IN THE HIGH COURT OF JUSTICE **Claim No. HQ13D00943**
SENIOR COURT COSTS OFFICE **SCCO Ref; PHW1502520**
BETWEEN

PETER JOHN REYNOLDS

Claimant

and

CHRISTOPHER BOVEY

Defendant

DEFENDANT'S NOTE TO THE COURT FOR HEARING OF CLAIMANT'S APPLICATION ON THE 23rd JUNE 2015

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1. This is the Claimant's application dated 4th March 2015, though apparently not issued until the 29th April 2015, to set aside the Final Costs Certificate ('FCC') issued by this court on the 19th November 2014.

2. It is hoped that this note will assist the court to deal with the matters arising out of the Claimant's application relatively shortly.

3. The Claimant's application seeks to set aside the FCC on one of three basis, namely:

   (i) That the Defendant was not entitled to an assessment of its costs, and therefore an FCC, on the basis that the order of the 23rd January 2014 is allegedly not a final order;

   (ii) That in any event, the FCC should be set because the Claimant apparently has an outstanding application to orally renew his rejected application for permission to appeal the 23rd January 2014 order;

   (iii) That the FCC should be set aside because the Claimant alleges that he did not receive the Notice of Provisional Assessment dated 20th October 2014.

4. For the reasons set out below, all three grounds are fundamentally flawed and appear to represent an attempt by the Claimant to avoid enforcement against him of the costs order which is the consequence of his flawed defamation claim against the Defendant, Mr Bovey, a private individual.

An ancillary matter

5. The Defendant has issued an application under CPR 71 for the judgment creditor (the Claimant) to attend court to provide information about his means.

6. Since this court issued the FCC, then that application must be made to this court (CPR 71.2(2).

7. At this stage, this is a formality. Indeed, the rules provide that the order can usually be made by a court officer alone and that if the application is in the appropriate form and with the appropriate information the court 'will' make an order requiring the Claimant's attendance and that he produce the described documents and answer such questions as the court may order.

8. The court is invited to order accordingly.

Background Facts

9. There is no witness statement from the Claimant in support of his application. The court is respectfully referred to the statement of Mr Spyrou in response dated 19th June 2015.

10. In relatively brief terms, the core facts of the substantive claim are as follows:

- In early 2013 the Claimant brought a defamation claim against Mr Bovey;
- On the 2nd May 2013 the claim was struck out;
- On the 3rd September 2013 the Claimant applied to reinstate the claim and this was granted;
- On the 23rd January 2014 the Claimant's claim was again struck out by Master Eastman at a hearing and the Claimant was ordered to pay the Defendant's costs on the standard basis. The strike out was on the basis that the statements of case disclosed no reasonable grounds for bringing the claim and/or that it was an abuse of process;
- On or about the 11th March 2014 (therefore out of time[1]) the Claimant filed an Appellant's notice against Master Eastman's decision;

[1] Holroyde J subsequently granted an extension of time.

- On the 20th November 2014 Holroyde J refused permission to appeal. The refusal is robust, indicating (inter alia) that he could see 'no basis on which the order of Master Eastman could successfully be challenged';
- As is the norm, Holroyde J granted the Claimant 7 days within which to make a written application to orally renew the application for PTA;
- The Claimant asserts that he made such a written request, but that he awaits a date for the oral hearing.

11. In relation to the costs issues, the relevant history is as follows:
    - On the 3rd February 2014 the Defendant wrote to the Claimant inviting payment of his costs. This was not accepted;
    - On the 23rd April 2014 a Notice of Commencement and Bill of Costs was served on the Claimant (Bill totalling £25,228.34);
    - On the 13th May the Claimant served, by email, a list of 16 'points' taken with the Claimant's Bill, ion non CPR compliant form. In addition, he expressed an intention to apply to the court for a determination of whether the assessment proceedings were premature on the basis that the order was not, in his view, a 'final' order within CPR PD 52.2A.2(sic – presumably meant to be CPR 52 PD 52A PD 3.6 and 3.7). Also he expressed an intention to apply for a stay of assessment pending the outcome of the appeal;
    - Neither application was made;
    - On the 23rd June 2014 the Claimant applied for a provisional assessment in accordance with CPR 47.15. The Claimant's Points of Dispute were enclosed in full along with Replies. No offers had been made;
    - On the 16th October 2014 Costs Officer Piggott carried out the Provisional Assessment;
    - On the 20th October 2014 the Court sent out to the Claimant and Defendant a copy of the assessed bill. The bill was assessed in the sum of £19,101.44 plus costs to the Defendant of £1,380.80. On page 12 of the Bill, the Bill was marked up with these figures and reference to the outcome of the Bill being 'provisionally assessed'. In addition, a Notice of Provisional Assessment (general form) was sent. The Claimant appears to assert he has not received the latter – though since he accepts he received a copy of the provisionally assessed Bill and the same was sent under cover of the Notice, this seems unlikely. Indeed, the provisionally assessed Bill would contain no details of the Claimant or his address. It is only the covering Notice which would contain his name and address and allow delivery of the documents to him;

