Neutral Citation Number: [2024] EWHC 551 (KB)

Case No: KA-2022-000122

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM CENTRAL LONDON COUNTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/03/2024

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

ASHOK KAPOOR (AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MADHU KAPOOR (Deceased))	**Appellant**
- and -	
BALTAJ JOHAL	**Respondent**

- -
- -

Andrew McKie (on a **Direct Access** basis) for the **Appellant**
Marc Roberts (instructed by **RH Solicitors**) for the **Respondent**

Hearing date: 6 October 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 20 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Julian Knowles:

Introduction

1. This is an appeal with the permission of Bourne J granted on 24 April 2023 in relation to costs.

2. The case has a long history which goes back to at least 2010. In that time the original claimant, Ms Madhu Kapoor, has sadly died, as has one of the original defendants, Ms Gurdev Johal. Nothing in this judgment should be interpreted as a lack of sympathy for them or their families. Ms Kapoor's estate is now represented in this litigation by her brother and personal representative, Ashok Kapoor.

3. The Appellant is represented by Mr McKie and the Respondent by Mr Roberts.

Dramatis personae

4. In this judgment I shall refer to persons as follows, for clarity:

   a. C1: the late Madhu Kapoor

   b. A: her brother and personal representative Ashok Kapoor (who is now the Appellant); he was joined as a party in 2022

   c. D1 and D2: Harchand Johal and the late Gurdev Johal

   d. R: Baltaj Johal (the son of D1 and D2, and the Respondent to this appeal; referred to in places in the appeal as D3)

The background in summary

5. To say the background to this appeal is convoluted would be an understatement. There have, over the last 13 or so years, been innumerable orders made by judges at several different county courts in relation to the claims which give rise to it. There has been widespread non-compliance with those orders and the CPR by both parties, in particular, by failing to serve the other side with correspondence and applications, which led to much confusion and unnecessary work. One judge described the case as having descended into 'chaos'. In this section of my judgment I will only set out what is necessary for an understanding of the issues which I have to decide.

6. This matter began in 2010 as a boundary dispute. C1 alleged that D1 and D2 had removed and destroyed a boundary fence and concrete posts which belonged to her and separated her home in Cranford Drive, Hayes, Middlesex, from the home of D1 and D2 at the next door property in Cranford Drive. She also alleged that there had been trespass to her property, and that foundations for a new wall had been dug on her land by the Defendants.

7. On 13 October 2010 C1 issued a claim in Uxbridge County Court for an injunction against D1 and D2 'and family'. The claim number was OUB02050. There was no claim for damages. An injunction was granted on the same day by a deputy district judge against D1 and D2 only. It appears it was granted without notice to the

Defendants. I will refer to this as 'the Property Claim'. In due course, in 2015, R was joined as a defendant in this claim (D3).

8. Over the years there were many orders made in the Property Claim including for the instruction of experts and the like. At one stage the claim was struck out because of C1's failure to comply with the CPR. In 2016 a civil restraint order was made against her.

9. On 6 October 2016, C1 issued a claim for damages against R who was by then occupying 56 Cranford Drive but who, it is alleged, had refused to reinstate the boundary fence. This claim was issued out of the County Court Money Claims Centre (CCMCC) under claim number C93YM217. The damages sought were limited to £10,000 plus costs. I will refer to this as 'the Money Claim'. The appeal before me arises out of this claim.

10. The Money Claim was served by CCMCC. No defence was filed and, on 20 December 2016, judgment was entered against R.

11. On 5 April 2017, the CCMCC issued a notice of application for attachment of earnings against R to enforce the judgment debt.

12. On 19 April 2017, R made an application to set aside the attachment of earnings order, however he failed to file from N56 (Form for Replying to Attachment of Earnings application) in time and, therefore, on 19 April 2017, the Money Claim was transferred to the Uxbridge County Court, which was R's local court.

13. In or around 2017 C1's ovarian cancer unfortunately recurred and she became very unwell. She was treated with chemotherapy, which made her more unwell with a variety of side-effects. During 2017 a number of hearings were adjourned because of C1's ill-health and inability to attend court.

14. On 27 October 2017, a deputy district judge made an order in both the Property Claim and the Money Claim that, by 24 November 2017, C1 should provide a statement or certificate from her medical practitioner as to her capacity to understand and conduct civil legal proceedings; that there should be a stay pending the filing of such statement or certificate; and that the Property Claim and Money Claim should be 'kept together'.

15. On 8 March 2018, D1, D2 and R made an application to strike out the Property Claim and set aside the judgment debt in the Money Claim, however, this does not appear to have been served on C1. A hearing was listed for 1 May 2018.

16. On 25 April 2018 C1 made a cross-application seeking to dismiss the application of D1, D2 and R and to vacate the hearing fixed for 1 May 2018 because she had not been served with Ds' application and did not know on what grounds they were seeking to strike out her claim.

17. On 1 May 2018 a deputy district judge: refused C1's application for an adjournment; set aside the judgment in the Money Claim; struck out the Money Claim because it was for damages arising out of the Property Claim and so was an abuse of process; and made a civil restraint order against C1. He also ordered C1 to remove rubbish along the boundary of the two properties.

18. The judge gave directions in the Property Claim, including directions for two experts and the exchange of witness statements, which were made subject to an unless order. He also ordered that no further application could be issued in the Property Claim without the permission of the resident judge at Uxbridge County Court. Permission to appeal was refused.

