Neutral Citation Number: [2019] EWCA Civ 1675

Case No: A2/2019/1854

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2019] EWHC 1954 QB

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/10/2019

Before:

LORD JUSTICE LEWISON
LORD JUSTICE IRWIN
and
LORD JUSTICE NEWEY

- -

Between:

THE CHIEF CONSTABLE OF AVON AND SOMERSET CONSTABULARY	**Appellant**
- and -	
BENJAMIN GRAY	**Respondent**

- -
- -

Robert Talalay (instructed by **Avon and Somerset Police**) for the **Appellant**
The Respondent appeared in person

Hearing date: 25 September 2019

- -

Approved Judgment

Lord Justice Irwin:

1. In this case the Appellant applies for permission to appeal on an expedited basis and in a "rolled-up" hearing pursuant to the order of Hickinbottom LJ of 21 August 2019. I would grant permission to appeal. The Respondent sought leave of the Court to uphold the finding below on a "different" and "additional" basis and to rely on further evidence to that end. I would refuse that application. It is totally without merit.

2. On 6 November 2018 the Appellant issued an application requesting the High Court to extend an existing General Civil Restraint Order ["GCRO"] made against the Respondent. The Respondent was first made subject to a GCRO on 11 January 2010 (MacDuff J). A further GCRO was made on 20 March 2012 (Silber J), amended and extended on 15 July 2013 (Swift J). A fresh GCRO was granted on 4 November 2014 (Teare J) and extended on 17 November 2016 (Warby J). On 23 November 2016, Warby J handed down a full, reasoned judgment: *Chief Constable of Avon and Somerset Constabulary v Benjamin Gray* [2016] EWHC 2998 (QB). In the course of that judgment, Warby J (paragraphs 8-35) reviewed the history to that date, addressing the numerous applications and claims brought by the Respondent against the Appellant. All were unsuccessful, save two. On 2 September 2013, the Respondent was successful in claiming damages for false imprisonment and assault, which were awarded in the sum of £5,025. In the course of that case Mr Recorder Norman dismissed a claim for malicious prosecution and rejected further "wide-ranging complaints" raised by the Respondent (see Warby J, paragraph 26(6)). On 5 September 2014, following a four-day trial before HHJ Cotter QC and a jury, the Respondent was awarded damages of £1 against the Appellant, but was ordered to pay 90% of the Appellant's costs (Warby J, paragraph 26(8)). Warby J also noted that the Respondent was refused permission to appeal the decision of HHJ Cotter QC (paragraph 35) and he then went on to observe:

> "36. For the reasons I have given it is not open to Mr Gray to challenge before me the conclusions arrived at in this case, or in the other cases which I have reviewed. That is so, whether his challenge is grounded on alleged corruption or misconduct by the judges involved, or otherwise. The appropriate route for any such challenge is by way of appeal. That is a route which Mr Gray sought to pursue, so far as Judge Cotter is concerned. The attempt failed utterly.
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> 37. It is clear from the evidence, and from my observations of Mr Gray at the hearing before me, that he remains the obsessive and highly unreasonable litigant which his history suggests, and which other judges have found him to be. There is every reason to believe that if he were not restrained or restricted in some way he would persist in making applications which are TWM. He has issued claims which are TWM before, and I see a real risk that he would do so again."

3. Warby J amended the GCRO on 11 January 2017 following which on 6 November 2018, as I have indicated, the Appellant applied for an extension to the GCRO. On 20 December 2018, Warby J extended the GCRO until that application was determined.

4. That application was heard on 6 June 2019 by Stuart-Smith J, who dismissed the application in an Order of 22 July 2019. That is the Order which is appealed by the Chief Constable, and which the Respondent seeks to uphold. The judge's reasoning is contained in his judgment *Chief Constable of Avon and Somerset Constabulary v Benjamin Gray* [2019] EWHC 1954 QB. Before I turn to his judgment, I must address some preliminary matters.

The Interlocutory Order of Hickinbottom LJ

5. As I have indicated, Hickinbottom LJ ordered an expedited hearing of this matter as a rolled-up hearing, fixed for 25 September. In addition, he ordered:

> "2. The GCRO imposed on the Respondent by Order of Warby J on 17 November 2016 shall be extended until the determination of this appeal."

