Neutral Citation Number: [2024] EWHC 2614 (Fam)

Case No: FA-2024-000056

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE FAMILY COURT AT CARDIFF
HHJ Furness KC
NP20D04014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2024

Before :

MS JUSTICE HENKE

- -

Between :

Philip John Mainwaring — **Appellant**

- and -

Susan Claire Bailey — **Respondent**

(Judgment on Costs)

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- -

Dr Julian Sidoli (instructed by **Vale Solicitors**) for the **Appellant**
Roger Thomas (instructed by **Talbots Law**) for the **Respondent**

Hearing dates: 28 August 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 16 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives, following circulation of the draft on 11 October 2024.

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MS JUSTICE HENKE

Ms Justice Henke :

1. On 28 August 2024, I heard a rolled-up hearing for permission to appeal with the appeal to follow. The Appellant was Mr Mainwaring. The case had been listed for a two-day hearing, but I was able to hear submissions on behalf of both parties on the first day and to adjourn to give a written reserved judgment. I formally handed down judgment on 5 September 2024. It is reported under neutral citation number [2024] EWHC 2296 (Fam). At paragraph 73 of that judgment, I gave directions to enable determination of any application for costs.

2. I now give this further judgment in relation to the Respondent's application for costs. The application is for indemnity costs. Her total costs of responding to this appeal amount to £20,240.60. On behalf of Mr Mainwaring the application for costs is resisted, particularly the application for indemnity costs. On behalf of the Appellant, I am urged to make no order for costs between the parties. I have the Appellant's N260. His costs are said to amount to £18,341. I note that the amount claimed relates to both solicitor costs and Counsel's fees.

The submissions on behalf of both parties.

3. On behalf of Ms Bailey, two basic submissions are made. They are (i) that costs should follow the event of this hopeless appeal and (ii) that the Appellant's litigation conduct significantly contributed to the costs of the appeal.

4. In response and on behalf of Mr Mainwaring, it is submitted that I have a discretion as to costs and that I ought not to make an award against him. It is argued that I should disallow Ms Bailey's costs prior to my order of 25 July 2024. It is said that before that date the Respondent was not obliged to respond to the appeal. Given it was always her case that it was a hopeless appeal, it is argued on behalf of the Appellant that it would have been reasonable for her not to engage with the process before being required to do so by the court.

5. On behalf of the Appellant, it is submitted that Mr Mainwaring "*essentially self-represented*". It is said that the Appellant's filing of documents without court direction or permission was because he did not understand the Family Procedure Rules. It is argued that the additional documents Mr Mainwaring placed before the court did not trouble the Respondent and clearly took the appeal no further. In addition, on behalf of Mr Mainwaring, the amount of costs claimed are challenged. Three separate items are identified and are said to be excessive.

The Law

The Rules

6. The High Court sitting as an appeal court has the power to make an order for costs when sitting as an appeal court by reason of FPR r.30.11(2)(e).

7. Further, on hearing an appeal, the appeal court has all the powers of the lower court under r.30.11(1).

8. The lower court's powers in relation to costs in "financial remedies proceedings" are prescribed by r.28.3. FPR 28.3 states as follows:

> "*(1) This rule applies in relation to financial remedy proceedings.*
>
> *(2) Rule 44.2(1), (4) and (5) of the CPR do not apply to financial remedy proceedings.*
>
> *(3) Rules 44.2(6) to (8) and 44.12 of the CPR apply to an order made under this rule as they apply to an order made under rule 44.3 of the CPR.*
>
> *(4) In this rule –*
>
> *(a) 'costs' has the same meaning as in rule 44.1(1)(c) of the CPR; and*
>
> *(b) 'financial remedy proceedings' means proceedings for –*
>
> *(i) a financial order except an order for maintenance pending suit, an order for maintenance pending outcome of proceedings, an interim periodical payments order, an order for payment in respect of legal services or any other form of interim order for the purposes of rule 9.7(1)(a), (b), (c) and (e);*
>
> *(ii) an order under Part 3 of the 1984 Act;*
>
> *(iii) an order under Schedule 7 to the 2004 Act;*
>
> *(iv) an order under section 10(2) of the 1973 Act;*
>
> *(v) an order under section 48(2) of the 2004 Act.*
>
> *(5) Subject to paragraph (6), the general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party.*
>
> *(6) The court may make an order requiring one party to pay the costs of another party at any stage of the proceedings where it considers it appropriate to*

do so because of the conduct of a party in relation to the proceedings before (whether or during them).

(7) In deciding what order (if any) to make under paragraph (6), the court must have regard to –

(a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;

(aa) any failure by a party, without good reason, to—

(i) attend a MIAM (as defined in rule 3.1); or
(ii) attend non-court dispute resolution;

(b) any open offer to settle made by a party;

(c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;

(e) any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and

(f) the financial effect on the parties of any costs order.

(8) No offer to settle which is not an open offer to settle is admissible at any stage of the proceedings, except as provided by rule 9.17.

(9) For the purposes of this rule 'financial remedy proceedings' do not include an application under rule 9.9A."