19. On 21 May 2018, C1 made an application for permission to appeal the deputy district judge's order of 1 May 2018. She submitted *inter alia* that the Money Claim should have been joined to the Property Claim and/or stayed until the Property Claim had been determined.

20. On 11 July 2018 the Defendants made an application to debar C1 from the proceedings because she had not complied with the part of the order made on 1 May 2018 requiring her to remove rubbish, etc.

21. On 29 August 2018, HHJ Saggerson refused permission to appeal on the papers.

22. On 16 October 2018 HHJ Luba KC directed an oral hearing of the application for permission to appeal which did not require the Defendants to attend. That application for permission was listed to be heard on 15 February 2019, however C1's condition began to deteriorate.

23. During 2019 the application for permission was adjourned a number of times because of C1's worsening condition and the effects of her chemotherapy. Unfortunately, C1 passed away from her illness on 30 January 2020. A was distraught at her death. At some point during this period, also, Gurdev Johal (D2) passed away.

24. In March 2020 the country went into lock-down because of the COVID-19 pandemic and, as is well-known, the administration of justice was affected in all courts.

25. During 2020 there then followed a series of orders which were intended to regularise the position in light of C1's death. Also, at some stage, R became the only defendant.

26. I now turn to the events with which this appeal is principally concerned.

27. On 4 February 2021 (order sealed on 24 February 2021), HHJ Lethem sitting at the Central London County Court made the following order in the Money Claim:

> "UPON reading the email of RH Solicitors dated the 4th January 2021 annexed to this order
>
> AND UPON:
>
> (a) It appearing that the email was not copied to the Appellant in breach of CPR 39.
>
> (b) The email alerting the court to the fact that the Appellant [ie, C1] has died
>
> (c) It appearing that CPR 19.8 is engaged and that the court has made no order appointing a person to act on behalf of the estate of the Appellant.

> (d) It appearing that Ashok Kapoor may be a personal representative of the Appellant and may wish to apply for an order under CPR 19.8
>
> IT IS ORDERED THAT:
>
> 1. The Respondent shall serve this order on Ashok Kapoor and any other person who they believe may have interest in the Appellant's estate or be affected by this order.
>
> 2. Any application for an order under CPR I 9.8 shall be made in compliance with that rule and supported by a witness statement from the applicant addressing:
>
> a. The applicant's interest in the estate.
>
> b. Whether a grant of probate or letters of administration have been applied for or are in the process of being applied for and the present status of any such application.
>
> c. Whether they are aware of any other person who has an interest in the estate or may be affected by this appeal other than the Respondents.
>
> 3. Any application made in accordance with paragraph 2 of this order shall he served on the Respondent solicitor and referred to HHJ Lethem for consideration on paper.
>
> 4. In the event that no application is made by 4.00 pm on the 22 March 2021 then the appeal shall stand struck out, the stay on proceedings lifted and the hearing listed for 11.06.2021 be vacated.
>
> 5. Because this order has been made without notice to the parties any party affected by the order may apply by 4.00pm on the 8 March 2021 to vary or discharge it."

28. There was no provision in this order dealing with costs. R did not apply to vary it so that it dealt with costs within the time specified in [5]. I will return to this point later.

29. CPR r 19.8(1) provides:

> "(1) Where more than one person has the same interest in a claim –
>
> (a) the claim may be begun; or
>
> (b) the court may order that the claim be continued,
>
> by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest."

30. On 8 March 2021, A sent an email to the court requesting that the order made by HHJ Lethem on 4 February 2021 be discharged/set aside because a copy of the email referred to in it had not been served nor attached to the order sent by the court to A; and explaining that A had additional difficulties, including the need to stay at home (because of the pandemic) and that he had no internet at home; and that he was grieving the death of C1 and needed to seek legal advice. He wrote:

> "I request His Honour Judge Lethem that the above order be discharged/set aside because the email of RH solicitors dated the 4th Jan 2021 was NOT ANNEXED to the order .The email has not been received by the court nor the RH solicitors.
>
> I appreciate that His Honour Judge Lethem has acknowledged that the RH solicitors breached CPR39.I would like to bring to His Honour Judge Lethem's attention that there has been also breach for the application dated 26 October 2020 made by the RH solicitors. Moreover, there are still outstanding complaint-issues of the emails in 2020 that were not sent by the RH solicitors & the court.
>
> I have not been informed. It is unfair.
>
> Also, to remind :- Please note other additional difficulties, which are-present pandemic situation/lockdown(Staying home to be safe),no internet at home .I am grieving of my sister M.KAPOOR who has passed away,& I need to seek legal advice.
>
> Please communicate by post & email(not regular user)
>
> I look forward to hear from the court."

31. On 22 March 2021, A sent a further email to the court requesting an extension of time to comply with the order of 4 February 2021 until at least 31 May 2021. He wrote:

> "Further to my last email on 8 March 2021 to the court (see below), to date have not received reply. Also, I have not received the email of RH Solicitors dated 4th January 2021 (not annexed to the order dated 24 February 2021) from the court nor the RH Solicitors.
>
> As requested, the order to be discharged/set aside.
>
> I request the Honourable Judge; in the interests of the justice at least there is extension in order to have the above email. Please also note that there are additional difficulties of my bereavement, covid-19 disruptions, not well and I have to stay home to be safe. I do not have internet at home. Recently; there have been other close relatives who have passed away. Moreover, I need to seek legal advice. Request, the extension to be at least end of May 2021.
>
> I look forward to hearing from the court. Please communicate by post and email."

