CO/5429/2002

Neutral Citation Number: [2002] EWHC 2712 Admin
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2

Thursday, 5 December 2002

B E F O R E:

LORD JUSTICE SIMON BROWN
(Vice President of the Court of Appeal, Civil Division)

MR JUSTICE MAURICE KAY

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THE QUEEN ON THE APPLICATION OF THE CAMPAIGN FOR NUCLEAR DISARMAMENT

(CLAIMANT)

-v-

THE PRIME MINISTER

(FIRST DEFENDANT)

SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(SECOND DEFENDANT)

SECRETARY OF STATE FOR DEFENCE

(THIRD DEFENDANT)

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MR N BLAKE QC AND MS C KILROY (instructed by Public Law Partnership, Birmingham) appeared on behalf of the CLAIMANT
MS J STRATFORD (instructed by Treasury Solicitor) appeared on behalf of the DEFENDANTS

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J U D G M E N T
(As Approved by the Court)

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Thursday 5 December 2002

1. LORD JUSTICE SIMON BROWN: Before the court today is an application for a pre-emptive costs order under CPR 44.3, more particularly, an order that:

> " ... in the event of the costs being awarded against the Claimant ... in the High Court, those costs be limited to the amount of £25,000."

It is made in proceedings brought by the applicants, the Campaign for Nuclear Disarmament (CND), against senior members of government for an advisory declaration that the United Nations Security Council Resolution 1441 does not authorise the use of force in the event of there being a breach, and that a further United Nations Security Council resolution would be needed to authorise such force. It is set, of course, against the background of the present inspections in Iraq.

2. At a directions hearing on 29 November my Lord, Maurice Kay J, ordered that the permission hearing should be confined initially to certain preliminary issues, namely, standing, prematurity and justiciability -- the latter, to my mind, being outstandingly the most critical -- such an initial hearing to carry a two day time estimate and to be listed for disposal on Monday and Tuesday of next week, 9 and 10 December. It is to be heard by myself, my Lord, and Richards J.

3. The principles guiding the court on an application for a pre-emptive costs order were established by Dyson J in R v Lord Chancellor ex parte Child Poverty Action Group [1999] 1 WLR 347; a decision that has subsequently secured at least the apparent approval of the Court of Appeal in Hodgson v Imperial Tobacco [1998] 1 WLR 1056, 1068A. Those principles were, furthermore, affirmed, following the advent of the CPR, by Richards J in R v London Borough of Hammersmith and Fulham, ex parte CPRE London Branch Unreported Transcription [26 October 1999]. Richards J accepted that he should:

> " ... seek to give effect to the overriding objective and should have particular regard to the need, so far as practicable, to ensure that the parties are on an equal footing and that the case is dealt with in a way which is proportionate to the financial position of each party."

He then usefully stated the effect of ex parte CPAG, namely that it:

> " ... sets out the following criteria or conditions for the making of a pre-emptive costs order in a public interest challenge case. First, that the court is satisfied that the issues raised are truly ones of general importance. Secondly, that it has a sufficient appreciation of the merits of the claim that it can conclude it is in the public interest to make the order. Thirdly, the court should have regard to the financial resources of the applicant and the respondent and the amount of the costs likely to be in issue and it would be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant and where it is satisfied that unless the order is made the applicant would probably discontinue the proceedings and will be acting reasonably in so doing."

Both those decisions emphasised that the discretion to make such an order, even in cases involving public interest challenges, should be exercised only in the most exceptional circumstances. As Dyson J pointed out in ex parte CPAG, it is, after all, the case that:

> " ... where an unsuccessful claim is brought against a public body, it imposes

costs on that body which have to be met out of public funds diverted from the funds available to fulfil its primary public functions."

In neither case was the discretion in fact exercised. Indeed, neither counsel before us is aware of any case in the public law arena in which such an order has ever been made; although, of course, there are a number of cases in which, at the conclusion of proceedings, the court has declined to make a costs order against the applicant or has made a reduced order to reflect the public interest in the litigation.

4. The applicants contend that this is a truly exceptional case in which the order should be made. The central arguments they advance in support of the argument are these. First, they are a private company limited by guarantee of modest resources, which, in the event of a large adverse costs order, would be at risk either of going into liquidation or of having to curtail severely their activities; these, in essence, are campaigning against nuclear weapons and other weapons of mass destruction, and in favour of a peaceful resolution of conflict. They state that, unless the court provides them with the certainty of a costs cap as now sought, they will not be able to proceed with the challenge. The time-frame for the challenge, moreover, is necessarily so short that it affords them no opportunity to seek to raise funds elsewhere. Secondly, CND points to the obvious public importance of the issues they seek to bring before the court. This hardly needs emphasis or explanation. Thirdly, and in response to the defendant's argument that the challenge is and will be found to be clearly without merit and, indeed, non-justiciable, CND, whilst contesting that assertion, point out that, if it be right, then the proceedings may be expected to end next Tuesday at the preliminary hearing, in which event £25,000 will surely meet the defendant's entitlement to costs in any case. Fourthly, if CND's challenge were to end for want of the pre-emptive costs order now sought, in all likelihood some substitute applicant would be found, perhaps legally assisted, perhaps an unassisted person of limited means, with or without some private funding, in which event, the Crown, supposing it successfully resists the challenge, could not hope to recover even the £25,000 now offered. For my part, I find these arguments compelling, in particular the first three.