6. It follows that, between 22 July 2019 and 21 August 2019, the Respondent was not subject to a GCRO, although it is the essence of the appeal that he should have been so subject. We were informed during the hearing that the Respondent took steps during this window of time to issue, or make preparatory steps to issue, three or four proceedings, one against Tesco plc and the others against the Appellant. We saw no documentation concerning these proceedings and are not seised of them. The Respondent indicated that the proceedings against the Appellant arose out of events of some antiquity, and are proceedings which he was not able to initiate during the currency of the successive GCROs. I am not able to be any more specific[1].

Various Applications

7. Both parties sought to introduce further material into the rolled-up hearing. We considered those applications at the outset of the hearing before us. On the Respondent's application we admitted a transcript of the hearing below and a series of the exhibits which were before the judge below identified as AWK15-38. It should be noted that no reference was in fact made to either.

8. The Appellant sought to introduce a witness statement and exhibits from his solicitor Mr Davies, dated 3 September 2019, intended to establish that the relevant fee payable by a party subject to a GCRO when making an application for permission to issue proceedings was £55, not £255. I address the significance of the fee later in this judgment. However, we indicated there was no need for evidence on the point since the fee payable is a matter of construction of the relevant regulation and thus a matter of law. We declined to admit this material.

9. The Respondent sought to introduce material by way of exhibits to a witness statement of 2 September, relevant to his application to support the decision below on other grounds. In essence he once more seeks to reopen very widely the decisions of previous courts, and to substantiate claims and complaints which have been rejected or dismissed. We have already noted that Warby J rebuffed such an attempt. So did Stuart-Smith J when he stated:

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[1] Following the hearing and while this judgment was in preparation, the Court was informed that the Appellant was served by Bristol County Court with Orders in eight claims, four of which are claims against the Appellant.

> "24. There has been no appeal against the orders of Teare J and Warby J, which stand as matters of record. It is no part of my function to act as any form of an appellate court in relation to those decisions and orders. In the same way, it is no part of my function to second guess the various other orders that have been made over time. They stand as matters of record and provide part of the context in which I must make my independent decision about the position as it appears now." (Judgment, paragraph 24)

As this Court stated in *Attorney General v Jones (Marcus David)* [1990] 1 WLR 859, the Court considering an application such as this is entitled to rely upon previous findings by other courts. Apart from all other considerations, this material was all available at the time of the hearing below and can in no sense be regarded as fresh. This application was totally without merit.

10. The Respondent made a number of references to documents within this bundle. In my view, these documents were not properly admissible and were not of assistance.

11. The Appellant has sought to rely on specific documents drawn from the last-mentioned body of material. Those appear in Tab 65 of the Expanded Supplementary Bundle. These two documents consist of copy correspondence to the Respondent from two different solicitors' firms. The content is of little significance, save to show that in 2012 and 2016 (at times when the Respondent was subject to a GCRO) there existed solicitors who were apparently contemplating acting for him in civil proceedings concerning this Appellant. I consider this evidence of marginal relevance. They were not previously available to the Appellant. Whilst I would admit these documents, I do not consider they carry weight.

12. For completeness, the Appellant has introduced into the Supplementary Bundle the balance of the papers before the judge below. We made no ruling excluding them from the appeal. I do not conclude that any of them were of relevance.

The Judgment Below

13. The judge began by rejecting an application by the Respondent that he should recuse himself. He did so firmly. He was right.

14. The judge correctly identified the tests for the imposition of a GCRO and the extension of a GCRO as follows:

> "14. The test for imposing a GCRO is stated by [4.1] of PD 3C to be that "the party against whom the order is made persists in issuing claims or making applications which are totally without merit, *in circumstances where an extended civil restraint order would not be sufficient or appropriate*." In *R (Kumar) v Secretary of State for Constitutional Affairs* [2007] 1 WLR 536 at [60] the Court of Appeal said that this language:
>
> > "… is apt to cover a situation in which one of these litigants adopts a scattergun approach to litigation on a number of different grievances without necessarily exhibiting such an