32. On 24 March 2021, A issued an N244 application notice. In section 3 he said he was seeking the following order:

> "To extend the deadline of the order dated 24/2/21 (claim number C93YM237) to end of May 2021 because of the difficulties I am having. Please refer to my emails 8/3/21 & 22/3/21 sent to the Court, My sister Miss Madhu Kapoor has passed away. I am grieving. I am not well. I need time to recover and seek legal advice."

33. In section 10 he continued:

> "… There have been additional difficulties with the pandemic and lockdown situation. I have to be home to be safe. I do not have internet at home and it is extremely difficult to have access to the internet. It is vital I have time to recover and seek legal advice. I am unrepresented and wish to know the legal implications of the order under CPR 19.8. Please note to date I have not received email of RH Solicitor dated 4 January 2021 from the court nor the defendants solicitors. Also, there are outstanding issues. Under these difficult circumstances I request for the extension of the deadline."

34. On 7 April 2021 (order dated 9 April 2021), HHJ Lethem made an order declaring that the appeal had been struck out by virtue of the order of 4 February 2021, with no further order being necessary. His order of 7 April 2021 stated as follows:

> "BACKGROUND:
>
> (i) On the 29 May 2018 the Appellant filed an appeal against an order of Deputy District Judge Hussain dated the 1st May 2018.
>
> (ii) By an order of the 29 August 2018 permission to appeal was refused on consideration of the papers.
>
> (iii) On the 20 February 2019 HHJ Gerald adjourned the permission to appeal to the first open date after the 1st January 2020.
>
> (iv) By an order dated 8 January 2020 (drawn on the 20th February 2020) the permission to appeal was further adjourned.
>
> (v) it seems that the Appellant [ie, C1] died on an unknown date prior to the 7th May 2020
>
> (vi) On 1 July 2020 HHJ Dight further adjourned the appeal and drew the attention to the need to appoint personal representatives for the Appellant and ordered the Appellant's brother to update the court as to any grant of representation by the 7th August 2020.
>
> (vii) No such update was filed.

> (viii) On the 26 October 2020 the Respondent's solicitors applied for the appeal to be listed and all stays lifted.
>
> (ix) By an email dated 04.01.21 the Respondent's solicitors pointing out (*sic*) that the Appellant was dead.
>
> (x) On the 4 February 2021 HHJ Lethem ordered that the information required by CPR 19.8 be filed by the 22nd March 2021 and in default the appeal do stand struck out.
>
> (xi) The Appellant's brother having emailed the court on the 8th March 2021 and the 22nd March 2021 (without copying the same to the Respondent in breach of CPR 39.8) pointing out that a copy of the Respondent's email was omitted from the order and seeking an extension of the time under the order of the 4th February 2021.
>
> IT IS ORDERED THAT
>
> 1. It is declared that the appeal herein was struck out by virtue of the order of the 4th February 2021 without further order being required.
>
> REASONS
>
> (A) This appeal is now nearly three years old and should have been progressed.
>
> (B) It has been bedevilled by the failure of the Respondent's solicitors and the Appellant's brother to copy the other side into correspondence to the court. This will no longer be tolerated.
>
> (C) As is evident from the order of 4th February 2021, the importance of the Respondent's solicitor email was the fact that the Appellant had died and thus a copy was not necessary for the Appellant's brother to comply with the order.
>
> (D) In any event the Appellant's brother failed to comply with the order of 1st July 2020
>
> (E) No application was made for a further extension and no sound reasons were advanced for an extension. The estate has had nearly a year to address this case."

35. From this, A says that it would appear that HHJ Leathem did not consider A's application of 24 March 2021 and that there must have been an 'administrative oversight', in that that application could not have been before the judge when he made his order.

36. Importantly, this order of 7 April 2021, like that of 4 February 2021, contained no provision concerning costs and there was no application to vary it.

37. On 28 April 2021, A applied by an application notice N244 to set aside the order of 7 April 2021. He again cited his bereavement and the pandemic.

38. On 2 July 2021, HHJ Lethem dismissed A's 'applications' dated 24 March 2021 and 28 April 2021. This order said:

> "BACKGROUND
>
> (i) It seems that the Appellant died on an unknown date prior to the 17 May May 2020
>
> (ii) On 1 July 2020 HHJ Dight further adjourned the appeal and drew the attention to then need to appoint personal representatives for the Appellant and ordered the Appellant's brother to update the court as to any grant of representation by the 7 August 2020
>
> (iii) No such update was filed.
>
> (iv) On the 4 February 2021 HHJ l.ethem ordering that the information required by CPR 19.8 be filed by the 22nd March 2021 and in default the appeal do stand struck out.
>
> (v) No such information was served.
>
> (vi) On the 7 March 2021 (drawn on the 11 April 2021) HHJ Lethem declared that the appeal herein was struck out by virtue of the order of the 4 February 2021 without further order being required
>
> (vii) On the 24 March 2021, the Appellant's brother issued a Form N244 application for further time to comply with the information required by the court to progress the matter and an extension of time until the end of May 2021.
>
> (viii) On the 28 .April 2021 the .Appellant's brother issued a further Form N244 application to set aside the order of 11 April 2021 and for further time to comply with the inforn1ation required by, the court to progress the matter
>
> (ix) In support of the application the brother indicated that his sister had passed away and that he was grieving and needed more time to cornply with the orders requiring the information under CPR 19.8 and also referred to the COVID 19 pandemic and the need to isolate.
>
> (x) The brother has also filed a letter from Bereavement Care confirming that he is receiving support from them.
>
> IT IS ORDERED THAT:
>
> l. The application of the 24 March 2021 is dismissed as totally without merit.

