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C1/2015/0979

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, BIRMINGHAM
(MR JUSTICE WILKIE)

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 19 July 2016

B e f o r e:

LORD JUSTICE BEATSON

Between:
THE QUEEN ON THE APPLICATION OF JOHN HEMMING
Applicant

v

BIRMINGHAM CITY COUNCIL
Respondent

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The Applicant appeared in person
The Respondent was not present and was not represented

J U D G M E N T
(Approved)

1. **LORD JUSTICE BEATSON:** This is the renewed application of Mr John Hemming for permission to appeal against the order of Wilkie J dated 11 March 2015 in the Administrative Court in Birmingham. Wilkie J dismissed an appeal by way of case stated dated 2 December 2014 from a decision of District Judge Zara sitting at Birmingham Magistrates' Court on 10 October 2014 and rejected an application on behalf of Mr Hemming to remit the case stated for amendment pursuant to section 28A of the Senior Courts Act 1980.

2. The District Judge had made a costs order in favour of Birmingham City Council, the Defendant in the Magistrates' Court, acting pursuant to his powers under section 64 of the Magistrates' Court Act 1980 (the 1980 Act) after dismissing Mr Hemming's complaints seeking a litter abatement order under section 91(6) of the Environmental Protection Act 1990 (the 1990 Act) against Birmingham City Council.

3. The costs are stated to be in excess of £13,000. It was not altogether clear from the papers how much of this is in respect of the proceedings before the District Judge and how much is in respect of the proceedings before the Administrative Court, but this application does not depend on the amount.

4. The application primarily concerns the costs order and section 91(12) of the 1990 Act. That provides that the court shall order a Defendant to pay such reasonable sum to a complainant if two conditions are satisfied. The first, in sub-section (12)(a), is that:

> "When the complaint was made to it, the highway or land in question was defaced by litter or refuse."

The second, in sub-section (12)(b), is that:

> "There were reasonable grounds for bringing the complaint."

5. It was common ground that Mr Hemming was entitled to a costs order under this provision although his application was dismissed. The reason that the District Judge refused to make the order was that he concluded that the second condition, reasonable grounds for bringing the complaint, was not satisfied.

6. I take the background from the case stated and from Wilkie J's judgment, [2015] EWHC 1472 (Admin). In February 2014 the council decided that it would use its powers under secondary legislation to introduce an annual charge for households for the removal of green waste. Problems arose because many people who had not paid the charge continued to put out green waste and there was a significant accumulation of such waste. To deal with the problem, the council had adopted a policy which it and Wilkie J described as a multifaceted approach. This inter alia involved a principle of not removing the waste until the behaviour had stopped and not removing dumped green waste until the council had been able to identify and take action against the offender.

7. At that time, Mr Hemming was the Member of Parliament for the Birmingham Yardley constituency. In part as a result of complaints by his constituents, he was aggrieved by the accumulating litter and refuse in areas in his constituency and considered that the

litter and refuse was defacing it. He informed the council on 24 April 2014 of the problem of mass fly tipping by those who had not joined the paid for disposal scheme. He identified many locations of waste.

8. On 4 May he gave the council notice pursuant to section 91(5) of the 1990 Act of his intention to make a complaint and to seek a litter abatement order against it under section 91(6) of the Act. During this process, he had identified a large number of further locations of waste. On 7 May the council responded and in an e-mail stated:

> "...as you are aware, the duty on the Local Authority to ensure that land is kept clear of litter and refuse stems from section 89 of the Environmental Protection Act 1990. The duty, however, is only "so far as is practicable" and is not therefore an absolute duty. I am aware that the department has a robust procedure in place for responding to reports of refuse/litter and am assured that these are being adhered to. The department would be willing to meet you to discuss the issue, however, if you feel that this would be beneficial."

9. In an e-mail later that day, Mr Hemming declined the offer of a meeting. He considered that he had been in communication with the council about his concern and was constantly told that they would not clear the waste. He knew about the policy of leaving the accumulations of rubbish. His e-mail stated:

> "I don't need a meeting. What I need is to be told what is being done about the 338 grade D dumps of refuse that I have referred to the Local Authority."