> obsessive approach to a single topic that an extended civil restraint order can appropriately be made against him/her."
>
> 15. The test when the Court is asked to extend a GCRO pursuant to [4.10] of PD 3C is different and is that the Court "considers it appropriate" to do so. That test must be read in the light of the criteria for imposing a GCRO in the first place, since the restriction upon the party's right to bring litigation is the same during the original term of a GCRO or during its extension. In briefest outline, the question either on an original application for a GCRO or on an application for an extension is whether an order (or its extension) is necessary in order (a) to protect litigants from vexatious proceedings against them and/or (b) to protect the finite resources of the Court from vexatious waste. This question is to be answered having full regard to the impact of any proposed order upon the party to be restrained. The main difference between an original application for a GCRO and an application for an extension is that, on an application for an extension, the respondent will have been restrained from bringing vexatious proceedings during the period of the existing GCRO."

15. The judge noted the procedural history and indeed quoted extensively from the judgment of Warby J as to the background to that point. He concurred with the findings of the judges who made the earlier orders, as to the risk of ill-founded proceedings. Indeed, for the future, he accepted "without hesitation that Mr Gray is very likely to bring civil claims, including at least some that are unmeritorious, if the GCRO is lifted" (paragraph 48). The first reason the judge gave for this was the Respondent's "utter conviction that anyone who disagrees with him, or does not do what he thinks they should, is corruptly conspiring against him and attempting to pervert the course of justice to his detriment" (paragraph 48). That was reinforced, said the judge, by the Respondent's "state of animation and anticipation that he is at present unable to conceive of an innocent explanation even where that possibility would be blindingly obvious to any reasonable person". He did acknowledge that some of the Respondent's claims might have merit. However, the reason for renewed litigation sprang from the Respondent's "unchanged view of the world where Mr Gray considers himself to be the victim of a multi-agency conspiracy" (paragraph 51). He would be unable to restrain himself from adopting a 'scattergun' approach when selecting targets for complaint. There was "obviously a risk that if the GCRO is removed, he may be unable to restrain himself from adopting a scattergun approach to civil claims." (paragraph 51).

16. The judge made it plain that a central concern for him was the impact of the fee payable on an application for permission to proceed. The judge himself had made enquiry of the Court Office in Bristol as to what was the appropriate fee, and had been:

> "13. …informed that the appropriate fee that would be required by the Court to be paid by a person under a restraint order who wishes to make an application for permission pursuant to PD 3C 4.2 ["the GCRO Application Fee"] is £255. The effect of paragraph 19 of Schedule 2 of the 2008 Order for a person who would otherwise be fee-exempt is that she or he has to raise and

> pay the GCRO Application Fee of £255 up front, and must bear the cost unless and until their application is granted, at which point it should be refunded. If the application is unsuccessful there is no refund."

17. It is clear that there was confusion as to the level of that fee. As the judge observed:

> "24. …During the hearing, Mr Dixey [counsel then appearing for the Chief Constable] addressed the amount of the GCRO Application Fee on two occasions. On the first occasion, just before the short adjournment, he raised the possibility that the fee might be £55. He suggested that the fee may in fact be £55 rather than £255. The Court suggested that this point should be sorted out after the short adjournment: see page 67 of the transcript. After the adjournment, Counsel submitted that he did not know what advice an individual would obtain as to what the fee would be; and he suggested that there might be at least two different fees, one of £255 and £55. In this state of the submissions, the draft of this judgment was prepared on the basis that the advice the Court had been given was correct."

18. However, in an Addendum to his judgment the judge recorded that, following delivery of the draft judgment under embargo in the usual way, the Appellant's counsel renewed the submission that the relevant fee was £55. This was based on paragraph 1.8(a) of Schedule 1 to the Civil Proceedings Fees Order 2008 which was (apparently for the first time) brought to the judge's attention. The Order prescribes a fee of £55 "on an application for permission to issue proceedings". If that is correct, the provisions of paragraph 2.4(a) of Schedule 1, prescribing a fee of £255 "on an application on notice when no other fee is specified", would not apply. This was advanced as a correction to the premise on which the judge had formerly proceeded. But the judge went on to state that:

> "64. In these circumstances, I consider that the most important thing is what Mr Gray would be told if he came to the Court to issue an application. I have no reason to doubt Mr Gray's account of his conversation, which is consistent with the information provided during the hearing, and no means of checking or confirming it before handing down judgment on the morning of 22 July 2019.
>
> 65. However, I have also undertaken the invidious exercise of trying to work out whether my decision as set out in the paragraphs that precede this addendum would have been the same or different if I had reached and written my judgment on the basis that the GCRO Application Fee that Mr Gray would be charged would be £55. The difference is material because a fee of £55 represents the bulk of a week's benefit whereas a fee of £255 represents the bulk of a month's. Clearly that affects consideration of Mr Gray's submission that the GCRO acted as a total ban, not least because he had said in submissions that he thought the fee would be £1,000 per application.

> 66. My conclusion is that I would still have come to the conclusion that the effect of the requirement to pay the fee up front had, in Mr Gray's case, the consequence that the GCRO was doing more than acting as a permission filter and was acting as a total ban, for the reasons (duly modified) set out above. If I had thought that Mr Gray would be asked to pay £55 rather than £255 per application for permission, I would have assessed the case as being close to the line but still just favouring the decision not to extend the GCRO."

19. The judge concluded that the Respondent had a mindset which was "way beyond normal and is now a manifestation of serious and complex mental health issues", but the judge went on to observe that these problems would "only be reinforced or prolonged by a further extension of the GCRO" (paragraph 52). His problems required a "multi-agency response" which was not within the Court's power. The Respondent was "not going to go away. If unable to bring civil proceedings, he will simply continue the conflict whenever he comes into contact with those who he considers abuse positions of power, however great or modest their powers may be. This will manifest itself in incidents of "kerfuffle"…" (paragraph 53). The judge recognised that in this case litigation costs represented no discipline (paragraph 57).

20. For those reasons, the judge declined to extend the GCRO.

The Grounds of Appeal

21. The Appellant advanced eight grounds of appeal. Mr Talalay refined those grounds in his oral submissions. Overall, he says the judge made significant errors of law and fact in the exercise of his discretion. He erred in fact in finding (initially) that the relevant fee for an application for permission to bring proceedings by a person subject to a GCRO was £255 rather than £55. He erred in fact and in law by concluding that the fee, whether £255 or £55, represented an absolute or alternatively an effective bar to seeking to bring proceedings, where the individual concerned was subject to a GCRO and living on state benefits. It was wrong in law to give any significant weight to the fee regime when determining whether it was appropriate to extend the GCRO. The effect of his findings as to the fee, and the effect of the fee regime, meant that the judge fettered his discretion and thus fell into error. Mr Talalay accepts that the judge may well have been properly positioned, having seen and heard the Respondent, and being fully informed as to his history of litigation, to conclude that the Respondent's "mindset revealed by the evidence is way beyond normal and is now a manifestation of serious and complex mental health issues" (paragraph 52). However, he says the judge had no proper basis to conclude as he did, that those mental health issues "will only be reinforced or prolonged by a further extension of the GCRO" (paragraph 52). Not only was that a conclusion of fact without a proper foundation, but it was an irrelevant consideration. It was also an error of fact, without foundation, to conclude that permitting the Respondent to bring claims without the constraint of the GCRO would reduce his propensity to engage in conflict, or "kerfuffles" with the police. This finding was in addition contradictory to the judge's own finding that "I do not think that Mr Gray is able to restrain himself". Mr Talalay adds the submission that there is an inherent and illogical contradiction in the judge's conclusion, expressed in paragraph 59 of his judgment, that on the one hand: "… this GCRO is … exceeding its intended function and … now represents a serious incursion upon Mr Gray's rights to bring

proceedings to vindicate his civil rights", and on the other hand the conclusion that the earlier GCROs "were properly and rightly made".

The Respondent's Submissions

22. The Respondent appeared to agree that the relevant fee for issue of proceedings would be £55, but he asserted that it was never payable. I was unable to discern the basis of that submission. He certainly submitted that for the cases which he wished to pursue against the Appellant, involving assault (which he described as "torture") and malicious prosecution, he would seek jury trial, by implication in every case. Hence, the higher fee would be in question even where permission had been granted. Even a £55 permission fee might amount to a bar, if he sought to make multiple claims. He argued that, given his means, these fees would be prohibitive.