> 2. The application 28 April 2021 is dismissed as totally without merit
>
> 3. Pursuant to CPR 3.3 the applicant may apply to set aside or vary·this order providing that the application is made in form N244 and filed by 4.00 14 July 2021.
>
> 4. This matter is reserved to HHJ Lethem.
>
> REASONS
>
> (A) The brother is not a party to these proceedings. he has made no application under CPR 19 to be substituted as the Appellant and thus the applications must fail
>
> (B) Frankly both HHJ Dight and I have bent over backwards to try to accommodate the Appellant's brother in progressing this appeal. 1t is now over a year since HHJ Dight first pointed out the issue arising out of the death of the Appellant. I directed the brother to the specific provisions of the CPR. We can only go so far. If the estate will not take reasonable steps to assist we can do no more. I do appreciate how debilitating bereavement can be but both the Respondent and the Court are entitled to expect some steps to be taken. All the indications are that no steps have been taken in the year to progress the appeal.
>
> (C) There is only the vaguest information as to what has occurred since the 1st July 2020.
>
> (D) In any event, the application of the 28 April 2021 is misconceived. The order of 11 April 2021 only points out the effect of the order of the 4th February 2021.
>
> (E) This appeal is now nearly three years old and should have been progressed."

39. I think the dates of the 7 March 2021 and 11 April 2021 in (vi) of this order must have been an error: the relevant dates were 7 April 2021 and 9 April 2021.

40. On 13 July 2021, A made an application to be joined as a party to the proceedings, and sought other relief.

41. On 23 August 2021, RH Solicitors (on behalf of R) filed an application in the Property Claim which, in section 3, asked for an order:

> 'To list the matter for Directions Hearing
> Cost in the application'

42. The application notice did not include any reasons for the order asked for in section 3 as required by CPR r 23.6.

43. On 27 September 2021 HHJ Lethem made an order in the Money Claim pursuant to A's application of 13 July 2021 listing it on the first open date before himself. The judge treated this as an application to set aside the order of 2 July 2021. The hearing was listed for a remote hearing on 6 January 2022.

44. On or about 6 December 2021, RH Solicitors filed an application in the Property Claim which, in section 3, asked for an order:

> "To list the matter for a hearing for a determination of the Defendant's costs in relation to the late Claimant's appeal, which was struck out by HHJ Lethem."

45. On 6 January 2022 in the Money Claim, following a hearing of A's application only, HHJ Lethem dismissed A's application to be joined to the proceedings and ordered that he pay the costs of the application, to be assessed at the same time as the hearing of R's application of 6 December 2021:

> "UPON hearing the Applicant Ashok Kapoor and counsel for the Respondent
>
> AND UPON:
>
> (i) Permission to appeal having been refused by virtue of an order of IlHJ Saggerson dated the 28th August 2018
>
> (ii) The appeal having been struck out pursuant to an unless order of the court dated the 4th February 2021, the Applicant having failed to apply to be joined as the Appellant following the death of his sister and despite two orders requiring such an application
>
> (iii) The Applicant Ashok Kapoor having applied on the 13th July 2021 to be joined as a party
>
> IT 1S ORDERED THAT:
>
> 1. The application to be joined as a party do stand dismissed.
>
> 2. The Applicant Ashok Kapoor do pay the costs of the application to be assessed at the same time as the hearing of the Respondent's application of the 6th December 2021."

46. On 17 May 2022, a district judge sitting at Uxbridge County Court made an order in the Property Claim, following a hearing, in the following terms:

> "Upon hearing counsel for the Defendants, Mr. M Roberts and counsel Ms. J Patang for Mr. Ashok Kapoor.
>
> RECITALS.
>
> 1. Upon it appearing to the court that the Claimant's claim OUB02050 has been automatically struck out, pursuant to the order

> of Deputy District Judge Hussain dated 1.5.18, nevertheless there remains a live issue relating to the boundary dispute between the parties.
>
> 2. The court having determined that the fair and proportionate way of dealing with that issue in accordance with the overriding objective; accordingly made the following directions
>
> IT IS ORDERED THAT
>
> 3. Mr. Ashok Kapoor is joined to the proceedings as the personal representative of the Claimant's estate pursuant to CPR 19.8.
>
> 4. Paragraphs 5 to 8 of the order of Deputy District Judge Hussain dated 1.5.18 is hereby amended as follows;
>
> a) All vegetation, debris and any other material obstructing the boundary area in dispute must be removed by the Claimant by 31.5.22.
>
> b).The Defendants expert, a Chartered Surveyor, Mr. Colin Volker shall attend the property(s) to mark out the boundary line by 28.6.22.
>
> c).The Defendants shall then erect a fence/wall in accordance with the marked boundary line.
>
> 5. The Claimant shall pay the Defendants costs of today' s hearing, summarily assessed at £4,000 inclusive of VAT by 7.6.22.
>
> 6. The Claimant shall pay the costs of the claim which shall be subject to a detailed assessment."

