Neutral Citation Number: [2022] EWHC 2922 (Admin)

Case No: CO/674/2022

IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
ADMINISTRATIVE COURT
BIRMINGHAM DISTRICT REGISTRY

ON APPEAL BY WAY OF CASE STATED

Priory Courts
33 Bull Street
Birmingham
B4 6DS

Date: Thursday, 27 October 2022

Before:

THE HONOURABLE MRS JUSTICE FARBEY

- -

Between:

A & D COMPUTERS LIMITED **Appellant**

- and -

NOTTINGHAM COUNTY COUNCIL

Respondent

- -
- -

MR CHRISTOPHER CONVEY (instructed by **Weightmans LLP**) for the **Appellant**
MR JONATHAN UNDERHILL (instructed by **Nottingham City Council**) for the **Respondent**

- -

JUDGMENT

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MRS JUSTICE FARBEY:

Introduction

1. The Appellant appeals, by way of Case Stated, from the Nottingham Magistrates' Court where on 2 August 2021, District Judge Pyle ("the DJ") refused to award any costs in favour of the Appellant following the dismissal of the Respondent's complaint under section 97 of the Trade Marks Act 1994. The Respondent had by that complaint applied for the forfeiture of a large number of items from the Appellant. The DJ had dismissed the complaint because the Respondent was not in a position to present its case to the DJ on the date listed for the hearing of the complaint.

2. In the Case Stated, the DJ asks the following questions:

   "i) Because the proceedings were civil, and not part of the Council's statutory or regulatory obligations, did I err in law and apply the wrong test in requiring that the Claimant must have acted unreasonably before the Respondent could be awarded its costs?

   ii) Should costs have 'followed the event' and should I have awarded the Respondent their costs, subject to assessment or agreement?

   iii) Even if I did not err in law, in the circumstances of the case, was my refusal to award the Respondent any of its costs such a failure as to 'balance the various factors fairly in the scale' that my decision should not stand?

   iv) In any event, given the Claimant's application was dismissed, should I have awarded the Respondent their costs from the point of time of their without prejudice offer to the Claimant to settle the case onwards, i.e. from the date of the pre-trial review onwards?"

3. I have today heard submissions from Mr Christopher Convey on behalf of the Appellant and Mr Jonathan Underhill (who did not appear below) on behalf of the Respondent. I am grateful to both counsel for their excellent submissions.

Background

4. I am bound to take the facts from the Case Stated by the DJ. He states that, on 19 March 2019, following the execution of search warrants at the Appellant's business premises and at the home address of its directors, a large quantity of car keys, car parts, computers, mobile phones, memory sticks and paperwork were seized. The directors were Deborah Sanderson and her husband, David. Sadly, David Sanderson died on 4 April 2019.

5. Subsequently, interviews were conducted under caution with Deborah Sanderson, her two sons and the Company Secretary. No criminal proceedings were brought but on 23 November 2020 the Respondent made an application by way of complaint for the forfeiture of some of the goods seized.

6. The case was first listed at Mansfield Magistrates' Court on 21 January 2021. It was listed for a five-day hearing commencing on 2 August 2021. The DJ was subsequently allocated the case and listed it for a pre-trial review. He was concerned that the five-day listing be used effectively, not least because the Court was trying to deal with a backlog of cases caused by the conditions of the Covid-19 pandemic.

7. At the pre-trial review, on 21 July 2021, counsel for the Respondent (not Mr Underhill) appeared by telephone. Mr Convey appeared by video link. The DJ impressed upon the parties the importance of narrowing the issues if possible. Discussions between the parties then took place while the DJ dealt with other matters in his list. When the case resumed later in the day, the DJ was informed that discussions had been productive. A joint application was made to adjourn the pre-trial review to the following week. It was relisted for 29 July 2021 at 2:00 pm.

