Neutral Citation Number: [2022] EWCA Civ 411

Case No: CA-2021-000647
(formerly A3/2021/1067)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Mr Justice Meade
CH-2020-000169

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 March 2022

Before :

LORD JUSTICE LEWISON
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ASPLIN

- -

Between :

SOUTH LODGE FLATS LIMITED	**Claimant**
- and -	
IFTIKHAR AHMAD MALIK	**Respondent and Part 20 Claimant**
(1) VAQAR MALIK **(2) FAHIM MALIK** **(3) RAHIM MALIK**	**Appellants and Part 20 Defendants**

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PAUL LETMAN (instructed by **Spencer West LLP**) for the **Appellants**
JAMES KINMAN (instructed by **Stephenson Harwood LLP**) for the **Respondent**

Hearing date : 23 March 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 10am on Tuesday 29 March 2022

Lord Justice Lewison:

Introduction and facts

1. The issue on this appeal is whether Meade J was wrong not to make an order that successful appellants ought to recover at least part of their costs of the appeal. Meade J made no order or costs. At the conclusion of the argument we announced that we would dismiss the appeal, with written reasons to follow. These are my reasons for joining in that decision.

2. The case is an unusual one in many respects. The litigation concerns a flat in Knightsbridge. Iftikhar Malik ("Iftikhar") is the proprietor of a long lease of the flat. At the relevant time, his brother Vaqar and Vaqar's two adult sons occupied it. The litigation began when the landlord issued a claim against Iftikhar for the purpose of investigating a leak from the flat. But Iftikhar issued a Part 20 claim against Vaqar and his sons for possession and declarations about the beneficial entitlement to the lease. That Part 20 claim was defended on a number of grounds.

3. The possession claim was first listed for trial in the county court at Central London before HHJ Gerald in October 2019 but was adjourned to January 2020. At that time, after some nine days of trial which included the completion of Vaqar's oral evidence, the matter went part heard on 29 January 2020 with the trial listed to resume on 22 June 2020. On 29 April 2020 the county court sent out a notice of hearing for a PTR on 14 May 2020. By email dated 6 May 2020 to the court Vaqar and his sons referred to the upcoming PTR and adjourned trial date of 22 June 2020. They mentioned that they understood that proceedings for possession were subject to an automatic stay, stated that they were out of the jurisdiction and acting as litigants in person and that "The state of emergency and restrictions that have been imposed on us as a consequence of the Covid-19 pandemic do not provide any opportunity for dealing with this matter through Skype or by any other means, i.e. by personal attendance." On that basis and because of the complexity of the case, the 20 lever arch files of paper and the need for lengthy cross examination, they requested that the court adjourn both the PTR and the trial "to a date to be fixed when it will be possible for all the litigants to be available in London for the resumption of the trial in person." Iftikhar's solicitors responded by email on the same day. They said (among other things) that they understood the reference to a stay to be a reference to PD 51Z; pointed out that PD 51Z only applied to Part 55 claims and said that the claims in the action were not Part 55 claims.

4. HHJ Gerald considered that application on 14 May 2020. Although the hearing was conducted remotely, Vaqar and his sons did not attend. The judge was addressed briefly on the question whether the proceedings were the subject of the automatic stay imposed by Practice Direction PD 51Z entitled 'Stay of Possession Proceedings and Extension of Time Limits - Coronavirus.' He decided that they were not; and gave directions for the resumed trial on 22 June 2020. His directions made provision for the giving of evidence remotely. He also said that if the appellants wished to make a further application to adjourn they should file and issue a formal application with supporting evidence by 22 May 2020.

5. On 27 May 2020 (some five days late) the appellants did apply by email for a further adjournment. On 8 and 10 June 2020 Vaqar made two witness statements (called "Statements of Truth") again seeking an adjournment of the part-heard trial. On 18 June 2020 the court sent out notice of a hearing on 19 June 2020 "to give the Part 20 Defendants an opportunity to be heard upon the contents of those Statements of Truth and whether same should be treated as informal application to adjourn." The appellants did not attend that hearing either in person or remotely; and the court in substance refused the application to adjourn.

6. The part-heard trial resumed on 23 June 2020. Iftikhar was represented and was himself available to give evidence remotely from Pakistan. Vaqar and his sons were neither present (whether in person or remotely) nor represented. In their absence the Court acceded to Iftikhar's application under CPR 39.3(1) to strike out the Amended Defence and Counterclaim and entered judgment for possession and mesne profits etc all as set out in the detailed provisions of the order. The order was drawn on 1 July 2020.

