



Neutral Citation Number: [2022] EWHC 2659 (Ch) Appeal Ref: CH-2021-LIV-000005

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
CHANCERY APPEALS (ChD)

Liverpool Civil and Family Court
35 Vernon Street
Liverpool
L2 2BX

03/05/2022

BEFORE:

THE HONOURABLE MR JUSTICE FAN COURT
The Vice-Chancellor of the County Palatine of Lancaster

BETWEEN:

DR CHRISTOPHER J MOON

Claimant

- and -

MS SANDY DEANE

Defendant

Dr Christopher J Moon (Claimant), Litigant in Person
Defendant not in attendance nor represented

Hearing date: 3 May 2022

Approved Judgment

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The Honourable Mr Justice Fancourt:

1. This is an application renewing an application for permission to appeal against an order of District Judge Johnson made on 20 September 2021. The would-be Appellant, Dr Moon, has appeared in front of me in person to advance his arguments.
2. The decision that he is seeking to appeal was a decision which followed a trial in this action and concerned the costs of the action. District Judge Johnson decided that Dr Moon should pay the Claimant's costs of the action. Those costs should be assessed, if not agreed, on the standard basis, not the indemnity basis, and then the District Judge carried out, as would be normal for such a relatively short case, a summary assessment of the costs and determined that a sum a little in excess of £30,000 was a reasonable sum for Dr Moon to pay.
3. The underlying proceedings were a claim by Sandy Deane to seek to remove Dr Moon as the sole executor and trustee of his father's will. That claim succeeded.
4. The grounds for seeking to appeal the Costs Orders were set out in section 11 of the Appellant's notice filed by Dr Moon and I addressed those grounds on paper, on 19 January 2022, when I refused permission to appeal and gave my reasons for that in six numbered paragraphs, identifying and addressing four separate grounds of appeal that in substance were being advanced.
5. What I am concerned with today is solely the question of whether, despite the view that I formed when considering the matter on paper, there is nevertheless a realistic prospect of one of those grounds of appeal (or some other ground) succeeding if I were to give permission to appeal. If there is no realistic prospect of any ground of appeal succeeding then it follows that permission to appeal must be refused.
6. What I am not concerned with on this application is the question of whether there are grounds of appeal against District Judge Johnson's underlying decision, in which she held that Dr Moon should be replaced as executor and trustee. Dr Moon did, indeed, seek to appeal that decision too, but his appeal was struck out by orders made by His Honour Judge Cadwallader in August and September last year, and no further steps have been taken to seek to pursue that appeal. I am, therefore, not concerned with the underlying merits of the case or, indeed, with any allegations that Dr Moon has made as to what has gone wrong with the replacement executors since the decision of District Judge Johnson, when he was replaced as executor by two professional executors and trustees.
7. I am solely, I emphasise, solely concerned with the question whether it is reasonably arguable that the decision of District Judge Johnson on costs and on the quantum of costs was wrong.
8. The arguments that were advanced today, if I may say so very capably by Dr Moon, acting in person, were essentially the following.

9. First that the District Judge was wrong to refuse him an adjournment of the hearing on 20 September 2021. In that regard, Dr Moon explains, as he explained previously in writing, that there had been a problem setting up the hearing and it had fallen to him, in liaison with the court staff at a late stage, to get a Teams hearing set up, and that having to do that put pressure on him at a late stage.
10. Additionally, he says that he only received the skeleton argument from the Claimant's counsel on the morning of the hearing. There had been no order previously made that any documents such as skeleton arguments should be provided at an earlier time. These matters were urged on District Judge Johnson at the hearing and she exercised her discretion by refusing an adjournment, on the basis that the hearing was up and running and effective; the Court had ample time to deal with the matters; and there did not seem to be any prejudice resulting from the fact that a quite short skeleton argument, dealing only with the question of incidence of costs, had been seen by Dr Moon only that day.
11. Whether or not to grant an adjournment is a question of the judge's discretion and will only be interfered with by an appeal court if it is apparent that the decision reached is one that no reasonable judge could have reached, properly directing themselves as to the law and the facts. I can discern no error of that kind in the decision that District Judge Johnson made on 20 September and the proposed appeal, on the basis that an adjournment should have been granted, is therefore, in my judgment, hopeless.
12. The second matter that Dr Moon advances is a complaint as to the way that the assessment of costs took place. He points out, quite rightly, that District Judge Johnson mentioned that she considered that the costs being sought, in a schedule of costs, by the Claimant's lawyers were excessive and were in totality unreasonable in amount.
13. What happened then was what always happens on a summary assessment, namely that the District Judge went through the various heads and items of costs and decided which component parts were unreasonable, either in principle or excessive or unreasonable in amount. As a result of that a reduction of something in the region of 10% was made to the amount of the costs claimed.
14. Dr Moon complains that he did not get a proper breakdown of the costs that had been allowed and pointed out that the Court's order did not explain in detail the adjustments that had been made to the schedule of costs that had been claimed.
15. This is perfectly normal. The matter is dealt with as an oral assessment in front of the parties and the court order does not record every adjustment that was made. It is, however, clear from the transcript of the hearing, which Dr Moon subsequently obtained, exactly what adjustments were made and for what reasons.
16. There is, in my judgment, nothing in this ground, nor is there anything in the criticism that District Judge Johnson found the costs total claimed was unreasonable. That is the nature of the exercise that is conducted, to reduce the costs that are claimed down to a level where the amount that is awarded is a reasonable and proportionate amount.
17. Another matter that Dr Moon raised again, this morning, related to the underlying trial where he complains that he did not get a proper PDF bundle for the trial. That may be