8. On the morning of 29 July, the DJ was informed that counsel for the Respondent was in France. After his arrival there, the UK government had altered the rules for returning from France so as to require a period of 10 days' quarantine. Although that period could be reduced to five days through Covid tests the Respondent's counsel could not attend any trial before 9 August 2021. The Respondent's position was that it was not practicable or desirable for the case to be returned to fresh counsel. The Respondent asked for a week's adjournment.

9. At or around 2:00 pm, the Appellant's legal team appeared by CVP but there were difficulties in getting hold of any of the Respondent's lawyers, including counsel. Counsel did eventually attend remotely, but during a break in the hearing he became unavailable and the Court contacted Mr Bines of the Respondent's solicitors' department. Mr Bines explained that the solicitor with conduct of the case was unfortunately extremely ill. A further member of the small legal department was off work. It was only on 28 July 2021, the day before the reconvened pre-trial review, that the Respondent's lawyers had had the resources to take instructions on the proposed resolution of the proceedings.

10. Mr Bines had not thought it necessary to seek alternative counsel. He advised that he did not have conduct of the case itself and was working under extreme pressure. He asked that in the interests of justice, given counsel's absence at the hearing, there should be a short adjournment. The Respondent would struggle to find alternative counsel. The Appellant opposed any adjournment.

11. The DJ refused the adjournment on the grounds that counsel's absence in France was not a good enough reason to put off a lengthy and longstanding listing. The difficulties outlined were avoidable. The Respondent had not sought to look for alternative counsel, even though it had known for some days, if not weeks, of counsel's problems. The DJ listed the matter again for 12 noon on the following day to see whether any progress had been made with securing counsel.

12. On 30 July 2021 the Respondent appeared, represented by different counsel. She renewed the application to adjourn the hearing, which was refused.

13. On 2 August 2021, the first day of what was meant to be the trial, original counsel for the Respondent appeared via CVP and renewed the adjournment application. I need not set out the reasons that counsel gave for being unable to proceed: they are, to some considerable degree, personal reasons for being in France. In short, the DJ refused to adjourn and decided to dismiss the complaint.

14. In determining whether to award the Appellant its costs, the DJ held:

> "Whilst the local authority has various statutory duties and obligations… it does not have a duty to bring forfeiture proceedings. So, whilst they are civil proceedings, as Lord Bingham says in *City of Bradford Metropolitan District Council v Booth* [2000] EWHC 444 (Admin) at paragraphs 23 to 26:
>
> > 'What the court will think just and reasonable will depend on all the relevant facts and circumstances of the case before the court. The court may think it just and reasonable that costs should follow the event, but need not think so in all cases covered by the subsection.'
>
> In this case, I have endeavoured to scrutinise the behaviour of the claimant Council to determine if it acted reasonably and properly.
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> Recent events and difficulties are the recent relevant issues. They were relevant to my determination to refuse to adjourn. But in exercising my discretion on costs, I have had the benefit of reading all the cases papers and I looked at the local authority's position when embarking on the civil proceedings at the end of last year.
>
> Following the execution of the warrant in 2019 evidence had been amassed by the trading standards officers and the various representatives of the various car manufacturers. A criminal prosecution was not proceeded with, however the local authority had in its possession a vast amount of items, which on the information they had, were counterfeit goods. Whilst they had no duty to institute proceedings for forfeiture, they equally had an obligation to ensure, if what they had were counterfeit goods, they were not put back into public circulation. They instituted the forfeiture proceedings and they were firmly opposed. Directions were given and the Respondents responded. Detailed statements and explanations were given to refute each of the items of evidence contained with the bundle. The Claimants were placed in a position where it was quite clear the issues needed to be resolved by a court. They placed the matter before a court to resolve them. For the reasons given the local authority have been unable to present their case and I have dismissed their Complaint.
>
> The Respondents were ready and had carried out a lot of work to meet the proceedings. All litigation should be subject to continuous review. Evidence will come in where instructions must be sought. Both sets of lawyers were endeavouring to do that and indeed sought to try and resolve the matter. My view is the local authority had not acted unreasonably in bringing the proceedings. Given all the circumstances, in exercising my discretion in this case I am not making any order as to costs."