7. On 14 July 2020 the appellants filed an Appellant's Notice seeking permission to appeal the orders of 23 June 2020, 19 June 2020 and 14 May 2020, on the basis that the Part 20 Claim, being a claim for possession of residential property within the scope of CPR Part 55, had since 27 March 2020 been subject to the stay imposed by Practice Direction PD 51Z. They also asked for an extension of time for appeal against the orders of 14 May and 19 June.

TFS Stores

8. In the meantime, an important legal development had taken place. On 2 July 2020 this court gave judgment in *TFS Stores Ltd v The Designer Retails Outlet Centres (Mansfield) General Partner Ltd* [2020] EWCA Civ 833, [2020] 4 WLR 99. By a majority, this court gave an expansive reading to the scope of PD 51Z. They held that, although PD 51Z stated that it applied to "proceedings for possession brought under CPR Part 55," it in fact applied to any proceedings in which there was a claim or counterclaim for possession, whether or not that claim or counterclaim had been initiated under CPR Part 55; and to any proceedings in which an order for possession had been made even if there had been no formal claim for possession.

The appeal to the High Court

9. On 11 January 2021 Trower J directed that the applications for an extension of time for appeal, the application for permission to appeal and the appeal itself should be dealt with at a "rolled up" hearing.

10. By a Respondent's Notice dated 11 February 2021, Iftikhar sought to support the appealed decisions on a number of additional grounds.

11. Meade J heard the "rolled up" application on Friday 14 May 2021 and gave judgment on Monday 17 May. He began by dealing with the arguments raised in the Respondent's Notice in order to clear the decks. Those arguments were advanced (a) for the purpose of distinguishing *TFS Stores* as a matter of interpretation of PD 51Z and, alternatively (b) in support of the proposition that any stay had already been lifted by HHJ Gerald; or should now be lifted by the judge. In the course of his judgment, the judge rejected all those arguments.

12. There was some argument about whether the focus of the appeal was the order of 14 May 2020 (by which HHJ Gerald ruled that the claim should proceed to trial) or his ultimate order of 23 June 2020. Meade J decided that the best approach was to decide whether an extension of time for appealing the order of 14 May should be granted, and then to see where matters stood. That avoided the need to decide whether the order of 14 May 2020 had created a procedural estoppel which would itself have barred an appeal against the order of 23 June. There is no appeal to this court against that aspect of the judge's judgment. In order to decide whether or not to grant the appellants an extension of time for an appeal, Meade J went on to consider the now familiar three-stage test laid down by *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926. A judge should address an application for relief from sanctions in three stages:

    i) identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order which engages rule 3.9 (1);

    ii) consider whether there was a good reason for the default;

    iii) evaluate all the circumstances of the case, so as to enable the court to deal justly with the application including the factors in sub-paragraphs i) and ii).

13. Meade J held that the default was serious; and that there was no good reason for it. Thus the appellants failed at the first two stages. At [64] the judge went on to consider the question what would have happened if an appeal had been presented in time. He thought that it was entirely possible that Iftikhar, "who in general seems to have taken a pragmatic" view of the proceedings, might have accepted that the automatic stay applied. He went on to say that the lateness of the notice of appeal meant that there had been no chance to consider the matter.

14. At the third stage it is not usually appropriate for the court to consider the merits of the underlying claim or defence, but it may do so where the merits (or otherwise) are clear: *Global Torch Ltd v Apex Global Management Ltd* [2014] UKSC 64, [2014] 1 WLR 4495. In *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, [2015] 1 WLR 2472 at [46] Moore-Bick LJ put the point as follows:

> "In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them."

15. In the present case, because the judge had rejected the arguments raised in the Respondent's Notice, he was able to form a clear view of the legal merits of the appellants' case on the scope of PD 51Z. He thus concluded that, almost uniquely, because of the decision of this court in *TFS Stores*, he was in a position to know that HHJ Gerald's decision on the ambit of PD 51Z was wrong; and that it would be unjust to let matters go forward as if it were right. Accordingly, he both granted the extension

of time and allowed the appeal; but on terms that the appellants paid the costs incurred by Iftikhar between 4 June and 14 July 2020.

Meade J's ruling on costs

16. Immediately following his judgment on the substantive applications, the judge came to deal with the costs of the application and appeal. He heard submissions from leading counsel on both sides. Having heard submissions he gave a very brief ruling which I should quote:

> "… I am going to make no order as to costs. It is a unique costs situation piled on top of [a] unique substantive situation. The principle under the CPR that costs should follow the event is a very important one but the appellants have only been successful on terms, and although it is very difficult for me to get into the detail, I am as sure as I can be that a lot of money has been spent [on] the question of whether there was a reasonable excuse. I think it was predictable that that would have to be argued and so I am going to make no order as to the costs of the appeal."