23. The Respondent also emphasised that he had not sought to issue proceedings whilst the GCRO was in force. He said he was not an irrational and persistent litigant. His only interest was (I paraphrase) legitimate financial compensation for real wrongs.

24. The main thrust of the Respondent's submissions was not directed at the grounds raised by the Appellant. His main thrust was that he wished before us to reopen the factual issues underlying all these claims which would demonstrate (again I paraphrase) that all the decisions by previous judges concluding that he was a vexatious litigant, were wrong and derived from judicial corruption and conspiracy. For example, early in the hearing before us the Respondent intervened in the Appellant's opening to complain about the interlocutory Order of Hickinbottom LJ, re-instituting the GCRO. This Order was, he said, made as a favour to the Chief Constable because of the power and money available to the Appellant and was an act of disobedience, breaching the judicial oath. He said that the outcome of the hearing before Stuart-Smith J also arose because of the money and power of the Chief Constable. He said that he had been prosecuted a number of times for matters but had no convictions. He had done nothing wrong in his life. When Mr Talalay raised his criminal record (he has multiple convictions), the Respondent stated that those convictions were the result of "utterly scurrilous stitch-ups". He also submitted that the GCRO meant that the police would do what they liked with him and represented "an encouragement to the police to arrest and harass me".

What is the Fee Regime?

25. The relevant regulation is the Civil Proceedings Fees Order 2008, which came into force on 1 May 2008. By Regulation 2:

> "2. The fees set out in column 2 of Schedule 1 are payable in the [Senior Courts of England and Wales] and in [the County Court] in respect of the items described in column 1 in accordance with and subject to the directions specified in that column."

26. Regulation 5 stipulates that Schedule 2 to the Order applies establishing whether a party is entitled to fee remission.

27. Within Schedule 1 the following fees are stipulated:

> "1.8(a) on an application for permission to issue proceedings [£55].
>
> …
>
> 1.9(a) for permission to apply for judicial review £154.
>
> …
>
> 2.4(a) on an application on notice when no other fee is specified, … £255.
>
> …
>
> 2.5(a) on an application by consent or without notice where no other fee is specified … £100."

In the context of this case, it is relevant to note that from 2008 to 2016 the fee for an application for permission to issue proceedings was £50.

28. Schedule 2 to the 2008 Order addresses "remissions and part-remissions" of fees. Paragraph 1 of Schedule 2 deals with interpretation and includes the following:

> "(1) …
>
> "party" means the individual who would, but for this Schedule, be liable to pay a fee under this Order;
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> …
>
> "restraint order" means –
>
> > (a) an order under section 42(1A) of the Senior Courts Act 1981;
> >
> > (b) an order under section 33 of the Employment Tribunals Act 1996;
> >
> > (c) a civil restraint order made under rule 3.11 of the Civil Procedure Rules 1998, or a practice direction made under that rule, or
> >
> > (d) a civil restraint order under rule 4.8 of the Family Procedure Rules 2010, or the practice direction referred to in that rule.
>
> (2) References to remission of a fee are to be read as including references to a part remission of a fee as appropriate and remit and remitted shall be construed accordingly."

29. Paragraph 15 of Schedule 2 addresses an application for remission:

> "**15. Application for remission of a fee**

(1) An application for remission of a fee must be made at the time when the fee would otherwise be payable.

(2) Where an application for remission of a fee is made, the party must –

(a) indicate the fee to which the application relates;

(b) declare the amount of their disposable capital; and

(c) provide documentary evidence of their gross monthly income and the number of children relevant for the purposes of paragraph 11 and 12.

(3) Where an application for remission of a fee is made on or before the date on which a fee is payable, the date for payment of the fee is disapplied."

30. Paragraph 18 of Schedule 2 addresses legal aid:

"**18 Legal Aid**

A party is not entitled to a fee remission if, under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, they are in receipt of the following civil legal services –

(a) Legal representation; or …"

31. Paragraph 19 of Schedule 2 addresses vexatious litigants:

"**19. Vexatious litigants**

(1) This paragraph applies where –

(a) a restraint order is in force against a party; and

(b) that party makes an application for permission to –

(i) issue proceedings or take a step in proceedings as required by the restraint order;

(ii) apply for amendment or discharge of the order; or

(iii) appeal the order.

