

JERSEY / JUDGMENT

W -v- JFSC [2017] JRC 020 (26 January 2017)

[2017] JRC 020

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

judgment

the master:

Introduction

1. This judgment represents my detailed reasons for my decision on costs following on from my substantive decision in this matter reported at W-v-JFSC

[2016] JRC 231A . The parties' contentions 2. Advocate Sinel for the appellant argued this was a case where indemnity costs should be ordered. In arguing for indemnity costs he accepted that some special or unusual picture was required to justify indemnity costs (see the discussion in *The Federal Republic of Brazil & Anor v Durant & Ors*

[2013] (1) JLR 103 at paragraph 21). 3. The special or unusual feature he argued in this case was that the attitude of the respondent to the appellant's application was "high handed". He indicated that the appellant had been complaining about the inadequacy of the respondent's reasons since the first notice of appeal, which notice describe the respondent's findings as incomplete and/or unbalanced and/or inaccurate and/or vague and/or unparticularised. The respondent, as a statutory body, was under a duty to explain its decisions, as had been found in the substantive judgment, and had not done so. Its approach was partisan because it had refused all requests to explain its decisions. Instead, it treated the appeal as adversarial. Without proper reasons the appellant could not prepare for its appeal. The law as set out in the judgment was clear and the respondent should have complied with the requests but did not. The respondent, according to Advocate Sinel, had therefore behaved unreasonably. While it was a public body, and he therefore accepted this was a factor to be taken into account in the exercise of discretion (see paragraph 22 of *Volaw Trust and Corporate Services Limited v Controller of Taxes*

[2013] (2) JLR 203), the respondent was spending public resources. The expenditure would have been less if they had responded to the requests for the reasons which the substantive judgment had found should have been provided. 4. In relation to the arguments advanced by Advocate Lacey, recorded at paragraph 39 of the substantive judgment, these had either been rejected, were misguided or were irrelevant in the vast majority of cases. The respondent also lost on the argument that there was no power vested in the Court to

require it to give reasons at this stage. 5. The main thrust of the argument had been whether or not the reasons given by the respondent were adequate. Largely speaking in respect of the substantive judgment the appellant had been successful. The matters the respondent had to advance were explanations that he described as "fairly basic"; in other words the respondent should have known of its obligations to provide these

reasons.

By refusing to do so the respondent had not acted lawfully and had contravened basic principles of fairness. 6. In relation to ordering indemnity costs, while his client was an individual, Advocate Sinel did not advance a case that a failure to provide his client would cause his client undue or severe hardship. He accepted that such hardship would be required to be shown to be a factor to be taken into account in deciding what form of costs order to make. 7. Advocate Lacey in response firstly pointed out that the respondent had bent over backwards to accommodate difficulties the appellant had faced in particular due to the appellant's illness. This did not sit with the criticisms of a high handed approach. 8. The decision was also three years old and the application was made late in the day. It could have been made much earlier and before the appellant's illness began in March 2015. 9. The appellant's summons contained 51 paragraphs, the majority of which applications were refused. Only 12 out of 33 of the requests for better reasons were granted and the appellant was unsuccessful, save in respect of one request, in its applications for discovery and to issue a subpoena. 10. The respondent genuinely believed that it could not give new reasons and, although it would attempt to file such further affidavit evidence as it could in respondent to the judgment, its role was not to add reasons that had not formed part of its original decision. The respondent's position therefore was that it had behaved reasonably and properly. This led to the conclusion that the right order to make in these circumstances was no order as to costs. In the alternative the Court could either make an order of costs in the cause of the appeal or leave the matter for the Royal Court to determine. 11. Advocate Sinel in reply contended that any application for better reasons would have been resisted. The timing of the application did not therefore matter. There were a serious number of points that the respondent had to address as summarised at paragraph 121 of the substantive judgment. These were key for the appellant. While therefore the appellant had lost its discovery applications for the most part, what the respondent was required to produce would provide or identify documentation relied upon which was material to the appellant's preparation of his appeal. The respondent had acted unfairly in refusing reasons and had taken an adversarial approach which justified the costs order sought. The respondent should have addressed the appellant's concerns. The fact it was a public body did not make it immune from any costs order. The position was as set out in Volaw at paragraph 22. There was no starting point that no award of costs should be made against a public body. Decision 12. There was no disagreement between the parties on the applicable legal principles as to the discretion vested in me to award costs or when costs might be relevant on an indemnity basis by reference to the cases noted above. Rather the disagreement related to the application of those principles. 13. Ultimately, it was accepted the approach set out in Volaw