5. Miss Stratford has valiantly sought to contest the application. She points out that an order here would not only be unique, in that no such order has ever previously been made, though the power to make it is undisputed, but it would be singular too in that in this case, unlike the position in both ex parte CPAG and ex parte CPRE, the application is made even before permission has been granted. The argument, however, seems to me impossible because, in the ordinary way, an applicant might normally hope to obtain the court's initial decision without any adverse costs order at all and, as already stated, this application, if it were to fall at the first hurdle would, in any event, be unlikely to cost the government more than the sum offered.

6. A further point made by Miss Stratford is that, far from this claim being litigated in the public interest, it is rather in the public interest that it should not be heard. Ingenious though this argument is, it too cannot succeed; it is, in truth, just another way of contending that the claim should and will fail for non-justiciability. I have no doubt that this is indeed an exceptional case in which the court should, albeit for the first time, make the pre-emptive order sought. It seems to me particularly appropriate to make it in a case like this where the course ordered to be taken will secure its speedy determination against the claimants were it to be found non-justiciable, the Crown's central response to it. The order for the preliminary hearing was specifically sought by the Crown; the applicants, for their part, seeking rather to have all issues rolled up together. It is, in my judgment, right in these circumstances to afford the claimants the relatively limited security that the order they seek here will afford them. I would grant the application.

7. MR JUSTICE MAURICE KAY: I agree that, in the particular circumstances of this case, the court ought to take the exceptional and, it seems, unprecedented course of making the order sought by CND. I agree with the reasons given by my Lord and simply add this: Miss Stratford has submitted that one of the reasons why an order should be refused is that the application is being made too early and that an application should only normally be made after permission has been granted. I accept that it will often be appropriate to determine such an application only at that stage. However, in my judgment, it is desirable that a claimant should give notice of the application for this type of order at an early stage, preferably in the claim form. I say that because, generally, a defendant should be informed at the earliest stage that such an exceptional order will be sought. In this case, although it was not sought in the claim form, there was correspondence prior to the first hearing and some attempt at negotiation had taken place.

8. Precisely when an application is determined will vary with the circumstances of each case. On occasions it may be appropriate for the judge to make an order when granting permission on paper, provided that the defendant has had an opportunity to make representations or is given an opportunity to show cause as to why such an order should not be made. More often it will be more appropriate to direct an oral hearing. In the present case, the reason why it is appropriate to make the order at this stage arises out of the particular arrangements that have been made for dealing with the case, as have just been mentioned by my Lord, Simon Brown LJ.

9. MR BLAKE: My Lords, may I then have the order in the terms of the draft order?

10. LORD JUSTICE SIMON BROWN: Yes, and you will give the undertaking that has already, I think, been offered?

11. MR BLAKE: Yes, as to the holding of the --

12. LORD JUSTICE SIMON BROWN: When I say "you", you will give it on behalf of those instructing you?

13. MR BLAKE: I will do that, my Lord.

14. LORD JUSTICE SIMON BROWN: So be it.

15. MR BLAKE: May I have the costs of this morning's application? The relevant matter is upon letters before and the application was notified by telephone, I think, at five o'clock --

16. LORD JUSTICE SIMON BROWN: What do you say about that?

17. MS STRATFORD: My Lord, I would ask that only costs in the cause should be ordered. In my submission, there were good grounds for resisting. Your Lordships have recognised that the case law was in my favour, and your Lordships have thought it appropriate to take matters further in your Lordships' judgment. This was a question of properly protecting public funds, my Lord, and, in my submission, it was perfectly appropriate for us to defend this application and the right order would be costs in the cause.

18. MR BLAKE: My Lord, the principle behind the CPR is one that portions issues on costs, rather than just looking at a global roll up; indeed, that was one of the submissions that we made. We respectfully submit that sensible proposals were made on 29 November and again on 2 December. It was with reluctance that we came before the court, but it was essential to have a strategic view, and we submit we won our point.

19. LORD JUSTICE SIMON BROWN: We would have ordered you to pay the costs if you had failed, Mr Blake; you shall have them since you have succeeded.

20. MR BLAKE: My Lord, I am obliged.