The appeal to the Court of Appeal

17. The appellants now appeal. Because there was some confusion about the test to be applied for the grant of permission to appeal, I should make it clear that the "first appeal" test applies to an order for costs made on appeal: *Handley v Lake Jackson Solicitors (a firm)* [2016] EWCA Civ 465, [2016] 1 WLR 3138.

18. It is common ground that a judge has a wide discretion in relation to costs. CPR Part 44.2 provides:

> "(1) The court has discretion as to—
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs—
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> …
>
> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—
>
> (a) the conduct of all the parties;

> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
>
> (5) The conduct of the parties includes—
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction—Pre-Action Conduct or any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

19. Since the judge has a wide discretion, it is well-settled that an appeal court should not interfere simply because it considers that it would have exercised the discretion differently. As Chadwick LJ explained in *Johnsey Estates (1990) Ltd v Secretary of State for the Environment* [2001] L & TR 32, that principle:

> "…requires an appellate court to exercise a degree of self-restraint. It must recognise the advantage which the trial judge enjoys as a result of his "feel" for the case which he has tried. Indeed, as it seems to me, it is not for an appellate court even to consider whether it would have exercised the discretion differently unless it has first reached the conclusion that the judge's exercise of his discretion is flawed. That is to say, that he has erred in principle, taken into account matters which should have been left out account, left out of account matters which should have been taken into account; or reached a conclusion which is so plainly wrong that it can be described as perverse."

20. In *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409 this court held at [30]:

> "Where no express explanation is given for a costs order, an appellate court will approach the material facts on the assumption that the judge will have had good reason for the award made. The appellate court will seldom be as well placed as the trial judge to exercise a discretion in relation to costs. Where it is apparent that there is a perfectly rational explanation for the order made, the court is likely to draw the inference that this is what motivated the judge in making the order."

21. It is quite clear that the judge was fully aware of "the general rule". Indeed, he described that principle as "very important". He was also aware that the appellants had been successful albeit "only on terms".

22. Nevertheless, he declined to order costs to be paid. That was, in effect, an exercise of his discretion under CPR Part 44.2 (1) (a) ("*whether* costs are payable"). Strictly speaking, the "general rule" applies only where the court has moved on to CPR Part 44.2 (2) ("*If* the court decides to make an order"); but no doubt a judge will always consider that principle when deciding *whether* to make a costs order. On the other hand, the factors listed in CPR 44.2 (4) apply to both stages ("In deciding what order (if any) to make").

23. Although the first ground of appeal was that the judge had no good reason for depriving the appellants of any of their costs, Mr Letman for the appellants did not press that ground; not least because at the hearing below Mr Jourdan QC (then appearing for the appellants with Mr Letman) did not ask the judge to make that order. The judge cannot be criticised for not making an order that he was not asked to make. What that means, however, is that this is a case in which the general rule has been displaced by concession. How far to depart from that general rule is a matter for the judge's discretion.

24. As Mr Letman recognises, it is open to a judge to take into account the various issues raised before him, and to consider who has been successful on each. The judge had three issues before him corresponding to the three stages of the *Denton* test and the further issue whether the proceedings came within the scope of PD 51Z. That last issue was, in effect, determinative both of the third stage of the *Denton* test and the appeal itself. So of the three substantive issues before the judge, the appellants lost on two and won on one. Moreover, they only won on that issue at the price of paying costs thrown away on the abortive trial, which they had not offered before the hearing in front of Meade J. That, to my mind, is what the judge meant when he said that the appellants had only succeeded on terms. Had the terms been offered earlier, that might have led to a different costs order; but they were not. It is true that the route to success on that issue involved dealing with the legal issues raised in the Respondent's Notice; but it is unrealistic to think that the judge was unaware of that, having just given judgment on all those questions.

25. The judge took the view that "a lot of money" had been spent on the second issue, on which Iftikhar also won,. He had already expressed that view in the course of his dialogue with counsel. That would have justified him in giving greater weight to that issue than to the others.

26. Although the court, of course, has the power to make an issue-based costs order under CPR Part 44.2 (6) (f), CPR Part 44.2 (7) encourages it not to do so if it is practicable to make a different order: see *English v Emery Reimbold & Strick Ltd* at [115]. In this case, although broad brush, the judge in effect balanced the costs of the two issues on which Iftikhar won against the costs of the issue on which he lost (albeit on terms that were favourable to him). Mr Letman took us to the transcript of the argument in order to demonstrate how many pages of the transcript were devoted to particular issues and argument. I do not consider that that is necessarily the way to assess the significance of particular arguments and issues to the overall costs order. Moreover, I do not consider that an appeal court should unpick the balance struck by the judge in granular detail.