Section 64 of the Magistrates' Court Act 1980

15. The power of a magistrates court to make an award of costs on the hearing of a complaint is contained in section 64 of the Magistrates' Court Act 1980 which provides (insofar as material) as follows:

> "(1) On the hearing of a complaint, a Magistrates' Court shall have power in its discretion to make such order as to costs—
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> (a) on making the order for which the complaint is made, to be paid by the defendant to the complainant;
>
> (b) on dismissing the complaint, to be paid by the complainant to the defendant, as it thinks just and reasonable…"

16. In *City of Bradford Metropolitan District Council v Eric Wilson Booth* [2000] 164 JP 485, Lord Bingham CJ summarised (at paras 24ff) the proper approach to the application of section 64 in three propositions:

> "1. Section 64(1) confers a discretion upon a Magistrates' Court to make such order as to costs as it thinks just and reasonable. That provision applies both to the quantum of the costs (if any) to be paid, but also as to the party (if any) which should pay them.
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> 2. What the court will think just and reasonable will depend on all the relevant facts and circumstances of the case before the court. The court may think it just and reasonable that costs should follow the event, but need not think so in all cases covered by the subsection.
>
> 3. Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged."

17. It will be seen that the first two of these propositions apply to section 64 cases generally. The third proposition applies to decisions taken in relation to proceedings brought by public authorities in the exercise of administrative or regulatory duties. In the *Booth* case itself, the Court was concerned with a successful complaint against a local authority's vehicle licencing decision in the context of a regulatory framework bestowing duties on the authority in the public interest, but the underlying reasoning within the third *Booth* proposition has been more widely applied.

18. Part of the rationale for a different approach in cases concerning administrative and regulatory duties is to create incentives that promote the public interest (*Derbyshire County Council and High Peak Magistrates' Court v Marlow* [2013] EWHC 1762 (Admin), para 29). Those incentives include some additional protection against costs. In short, a local authority should not be deterred from bringing a complaint in the public interest out of concern that, should it have misjudged the merits of the complaint, it would be ordered to pay the costs of the other party.

19. I do not need to reach any conclusion on the precise delineation between administrative and regulatory matters (on the one hand) and other proceedings brought by local authorities in the Magistrates' Court. It is common ground before me (as it was before the DJ) that a local authority is not under an administrative or regulatory duty to bring forfeiture proceedings in trademark cases. It has been held that section 97 of the Trade Marks Act is predominantly concerned with the determination of private rather than public interests. Forfeiture proceedings brought under that section are to be classified as civil rather than regulatory in nature (*R v Harrow Crown Court (ex parte UNIC Centre SARL)* [2000] 1 WLR 2112). The Respondent therefore accepts on the basis of authority that the third of the *Booth* propositions does not apply to the present case. I shall proceed on that basis.

The Court's approach on appeal

20. The width of discretion exercised by judges in relation to costs is well established. An appellate court will interfere only if the judge has "exceeded the generous ambit within which reasonable disagreement is possible" (*Marlow* above, para 33, citing previous case law). The court should intervene only if the judge has either erred in principle in his or her approach or has left out of account (or taken into account) some feature that should (or should not) have been considered, or if the judge's exercise of discretion was wholly wrong because the court is forced to the conclusion that the judge failed to balance the various factors in the scale (*Marlow* above, para 33, citing previous case law). The court will be vigilant not to encourage satellite litigation on questions of costs (*Marlow* above, para 31, citing previous case law).