47. I come, then, to the order of HHJ Letham of 19 May 2022 (dated 20 May 2022) which is the subject of the present appeal. It was made in the Central London County Court in the Money Claim under reference C93YM217.

48. On that date, following a remote video hearing, HHJ Lethem made an order in the Money Claim as follows:

> "UPON hearing counsel for the Appellant estate and for the Respondent
>
> AND UPON
>
> (i) Ashok Kapoor having been appointed a representative of the estate pursuant to CPR 19.8. and an order of District Judge Jordan dated the 17th May 2022
>
> (ii) The Respondent application for the Appellant estate to pay the costs of the appeal save as disposed of by other order dated the 6th December 2021

> (iii) The Respondent['s] confirming through counsel that, contrary to the indication in their position statement, they do not seek costs against Ashok Kapoor personally save in respect of any order already made
>
> (iv) The Respondent confirming that the Second Defendant has died and that no order has been made under CPR 19.8 to nominate a representative of her estate.
>
> (v) The court intending to summarily assess the costs of the appeal today, but being unable to do so because the Respondents have failed without good reason to file and serve any compliant Statement of Costs and the court being of the opinion that unless the court orders otherwise the Respondents should pay the costs of any assessment proceedings.
>
> IT IS ORDERED THAT:
>
> I. The Respondent/Defendants shall make an application in accordance with CPR 19.8 in relation to the Second Defendant's estate by 4.00pm on the 16th June 2022 and in default the action do stand stayed with permission to apply to lift the stay.
>
> 2. The Appellant's estate do pay the costs of the appeal to be assessed if not agreed
>
> 3. The Appellant do pay the costs of the application of the 6th December 2021 to be assessed if not agreed.
>
> 4. Ashok Kapoor do pay the costs reserved on the 6th January 2022 assessed in the sum of £3855.00 within 28 days."

49. It is [2] and [3] of this order which is challenged in this appeal. I was told the amount in issue is c. £27,000. As I shall explain, Mr McKie also made submissions about [4], which I will return to.

50. The short transcript of the judge's ruling is as follows (counsel for R was Mr Roberts, who appeared before me, and not Mr Galway-Cooper, whose name is shown on the transcript):

> "1. I am going to make an order for costs in relation to the cost of the appeal. I do so because the way in which the appellant has conducted the appeal whilst she was alive, and the way in which her brother has conducted the appeal on behalf of the estate after her death. This has been egregious in the extreme. It is rare that I have come across so many court orders ignored or disobeyed as occurred in this particular case. This is not a case where a party is simply responding to an appeal, it is a case that descended into chaos with the failure to abide by court orders, Practice Directions and rules.

> 2. I recognise that, under PD 52B8.1, a respondent who attends a hearing will not normally be ordered their costs, but of course that relates to attending a hearing. We are talking here about much more than a hearing and, I also bear in mind that under the provision the Court can make an order where it considers it just, in all circumstances, to award costs to the respondent.
>
> 3. This is one of the circumstances, and I say that for the following reasons; firstly the respondent has been successful, secondly the respondent was successful because the appeal was struck out, thirdly the conduct of the appellant, and subsequently her brother on behalf of the estate, was deserving of criticism by the Court.
>
> 4. It is very plain from the history of orders, that the judges of this court, to use my own earlier words, bent over backwards to try and support, assist and guide the appellant and subsequently the estate, towards the steps they should be taking. That much appears from the contents of the orders. That fell on fallow ground. No matter how much the Court tried to assist, it was ignored. That sort of conduct means that the respondent had to step into the situation in order to try and get some structure to the case, hence orders requiring them to serve various orders and documents. This is a case where the involvement of the respondents was integral and the direct result of the claimant s failure to conduct this litigation in accordance with the overriding objective.
>
> 5. In those circumstances I will make an order for costs against the estate."

This appeal

51. A now appeals against the order made by HHJ Lethem on 19 May 2021 that C1's estate shall pay R's costs of the appeal. It is said the learned judge did not have the power to make an order for costs or, alternatively, if he did have such a power, the order for costs was one that no reasonable judge would have made in all the circumstances.

52. The two grounds of appeal advanced by Mr McKie for A in the Amended Grounds of Appeal are as follows. (These were not settled by him, and I give leave to amend, if necessary):

> "[Ground 1]: the learned Judge erred in principle in making any order for the Appellant to pay the costs of the appeal because the learned judge had, on 7 April 2021, made an order declaring that the appeal was struck out which order did not include any order for costs and, therefore, subsequently the learned Judge did not have the jurisdiction to vary this, as he purported to do more than 1 year later, on 19 May 2022, contrary to *Griffiths v Commissioner of Police for the Metropolis* [2003] EWCA Civ 313.
>
> [Ground 2]. The learned Judge erred in his consideration of the provision of Practice Direction 52B paragraph 8.1(d) in that the

> conduct of the personal representatives on behalf of the estate of Miss Madhu Kapoor was not of such quality as to trigger an award of costs and had failed to give proper weight to, first, the fact that, as a result of an administrative error of the court, an application, dated 24 March 2021, made by the Appellant for an extension of time was not considered by the learned judge, on or before 7 April 2021 and, secondly, evidence that Miss Madhu Kapoor had suffered a protracted terminal illness, debilitating chemotherapy and had died following which the Appellant had been grief stricken and unable to cope and, when the Appellant made an application, dated 13 July 2021, to be joined to the proceedings in his capacity as personal representative of Miss Madhu Kapoor's estate, on 6 January 2022, this was dismissed by the learned Judge."

