

Neutral Citation Number: [2014] EWHC 588 (Admin)

Case No: CO/290/2012

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

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 19 February 2014

BEFORE:

MR JUSTICE LEWIS

BETWEEN:

THE QUEEN (ON THE APPLICATION OF NICK BROWN) Applicant/Claimant
- and -

CANAL & RIVER TRUST

Respondent/Defendant

MR M WESTGATE QC & MR C JOHNSON (instructed by Community Law Partnership) appeared on behalf of the Claimant

MR C STONER QC & MR I STEELE (instructed by Bates Wells Braithwaite) appeared on behalf of the Defendant

Approved Judgment
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1. MR JUSTICE LEWIS: There is before me, in effect, an application to discontinue a claim for judicial review and, if that application is granted, consequential applications for costs.
2. Very briefly, the position concerns a claim for judicial review brought by Nick Brown, who has sought to challenge guidance issued in 2011 by the successor body to the British Waterways Board. There was a very lengthy and quite complex claim form issued by Mr Brown, who was acting in person at that stage. Permission was refused on the papers by Eder J and costs for the acknowledgement of service in the sum of £15,000 were ordered. Unusually, Cox J gave a reserved judgment on the permission issue and she, too, dismissed the application.
3. Undaunted, Mr Brown continued his voyage to the Court of Appeal. There he ran aground in front of Pitchford LJ on the papers because Pitchford LJ refused him permission to appeal. However, he renewed his application. He appeared in person and he persuaded Jackson LJ that there was an issue on which permission should be granted, namely whether the 2011 guidance complied with section 17(3)(c)(ii) of the British Waterways Act 1995. The matter was then prepared for a substantive judicial review hearing and that began this morning.
4. Shortly before the hearing, Mr Brown obtained legal aid and has been represented by Mr Westgate QC this morning. Mr Stoner QC, together with Mr Steele, appears on behalf of the Canal & River Trust.
5. During the course of argument, I raised with Mr Westgate what appeared to me to be a particular problem. Courts are constantly reminded of the undesirability of deciding issues in the absence of a proper factual context. It is often very difficult to take an abstract statement of principle in a guidance document and measure that against a statute and give a meaningful judgment. The way the common law works, largely, is to look at the facts of the particular case and in that context to give the necessary rulings on points of law and, if necessary, to consider guidance on whether the guidance is lawful. There are a number of cases such as Gillick [1986] A.C. 112 and also R(Burke) v The General Medical Council [2006] Q.B. 273 where the House of Lords and the Court of Appeal have warned against courts being too ready to consider questions in the abstract and have emphasised the importance of having a proper factual matrix in which to consider questions.
6. I was concerned that Mr Brown in his witness statement had told me very, very little about the factual circumstances in which his boat came to be in the area in which it is. I had very little by way of factual information about the journeys that Mr Brown had made in the boat or the purposes of those journeys. The boat is at present, I understand, undergoing maintenance or restoration. In light of that, whilst the issues raised may well be interesting and one can look at the guidance and measure the black letter words against the black letter words of the statute, it did seem to me that very little purpose would be served by this hearing as it would not ultimately resolve any concrete issues. Mr Westgate very sensibly took instructions over the lunch hour and in the light of that made an application to discontinue.
7. Mr Stoner for the Canal & River Trust opposed that application. He said his clients firstly were, as I fully accept, a responsible public body and would wish to have

meaningful, preferably authoritative, guidance from the court as to the meaning of the relevant statute because it, as a responsible public body, wishes to discharge its functions properly and lawfully. I commend it for that stance and I understand its position. There is also frustration at the amount of time and public money that would have been spent on these proceedings if they are aborted. Again, I have sympathy with that.

8. However, the fact of the matter is that in my judgment it is very unlikely that any guidance I could give would be of any value or would be meaningful in the absence of a factual context in which to assess the problem. So, in all those circumstances, I will grant permission to withdraw this claim.
9. The next question is costs. I will divide that into the following three parts. Firstly, there are the costs of the acknowledgement of service. As Mr Westgate said, that is dealt with in Civil Procedure Rule 44.13 and that provides that:

“(1) Where the court makes an order which does not mention costs ... (2) [and it grants] (b) an order granting permission to apply for judicial review ... [the order] will be deemed to include an order for applicant’s costs in the case.”
10. Where Jackson LJ granted permission, his order was silent on costs. Applying Civil Procedure Rule 44.13, it is therefore deemed to include an order for the applicant’s costs in the case. That means that Mr Brown would have been able to proceed after the grant of permission in the belief that he was no longer going to face any prospect of costs for the acknowledgement of service. There is provision in Civil Procedure Rule 44.13(1)(b) whereby:

“Any party affected by a deemed order for costs ... may apply at any time to vary the order.”
11. Mr Stoner has, in effect, made such an application before me today and has set out a number of reasons why he considers it appropriate to reopen the question of the costs of the acknowledgement of service.
12. Having heard all those submissions, in my judgment, there is insufficient reason to justify a departure from the normal position in Civil Procedure Rule 44.13. In my judgment, the consequence of the rule - odd though it is - means that Mr Brown would have assumed that he was protected in respect of the period prior to Jackson LJ’s order. Therefore the position in relation to the costs of the acknowledgement of service is that that is covered by the deemed costs order. I am not going to vary that order and I am not going to order Mr Brown to pay the costs of the acknowledgement of service.
13. The next set of costs deals with the time between the grant of permission by Jackson LJ and 6 February 2014 when Mr Brown became the recipient of a legal aid certificate and was legally represented under the legal aid scheme. Civil Procedure Rule 38.6 provides that:

“Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served ...”

14. Here, there has been no notice of discontinuance but I dispense with the requirement for a notice. The real question is whether Mr Brown should be liable to pay the costs from the order of Jackson LJ until 6 February 2014.
15. In my judgment, there is no sufficient reason to depart from the position under Civil Procedure Rule 38.6. In my judgment, it is right that Mr Brown pays those costs.
16. I would add this. To a certain extent, Mr Brown, although seeking to do the best he could, has not always helped the situation. His claim form and his response to the detailed grounds are very long, are very dense and have required quite considerable time to unpick and to consider. I would have had some sympathy in any event with any application for costs by the defendant. As I say, in my judgment, the position is dealt with under Civil Procedure Rule 38.6 and I see no reason to depart from Civil Procedure Rule 38.6.
17. Strictly, the position from 6 February is that the claimant, Mr Brown, is ordered to pay the costs of the defendant but of course he does have the protection of a legal aid certificate after 6 February. Whilst I order Mr Brown to pay those costs, it would be obviously subject to the legal aid protection. The order will be that permission is granted to discontinue this claim and that the claimant pay the costs of the defendant from the date of the order of Jackson LJ granting permission to today's date, but the order will need to bear in mind that the period from 6 February 2014 to today is covered by the legal aid protection.