Neutral Citation Number: [2021] EWHC 2727 (QB)

Case Nos: QA-2020-000162 and QA-2020-000227

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2021

Before :

MR JUSTICE LANE

- -

Between :

Thomas Banks Hamilton	**Applicant**
- and –	
(1) Secretary of State for Business, Energy and Industrial Strategy	**First Respondent**
(2) Christopher Lucas-Jones	**Second Respondent**

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The applicant appeared in person
Mr Simon Hunter (instructed by **Sheppard & Wedderburn**) for the **first respondent**
Mr Chris Royle (instructed by **Felton's Law**) for the **second respondent**

Hearing date: 6 October 2021

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JUDGMENT ON COSTS

Mr Justice Lane :

1. On 6 October 2021, I handed down judgment in this case: [2021] EWHC 2647 (QB). The procedural background is set out in my judgment. At paragraph 126, I concluded that, whatever the merits or otherwise of the applicant's (Mr Hamilton's) applications, paragraph 2 of Master Cook's order of 22 May 2020 could not stand. The second respondent cannot sell the vessel *MV Samara*. At paragraph 135, having found Mr Hamilton's applications for permission to appeal against Master Cook's order in QA-2020-000227 and his order in QA-2020-000162 to be without arguable merit, I nevertheless granted permission, so as to allow the appeal against paragraph 2 of Master Cook's order of 22 May 2020, replacing it with a declaration that the *MV Samara* became abandoned on 30 April 2020.

2. On 6 October, I considered the written and oral submissions of the parties on the issue of costs. I reserved my decision and now give it in writing.

3. Insofar as relevant, CPR 44.2 (Court's discretion as to costs) provides as follows:-

> "44.2 - (1) The court has discretion as to –
>
> (a) where the costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs –
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> …
>
> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successfully; and
>
> …
>
> (5) The conduct of the parties includes –
>
> …
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

…"

4. Mr Hamilton seeks an order for costs in respect of loss of abode and personal belongings; vessel damage; lower court action (concerning the time expended by him "on the initial process before various Masters", along with "having to pay for Mr Newett's cost orders"); and the cost of the appeals.

5. For the first respondent, Mr Hunter submits that his client has been successful in defeating Mr Hamilton's grounds of appeal, which were dismissed as having no arguable merit. Looked at solely on the basis of the pleaded cases before the High Court, therefore, the first respondent is, Mr Hunter says, successful and should have his costs paid. There is no good reason to disallow those costs.

6. As to who should pay them, Mr Hunter points to the general rule that the unsuccessful party should pay. The first respondent submits that "the more unsuccessful party" is the second respondent. Accordingly, the first respondent's primary position is that his costs should be paid by the second respondent.

7. Mr Hunter submits that the appeal has been allowed, with no small benefit to Mr Hamilton, because the second respondent abandoned the *MV Samara*. Since the second respondent was an expert instructed for the very purpose of realising the value of the asset, the second respondent has "manifestly failed to achieve that, and his failure has caused this appeal to succeed". As between Mr Hamilton and the second respondent, therefore, Mr Hunter submits that it is the latter who has been "the more unsuccessful".

8. Very much as an alternative, the first respondent seeks an order, either that Mr Hamilton and the second respondent jointly and severally pay his costs or that Mr Hamilton pays those costs.

9. Mr Hunter submits that the second respondent is not entitled to recover his costs. As for Mr Hamilton's claim to costs, Mr Hunter contends that the headings "loss of abode and personal belongings" and "vessel damage" are not costs. The remaining headings deal with costs properly so-called. However, Mr Hunter says that, in my judgment, I have not interfered with Master Cook's cost orders below and that there is no reason to do so. The third party application of Mr Newett was properly dismissed on its merits. Insofar as Mr Hamilton's appeal has partially succeeded, this has been despite the work done by Mr Hamilton, not because of it. Mr Hamilton has been successful only "on a technicality not of his own making". To put that as another way, Mr Hamilton "has not won this appeal, [as the second respondent] lost it by abandoning the *MV Samara*".

10. Insofar as the court might see Mr Hamilton as a successful party, Mr Hunter argues that there is a very good reason to depart from the general rule that Mr Hamilton, as the winner, should get his costs, there being "no justice" in ordering other parties to pay for the preparation of unarguable submissions.

11. Mr Royle, for the second respondent, submits that Mr Hamilton should pay the second respondent's costs and that any order sought by the first respondent should not be made against the second respondent. On any view, Mr Hamilton's own grounds were "entirely

unmeritorious". Mr Hamilton's "success" has arisen only by the work of the lawyers acting for the second respondent "in doing the detailed analysis (thus far at no cost to him) on what is, on any view, an unusual point of law". It is Mr Hamilton's grounds of challenge to the decisions of Master Cook that have occupied the rump of the litigation costs in the present proceedings. The second respondent should not be criticised for not selling the *MV Samara* until the date of abandonment. Whilst Master Cook made what has proved to be an erroneous order, there were almost immediate appeals, with the result that the second respondent "can hardly be criticised for dealing with those appeals either, or for failing to sell the MV Samara whilst appeals were pending". Mr Royle points out that, at the hearing before Master Cook on 22 May 2020, the first respondent was represented by counsel. By contrast, the second respondent was not even a party to the proceedings before Master Cook.