53. Paragraph 8.1 of CPR PD52B provides:

> "*8.1 Attendance at permission hearings***:** Where a respondent to an appeal or cross-appeal attends the hearing of an application for permission to appeal, costs will not be awarded to the respondent unless–
>
> (a) the court has ordered or requested attendance by the respondent;
>
> (b) the court has ordered that the application for permission to appeal be listed at the same time as the determination of other applications;
>
> (c) the court has ordered that the hearing of the appeal will follow the hearing of the application if permission is granted; or
>
> (d) the court considers it just, in all the circumstances, to award costs to the respondent."

54. Grounds 3, 4 and 5 in the Amended Grounds were not pursued by Mr McKie and I need say no more about them.

55. As I have said, this appeal was primarily aimed at [2] and [3] of HHJ Lethem's order of 19 May 2022, however Mr McKie also raised an issue about [4] and whether this ought to have been against the estate rather than A personally.

Submissions

56. Mr McKie submitted for A as follows.

57. In relation to Ground 1, because the order made by HHJ Lethem on 7 April 2021 declaring that the appeal was struck out made no order as to costs, no order for costs could or should have subsequently been made. This is by virtue of CPR r 44.10 (where the court makes an order which does not mention costs, the general rule is that no party is entitled to costs), and the decision in *Griffiths* at [7]-[9]. (I have seen a Skeleton

Argument from previously instructed counsel for the hearing on 19 May 2022, where this point was specifically raised).

58. In relation to Ground 2**,** Mr McKie said that that although R contended that there had been a large scale failure of A to comply with court orders, the judgment did not set any of these out and did not cite specific examples of the type of conduct necessary to justify an order for costs in favour of R. He did not refer to A's 'mitigation' such as: his sister's death; his bereavement and own health problems; COVID; and that he was unrepresented. The judge not having done that, I could not now, retrospectively, look at what had happened since 2016 when the money claim was issued.

59. On behalf of R, Mr Roberts submitted as follows.

60. In relation to Ground 1, Mr Roberts pointed out (correctly, as I shall explain) that *Griffiths* is an old case which was concerned with CPR r 44.13, the predecessor to CPR r 44.10, which was in a different form. There is now CPR r 44.10(1)(b), which provides the general rule does not affect any entitlement of a party to recover costs out of a fund held by that party as a trustee or personal representative. This was the Appellant's own case according to his application to join the proceedings of 13 July 2021. Mr Roberts submitted that R falls within CPR r 44.10(1)(b) and is entitled to recover costs from C1's estate.

61. He also relied on CPR r 44.10(2)(c), namely that any order or directions sought by a party on an application without notice and its order does not mention costs, it will be deemed to include an order for the Applicant's costs in the case. There were a number of orders and directions made by the court on the application of the parties. He submitted that this provision must apply.

62. R also relies on CPR r 44.10(3), which provides that any party affected by a deemed order for costs under CPR r 44.10(2) can apply at any time to vary the order. The Respondent did so, on 6 December 2021, in substance if not in form having earlier been in contact with the court.

63. Mr Roberts also referred to [8] of CPRPD 52B, which he said gave the court on 19 May 2022 the power to vary the two orders of 4 February 2021 and 7 April 2021.

64. In relation to Ground 2, Mr Roberts said the judge had been entitled to award costs against the estate given its conduct in the litigation (and latter that of R), which the judge had correctly characterised in his judgment as 'egregious'. His Skeleton Argument listed what he said had been the failures and defaults by C1 and then A to comply with the CPR and with Court orders. I need not set them all out.

Discussion

Ground 1

65. CPR r 44.10 is in the following terms:

> "*Where the court makes no order for costs*

> 44.10
>
> (1) Where the court makes an order which does not mention costs –
>
> (a) subject to paragraphs (2) and (3), the general rule is that no party is entitled –
>
> (i) to costs; or
>
> (ii) to seek an order under section 194(3) of the 2007 Act, in relation to that order; but
>
> (b) this does not affect any entitlement of a party to recover costs out of a fund held by that party as trustee or personal representative, or under any lease, mortgage or other security.
>
> (2) Where the court makes –
>
> (a) an order granting permission to appeal;
>
> (b) an order granting permission to apply for judicial review; or
>
> (c) any other order or direction sought by a party on an application without notice,
>
> and its order does not mention costs, it will be deemed to include an order for applicant's costs in the case.
>
> (3) Any party affected by a deemed order for costs under paragraph (2) may apply at any time to vary the order.
>
> (4) The court hearing an appeal may, unless it dismisses the appeal, make orders about the costs of the proceedings giving rise to the appeal as well as the costs of the appeal.
>
> (5) Subject to any order made by the transferring court, where proceedings are transferred from one court to another, the court to which they are transferred may deal with all the costs, including the costs before the transfer."

