Neutral Citation Number:

Case No: CO/3213/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 June 2020

Before :

HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THIS COURT

Between :

R (on the application on Bertoncini)	**Claimant**
- and -	
London Borough of Hammersmith and Fulham	**Defendant**
-and-	
Kendall Massey	**Interested Party**

Jacqueline Lean (instructed by Richard Buxton Solicitors) for the Claimant
George Mackenzie (instructed by Hammersmith & Fulham Council legal Services) for the Defendant
Stephen Whale (instructed by Harwood LLP) for the Interested Party

Hearing dates: 15 January 2020

Approved Judgment

His Honour Judge Bird :

1. On 2 December 2019, Waksman J refused permission on paper for the Claimant to proceed with a judicial review application. He determined that the claim was an Aarhus convention claim and increased the default cap on costs the Claimant would pay from £5,000 to £20,000 in total. He ordered that the Claimant pay the Defendant's costs assessed in the sum of £4,991 and the interested party's costs assessed in the sum of £10,000.

2. The Defendant had argued in its summary grounds for contesting the application that the cap should be increased to £10,000. The interested party had argued that the costs cap be increased to £20,000.

3. The parties proceed on the basis that Waksman J's order was made on the application of the Interested party. A point of jurisdiction has arisen, namely, does an interested party have standing to apply for a variation to the Aarhus cap? I am asked to reconsider the order made by Waksman J.

The Rules

4. Part VII of CPR 45 deals with costs limits in Aarhus convention claims.

5. CPR 45.43 imposes a cap on the costs that a Claimant or Defendant in Aarhus proceedings may be ordered to pay. In the present case, because the Claimant was an individual, the cap was £5,000:

> 45.43
>
> (1) Subject to rules 45.42 and 45.45, a claimant or defendant in an Aarhus Convention claim may not be ordered to pay costs exceeding the amounts in paragraph (2) or (3) or as varied in accordance with rule 45.44.
>
> (2) For a claimant the amount is—
>
> (a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;
>
> (b) £10,000 in all other cases.
>
> (3) For a defendant the amount is £35,000.
>
> (4) In an Aarhus Convention claim with multiple claimants or multiple defendants, the amounts in paragraphs (2) and (3) (subject to any direction of the court under rule 45.44) apply in relation to each such claimant or defendant individually and may not be exceeded, irrespective of the number of receiving parties.
> Varying the limit on costs recoverable from a party in an Aarhus Convention claim

6. CPR 45.44 gives the court power to vary the costs cap. CPR 45.44(1) and (2) set out a general power to vary the cap if an application is made in accordance with CPR 45.44(5) to (7).

> 45.44
>
> (1) The court may vary the amounts in rule 45.43 or may remove altogether the limits on the maximum costs liability of any party in an Aarhus Convention claim.

(2) The court may vary such an amount or remove such a limit only on an application made in accordance with paragraphs (5) to (7) ("an application to vary") and if satisfied that—

(a) to do so would not make the costs of the proceedings prohibitively expensive for the claimant; and

(b) in the case of a variation which would reduce a claimant's maximum costs liability or increase that of a defendant, without the variation the costs of the proceedings would be prohibitively expensive for the claimant.

7. CPR 45.44(5) and 45.5(7) (CPR 45.5(6) deals only with timing) follow a similar format. Each imposes certain requirements on an application, if the application is made by a Claimant or a Defendant.

(5) Subject to paragraph (6), an application to vary must—

(a) if made by the claimant, be made in the claim form and provide the claimant's reasons why, if the variation were not made, the costs of the proceedings would be prohibitively expensive for the claimant;

(b) if made by the defendant, be made in the acknowledgment of service and provide the defendant's reasons why, if the variation were made, the costs of the proceedings would not be prohibitively expensive for the claimant; and

(c) be determined by the court at the earliest opportunity.

(6).....

(7) An application under paragraph (6) must—

(a) if made by the claimant—

(i) be accompanied by a revised schedule of the claimant's financial resources or confirmation that the claimant's financial resources have not changed; and

(ii) provide reasons why the proceedings would now be prohibitively expensive for the claimant if the variation were not made; and

(b) if made by the defendant, provide reasons why the proceedings would now not be prohibitively expensive for the claimant if the variation were made.

8. These rules represent the fulfilment of the United Kingdom's obligations under the Aarhus Convention (see Art.9 of the Aarhus Convention) to ensure that a Claimant who brings an Aarhus claim "has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority…".