10. Wilkie J regarded parts of Mr Hemming's application to amend the case stated as no more than minor drafting complaints, but he considered that Mr Hemming's desire for an amendment to include two paragraphs recording his submissions that (A) the proposed meeting was irrelevant to the reasonableness of his complaint, as the District Judge had found and (B) that the sites were only cleared as a result of his pursuit of the complaint after a directions hearing which happened in July was of greater substance. I will come to the District Judge's reasons and Wilkie J's decision, but it is important to interpose that the council's explanation of what it intended at the meeting was later provided in a witness statement of Mr Thomas Wallis, the council's director of fleet and waste management. It was filed in the Magistrates' Court. It was summarised by Wilkie J at paragraph 27 of his judgment. For present purposes, it suffices to state that Mr Wallis' uncontested evidence was that had Mr Hemming taken up the offer of the meeting, the council would have explained its multifaceted approach and the reason for its wish not to have undue publicity about matters. It would, in particular, have informed him on a confidential basis that there was to be a blitz to clear the green waste on 17 and 18 May, i.e. within 10 days.

11. Mr Hemming filed his complaint under section 91(6) on 15 May having turned down the meeting and therefore not knowing of the council's intentions about the blitz. The order he sought extended to the whole area of his constituency. The blitz was conducted on the 17th and 18th, but this did not remove all the waste. Mr Hemming

today submitted that the fundamental point was that none of the rubbish on the specified sites was cleared up in the blitz.

12. Because the council contended that the order sought was too wide, there was a directions hearing on 4 July at which Mr Hemming sought to identify the specified sites which had not been cleared by 4 July. At the hearing in October the council did not accept that those sites had not been cleared, but accepted that subsequently waste was on them. Mr Hemming accepted in a statement dated 3 August and an e-mail dated 24 September that by then those sites had been cleared.

13. The District Judge held that an order in the terms sought was too wide and outside the scope of the section. He dismissed Mr Hemming's application. His reasons for accepting the council's submissions on this are set out in paragraphs 3 and 4 of the case stated and dealt with by Wilkie J at paragraphs 34 to 36 of his judgment. It is not necessary to set them out.

14. On the question of costs, in paragraph 6 of the case stated the District Judge stated that he was satisfied that at the time the complaint was made the land in question was defaced by litter or refuse. Mr Hemming thus met the first condition under section 91(12)(a). He continued:

> "However, I was referred to correspondence between [Mr Hemming] and [the Defendant] in which the City Council offered to meet him to discuss its policy of not removing garden refuse. [Mr Hemming] chose not to avail himself of that offer and instead issued proceedings. I concluded that that was unreasonable. I therefore refused to make an order for costs in his favour."

15. The reason that the District Judge made the costs order in favour of the council under section 64 of the Act was (see paragraph 7 of the case stated) that the council had made an open offer to make no claim for costs if proceedings were withdrawn before the directions hearing on 4 July, but that had been ignored. This application does not concern that part of the decision.

16. The two questions posed by the DJ were (1):

> "Was I right to decide that Mr Hemming did not have reasonable grounds for bringing the complaint and that he did not therefore satisfy the test under section 91(12)(B)?"

(2):

> "Was the decision to make an order for costs in favour of the council a lawful exercise of my discretionary powers under section 64 of the Magistrates' Court Act 1980?"

17. At the hearing before Wilkie J it was accepted by counsel for Mr Hemming that absent an amendment to the case stated:

> "it is inevitable that Mr Hemming's appeal would fail on both of the issues posed by the magistrates as questions for answering by this court."

See [2015] EWHC 1472 at 8 and 59.

18. Wilkie J stated at paragraphs 52 to 53 that section 91(12)(a) and (b) are clear in that they focus upon the time when the complaint is made to the Magistrates' Court, in this case 15 May, and sub-section (12)(a) expressly refers to the time when the complaint is made to the Magistrates' Court. It is clear, he stated, from the statutory scheme that the District Judge would have been wrong in law to consider matters which occurred after the complaint had been made when considering whether there were reasonable grounds for bringing the complaint unless there were exceptional circumstances such as evidencing a lack of good faith in something which had happened prior to bringing the complaint.