The parties' submissions

21. In his written and oral submissions, Mr Convey emphasises that the DJ asked himself the question whether the Respondent acted reasonably and properly. By focusing on that question and concluding that the Respondent had not acted unreasonably in bringing the proceedings, the DJ had misdirected himself in law. He had, in effect, applied the third *Booth* proposition to a non-regulatory case and so had unreasonably circumscribed his discretion. He had exercised his discretion in a way that was wholly wrong. He had failed to balance the various relevant factors fairly in the scale. In any event, he should have awarded the Appellant its costs from the point of time of the offer to the Respondent to settle the case.

22. In a conspicuously well-drafted skeleton argument, supported by his oral submissions, Mr Underhill accepts that the wider principles of unreasonableness

and good faith, which shield local authorities and other public bodies from the general rule that costs follow the event, are set within the context of administrative and regulatory decisions and proceedings. He accepts that the third proposition in *Booth* does not apply in the present case. Nevertheless, he submits that the question of whether it is just and reasonable to award costs includes an assessment of a public authority's conduct. While the DJ may have fallen into error of law in concluding that the question of unreasonable behaviour was the overarching determining factor, he was entitled to consider the actions of the Respondent. Overall, the DJ had given adequate reasons as to why it was not just and reasonable to award the Appellant its costs. He had in any event reached a conclusion that was within the range of reasonable conclusions such that this Court should not intervene.

Analysis and conclusions

23. Mr Underhill very properly accepts that the DJ regarded the critical question as being whether the Respondent had acted reasonably and properly in bringing the proceedings. He accepts that, to this extent, the DJ's language reflects the language of the third *Booth* proposition. He accepts that this was a civil and not a regulatory case so that the third *Booth* proposition did not apply. In my judgment, to the extent that the DJ applied the third *Booth* proposition, he misdirected himself in law. In oral submissions, Mr Underhill realistically conceded as much. His principal submission orally was that the DJ's misdirection was immaterial against the background of the wide statutory test. The decision not to award costs was one that was open to him.

24. Although the reasoning of the DJ implies that he regarded the third *Booth* proposition as critical, the Case Stated indicates that he considered "all the circumstances". It is however unclear from that compendious phrase what the DJ regarded as being relevant to the exercise of his discretion. In an otherwise detailed document, the Case Stated does not, in my judgment, adequately set out whether or how the DJ balanced any factors other than whether the Respondent was reasonable to commence proceedings in the first place.

25. The DJ considered that "recent events and difficulties" were relevant to his decision not to adjourn the hearing but he regarded the costs decision as entirely separate. In respect of costs, he held that the focus should be on the Respondent's position "when embarking on these civil proceedings at the end of last year". In my judgment, the DJ has unduly circumscribed his general discretion by looking at events only at the point at which proceedings in the Magistrates' Court were started rather than in the round.

26. Costs are incurred not only by the commencement of proceedings but also by the manner in which they are (or are not) pursued. Any party to proceedings in the Magistrates' Court should be prepared to pursue those proceedings conscientiously. It does not matter whether the party is a private or a public actor. In my judgment, it was unreasonable for the DJ to leave out of the balance the Respondent's conduct during the course of the proceedings.

27. The Respondent was at all times aware that the August hearing had been fixed by the court in January 2021. The DJ had made plain at the pre-trial review on

21 July 2021 that court time is precious and that he was concerned that the five-day listing should be used effectively. The pre-trial review was adjourned until 29 July 2021 for the parties to enter into discussion with a view to narrowing the issues and shortening the full hearing. There was no suggestion from the Court at any stage that the August hearing would be adjourned and no reason for the Respondent to consider (as Mr Bines considered at one stage) that it was not necessary to seek alternative counsel.

28. By the time of the substantive hearing, two adjournment applications had been refused. It was plainly rash for the Respondent to rely on making a third adjournment application, on the day of the hearing, and to come to court with no ability to present the complaint to the DJ.