Practice Direction

9. Practice Direction 30A specifically deals with Respondent's costs on permission applications. It states as follows:

"*4.22*

In most cases, applications for permission to appeal will be determined without the court requesting –

(a) submissions from; or
(b) if there is an oral hearing, attendance by,

the respondent.

4.23

Where the court does not request submissions from or attendance by the respondent, costs will not normally be allowed to a respondent who volunteers submissions or attendance.

4.24

Where the court does request –

(a) submissions from; or

(b) attendance by the respondent,

the court will normally allow the costs of the respondent if permission is refused."

Case Law

10. In *H v W* [2014] EWHC 2846 (Fam), Mrs Justice Eleanor King DBE (as she then was) considered and adopted the reasoning of Wilson LJ (as he then was) in *Judge v Judge* [2008] EWCA Civ 1456 and *Baker v Rowe* [2010] 1 FLR 761. Having done so she stated in relation to the financial remedy appeal then before her:

"*20. The essential feature of the proceedings in the present case is that this is an appeal. Appeals can be made against many different orders and may arise out of many different types of proceedings. Appeals can be launched against a whole range of first instance orders which will have been governed at first instance by any number of rules and procedures. Appeals are a separate category of hearing in respect of which specific rules apply. An appeal is separate from the proceedings the subject of the appeal and is governed by its own rules (here FPR r.30 which, inter alia, gives the appeal court the power to make an order for costs .....).*

21. Respectfully adopting the approach of Wilson LJ in Judge and in Baker , an appeal is in my judgment in connection with and not in financial remedy proceedings and therefore is not subject to FPR r.28.3(5) . Nor is the court bound by the general rule that costs follow the event.

22. It follows that this as this court approaches the exercise of its discretion when deciding what, if any, order for costs it should make it starts with a clean sheet. The success or failure of a party in the appeal whether in whole or in part may not always be determinative but is capable of being a decisive factor in the exercise of that discretion."

My Analysis and Decision

11. At the beginning of the hearing on 28 August 2024, I permitted the Appellant to withdraw his first ground of appeal. However, as I stated at paragraph 50 of the substantive judgment, I determined it necessary to consider a number of examples of bias relied upon by the Appellant in support of ground 1 because they were interwoven with grounds 2 and 3. Having heard argument on those specific examples as well as grounds 2 and 3, I dismissed the appeal. This was a hopeless appeal and one wherein I considered whether I should simply refuse permission to appeal and certify it as being totally without merit or proceed to dismiss it. Because I had heard full argument, I decided to dismiss it.

12. On behalf of the Appellant, it is submitted that the appeal was so evidently hopeless that the Respondent need not have responded. I consider that that is an unattractive argument given the Appellant pursued his appeal with vigour up to and including oral submissions at the appeal hearing. At no point before the appeal was dismissed by me did the Appellant concede that the appeal was hopeless. He did not even withdraw ground 1 on the basis that it lacked merit. Instead, he continued to argue the specific factual examples which were interlinked with grounds 2 and 3.

13. On behalf of the Appellant, the appeal is now rightly characterised as hopeless. My decision has not altered the merits of an appeal but is reactive to its merits. This was always a meritless appeal. Nevertheless, the Appellant chose to pursue that hopeless appeal to the Nth degree.

14. At no point during the appeal process has the Respondent been mandated to file a skeleton argument or attend the appeal hearing. Instead, the court has given direction for any skeleton argument upon which she relies to be filed and served and has provided that she must be given notice of the appeal hearing. The Respondent has engaged with the process. She has filed her skeleton argument as directed and has chosen to attend the hearing before me with Counsel. Given the way the Appellant has pursued the appeal, I consider that her engagement with the process was necessary and proportionate from the moment Mr Justice Keehan set down the appeal for a rolled-up oral hearing.

15. On 16 April 2024, Mr Justice Keehan listed the Appellant's application for permission to appeal for an oral hearing on 23 May 2024 with a time estimate of 1 day. The application was to be on notice to the Respondent with an appeal to follow if permission was granted. The May 2024 hearing did not proceed and was adjourned to 21 June 2024. On 17 June 2024 those instructed on behalf of Mr Mainwaring applied for an adjournment of that hearing because of his professed need to obtain transcripts of the hearing at first instance (note the judgment was available). That application was allowed by consent. That consent order provided for a hearing on 28 August 2024 but also contained a provision for the automatic dismissal of the appeal in the event of the Appellant's non-compliance with the proposed revised timetable for the filing of transcripts, grounds etc. The date for compliance was 17 July 2024. On 24 July 2024

the Appellant made an application for an extension of time. That was 7 days after the date for compliance provided in the earlier order which should have led to the automatic dismissal of this appeal. However, the Appellant's application did not refer to the consent order. In the context of that significant omission, on 25 July 2024 I made my first case management order in this appeal. I gave directions which re-timetabled the appeal but would enable the hearing date in August 2024 to be held. The directions I gave included the direction that the Respondent must file and serve any skeleton argument upon which she sought to rely by a specific date. On 12 August 2024 I made a further directions order to manage the appeal in response to a yet further application on behalf of the Appellant for an extension of time to file transcripts of the hearings. I gave written reasons for the direction I made on that occasion. Within those written reasons I reminded both parties of PD30A r.4.24 and stated this – "*the issue of costs will thus be live and litigation conduct will be one of the issues I will be required to factor into any application for costs*".