- The Claimant accepts that the assessed Bill was received by him by the 9th November 2014 at the latest. In fact, on the basis of deemed service (CPR 6.25) service was effected on the 22nd October 2014;
- It would appear that on the 4th March 2015, some 4 months after, on his own case, the Claimant had received the documents, he contemplated the present application and that it was issued on the 29th April 2015, some 6 months approximately after service of the provisionally assessed bill;
- No explanation for any delay – at least since November 2014 – is included in the application.

12. As this court will be well aware, pursuant to CPR 47.15(7), if no request for an oral hearing is received within 21 days of service of the provisionally assessed bill, 'the provisional assessment shall be binding upon the parties, save in exceptional circumstances'.

13. In the absence of any such request, on the 3rd February 2015 the court issued a Final Costs Certificate.

14. As noted, the present application seeks to set aside that certificate. The basis on which it does so are addressed below.

That the order of the 23rd January 2014 was not a 'Final Order'

15. The Claimant unfortunately conflates two matters.

16. When dealing with appeals, there has to be a mechanism for deciding if the appeal is to a High Court judge or the Court of Appeal. Put bluntly, there is a filter mechanism to ensure that the Court of Appeal is not bogged down with lots of appeals from what might be regarded as less important matters.

17. Part of that filter mechanism is that the destination of appeal turns, in part, on whether the decision is a 'final decision for destination of appeal purposes' (CPR 52 PD 52A paragraph 3.7).

18. For those purposes, a decision is only final if it would finally determine (subject to any appeal or costs assessment) the entire proceedings whichever way the court decided the issue before it (CPR 52 PD 52A paragraph 3.6).

19. Accordingly, matters such as decisions on strike outs are not final decisions for the purposes of determining the destination of any appeal. The proceedings are finally determined if the court finds for the applicant, but not if it finds for the Respondent. Hence why, here, the appeal, if it were to proceed, is to the High Court, not the Court of Appeal.

20. The Claimant here, sadly, conflates this concept, expressly limited to the question of destination of appeals, with the question of whether the case he brought against the Defendant is 'finally determined', subject to any appeal. It is. His claim has been struck out in its entirety. Absent a successful appeal, that claim is at an end.

21. The point can be simply tested. If no appeal was brought, there would be no need for any further order to 'conclude' these proceedings. They are concluded.

22. Similarly, if permission to appeal remains refused, or if any appeal is dismissed, there is no need for any further order in respect of the main proceedings to be made in the appeal. The Defendant does not need the appellate court to order 'and therefore the claim below is concluded'. It already is.

23. It is, for this reason, of course, that CPR 47.2 provides that detailed assessment is not stayed pending an appeal. The claim is concluded and the Defendant was perfectly entitled to proceed to assessment (indeed, would have been in breach of CPR 47.7 had he not done so) absent any successful application by the Claimant (presumably to the appellate court) for a stay.

24. As noted, suggestions were made that such an application would be made, but no such application was ever forthcoming. It is highly unlikely it would have succeeded in any event unless and until, as a minimum, any court took the view that the Claimant had any prospect of success on his appeal[2].

[2] And even then, there appears to be no reason why the court would stay the assessment itself.

25. It is also, no doubt, for this reason that CPR 47 PD 1.1 takes a different approach to CPR 52 and refers to matters being 'concluded' for detailed assessment purposes when they have been 'finally determined' 'whether or not there is an appeal'. The fact of the appeal itself is therefore immaterial.

26. This ground is flawed in law and should be dismissed.

That there is an outstanding application to orally renew the rejected application for permission to appeal the 23rd January 2014 order

27. It is entirely unclear what is happening to this and whether the Claimant has taken any step to progress this. The Defendant has not seen any evidence that such a request has even been made.

28. In any event, there is no indication that any application has been made to that court for any kind of stay, either of the detailed assessment proceedings originally or of the enforcement of the now assessed costs.

29. Reference has already been made to Holroyde J's order. The Claimant's belated application for permission to appeal discloses no reasonable grounds whatsoever for the appeal and has been robustly dismissed. If it is to be persisted in, it appears to be a hopeless attempt to delay and avoid the inevitable.