9. In *Campaign to Protect Rural England v the Secretary of state for Communities and Local Government and others* [2019] EWCA Civ 1230, Coulson LJ (dealing with a different point, namely whether the costs of an interested party were covered by the cap) said:

> "47. I am in no doubt that the absence of any express reference to interested parties in CPR Part 45 is of no consequence. It was probably deemed unnecessary by the draftsmen to refer to 'and/or interested parties' after the reference to 'defendant' every time the latter was mentioned. But in any event the omission makes no difference to the application of the Aarhus cap. That is because, as Ms Lean pointed out, r.45.4.3 limits the costs exposure to the claimant; it is the claimant who "may not be ordered to pay more than..." It does not spell out to whom the claimant might be paying the costs up to the limit of the cap. The obvious answer is: any defendant or interested party who is otherwise entitled to their costs."

10. There is then no doubt that an interested party will be subject to the Aarhus costs cap. Once that is accepted, it seems to me that it would be unjust (and contrary to principle) if the interested party had no standing to ask the court to vary that cap. I can see nothing in CPR 45 (which should be read in context and interpreted to give effect to the overriding objective of dealing with matters justly – see CPR 1.2(b)) that could lead to the conclusion that an interested party has no right to apply to the court to vary the Aarhus cap. The rules explain the requirements to be met if an application to vary is made by a Claimant or a Defendant. The absence of any express requirements in respect of an application by an interested party should not be read as a ban on all applications by interested parties.

11. It follows that Waksman J clearly had the power to deal with the interested party's application. He set out his reasons for making the order at paragraph 2 under the heading "costs". I am asked to consider the variation afresh.

12. The Claimant argues that an increase in the cap to £10,000 would be appropriate. The Interested Party argues for the maintenance of the £20,000 ordered by Waksman J.

13. The Court's discretion is set out at CPR 45.44. To vary the cap at all (whether as requested by the Interested party or suggested by the Claimant) the rules require I must be satisfied that the variation would not make the costs of the proceedings prohibitively expensive for the Claimant and (if the variation sought is a downward variation) that without the variation, the costs of the proceedings would be prohibitively expensive for the Claimant.

14. There is no application to vary the figure down. The only question then is whether an order that the cap be increased to £20,000 would make the costs of the proceedings prohibitively expensive for the Claimant. The Claimant's position seems to me be that it would, but that a costs order of £10,000 would not.

15. It seems to me, approaching the question afresh that there is no real basis on which I should reach a different conclusion to that reached by Waksman J. I am satisfied that an increase in the cap to £20,000 would not render the proceedings prohibitively expensive for all the reasons he gave.

16. I therefore vary the cap to £20,000.

Quantification of costs

17. I am invited to re-consider the quantification of costs. Awarded by Waksman J.

18. The costs payable to the Defendant of £4,991 were based on a schedule of costs submitted in that sum. The schedule is based on the guideline hourly rates last reviewed in 2009 although most recently dated 2014. It is a fair assumption that the guideline hourly rates (now more than 10 years old) represent, if anything at all, a low starting point. The total of the Defendant's claim for costs represents 18 hours of work by fee earners of various grades and

£1,625 in counsel's fees.

19. I am entirely satisfied that such costs are reasonable in amount, were reasonably incurred and are entirely proportionate. I can see no reason therefore to vary the order of Waksman in respect of the Defendant's costs.

20. The Interested Party's costs are set out in the statement of costs in the total sum of £14,068.68. Waksman J assessed those costs in the sum of £10,000. Starting afresh as I must, it is striking that the vast majority of the work charged for was done by a partner at the hourly rate of £540 plus VAT.

21. In my view the 15 hours or so charged for is in the most part broadly reasonable. I would reduce it to 14 hours to remove the 0.8 hours charged for considering rules on service. Generally speaking, basic research of that kind should not in my view be recoverable. Of the 14 hours I think it reasonable to allow 4 hours at £540 and 10 hours at £400. That gives a total of £6,160 (£4,000 + £2,160).

22. Dealing with disbursements I am satisfied that counsel's fees of £2,800 are reasonable and I am also satisfied that it is reasonable for the Interested Party to have engaged an expert to consider the Claimant's engineer's report. I am satisfied that £1,031.90 is a reasonable sum to pay for that report.

23. I am also satisfied that the disbursements claimed and solicitor's charges are proportionate.

24. The total sum is therefore £9,991 which I propose to round up to £10,000.

25. Waksman J's figure of £10,000 was inclusive of VAT. VAT is to be added to my figure.

26. I am further satisfied that the Interested Party should have costs. A refusal to award costs to the party (as is suggested by the Claimant in the renewal grounds) would disincentivise participation on planning proceedings of this kind. The voice of the interested party is in my view an important one.