Case No: B4 / 2010 / 0419

Neutral Citation Number: [2010] EWCA Civ 747
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
(MR JUSTICE SINGER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 9th June 2010

Before:

LORD JUSTICE THORPE
LORD JUSTICE MOSES
and
LORD JUSTICE RICHARDS

- -

Between:

CONSTANTINOU AND OTHERS

Appellant

- and -

WILMOT-JOSIFE AND OTHERS

Respondent

- -

(DAR Transcript of
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Ms Deborah Bangay QC and Ms Katherine Cook (instructed by Messrs Clifford Harris and Co) appeared on behalf of the **Appellant**.

Mr Charles Howard QC and **Mr Michael Glaser** (instructed by Messrs Burrows) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Thorpe:

1. The parties to this appeal are first the estate of the deceased and second the claimant under the Inheritance Act, the lady with whom the deceased had a long standing relationship and with whom he had children.

2. The issues in contention were decided by District Judge Bowman in a judgment which she gave in November 2009. There were residual issues which were dealt with at a hearing on 11 January. The order that emerged from that hearing contained a recital thus:

> "And upon the parties agreeing that the time estimate for the hearing listed on 9 February 2010 at the Royal Courts be extended to one hour."

3. That recital recognised that the claimant, having failed to persuade the District Judge to grant permission and there being a very live issue as to a stay on the provision ordered to the claimants, the future task of the Family Division judge would be threefold. He would have to decide whether or not to grant permission to appeal, since this is an appeal from a District Judge that, unusually, requires the permission of the appellate Family Division judge. Secondly, he would have to decide the application by the estate for a stay on the substantial provision ordered to the claimant. And third, he would have to give directions in the proceedings. Apparently when an appeal is brought under an order in this territory there is an automatic directions appointment. It does seem to be a questionable practice as it would seem that the first point for consideration should be is there a meritorious appeal. The second point should be, if yes, should there be a stay? And thirdly, if yes, what directions for the future conduct? But the rules provide for an automatic directions appointment with half-hour duration, and prior to the recital the parties had sought the co-operation of the Clerk of the Rules to extend the automatic half-hour directions appointment as much as her listing permitted. She made it plain that she could not give more than one hour, so that is the origin of the recital.

4. The developments between the 11 January and 9 February are significant and highly influential on the outcome of this application.

5. I should perhaps before recording them say that the order ultimately made by Singer J was the subject of a permission application to this court which was considered by Wall LJ, who directed that the application should be listed on notice with appeal to follow and it is that hearing that we conduct.

6. But to return to the history, on 5 February, the estate through Ms Bangay QC and Ms Cook, filed a skeleton position statement which extended to some 52 pages and which at the outset made it plain (paragraph 1.7) that the automatic directions hearing had been extended to accommodate additionally the estate's applications for permission to appeal and a stay. In paragraph 2.2 the authors of the skeleton set a stiff task for the judge, a reading list which would have

taken even a swift reading judge several hours to consume. There was also correspondence between solicitors. There is an issue as to the extent to which the parties had been *ad idem* on 11 January that: a) the listing on 9 February would comprehend all three issues; and b) that that could be achieved in one hour. Ms Bangay, who today represents the estate, has said that the transcript of the judgment of the District Judge on 11 January made plain that the parties were, through Mr Glaser, junior counsel for the claimant, accepting that future programme, but it does not seem to me that the transcribed words of either Mr Glaser or the judge substantiate that, and it does seem that the impetus on 11 January to determine all three issues on 9 February came principally from the estate.

7. Furthermore, the solicitors' correspondence demonstrates that on 31 January the claimants were throwing into real question what was achievable on 9 February, given the slender time allowance. A highly significant response from the estate, in a letter dated 5 February, was that all three issues would be addressed on 9 February and that the one hour allowed would be sufficient for the purpose. The reply from the claimants was in that event they would have to brief leading counsel and they would be requiring additional bundles to ensure that both leading and junior counsel were equipped for the determination of what were of course the crucial issues of permission and stay.