66. The notes to CPR r 44.10.1 in the *White Book 2023* state:

> "Before the re-enactment of Pt 44 by the Civil Procedure (Amendment) Rules 2013 (SI 2013/262), with effect from 1 April 2013, this rule was r.44.13. As originally enacted, para.(1) of the rule stated, simply, that where the court makes an order which does not mention costs, "no party is entitled to costs in relation to that order". The rule came into its current form as a result of successive amendments made by SI 2001/4015 (substituting para (1)), by SI

> 2005/2292 (adding, what are now, paras (2) and (3), and by SI 2008/2178 (making amendments to those three paragraphs).
>
> As re-enacted by SI 2013/262 the rule was substantively amended by the addition, at the beginning of (what is now) para.(5) of the words, "Subject to any order of the transferring court", but otherwise remained the same.
>
> Rule 44.10(1) makes it clear that where an order is silent as to costs no party is entitled to the costs in relation to that order.
>
> In this context, "the 2007 Act" referred to in r.44.10(1)(a) is the Legal Services Act 2007. For text of s.194 (Payments in respect of pro bono representation), see Vol.2 para.9B-550.
>
> …
>
> Where an action had been automatically struck out due to the claimant's delay and the claimant successfully applied for it to be reinstated, the order made on that application was silent as to costs between the parties. The question of wasted costs was reserved to the trial judge. When, at the trial the claimant was successful, the trial judge had no jurisdiction to vary the earlier order to make the defendant pay the costs arising out of the strike out and reinstatement application: *Griffiths v Commissioner of Police* [2003] EWCA Civ 313."

67. In *Griffiths*, [7]-[9], Mantell LJ said:

> "7. By part 44.13 of the CPR [now 44.10 – see above] the general rule is now that where nothing is said about an order, no party is entitled to costs in relation to that order. So it would seem to me that, as matters stood following the hearing on 10 December, there was in effect no order for costs as between the claimant and the defendant.
>
> 8. In due course, following the trial, when His Honour Judge Dean came to consider the question of costs, first of all it is apparent that there was no transcript available to the learned judge of what had been said by His Honour Judge Collins and also, unfortunately, it appears that no one was able or willing to produce before the judge the three orders to which I have referred. It is perfectly clear from the transcript we have of the hearing before His Honour Judge Dean that the judge took an entirely different view from His Honour Judge Collins as to the merits of the matter. He was very critical of the Commissioner for standing upon the order made by His Honour Judge Green and insisting that the order be complied with strictly, with the consequence if it were not that the action would be struck out. It was following that that he made the order for costs to which I have referred.

> 9. It is clear to me, therefore, that His Honour Judge Dean was in error. The matter of costs had already been disposed of by His Honour Judge Collins. There was no jurisdiction in His Honour Judge Dean to make any other order save (should he have considered it appropriate) with regard to the costs being paid by the claimant's solicitors, because that was the only matter in relation to costs which had been reserved. It would follow that, in my view, this appeal ought to be allowed to the extent that the order made by Judge Dean with regard to those interim matters should be set aside and there be substituted for it an order which does not place the burden of costs upon either side."

68. Hence, CPR r 44.10(1)(a)(i) is clear in its meaning and effect, namely, where an order does not mention costs, then no party is entitled to costs.

69. Neither of the two orders in question in his appeal, namely the order of 4 February 2021 and the order of 7 April 2021, made any reference to, or provision for, costs. R did not seek to vary either of the orders pursuant to CPR r 3.1(7), nor to appeal the absence of a costs provision in either of them. On the face of it, therefore, it would follow that the general rule applies and no party was or is entitled to costs, and hence that HHJ Lethem had no jurisdiction on 19 May 2022 to award R the costs of the appeal (as, indeed, A's then counsel had submitted.)

70. As Mr Roberts rightly submitted, *Griffiths* is now quite an old case dealing with an earlier version of what is now CPR r 44.10. CPR r 44.13 was headed, 'Special Situations'. However, the material parts of CPR r 44.13 as it was and CPR 44.10(1)(a)(i) are the same (see above), and so in my judgment *Griffiths* remains good law.

71. I do not accept Mr Roberts' submissions that his client can benefit from the exceptions in CPR r 44.10(1)(b), or CPR r 44.10(2)(c) read with CPR r 44.10(3).

72. So far as CPR r 44.10(1)(b) is concerned, that refers to the general rule not affecting the entitlement 'of a party to recover costs out of a fund *held by that party* as trustee or personal representative' (emphasis added). R did not hold the fund in question as a personal representative; A did. Hence, this rule cannot avail R.