so and I do not suggest that he is wrong in his assertion. However, it is simply irrelevant to the question of whether there is a reasonable ground for appeal against the costs decision of District Judge Johnson, as distinct from against the underlying decision or the fact that the trial was allowed to proceed in those circumstances.

18. The third ground raised by Dr Moon is that the District Judge was wrong not to take into account the fact that on a number of occasions he had offered to go to mediation in order to resolve the dispute, and had offered, as he said, six different dates on which he would be willing to attend a mediation, to which he got no response from the Claimant or her lawyers. This matter was first raised at the trial when District Judge Johnson indicated that such matters might be relevant to the question of costs, depending on the outcome of the trial, but were not a matter to be dealt with at the trial itself.
19. At the Costs Hearing the matter was alluded to briefly again, although there was no sustained submission by Dr Moon along the lines that costs that otherwise would be awarded to the successful party should be disallowed because of a refusal to attend mediation. The following paragraph from the transcript, in words spoken by Judge Johnson, indicate the view that she had formed:

“The evidence or the points that Dr Moon makes are partly ones I have already dealt with in in my judgment, the points about the six mediation dates. I have already dealt with that in my judgment and I found that there was not anything there to persuade me that there had been an unreasonable refusal to mediate. What I said in my judgment was that this particular case is an ‘all or nothing case’ either Dr Moon was to be removed as the executor or he wasn’t.”

The matter was not developed any further in the District Judge’s reasons for awarding costs against Dr Moon.

20. The point that the District Judge was making there is that if a party to litigation has been wholly successful in their claim, as the Claimant was in this case, then it does not necessarily follow that even an unreasonable refusal to mediate will have some costs sanction. Sometimes there are good reasons for not engaging in mediation, though on the whole the courts support mediation as a means of dispute resolution. It is much more usual for a refusal to mediate to have a consequence in costs if the party who refused to mediate lost, or if the outcome of the case is that neither one party nor the other succeeded, with the court reaching a position somewhere in the middle between the two parties. In such a case, the judge may form the view that something very similar might very well have been achieved by the parties themselves, if only they had held a mediation in good faith. The point being made by the District Judge was that this is not that kind of case, since the Claimant was entirely successful.
21. Again, I can see no error in principle in the way that the District Judge approached the matter, such that an appeal on the basis that she had failed to make some adjustment on that account has a reasonable prospect of success. Put another way, it will not be possible for an appeal court to say that the District Judge should have disallowed the successful party her costs, or part of her costs, merely because she declined an offer to mediate. The question of costs is inevitably a discretionary matter for the judge.

Unless it is possible for an appeal court to say that the failure to take into account some particular matter prejudiced the whole decision on costs, the appeal will not succeed on that basis. The District Judge did take into account the failure to mediate but, in her judgment, given the nature of the case, that did not justify depriving the successful party of all or part of her costs.

22. In my judgment, there is nothing here on the facts, particularly bearing in mind that the point was not even urged in detail on the District Judge at the hearing, to suggest that an appeal on that basis would succeed.
23. Dr Moon sought, fourth, to reopen the question of whether he was found to have been at fault, and whether that was the reason for his removal as executor and trustee. He submits that there was no evidence of any fault on his part, though that is not what District Judge Johnson found. She decided that there was fault and that was the reason why Dr Moon should be removed. That, clearly, is a point that can only be challenged in an appeal against the substantive decision and not in a challenge to the decision of the District Judge on the question of costs.
24. I listened to a number of criticisms raised by Dr Moon relating to the conduct of the Claimant and her solicitors and the replacement executors. There may or may not be substance in them, but the simple fact is that they cannot have any bearing on the question of whether District Judge Johnson was wrong to make the order for costs that she did and to assess the costs in the amount that she did. None of the points raised by Dr Moon, with respect, in my judgment, have any prospect of success on appeal and therefore it is right for me to refuse permission to appeal.

This Transcript has been approved by the Judge.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

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