the overriding objective and not in the public interest.

6. The claimant accepted that it is open to the court to make a different order about costs (CPR 44.2(2)(b)), but contended that neither the conduct of the parties (CPR 44.2(4)(a)) nor the question of whether the defendants succeeded on part of their case (CPR 44.2(4)(b)) point to any order being made other than in accordance with the general rule.

7. As to questions of conduct, the claimant submitted that, while the court ruled against her on the admissibility of the without prejudice letter, it was not unreasonable for the point to be taken. As to the question of whether it might be said that the defendants succeeded on part of their case, the claimant submitted that the Application was dismissed *in toto*. So far as the relief sought is concerned, it cannot be said that the defendants succeeded in part.

8. The claimant also submitted that any order which provided for the parties to bear their own costs would create an unfortunate precedent which failed to give appropriate weight to the need to discourage premature applications for committal in circumstances similar to the present.

9. The defendants submitted that this was a case in which the court should depart from applying the general rule. In substance they said it was they, not the claimant, who were the successful parties for the purposes of CPR 44.2(2)(a). They argued that, in light of a number of the findings I made, the conclusions I reached in the Main Judgment could hardly be described as a 'success' for the claimant. They also pointed to the fact that the majority of the Application was spent considering issues on which the defendants were ultimately successful, including the strength of their case on the allegations of dishonesty against the claimant, whether or not the application had been brought in furtherance of an improper motive and the admissibility of the without prejudice correspondence.

10. The defendants submitted, quite correctly, that there are numerous instances in which the putative winner has been denied all or part of their costs on the basis that they have lost on most or all of the substantive issues. This is particularly the case where the successful party has raised issues or made allegations on which they fail which have caused a significant increase in the length or cost of the proceedings see e.g. *Re Elgindata Ltd (No 2)* [1992] 1 WLR 1207, 1214.

11. Other instances in which the court will deviate from the general rule are where the degree of success is substantially less than absolute in the sense that the amount recovered was very significantly less than the amount claimed, more particularly where it is quantified on a basis that is different from the basis on which the claim was put forward.

12. The defendants also drew my attention to *Summers v. Fairclough Homes Ltd* [2012] UKSC 26 at [53], in which Lord Clarke, giving the judgment of the Supreme Court, said "it is entirely appropriate in a case of this kind to order the claimant to pay the costs of any part of the process which had been caused by his fraud or dishonesty and moreover to do so by making orders for costs on an indemnity basis". That was a very different case from the present, but drew attention to what will normally be a necessary causal link between the relevant costs and the dishonesty.

13. Against this background the defendants submitted that the interests of justice require the issue of costs to be reserved to the trial judge or at least to be costs in the case. They picked out a number of parts of the Main Judgment in which I found that there was a strong prima facie case of conduct by the claimant, which if proved would amount to serious dishonesty. They submitted that it would be unjust for them to be ordered to pay the costs at this stage if it were subsequently to be established that some of the matters of which I was satisfied on the hearing of the Main Application as amounting to prima facie dishonesty, were found at trial to be true.

14. I think that there is substance in the defendants' submission that it would not meet the justice of the case for them to be ordered to pay all of the costs of the Application in any event (anyway at this stage). There were a number of matters on which they were successful: in particular they established that there was a strong prima facie case that a contempt had been committed and they won on the issue of the without prejudice correspondence. It remains the case, however, that they failed in the application and I concluded that it was premature and disproportionate at this stage of the proceedings.

15. In my judgment, the right order to make is that the defendants should bear their own costs of the Application in any event, but that the claimant's costs of the Application should be reserved to the trial judge.

16. It is appropriate to reserve costs in this way, because, as I said in paragraph 83 of the Main Judgment, "once the trial has concluded it will be possible for the court to adopt a more clear-sighted view of the true significance of what occurred at the time of the alleged email exchange and the extent to which it was in fact material to the issues in the action". While I said that in the context of assessing the seriousness of any contempt, it is equally applicable to deciding the extent to which the claimant or the defendants were the successful party on the Application. It therefore remains open to the claimant to seek her costs of the Application in due course, although it may well be that the trial judge would regard it as inappropriate for such an order to be made if conduct amounting to a contempt were to be proved at trial.

17. While the defendants may consider that, in such an eventuality, it would be wrong to deprive them of the ability to recover their costs of the Application against the claimant, I disagree. The order, as it relates to the defendants' costs, reflects the fact that they failed to obtain the relief that they had sought, because it was both disproportionate at this stage and premature. In my judgment, the order I shall make amounts to appropriate discouragement to the commencement of a contempt application when it is premature to do so.

18. I should add that I considered whether to make an order for claimant's costs in the case, but determined that this was inappropriate. It is possible that the result of the proceedings as a whole may not reflect the question of who in substance was the successful party on the Application.

19. The consequence of this decision is that it is neither appropriate nor necessary for any assessment of costs to be carried out at this stage. If, in due course, the claimant persuades the trial judge to make an order for her costs of the Application to be paid by the defendants, those costs will doubtless be subject to detailed assessment in the normal way.