27. He also took the view that if an application for permission to appeal had been launched promptly, then the appeal itself might have been avoided. Although the judge's reasoning on that point was compressed, I think that Mr Kinman was justified in unpacking it along the following lines. If an appeal had been lodged in time, the trial date would not yet have arrived. But the lodging of an in-time appeal from the order of 14 May 2020 was unlikely to have been heard and determined by the trial date. Unless the appeal had been heard by the trial date, it was unlikely that the trial would have gone ahead (or Iftikhar would have agreed to the adjournment); and the appeal would have been academic. So Vaqar would have achieved indirectly what his applications to adjourn had not achieved; and the costs of the appeal would have been avoided.

28. In addition, the application itself, and the basis on which the judge decided it, was a plea by the appellants for the indulgence of the court in granting relief against sanctions.

29. Professor Zuckerman observes in Civil Procedure (4th ed) para 11.199:

> "The court has always had the power to require a litigant who has applied for an extension of time or for late performance to pay the costs of the application."

30. That is an element of "conduct" to which the court must have regard under CPR Part 44.2 (4) (a).

31. In *R (Idira) v Secretary of State for the Home Department* [2015] EWCA Civ 1187, [2016] 1 WLR 1694 the Home Secretary applied for permission to serve a Respondent's Notice out of time. On an opposed application, the Master granted an extension of time for the filing of the Respondent's Notice on the grounds that the issues raised constituted the bulk of the Home Secretary's case, it was a significant appeal and it was in the public interest for the court to consider the points it raised. But, because the delay had been excessively long and no sufficient excuse had been provided for the failure to comply with the rules, the Home Secretary was ordered to pay the claimant's costs of the application for an extension of time on an indemnity basis. Thus, even though the application succeeded despite opposition, the Home Secretary was still ordered to pay the costs; and on the indemnity basis, to boot. The Master's decision was upheld by this court. Lord Dyson MR said that the Master had been right to grant the extension of time because the point went to the heart of the Home Secretary's case and it was in the public interest for it to be decided. He continued:

> "[83] On the other hand, the delay was substantial and unjustified. The case did not fall within the ambit of para 43 of *Denton*'s case i.e. the claimant was not unreasonably seeking to take advantage of a minor error on the part of the Secretary of State. Master Meacher rightly applied what this court said at para 21 in *Altomart's* case … and asked whether the Secretary of State should be granted an indulgence or whether "the application should be refused in the interests of encouraging more rigorous compliance with the requirements of the rules and promoting a more disciplined approach to litigation generally".
>
> [84] In my view, her decision struck the right balance on the facts of this case. I agree with it."

32. Indeed, *Salford Estates (No 2) Ltd v Altomart Ltd* [2014] EWCA Civ 1408, [2015] 1 WLR 1825, to which Lord Dyson MR referred, was another case in which an extension of time for serving a Respondent's Notice was granted, but on terms that the applicant bore "the costs occasioned by its need to seek the court's indulgence."

33. Mr Letman correctly pointed out that what was in issue in those cases was the costs attributable to a "stand-alone" application for an extension of time. But in the present case (a) Trower J had ordered a "rolled up" hearing of both the application and the appeal; and (b) it was only because the judge formed a clear view on the strength of the appeal based on his analysis of *TFS Stores* that he was persuaded to grant the extension and allow the appeal. It would not have been realistic to divorce the two.

Conclusion and result

34. Although the judge's reasons were very compressed, I do not consider that he erred in principle, took into account matters which should have been left out account, left out of account matters which should have been taken into account; or reached a conclusion which is so plainly wrong that it can be described as perverse. In my judgment there is a "perfectly rational explanation" for the order that he made. Another judge might have made a different order; and I might have done so myself. But that is beside the point.

35. It was for these reasons that I joined in the decision to dismiss the appeal.

Lord Justice Peter Jackson:

36. I agree. The Judge might very well have accepted the Appellants' argument that their success on the raft of legal issues raised by the Respondent should be reflected in a more favourable costs order; had that been his decision, the Respondent could have had no complaint. But this court always recognises the distinct advantage enjoyed by trial judges in relation to questions of costs. In a case with such an unusual procedural history, there was no one right order and, despite Mr Letman's clear submissions, I am not persuaded that the Judge's order exceeded the principled latitude that was available to him.

Lady Justice Asplin

37. I agree with both judgments.