29. I do not doubt that some efforts were made to find fresh counsel. However, as the Case Stated implies and as Mr Underhill has confirmed today, the search for counsel was limited to local chambers. I cannot see any good reason why the Respondent's solicitors did not make wider enquiries from the wider Bar. There is no evidence that, if proper enquiries had been made, counsel could not have been located. As Mr Convey submits, they could as an alternative have instructed a solicitor advocate.

30. While the Court appreciates that local authorities have finite resources and that the Respondent's resources were particularly stretched at the time, the Respondent failed to instruct alternative counsel in relation to an imminent hearing which had been fixed for months in circumstances where the DJ had already impressed on the parties the importance of using court time expeditiously. In these circumstances, someone should have taken responsibility for the conduct of the case and for ensuring that the matter was ready for trial. Instructed counsel's difficulties ought to have been obvious from 21 July at the latest (if not before). There is no evidence of insurmountable obstacles to instructing fresh counsel who would have had a reasonable time to prepare before the hearing.

31. In these respects, the Respondent was in the same position as any other party before the Magistrates' Court. The complaint was dismissed because the Respondent was unable to advance it at the hearing. In considering whether it was just and reasonable to award costs against the Respondent, the DJ could not have reasonably concluded that the public interest in protecting local authorities from costs consequences of the proper discharge of statutory duties was engaged. The Respondent was in no privileged position in relation to its failure to be ready for the hearing. That failure had nothing to do with any part of its statutory duties but was the result of a failure to instruct counsel and to ensure that its own complaint was ready to be tried.

32. It ought to have been obvious to the Respondent that, if the complaint collapsed, the Appellant would have incurred the costs of the proceedings (including costs incurred by the two pre-trial review dates) for no purpose. I am not able to surmise whether, if properly presented to the DJ, the complaint would or would not have succeeded. The point is that the Appellant's costs were in the event incurred unnecessarily.

33. For these reasons, the decision of the DJ not to award the Appellant its costs involved a material misdirection of law and he exceeded the ambit of his discretion. I shall therefore answer questions i) to iii) in the affirmative. It follows from my judgment that there is no need to dwell on question iv). I will quash the DJ's decision and substitute a decision that it was just and convenient for the Respondent to pay the Appellant's costs.

The assessment of costs

34. The Appellant has, very recently, provided a statement of its costs below. I have power to amend the DJ's determination (under section 28A(3)(a) of the Senior Courts Act 1981) and to assess the costs for myself. I also have power to remit the matter to the Magistrates' Court under section 28A(3)(b) of the 1981 Act.

35. Mr Convey submits that, as no evidence was heard and as the Case Stated is detailed, I am in as good a position as the DJ to assess costs. I can be provided with the file of documents that was before the DJ and counsel may make any submissions that they wish to make about it.

36. Mr Underhill's refined submission is that fairness must be my guide. The DJ had considerable involvement in the case and he had sight of the evidence that would have been produced. He is thereby in the best position to assess costs on appropriate directions from this Court.

37. The Court is in an invidious position. On the one hand, it is difficult to assess the costs of proceedings in a different court when I know very little about the nature or extent of the substantive issues that were before that court. I am wary of expanding the appeal to include consideration of documents from a fairly large file that has not been provided to me for the appeal. On the other hand, I am acutely aware of the disadvantages, both to a public authority and to a small company, of further costs that would inevitably be incurred by remittal.

38. On balance, I have concluded that the better course is for the assessment to be remitted to the DJ. While the offer from the Appellant that I be provided with the bundle before the DJ is appreciated, this Court's resources would then be spent absorbing a substantial quantity of documents that have not been filed. That course would involve a number of hostages to fortune; not least I cannot be sure that, having started along the path of an assessment, I might not require more substantial submissions on how the forfeiture proceedings were conducted by both parties than the timeslot today would allow. I regard the better course as to grasp the nettle and to remit the matter to the DJ as Mr Underhill suggests.

39. Accordingly, this appeal is allowed to the extent that the DJ's decision is reversed and the matter will be remitted to the DJ with the opinion of the High Court.