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Re A (A Child) (Costs) (2013)

[2013] EWCA Civ 43

06/02/2013

Barristers
Jo Delahunty QC

Court
Court of Appeal (Civil Division)

Practice Areas
Public Children Law

Summary
The Court of Appeal refused a local authority's application for wasted costs against solicitors acting for the parents in care proceedings as, despite litigation conduct which on occasion fell woefully short of that required, none of the identified errors had been causative of costs being wasted by the opposing parties.

Facts
The applicant local authority applied for a wasted costs order against the respondent firm of solicitors (F).

F represented the parents of a child in care proceedings brought by the local authority. In A (A Child) (Permission to Appeal Fact-Finding Judgment), Re [2012] EWCA Civ 1477, [2013] 1 F.L.R. 1187 the parents were refused permission to appeal against a decision of the trial judge not to re-open a fact-finding determination regarding injuries sustained by the child. The notice of appeal had been issued 30 days outside the three-week time limit. The initial without notice application had been adjourned for the parents to obtain a report from a medical expert (N). The local authority claimed that F's conduct in preparing for and pursuing the without notice permission application amounted to "improper, unreasonable or negligent" litigation conduct sufficient to trigger the instant court's jurisdiction under the Senior Courts Act 1981 s.51(6) to award wasted costs. The local authority's application was founded on the basis that the permission application should have been withdrawn following receipt of N's report, and that the instant hearing would have been unnecessary but for the way in which F had conducted the proceedings.

The local authority argued that F had failed in their duty to provide the court with full and frank disclosure of all relevant material, including the original fact-finding judgment and the expert medical evidence adduced at trial. It further argued that F had failed to properly disclose relevant information to the other parties, and had not complied with the Family Procedure Rules 2010 Pt 25 when instructing N.

Held
(1) It had been incumbent on F to furnish the court with the core relevant material, including the judge's

fact-finding judgment and the expert section in the bundle, S (A Child) (Family Division: Without Notice Orders), Re [2001] 1 W.L.R. 211 applied. F's submission that the purpose of the without notice application was to seek direction on whether a full application to instruct an expert should be made was unsustainable. The general approach of the 2010 Rules had to, by extension, apply to appellate proceedings, M (A Child), Re [2012] EWCA Civ 165, [2012] 2 F.L.R. 121 applied. The basic requirement of any litigant to be open with the court had to be applicable across the board. However, F's errors in that regard were not causative of any wasting of cost on the part of the local authority or the child (see paras 17-25 of judgment). F had been instructed for some 18 weeks prior to issuing the notice of appeal and any plea by them to the effect that they had "a limited time" to prepare the case was hard to sustain. However, no adverse consequence in terms of wasted costs flowed from that misstatement of the position, nor had it affected the court's decision to permit N's instruction (para.26). The court orders had made it plain that the court expected the other parties to be fully aware of and involved in the permission application, including having scrutiny of any material flowing from N's instruction. The privilege of instructing an expert in family proceedings came with the responsibility of transparency, proportionality and neutrality. CPR PD 52C para.16 required that, where the court had directed a respondent to attend an oral permission hearing, the appellant had to supply the respondent with a copy of the skeleton argument "and any documents to which the appellant intends to refer". F's failure to act in a co-operative and open way was a serious and gross failure, and betrayed an attitude which sought to maintain and capitalise on some perceived tactical forensic advantage gained by obtaining the court's leave to instruct an expert at a without notice hearing. Such an attitude could have no place in family proceedings (paras 29-32). F's failure to send relevant material to N when instructing him was a clear error of judgment, but no additional costs had been incurred by the other parties as a result (paras 33-34). The manner in which the permission application was pursued after receipt of N's report had removed any true validity, arose almost entirely from the wholly over-optimistic judgement of counsel, and not from any improper or unreasonable act or omission by F (paras 35-41). (2) Despite litigation conduct which on occasion fell woefully short of that which was required in mounting a without notice application for permission to appeal in a child case where the Court of Appeal had given permission to one party to instruct a new expert, none of the identified errors had been causative of costs being wasted by either of the opposing parties, Ridehalgh v Horsefield [1994] Ch. 205 and Harrison v Harrison [2009] EWHC 428 (QB), [2009] 1 F.L.R. 1434 applied. In addition, to award the local authority the costs of the instant hearing, where it had failed to achieve the substantive order for wasted costs, would be wrong in principle (paras 42-43).

Application refused

Permission

Lawtel