19. He concluded at paragraph 57 that omitting arguments which were irrelevant to the consideration by the District Judge of whether the second condition in section 91(12) was satisfied did not render the case stated deficient or require it to be sent back for amending.

20. Mr Hemming's application to this court relies on three grounds. The first is that the District Judge and Wilkie J effectively set the threshold for reasonable grounds in the second condition far too high. Mr Hemming relied on the fact that applications under section 91 are supposed to be ones which lay people can make. The costs protection in section 91(12) reflects that.

21. He submitted that the decision that he did not have reasonable grounds for bringing the complaint in the situation where the council had a policy of not collecting the litter was absurd and that the approach of Wilkie J and the District Judge discourages lay people from using the section 91 procedures and holding local authorities to account. In this, he is supported by the Council for the Protection of Rural England in a letter dated 27 June 2015.

22. The focus of his first ground and his submissions today is that it was manifestly wrong to find that he did not have reasonable grounds for bringing the complaint because all his contacts with the council were ones in which he was told they would not remove the rubbish. When they offered him the meeting, they had not stated that they had information to give him about what they were doing. He took it, as he put it this morning, to be a standard political ploy of offering a meeting when you do not intend to do anything and (though he did not use these words) going through the motions.

23. Mr Hemming's second ground is that by dealing with the appeal itself and not only Mr Hemming's application to amend the case stated, Wilkie J deprived Mr Hemming of the opportunity to reconsider the position following a detailed judgment on the application to amend pursuant to section 28A and that was unfair. He explained to me this morning that although his barrister had said that they would concede if there was no amendment, the barrister had not understood that the rubbish was left uncollected as a matter of policy.

24. Had there been a decision on the application to amend, in particular Mr Hemming would have put before Wilkie J at the hearing of the appeal the material on his Aarhus Convention point, which is his third ground of appeal. He maintains that the proceedings were covered by the Aarhus Convention so that his liability for costs should have been limited. He has not had the procedural protection of the Convention and that in itself is an issue of principle and a compelling reason for a second appeal. Mr Hemming's submissions this morning were very clear.

25. As to ground one, the District Judge made an assessment as to the facts and evidence before him. He accepted that at the date of the complaint the sites were defaced by litter and waste. He concluded on the evidence before him, in particular Mr Wallis' contested evidence to which I have referred, that an offer had been made for a meeting and that, had that offer been accepted, the council would have discussed and explained its policy, told Mr Hemming of the blitz, told him why it was to be performed without undue publicity and the date of the blitz. But Mr Hemming refused the offer.

26. In a context in which it had been conceded by Mr Hemming's then counsel that on the face of paragraphs 5 and 6 of the case stated unamplified by any amendment that the substantive appeal would fail, Mr Hemming's argument in his recent statement for permission and oral submissions that the position might have been different because in effect, in delicate terms, he and his counsel may not have been in agreement as to how to proceed, is a point he is entitled to make. But it is difficult to see that Wilkie J, who was not aware of these points but was aware of the fact that counsel had conceded that the substantive appeal would fail on the face of paragraphs 5 and 6 of the case stated if it was not amended, what point there was to proceed.

27. I will deal with whether there is any arguable error in Wilkie J's treatment of the application to amend when I deal with ground two, but assuming for the purposes of ground one that the case stated remained as it was because only events prior to the bringing of the complaint are relevant, in my judgment, this ground does not give rise to an arguable error, let alone an important point of principle or a compelling reason.

28. Mr Hemming may have considered the meeting was irrelevant to the reasonableness of his complaint, but his statement that he did not need a meeting and needed to be told what the council was doing meant that he deprived himself of the opportunity to be told more about the council's policy, the reason for the blitz and the fact that it was to be carried into effect very soon.

29. The question is whether the District Judge stepped outside the wide margin accorded to a judge in assessing reasonableness in instituting proceedings in concluding that Mr Hemming was not reasonable. I am clear that he did not.

30. There is some irony in that while Mr Hemming complains that the council did not put him on notice that they were going to inform him of new information that was different to what he had been told in the communications he had had, it does not appear either in the case stated or Wilkie J's judgment that Wilkie J understood that Mr Hemming considered that the offer of a meeting was in effect a sham. In deciding whether it is reasonable to institute litigation, there is a great emphasis in the modern world on

pre-litigation steps to avoid litigation. The judge's decision that refusing the meeting in these circumstances was not reasonable cannot be criticised.