8. Ms Bangay for the estate helpfully sent over to the court at 11am on the eve, namely 8 February, a much reduced positions statement in which the judge's reading list was confined to some 200 pages, taking both volume 1 and the correspondence, but which, however, indicated to the judge that received it that that reading was in preparation for the determination of all three issues. It seems that all this came into the list of Singer J, who was applications judge for the week, and he, making conscientious preparation for his task on the 9th, was dismayed and considerably angered by the expectation of the applicant/appellant that so much preparation should be done in the judge's own time and that such substantial issues should be expected to be disposed of in one hour, including not only submissions from both sides but also judgment time. He, accordingly, telephoned both leading counsel and made it absolutely plain that the task was completely unrealistic and that they would simply be put back last in the list in the applications court and would have to discuss between themselves what could be salvaged to solve the problem presented by an impossible management programme that seemed to have developed in the preceding four weeks.

9. On the day, the judge again made it plain to the parties that he could give them no more than the hour allocated and they in vain searched to see if another judge might be available. So it was agreed that the parties would use the morning to discuss future management and that the judge would be available for them to determine any manageable issues that they could not agree.

10. The parties returned to the judge at 1.20 during the lunch adjournment and explained where they then stood. They were finally before him somewhere after 3 pm when Ms Bangay assured him that all was agreed except a very minor issue as to whether the appeal, assuming an intervening grant of

permission, would be listed in October or November. The judge decided in Ms Bangay's favour and set the potential appeal hearing for 8 November.

11. We have a transcript of the hearing that afternoon which runs to some 25 pages. Given the introduction, why was it so extensive? We can see the judge throughout taking considerable pains to ensure that there was realistic management of the course ahead. He explored in detail what judicial time was really required for the determination on permission and stay, including pre-reading time for the judge, and that resulted in the judge identifying two days as being required in July. The question of what time would be needed for the potential appeal, if permission were granted, was equally carefully explored by the judge and he decided that four or five days would be necessary, including judicial reading time.

12. The parties had laid before the judge for his consideration a draft order and the judge went through the various paragraphs. We can see that, as the judge approached the final paragraphs of the draft order, he said at the foot of page 17 of the transcript:

> "MR JUSTICE SINGER: Right… Costs?
>
> MISS BANGAY: My Lord, as I understand it, we had agreed costs reserved.
>
> MR HOWARD: Well, my Lord, whether it is today or on 7 and 8 July, I do want to apply for the costs thrown away of today because we did say in correspondence twice that this was a plainly inadequate time estimate and that the proposed appellants pressed on.
>
> MR JUSTICE SINGER: Pause. Who is going to be able to deal with this Ms Bangay, me or the judge, if you ever get to it, on 7/8 July."

13. Ms Bangay suggested the judge on the 7th and Singer J disagreed. He then heard lengthy submissions from Ms Bangay, at the conclusion of which he perhaps unwisely said at page 21 :

> "I am sorry, Ms Bangay. None of this makes any sense in terms of the realities of court listing, which is becoming quite intolerable. So my decision is that the appellants will pay half the costs of today in any event on a standard basis…"

14. He announced that conclusion without having heard Mr Howard, who then got to his feet and made a number of telling points, at the end of which the judge said that he had revised his earlier view and that the costs of that day should be paid by the appellants in full in any event, on the standard basis.

15. He concluded by determining an application by Mr Howard for an interim payment, with a figure fixed at £17,500; that on a costs bill produced by Mr Howard at nearly £27,000. The judge finally said that it was only an interim payment; that he was not making any assessment himself; he had not quantified the actual amount; and that the quantification of the costs thrown away should be adjourned to a costs judge. Further, if the costs judge made that assessment at less than £17,500 then there would be a credit or a reimbursement to the estate.