30. It is respectfully submitted that if the Claimant wanted such an order the application should have been made to this High Court and that the court best placed to consider whether any such stay is appropriate in light of the proposed appeal is that court. In light of Master Eastman's judgment and Holroyde J's judgment on the application for permission, there is no proper basis for such an order.

31. Further, it is a source of significant concern to the Defendant that public statements by the Claimant appear to suggest that he has taken steps in relation to his assets to avoid any possible enforcement of adverse costs orders against him (see Mr Spyrou at paragraph 20). This court should do nothing which is likely to facilitate or assist him in this improper behaviour.

That the FCC should be set aside because the Claimant alleges that he did not receive the Notice of Provisional Assessment dated 20th October 2014

32. The court does, of course, have a general power to set aside, vary or revoke an order (CPR 3.1(7)) though it is clear that this power is not without limitation and that it is not an alternative to an appeal process and that it should only normally be used where (i) the original order was made on the basis of wrong information or (ii) subsequent, unforeseen, events have destroyed the basis on which the order was made (see **Roult v North West Strategic Health Authority** [2010] 1 WLR 487 and **Hackney LBC v Findlay** [2011] EWCA Civ 8).

33. In cases of non-attendance, or similar, it may be appropriate for the court to take into account the factors in CPR 39.3(5).

34. In the instant case, the Claimant's application rests on the alleged non-receipt of the Notice of Outcome of Provisional Assessment.

35. The first point to note is that non-receipt of the same is not accepted. The circumstances surrounding the fact that the Claimant clearly accepts that he received a copy of the provisionally assessed bill, but asserts he did not receive a copy of the covering Notice are unclear and not properly set out. It is not even clear on what date the Claimant asserts he did receive a copy of the assessed bill, in what form it was delivered to him, under what cover it was provided etc.

36. No exhibits have been produced by the Claimant.

37. It is noted, as already stated, that there does not appear to be any explanation of how the provisionally assessed bill – which in itself would contain no details of the Claimant or his address – made its way to the Claimant unless sent with the covering notice which is the document that would have set out his name and address to allow for postage.

38. There does not appear to be any suggestion that there was any error in his address details and the Claimant's explanation, given at best almost 5 months after the material events, smacks at best of a party that cannot now find all the documents it was sent months earlier or, at worst, of

a party that is prepared to assert that documents which were received were not, however implausibly, because it suits their present purpose.

39. In passing, it is also noted that in the chronology given in the application, the Claimant does not address at all the fact that on the 19th November 2014 the FCC was sent to the Claimant. He clearly received it, but again chooses to gloss over this fact.

40. Accordingly, the court is invited to conclude that the Claimant's explanation is implausible at best and false at worst and on that basis alone to reject the application.

41. Even if the court was to give the Claimant the benefit of the doubt on this point, it would not amount to a good reason for granting the application. The court would be obliged to consider all of the circumstances of the case and to act justly.

42. In particular, the court should consider:

- Whether the Claimant acted promptly – this is a key consideration at the heart of the CPR and repeated, for example, at CPR 39.3(5). The Claimant will have known by the 22nd October 2014 that the Bill was provisionally assessed and by the 21st November 2014 that a FCC had been issued. No application was made until April 2015. This is a wholly unexplained and unacceptable delay;
- The other information available to the Claimant. The Bill clearly sets out, on page 12, the outcome of the provisional assessment. Whilst the CPR can be opaque sometimes, the rules on provisional assessment are contained in a single rule and CPR 47.15 sets out very clearly what must be done. Even if there was some minor procedural error, the information available to the Claimant is such that there is no proper justification for his failure to act accordingly or for the present application;
- The poor quality of the Claimant's Points of Dispute, but the fact that Costs Officer Piggott appears to have made a full and proper effort to take these into account and conduct a proper assessment of the costs. The sum allowed on the bill was approximately 75% of that claimed. Little, if anything, is to be gained by setting aside the final certificate and having an oral hearing, save further cost (which it appears the Claimant may be unable to pay) and delay. Indeed, given the 20% rule ion CPR 47.15(10)

it is very much to be doubted whether the Claimant, if properly advised, would truly want that which he seeks.

- The concern already mentioned that the Claimant has sought to avoid enforcement of the consequences of his failed claim and that this application may simply be a further means to seek to do so.

43. For all the reasons given, the court is respectfully invited to dismiss the applications, with costs.

Roger Mallalieu
22nd June 2015
4 New Square
Lincoln's Inn