(2) The fee prescribed by this Order for the application is payable in full.

(3) If the party is granted permission, they are to be refunded the difference between –

(a) the fee paid; and

(b) the fee that would have been payable if this Schedule had been applied without reference to this paragraph."

32. In my view, the relevant language of these regulations is clear. There is a distinction between "remission" and the refunding of a fee. Subject to other provisions, an impecunious litigant can apply for remission of the fee under paragraph 15 of Schedule 2 and, upon making the application, the date for payment of the fee is disapplied. To the extent that the application for remission succeeds, that fee never becomes payable. However, where a restraint order is in force against such an individual, then the prescribed fee "is payable in full", and it follows the individual cannot make the application for remission. It also follows that the date for payment cannot be "disapplied" and therefore the payment must be made before the relevant issue or step in the action. Paragraph 19(3) simply means that, if the relevant individual has a reasonable claim and is granted permission then they will be put back into the position they would have been had remission of the fee been open to them.

33. In my view, the intention of these provisions is obvious: the requirement to pay the fee at the initiation of action must be taken to be part of the discipline imposed on vexatious litigants.

34. In my view, it is also clear from Schedule 1 that the appropriate fee on an application for permission to issue is £55 and not £255. Whatever confusion was introduced into the proceedings below, it seems to me that is beyond doubt.

35. As a matter of fairness, Mr Talalay pointed out in response to some remarks from the Respondent that a £255 fee may be payable in some instances. The Respondent submitted that in a case where he had permission to proceed but subsequently wished to apply by trial by jury, the fee would be £255 for that application. Whether such a fee is payable is complex and was not fully argued before us. It may be that no fee is payable for applications for permission to take a 'step' in proceedings; as Mr Talalay has pointed out in a written submission, a 'step' refers to those actions expressly identified in the body of the CRO in question. The language of CPR 3 CPD 4 may give rise to the inference that an application for permission to take a 'step' in an action is not a CPR 23 application. I reach no conclusion on this, and it is not central to this appeal, since the judge's decision turned on the issue of proceedings, not the subsequent conduct of proceedings.

36. It also follows, however, if the Respondent was able to be represented by solicitors, whether under a Legal Aid Order or otherwise, he would then be in the same position as other litigants. Whether under a Legal Aid Order or by reason of a fee agreement, the relevant fees would be payable and would not be susceptible of remission. Common sense suggests that the Respondent is more likely to gain representation in respect of an action where permission has been granted.

Did the judge fall into error in concluding that the fees payable represented an absolute or effective bar to litigating?

37. In my view, the judge did fall into such an error. The evidence was somewhat confused and the process adopted was unusual. The fee payable is a matter of construction of the relevant regulation, not a matter of fact. The judge's initial enquiry of court staff at Bristol led to the misleading indication that the higher fee was payable. But this was

never a matter of evidence in any event. As we have seen, the misapprehension as to the fee was only corrected (to the extent that it was) after the conclusion of the hearing and before final hand-down.

38. It seems to me that the judge's conclusion, even if the fee was at the lower level was, with great respect to him, unsustainable. £55 may be a significant sum for someone in receipt of benefits but without detailed evidence showing that the individual would be unable to access that amount of money by borrowing, from support by friends and family, by obtaining legal aid or legal representation subject to a damages-based agreement or conditional fee agreement, it seems to me it was not open to the court simply to conclude without more that the fee represented a bar to litigation in this way. If it was so in this case it would be so in respect of very many of those subject to civil restraint.