31. As to ground two, it was not clear until the hearing whether what Mr Hemming wished was an opportunity to reconsider the issue so he could discontinue the proceedings or whether he wished to reconsider it so as to seek some other way of getting the post-15 May material into the case stated.

32. As I have said, he explained this morning that what he wanted to have done would have been to put all the Aarhus material before the judge. There was no indication that the Aarhus material featured at those stages, nor is the material, so far as I can ascertain it from Wilkie J's judgment, that was to form the subject of the amendment to the case stated relevant to the Aarhus Convention.

33. I agree with the reasons given by Elias LJ for refusing permission on the papers. It is clear from the statute that it would not have been proper to amend the stated case to take into account events that occurred after 15 May. The substantive application was only dismissed because Mr Hemming's counsel had conceded that was inevitable once the amendment had been refused.

34. I turn to the final ground, the Aarhus Convention ground, that there should have been a protective costs order to give effect to the provisions and principles in that Convention. This was a point that was not raised before the District Judge. At the hearing this morning, I made efforts to confirm that this was the position from Mr Hemming. Mr Hemming, who as I have said made his submissions clearly and in a straightforward manner, did confirm it.

35. His case is that the protections of the Aarhus Convention should be in place for these cases raising environmental issues. Had he proceeded by judicial review, that protection would have been flagged in the template forms, but that because the Civil Procedure Rules only direct Aarhus consideration for judicial review the forms he correctly filled in in respect of his section 91 complaint did not alert him to this. Accordingly, although he used the procedure that should have been used he had not had the direction that he would have had in judicial review. That is a defect in the system.

36. Mr Hemming, although with some experience in these environmental matters, is a layman. As he pointed out, these proceedings are meant to be used by lay people. The effect of the costs order such as the one imposed on him would be devastating for many and if known about would have a chilling effect on section 91 applications. The Council for the Protection of Rural England also supported this aspect of his application.

37. The authorities have proceeded on a basis that the Aarhus Convention is capable of applying to nuisance claims and statutory applications under the Town and Country Planning Act, although they are not judicial reviews: see Morgan v Hinton Organics [2009] EWCA Civ 107, Austin v Miller Argent (South Wales) [2014] EWCA Civ 1012 and Secretary of State for Communities and Local Government v Venn [2014] EWCA

Civ 1539. These authorities, however, show that in the particular circumstances of Mr Hemming's case, this ground is not arguable.

38. First, the point was not raised before the District Judge. In Morgan v Hinton at paragraph 49 Carnwath LJ, giving the judgment of this court, stated that it was an insuperable objection to an application of the Convention that the point had not been made before the first instance judge. The first instance judge in this case was the District Judge in the Birmingham Magistrates' Court.

39. In Morgan v Hinton the court rejected the submission that it was an obligation on the first instance judge to consider the Convention of his own motion. That is of itself fatal to this ground, but the indications from the other two cases also raise very difficult barriers. In Austin v Miller Argent Elias LJ and Pitchford LJ stated that the court is not obliged to exercise its discretion to grant a protective costs order and the obligation in Article 9(4) of the Convention to provide proceedings that are inter alia not prohibitively expensive is no more than a factor to be taken into account in deciding whether to grant a protective costs order.

40. If one puts that together with the fact that there is no obligation on the first instance judge to consider the Convention of his own motion, it will appear that, even if the matter had been drawn to his attention, it did not follow that in the circumstances of this case an order would necessarily have to have been made.

41. Thirdly, in Venn's case Sullivan LJ, who has considerable experience in environmental cases, pointed to the fact that the scope of the provision in the Civil Procedure Rules and the exclusion of statutory appeals and applications from part 45.41 was a deliberate expression of the legislator's intent and meant it would not be appropriate to exercise a judicial discretion so as to sidestep that limitation, particularly if to do so was for the purpose of giving effect under domestic law to a requirement of an international convention which, while an integral part of the legal order of the European Union, is not directly effective and has not been incorporated into UK domestic law.

42. For those reasons, notwithstanding the clear and attractive way Mr Hemming put his case, I must refuse his application.