16. As to the Appellant's litigation conduct within this appeal, it seems to me that it has been unreasonable in the following ways:

    a. The application of 24 July 2024 was not made on a full and frank basis. It failed to alert the court to the consent order entered when the hearing of 12 June 2024 was adjourned. That consent order was only drawn to this court's attention by the Respondent after this court had made its order of 25 July 2024 on an erroneous basis.

    b. The Appellant failed to follow PD30A paragraphs 5.10, 5.10A(c), 5.10B, 5.11, 5.12 and 5.31, despite a specific order from me that the appeal bundle must comply with 5.10 A-C.

    c. In breach of paragraph 3 of my order of 12 August 2024, the Appellant added to his counsel's skeleton argument two documents, namely a "*Continuation of Skeleton Argument of behalf of the Appellant*" and "*Position Statement of Philip John Mainwaring*",

    d. The Appellant made an application to submit fresh evidence which he submitted was relevant to the outcome of the appeal. However, having allowed that application, only one of the documents was relied upon at all.

    Each of these breaches has added to the costs that have been incurred by the Respondent.

17. On behalf of Mr Mainwaring, I am asked to disregard his litigation conduct or have sympathy for it because he was in effect a litigant in person. I have been troubled by that submission because the Appellant has had both solicitor and counsel representing him before me. Both his counsel and his solicitors have claimed costs on the N260

submitted on his behalf which are not dissimilar to the N260 filed on behalf of the Respondent. In those circumstances, I do not consider that he can be properly described as a self-representing party although I do accept that he took some steps himself within the appeal process to save money.

18. I have reminded myself that the Court of Appeal has held that litigants in person as much as a represented party are required to comply with the procedural rules on appeals. In *Re D (Appeal: Procedure: Evidence)* [2016] 1 FLR 249 at paragraph 40 McFarlane LJ (as he then was) said:

> "*The fact that an applicant for permission to appeal is a litigant in person may cause a judge to spend more time explaining the process and the requirements, but that fact is not, and should not be, a reason for relaxing or ignoring the ordinary procedural structure of an appeal or the requirements of the rules. Indeed, as I have suggested, adherence to the rules should be seen as a benefit to all parties, including litigants in person, rather than an impediment*".

19. In this case on the basis of the above analysis, I consider that (i) the outcome of the appeal and (ii) the litigation conduct of the Appellant are significant and weighty factors which when I place on a "clean sheet" cause me to conclude that the Appellant should pay the Respondent's costs of the appeal. I do not agree that those costs should be limited to those incurred after my order of 25 July 2024. This was always a hopeless appeal. I consider that the proper order in this case is that the Appellant should pay the Respondent's costs of this appeal from the date of Mr Justice Keehan's order, namely 16 April 2024. That order set down the rolled- up permission and appeal for hearing. The Respondent's engagement with the process thereafter was not only reasonable it was necessary and proportionate because of the way in which the Appellant conducted this litigation.

20. I have reminded myself of *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 88 wherein it is stated that:

> "*83. The judge had a wide discretion as to costs but I consider that, in awarding costs on the indemnity basis rather than the standard basis, the judge made an error in principle. The weakness of a legal argument is not without more, justification for an indemnity basis of costs, which is in its nature penal. The position might be different if proceedings or steps take within them are not only based on a plainly hopeless case but are motivate by some ulterior commercial or personal purpose or otherwise for purely tactical reasons unconnected with any real belief in their merit.*
>
> *84. The claimants' arguments on limitation have not been associated with culpable motive or improper purpose or otherwise such as to amount to an abuse […]*"

21. I do not consider that the Appellant's litigation conduct, as I have set out above, was motivated by a personal purpose or undertaken for tactical advantage. Rather I have concluded that the Appellant pursued this hopeless appeal in the manner of a proverbial drowning man. His actions caused the Respondent to incur additional costs, but those costs are addressed by my order that he should pay her costs. The appropriate basis for assessment of those costs is thus, in my judgment, the standard basis.

22. That leads me to my assessment of costs. Both parties ask me to assess costs. When making that assessment I have considered the Appellant's suggested and itemised deductions from the Respondent's costs. In my judgment the items said to be either excessive or unnecessary were reasonably incurred given the way in which the Appellant chose to litigate this case. However, I have already decided that costs should run from 16 April 2024. The application for permission to appeal was issued on 6 March 2024 and the Respondent chose to submit a Response before any court direction. Looking at the cost schedules and assessing costs on a standard basis I have decided that the appropriate award for costs is therefore £16,192.48 inclusive of VAT. That sum is 80% of the costs the Respondent has incurred. In my judgment, such costs were reasonably and necessary once the application for permission with appeal to follow was set down for a rolled up hearing. That sum is proportionate to: (i) the issues raised; and (ii) the manner in which the Appellant litigated this appeal.