73. In relation to CPR r 44.10(2)(c), there are a number of reasons why this also cannot avail R:

    a. Firstly, it is plainly referring to the costs of *the application* sought without notice by the applicant which leads to the order in question, and *not* to the costs of the whole case (ie, here, the costs of the appeal).

    b. Second, the orders in question here made on 4 February 2021 and 7 April 2021 were not made without notice. The order on 4 February 2021 was made on the court's own motion. The order of 7 April 2021 seems to been triggered by the emails from A seeking extensions of time, but the order also said at (E) that, 'No application was made for a further extension …', and I do not therefore consider that qualifies as an 'application without notice.'

c. Third, and in any event, even if these orders were made pursuant to applications without notice, CPR r 44.10(2)(c) refers to the court needing to have made an 'order or direction *sought by a party* on an application without notice' before the deemed costs provision applies. Neither of these orders made any order or direction which A had sought – for example, he did not seek the striking out of the appeal - and so this rule simply does not apply.

d. Thus, fourth, there was no 'deemed' order for costs on which CPR r 44.10(3) could have bitten.

e. Fifth, there was no application to vary either order by R. The order of 4 February 2021 provided that an application to vary could be made by 8 March 2021. No such application was made. His' application' for the costs of the appeal, when it was eventually made on 6 December 2021, such as it was, was a freestanding application and not an application to vary any earlier order. Mr Roberts accepted that, but said that I needed to look at the substance and not the form. In substance, he said the application of 6 December 2021 was an application to vary. I do not agree. The CPR are clear and precise; R was represented by professional lawyers; and if they wished to seek a variation either of the order of 4 February 2021 or 7 April 2021, so that R was awarded his costs of the appeal, that is the application they should have made. They did not.

74. Mr Roberts also sought to amount an argument under CPR PD52B, Section 7, and in particular [7.3], which provides:

> "7.1 Applications made in the appeal, including applications for permission to appeal under rule 52.3(2)(a) or rule 52.13(3), may be determined with or without a hearing.
>
> 7.2 Where the court refuses an application for permission to appeal without a hearing, the appellant (or, where appropriate, the respondent) may request the application to be reconsidered at a hearing.
>
> 7.3 Where the court determines any other application without hearing the respondent (including an application for permission to bring the appeal out of time) any party affected by the determination may apply to have the order set aside or varied.
>
> 7.4 Any request or application made under this section must be made within 7 days of service of notification of the determination upon the person making the application. Where any such request or application is made –
>
> (a) a copy of the request or application must be served on all other parties at the same time; and
>
> (b) the court will give directions for the determination of the application."

75. I do not consider this general provisions assists R. Firstly, I do consider it can override the specific words of CPR 44.10. Second, [7.3] refers to 'an application', however neither of the two orders were made pursuant to an application. Third, [7.3] cannot avail R because there was no application to vary the two orders in question within seven days of them being made as required by [7.4].

76. It follows that Ground 1 succeeds. Paragraphs 2 and 3 of the order of HHJ Lethem of 19 May 2022 are therefore set aside:

    a. The learned judge had no jurisdiction to make a costs order against the estate of C1 for the reasons I have given and so [2] of his order must be set aside.

    b. The R's application of 6 December 2021 for his costs of the appeal therefore having failed for lack of jurisdiction, the costs order in his favour granted in [3] for that application must also be set aside.

77. Mr McKie also indicated that he was appealing [4] of that order ('Ashok Kapoor do pay the costs reserved on the 6 January 2022 assessed in the sum of £3855.00 within 28 days').

78. The relevant part of the order of 6 January 2022 (which dismissed A's application to be joined as a party made on 13 July 2021) was:

> "The Applicant Ashok Kapoor do pay the costs of the application to be assessed at the same time as the hearing of the Respondent's application of the 6th December 2021.""

79. Hence, it was only the amount which was reserved on 6 January 2022, and not in whose favour a costs order should be made. Because costs were dealt with in that order, CPR r 44.10 does not apply.

80. A's application having failed, there is no reason why either he, or his late sister's estate, should not have to pay the R's costs of that failed application. Both Mr McKie and Mr Roberts accepted that the order should have been made against the estate rather than against A personally, because he was not then a party to the litigation and hence there was no power to award costs against him.

81. It follows that I allow the appeal to the extent of varying [4] in the order of 19 May 2022 so that it reads:

> "The estate of the late Madhu Kapoor do pay the costs reserved on the 6th January 2022 assessed in the sum of £3855.00 within 28 days."

82. Thus, I do not need to decide Ground 2. However, the points that strike me as relevant in relation to the judge's decision (assuming he had the power to award costs) are:

    a. C1 and her estate had lost, because the Money Claim had been struck out and her appeal against that striking out m had itself been struck out;

b. the general rule in CPR r 44.2(2)(a) was therefore that the estate, as the unsuccessful party, should pay R's costs as the successful;

c. but the court could have made some other order, *per* CPR r 44.2(b), and in doing so could have taken account of the parties' conduct (*per* CPR r 44.2(4)(a)). There is no doubt, for all of the reasons set out in R's Amended Skeleton Argument of 3 October 2023 that A and, before that C1, had been responsible for serious defaults in the conduct of the litigation;

d. the court had tried to assist A following his sister's death and pointed out the relevant provisions;

e. on the other hand, there were mitigating features such as C1's ill-health and death, and A's problems thereafter as he set them out in his applications in March and April 2021 (including the pandemic), and HHJ Lethem was aware of these because he had referred to them in his order of 3 July 2021; and

f. R's lawyers were not blameless, and had failed several time to comply with the CPR.

83. Whilst the judge's reasoning was brief, and because both sides had been at fault over the years some judges might have made no order as to costs, I would have found it difficult, overall, if I had had to decide it, to have concluded that he order he made was not one which was reasonably open to him in all the circumstances of the case. I do not consider the apparent oversight of the 24 March 2021 application by HHJ Lethem on 7 April 2021 has any relevance.