- [2013] JLR 203 at paragraphs 18 to 22 is the one I should adopt. 14. In relation to the question of the effect of financial prejudice, this was addressed by Stanley Burnton LJ's judgment *Regina (Perinpanathan) v City of Westminster Magistrates Court & Anor*
- [2010] EWCA Civ 40 at paragraph 41 where he stated as follows:- "41. Lord Bingham LCJ stated that financial prejudice to the private party may justify an order for costs in his favour. I think it clear that the financial prejudice necessarily involved in litigation would not normally justify an order. If that were not so, an order would be made in every case in which the successful private party incurred legal costs. Lord Bingham LCJ had in mind a case in which the successful private party would suffer substantial hardship if no order for costs was made in his favour. I respectfully agree with what Toulson J (with whom Richards LJ agreed) said in *R (Cambridge City Council) v Alex Nestling Ltd*: 12. As to the financial loss suffered by the successful appellant, a successful appellant who has to bear his own costs will necessarily be out of pocket, and that is the reason in ordinary civil litigation for the principle that costs follow the event. But that principle does not apply in this type of case. When Lord Bingham referred to the need to consider the financial prejudice to a particular complainant in the particular circumstances, he was not in implying that an award for costs should routinely follow in favour of a successful appellant; quite to the contrary." 15. In this case, the appellant has not sought to argue that he would suffer substantial hardship if a costs order was not made in his favour. 16. The first conclusion I reached in this case is that I was not satisfied that the appellant had persuaded me that there was some special or unusual feature which justified indemnity costs being awarded against the respondent. This is for the following reasons. 17. Firstly, the main thrust of the argument concerned the adequacy of the reasons given by the respondent. In my judgment, this was a hard fought argument on both sides. Although this is an administrative appeal the approach of both parties was one that I would describe as adversarial. However, the fact that it was adversarial and hard fought does not justify indemnity costs. 18. Secondly, I was not satisfied that the approach of the respondent was high handed. The respondent had concluded that it had provided all the reasons it could and that its reasons were clear. While I have reached a different conclusion, the fact that the respondent advanced the arguments it did, does not take its conduct into an area which justifies indemnity costs. 19. However, my conclusion on indemnity costs does not mean that some form of costs order should not be made in favour the appellant. I say that because I do not accept the argument that the respondent had no choice but to fight the request for reasons. The respondent is a public body funded by subscriptions from those that operate within the financial services industry. As a public body, it has a duty to evaluate whether or not it should spend the resources it has received from subscriptions on litigation. 20. In some circumstances the respondent will have no choice but to appear before the Court. Indeed, in the present case in relation to the applications to amend, the discovery application and the subpoena, the respondent had legitimate concerns which it would have had to draw to the Court's attention because of its obligations of confidentiality and restrictions placed upon it as to how it can use information. I add in this case that the

respondent was also successful in relation to resisting the discovery applications and the request for a subpoena and those matters that should also be taken into account in deciding what costs order to make. 21. The fact however the respondent in some cases has no choice to appear does not mean that every application made against it must be resisted and must be fought. The respondent always has a choice as to whether or not to accede to an application in whole or in part. 22. In relation to the request to provide reasons, as set out in the substantive judgment, at paragraph 60 the purpose of providing reasons is so an appellant can formulate any evidence relied upon on its submissions as to why a public body has acted unreasonably. Of course, care should be taken, as noted at paragraph 64 of the judgment, to ensure that requests for reasons are not a device being used to attack the adequacy of reasons already given. This possibility does not mean however that the respondent should not consider requests for better reasons and review whether or not it should agree to give greater detail as to the reasons for its decision if the criticisms advanced are justifiable having regard to the applicable principles referred to in the substantive judgment. 23. Turning now to the specific findings in respect of the respect for reasons, in my view it is not right in this case to take a quantitative approach to consider how many paragraphs of the summons were ordered to or refused in this case in relation to the request for reasons. Rather I would prefer to take a qualitative approach and look at the extent of the information the respondent was ordered to provide by the substantive judgment. In my judgment the matters the respondent was ordered to provide, summarised at paragraph 121, form a significant part of the issues in this appeal. I have also concluded that in relation to the request for reasons, the appellant, although not succeeding in respect of every request, was generally successful and in the round prevailed in the majority of its arguments. In particular I generally accepted the appellant's submissions on the applicable legal principles and the fact that I could require reasons or more detailed reasons to be given. I also found that no reasons had been given at all in respect of the decision to issue a public statement and in respect of certain findings that the appellant lacked both competence and integrity. I also found that any breaches of the codes of practice by the trust company concerned should be identified as well as any parts of any reports provided by the Executive. These are important matters. 24. Against that, the appellant was unsuccessful in its discovery applications which as I noted at paragraph 140 of the substantive judgment were an attempt to reformulate requests that had been previously been rejected or not pursued. The request for a subpoena was flawed in a number of respects. The concern of the respondent about the purpose of the application to amend the notice of appeal was a legitimate concern that it was entirely appropriate for the respondent to raise even though I generally allowed the applications to apart from in one respect. 25. Standing back, the decision I made in respect of costs therefore was that the appellant should recover 50% of its costs on the standard basis, such costs to be taxed if not agreed. While Advocate Sinel offered a discount of one third in respect of indemnity costs, I did not regard this discount as sufficient to reflect the areas where the respondent had been successful and/or where it was appropriate for the respondent to raise matters of concern. Accordingly, these

matters were appropriate factors to justify a reduction of a costs order in the appellant's favour even though the appellant had been primarily successful in respect of its application for better reasons. 26. I did not regard it appropriate to refer the matter to the trial judge given that I had determined the application and was best placed to assess where the justice of the outcome of application lay. 27. I also did not regard it appropriate to make an order of costs in the cause because even though the appellant had generally prevailed on this application, it might not prevail on its appeal. I did not regard it as a just outcome that the appellant would have succeeded on this application yet not recovered its costs because it lost the substantive appeal. In my judgment the two issues were sufficiently separate for a costs order to be made at this stage. Authorities W-v-JFSC

[2016] JRC 231A . The Federal Republic of Brazil & Anor v Durant & Ors

[2013] (1) JLR 103. Volaw Trust and Corporate Services Limited v Controller of Taxes

[2013] (2) JLR 203. Regina (Perinpanathan) v City of Westminster Magistrates Court & Anor

[2010] EWCA Civ 40 . Page Last Updated: 02 Feb 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2017/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/w-v-jfsc-2017-jrc-020-26-january-2017>

Prepared on 22 October 2026 · Esheria