39. In *R(Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409, the Supreme Court addressed the principles by which a court might properly conclude that a fee regime unlawfully restricts the constitutional right of access to justice. The facts in that case were very different from those applying here. Following a review of earlier authority, Lord Reed (with whom the others agreed) said:

> "86. The 2007 Act does not state the purposes for which the power conferred by section 42(1) to prescribe fees may be exercised. There is however no dispute that the purposes which underlay the making of the Fees Order are legitimate. Fees paid by litigants can, in principle, reasonably be considered to be a justifiable way of making resources available for the justice system and so securing access to justice. Measures that deter the bringing of frivolous and vexatious cases can also increase the efficiency of the justice system and overall access to justice.
>
> 87. The Lord Chancellor cannot, however, lawfully impose whatever fees he chooses in order to achieve those purposes. It follows from the authorities cited that the Fees Order will be ultra vires if there is a real risk that persons will effectively be prevented from having access to justice. That will be so because section 42 of the 2007 Act contains no words authorising the prevention of access to the relevant tribunals. That is indeed accepted by the Lord Chancellor.
>
> 88. But a situation in which some persons are effectively prevented from having access to justice is not the only situation in which the Fees Order might be regarded as ultra vires. As appears from such cases as *Leech* and *Daly,* even where primary legislation authorises the imposition of an intrusion on the right of access to justice, it is presumed to be subject to an implied limitation. As it was put by Lord Bingham in *Daly,* the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve."

40. In that case, the claim that the fees there imposed represented an effective bar to access to justice was supported by very wide evidence, on a national scale, to the effect that

access to the Employment Tribunal had been drastically reduced. There was no such evidence here. Moreover, as Lord Reed made clear, there is a legitimate public consideration to have in place "measures that deter the bringing of frivolous and vexatious cases". That bears directly on this case.

41. For a meritorious claim, the permission fee is returnable. Although the party under a restraining order has to provide the fee in the first place, in such a case the individual will get it back. It therefore can be regarded as a "cash-flow" problem. This is in contrast, for example, to the claimants in the Unison case, where the fees were not returnable, and in very many cases no costs orders could be obtained. On the other hand, the fact that the fee will not be returned in an unmeritorious claim must represent a legitimate deterrent to making such claims.

42. With respect to the judge, who was scrupulous to be fair to the Respondent, it seems to me also to have been an error to proceed on the basis of "what [the Respondent] would be told" was the fee, even if what he was told was a mistake. Once the judge found that the fee on an application for permission was £55, that was the only relevant consideration. The fact that a mistaken indication was given to the judge on his enquiry was very unfortunate, but not to the point.

43. For those reasons I accept that the judge fettered his discretion in this case.

Other Points

44. In my view the Appellant is also correct to argue that the judge was not in a position to conclude that the absence of an extended GCRO would improve the Respondent's mental health, or reduce his conflicts with the Appellant (or anyone else). The judge was fully entitled to reach the conclusion he did about the Respondent's state of mind. That conclusion was well-supported by the history, and by the presentation of the Respondent. The judge's conclusion here was a general one, not a specific categorisation of mental disorder. However, that is a different matter from reaching, without any expert evidence at all, a prognosis as to how matters would be affected by the extension. Apart from any other consideration, the refusal of the extended order was rather obviously likely to permit the Respondent to issue proceedings which would subsequently be struck out. It is hard to see how that sequence of events would assist the Respondent's state of mind any more than the requirement to seek permission. Any reasonable case, which would survive such a subsequent challenge, would and should have been given permission at the outset.

45. The judge found that the previous Orders had been properly made and extended, for good reason, and based on proper evidence. He found that the Respondent's mental health problems were significant, and that he could not "restrain himself". He considered, quite rightly, that the Respondent might have valid, as well as invalid and unreasonable, claims which he would seek to advance. But such valid claims should and would gain permission. In the absence of a properly founded argument that the relevant fee represented an effective bar from the Court, it seems to me impossible properly to conclude against the extension of the GCRO.

Conclusions

46. For those reasons I would allow the appeal, set aside the decision below, and extend the GCRO as from 22 July 2019.

47. It follows that there should have been a GCRO in place between 22 July and 21 August, when it was re-imposed by Hickinbottom LJ. The proceedings issued during that period cannot now be regarded as breaches of the Order and could not found any suggestion of contempt of court. However, the further conduct of that litigation will require close consideration by the Court. It will be appropriate for those cases to be listed together before the judge nominated to deal with applications under the revived GCRO, so that relevant applications by either party may be efficiently addressed.

Lord Justice Newey:

48. I agree.

Lord Justice Lewison:

49. I also agree.