12. In conclusion, Mr Royle asserts that the worst that can be said of the second respondent is that he should have foreseen the result of my judgment and released the *MV Samara* earlier; but, given the points of law at stake, Mr Royle invites me not to criticise the second respondent in that respect.

DISCUSSION

13. The commentary at 44.2.13 of the *White Book* 2021, Volume 1, pp 1454-1457 contains a useful synthesis of relevant case law on how to establish which party to litigation has been successful for the purposes of CPR 44.2(2)(a). Sir Thomas Bingham MR in Roache v News Group Newspaper Ltd [1998] E.L.M.R. 161 stated that the judge must look closely at the facts of a particular case and ask: "Who as a matter of substance in reality has won?". In this regard, "success" is to be viewed not as a technical term but as "a result in real life", which requires to be determined with the "exercise of common sense": Bank of Credit and Commerce International SA v Ali (No. 3) [1999] NLJ 1734.

14. Applying this approach, the only party who has emerged from the litigation with any degree of "real life" success is Mr Hamilton. As my judgment makes clear, Mr Hamilton has consistently sought to resist the attempts of the respondents to enforce the debt he owes to the first respondent by selling the *MV Samara*. The result of my judgment is that this cannot happen.

15. I am, however, in no doubt that to apply the general rule, so as to award Mr Hamilton his costs against either or both of the respondents would not result in an outcome that could be described as just.

16. Having regard to all the circumstances, as required by CPR 44.2(4), the following matters are relevant.

17. Mr Hamilton's involvement in the proceedings arose because he supported the contention of Mr Newett that the latter had an interest in the *MV Samara*. That contention was rejected by Master Cook, for reasons which I have found to be unarguably correct. The present proceedings in the High Court, challenging Master Cook's orders, were occasioned by Mr Hamilton's unmeritorious challenges. I agree with the respondents that Mr Hamilton's ultimate success, in the sense I have described, owes nothing to his submissions to this court or to his submissions in the proceedings before Master Cook.

Mr Hamilton has, indeed, succeeded despite those submissions. He has succeeded only because the second respondent, through Mr Royle, identified that the effect of the statutory scheme is such that the *MV Samara* was abandoned on 30 April 2020. For this purpose, it is irrelevant that I found against the second respondent's construction argument.

18. Accordingly, in the exercise of my discretion, I find that it would be wrong to apply the general rule and so I decline to make an order for costs in favour of Mr Hamilton. For completeness, however, I record my agreement with Mr Hunter that loss of abode and personal belongings, and vessel damage are not valid heads of claim for costs.

19. In reaching my view that Mr Hamilton falls, for present purposes, to be regarded as the successful party I have, necessarily, found the respondents to be unsuccessful for those purposes. I take account of that fact in considering whether, in the light of what I have said, either or both of the respondents should recover costs against Mr Hamilton.

20. The respondents have, nevertheless, succeeded in resisting Mr Hamilton's substantive challenges to Master Cook's orders. I take account of that fact also.

21. I do, however, place greater weight on the "real life" result, whereby the first respondent has manifestly failed in his attempt to secure payment of the debt owed to him by Mr Hamilton by obtaining part of the proceeds of sale of the *MV Samara*; and that the second respondent has manifestly failed to bring about that result for the first respondent.

22. Furthermore, the fact that, as I have found, abandonment of the vessel occurred on 30 April 2020 could have been realised by the respondents at that point. I appreciate that, in so finding, there is an element of being wise after the event and I wish to make clear that I intend no personal criticism of any of the lawyers who have, at any stage, been involved in this case. The relevant provisions of the statutory scheme have, nevertheless, been in place at all material times. Accordingly, despite what I have said about Mr Hamilton's conduct, I consider that it would be unjust for him to pay the whole or any part of the respondents' costs. Put bluntly, there has been no point to the proceedings since 30 April 2020 and, unlike Mr Hamilton, the respondents have at all material times had access to advice that could have made this evident.

23. I agree with Mr Royle that there is no legitimate basis for ordering his client to bear the costs of the first respondent. Unlike the second respondent, in the spring of 2020 the first respondent was already a party to the proceedings and was represented by counsel at the hearing before Master Cook. If the actual legal position had been presented to Master Cook at that hearing, he would not have made paragraph 2 of the order and none of the ensuing proceedings would have arisen.

24. In conclusion, for the reasons I have given, in the exercise of my discretion, I find that (i) no order for costs falls to be made in favour of, or against, Mr Hamilton; and (ii) no order for costs falls to be made in favour of the first respondent, against the second respondent. There was, understandably, no submission that the first respondent should pay the costs of the second respondent.

25. I therefore make no order as to costs.