16. Wall LJ, in ordering this hearing, identified that the judge was possibly vulnerable in that he maybe had not afforded adequate recognition to the fact that the applicants had little choice as to timing or therefore listing; that the parties had agreed in correspondence that the appointment should be used for dealing with the question of stay; that there was no sufficient explanation for the judge's communicating privately with counsel on the eve; the judge had not given perhaps sufficient weight to the agreement that costs would be reserved; there was perhaps no sufficient explanation as to why the judge should move from one-half to the whole of the respondent's costs; and the judge had not sufficiently explained his acceptance of the quantum.

17. All those doubts in the mind of Wall LJ have for me been fully answered by the profounder investigation that this on notice hearing has allowed. I do have misgivings as to the wisdom of the judge telephoning both leading counsel on the eve to express his profound disquiet and irritation at the way the parties were treating the court. It seems to me that that is not good practice because there is no record of the exchange and it would clearly have been preferable for the judge to have sent an identical e-mail to each of the leaders explaining what were his misgivings and what were his preliminary directions for the conduct of the hearing the next day.

18. The investigation that we have conducted demonstrates how the one-hour time estimate emerged and how each of the parties manoeuvred to gain what one or other wanted to achieve within that span. The agreement in correspondence to the effect that the appointment should be used for dealing only with the question of stay has been demonstrated to be no agreement at all. There was a disagreement. Each took a polarised position. The apparent agreement was just that, an apparent agreement, and even if it had been an agreement it clearly could not limit the judge's freedom and responsibility to impose some other provision, particularly given that the parties were only agreeing a reservation to another judge. The movement from one-half to a whole of the respondent's costs is easily explained in that the movement was impelled by Mr Howard's submissions. As to quantum, given that he was not making a summary assessment but only dictating an interim payment, perhaps little reasoning was required. So what Ms Bangay has really emphasised this morning, which was perhaps not so clear to Wall LJ, is that she asserts a fundamental injustice, a fundamental lack of impartiality, a judge who was hell-bent on punishing the applicant and, nothing in the way of submission would divert him from a covert intention to punish them with costs at the end of the day.

19. Ms Bangay says that the atmosphere was unique in her long experience, even if it is not captured on the transcript. That is a point that can always be made in an appellate court, but if this bold submission had any prospect of success there had to be something in the transcribed words to substantiate the very serious charge. All I see in a reading of the transcript is the judge going about his objective in a full, careful and rational way, his objective being to make the best he could out of the attendance of the parties by leading and junior counsel at considerable expense to the clients. His case management of the further stages that were compelled by the inadequate time estimate seems to me to have been conducted in a thorough, balanced and judicial way. So, whilst I respect Ms Bangay's experience, it would be impossible to uphold that submission without substantiation beyond her subjective impression. As to the merits of the judge's determination, the answer is already plain from the chronology. It is not clear that responsibility for listing the three issues for 9 February within a one-hour time estimate was a shared responsibility. It is quite plain that it was the estate that wanted the permission application listed and heard. It was the estate that wanted the stay on the District Judge's order. We can see from subsequent correspondence that it was the claimants who were questioning the practicality, the reality, of cramming so much into so little time. The response from the estate by the letter of 5 February and by Ms Bangay's position statement of the 8 February demonstrates quite clearly that it was the estate which bore the responsibility for the pressurised hearing and for the briefing of Mr Howard on behalf of the claimants.

20. So in my judgment it would quite impossible to say that Singer J's ultimate conclusion that the estate should bear all the costs thrown away exceeded the very generous ambit of discretion. His quantification of the interim payment does seem at first blush, and perhaps beyond, as on the high side, if not excessive, but I would not interfere in that very limited sphere, given that it is a pure cashflow point. Obviously the cost to the estate will ultimately be set by the costs judge, who will be looking only at costs thrown away, and it seems to me obvious that the sensible course for the estate to pursue is to push for that assessment, something which presumably they could have done in the interim.

21. So for all those reasons I would dismiss the application for permission.

Lord Justice Moses:

22. So would I.

Lord Justice Richards:

23. I also agree.

Order: Application refused