Neutral Citation Number: [2024] EWCA Civ 1558

Case No: CA-2023-001116

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
His Honour Judge Hodge KC (sitting as a Judge of the High Court)
[2023] EWHC 567 (Ch) and [2023] EWHC 1350 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 12 December 2024

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE GREEN
and
LORD JUSTICE SNOWDEN

- -

Between :

MANOLETE PARTNERS PLC	**Applicant/ Respondent**
- and –	
IAN RUSSELL WHITE	**Respondent /Appellant**

- -

Brad Pomfret KC and Reuben Comiskey (instructed *pro bono* by **Edwin Coe LLP**) for the **Appellant**
Joseph Curl KC and Jon Colclough (instructed by **Addleshaw Goddard LLP**) for the **Respondent**

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Approved Judgment

This judgment was handed down remotely at 10.30 a.m. on Thursday 12 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Snowden :

1. This judgment deals with a short but important point relating to so-called *pro bono* costs orders made under section 194 of the Legal Services Act 2007 ("section 194"). The question is whether, and if so, how, when considering whether to make such an order, the court should take into account the fact that the successful party who was represented *pro bono* owes a large and unsatisfied judgment debt to the potential paying party?

2. The issue arises following the judgment which we handed down in this matter on 15 November 2024: see [2024] EWCA Civ 1418. We allowed an appeal by Mr. Ian White against an order of HHJ Hodge KC (the "Order") which had required Mr. White to exercise such rights as he might have to draw down the entirety of his occupational pension fund so that the monies could be applied towards satisfaction of a judgment debt (the "Judgment Debt") of over £1 million that he owes to Manolete Partners plc ("Manolete"). We held that the Order was prohibited by section 91(2) of the Pensions Act 1995.

The issues

3. There are three amounts in issue.

4. The first element relates to Mr. White's costs of resisting the application made by Manolete for the Order. Mr. White was represented by solicitors and counsel at the hearings before the judge. He incurred costs of £51,708 in respect of the main hearing on 13 March 2023, together with some additional costs for the further hearing on 22 May 2023 for which a schedule of costs was not available. It is agreed that in the conventional way pursuant to section 51 of the Senior Courts Act 1981 ("section 51") and CPR 44, Manolete should be ordered to pay Mr. White his costs of the application to be assessed if not agreed. It is also agreed that we should make an order that Manolete's liability for such costs should be set off in reduction of Mr. White's liability under the Judgment Debt. Mr. White seeks an order for a payment on account of £35,000 to fix the minimum amount of such set off. There does not appear to be any opposition to such an order in principle, and I would be prepared to make such an order, but in the lesser sum of £30,000.

5. Secondly, Mr. White seeks a similar order in respect of the costs of filing his Appellant's Notice and associated documents, when he continued to be represented by his former solicitors and counsel. Those costs, which are likely to be relatively modest, remain unbilled. It is agreed that Mr. White should be entitled to an order for such costs (when billed) to be paid by Manolete in an amount to be assessed if not agreed. As with the first set of costs, it is further agreed that the court should make an order that such liability should be set off in reduction of Mr. White's liability to Manolete in respect of the Judgment Debt.

6. The main contention between the parties relates to the period when Mr. White was represented in relation to the appeal by solicitors and counsel acting *pro bono*. Having obtained permission to appeal, Mr. White appeared without representation at the first hearing of the appeal, stating that he could not afford to instruct a solicitor or counsel. Given the wider importance of the point raised by his appeal, the hearing was adjourned to enable him to seek *pro bono* representation via Advocate, the Bar's national *pro bono* charity: see [2024] EWCA Civ 356. Having, through its solicitors, drawn Mr. White's

attention to the possibility of obtaining *pro bono* representation shortly before the hearing, Manolete very properly did not oppose that adjournment. Thereafter Mr. White contacted Advocate and was represented on the appeal by leading and junior counsel and solicitors acting free of charge.

7. Following Mr. White's success in the appeal, his *pro bono* lawyers now seek an order pursuant to section 194. Section 194 provides, in material part,

> "(1) This section applies to proceedings in a civil court [including the civil division of the Court of Appeal] in which -
>
> (a) a party to the proceedings ("P") is or was represented by a legal representative ("R"), and
>
> (b) R's representation of P is or was provided free of charge, in whole or in part.
>
> (2) This section applies to such proceedings even if P is or was also represented by a legal representative not acting free of charge.
>
> (3) The court may order any person to make a payment to the prescribed charity in respect of R's representation of P (or, if only part of R's representation of P was provided free of charge, in respect of that part).
>
> (4) In considering whether to make such an order and the terms of such an order, the court must have regard to -
>
> (a) whether, had R's representation of P not been provided free of charge, it would have ordered the person to make a payment to P in respect of the costs payable to R by P in respect of that representation, and
>
> (b) if it would, what the terms of the order would have been."

8. The "prescribed charity" for the purposes of section 194 is the Access to Justice Foundation (the "AJF").

9. In accordance with CPR Part 46.7, Mr. White's legal representatives have submitted a schedule of the notional costs that they would have charged Mr. White if they had not been acting *pro bono*. After one correction, this amounts to £121,920.80. They seek a summary assessment of those notional costs, and an order for payment of that amount by Manolete to the AJF under section 194(3).

10. Manolete accepts that if Mr. White had not been represented on a *pro bono* basis he would have been entitled to an order for payment of his costs to be assessed if not agreed. However, it contends that the £121,920.80 claimed is unreasonable because of what are said to be the excessive fees of junior counsel, the disproportionate amount of time spent by solicitors on the case, and the excessive charging rate of the senior solicitor on the case.

11. More significantly, however, Manolete submits that if Mr. White had not been represented on a *pro bono* basis, Manolete would inevitably have obtained an order that its liability for costs could be set off in reduction of the outstanding Judgment Debt owed to it by Mr. White. Manolete contends that the court "must" have regard to this under section 194(4), and that the court is accordingly required, so far as possible, to replicate such set off in its order.

12. In correspondence, Manolete suggested that the court should do this by making an order (i) that Mr. White make payment to the AJF of an amount equal to the assessed amount of the notional costs, and (ii) that his liability to Manolete under the Judgment Debt should be reduced by the like amount of such payment, £ for £.

13. I do not think that such an order is permitted by section 194. Although section 194(3) enables an order to be made against "any person", section 194(4)(a) is drafted on the basis that "the person" is someone who would have been ordered to make a payment to "P" (the party who was represented *pro bono*). It is thus implicit that an order under section 194 cannot be made against "P" himself.

14. Doubtless recognising this, in its written submissions, Manolete suggested an alternative. It submitted that the court should make an order under section 194 that Manolete pay a sum equal to the assessed amount of the notional costs to the AJF, but subject to a condition that such payment should only be required to be made if and to the extent that Manolete were to recover money from Mr. White in respect of the Judgment Debt.

15. I accept that such an order would not suffer from the technical problem of the order suggested in correspondence. It is an order against a person (Manolete) that would have been required to make a payment to "P" (Mr. White), and it requires Manolete to pay AJF out of monies which Manolete would have received for its own benefit in discharge or partial discharge of the Judgment Debt.

16. However, Mr. White's legal team submitted that, contrary to Manolete's contention, section 194(4) does not require the court to replicate any set off which the court might have ordered in favour of Manolete had there been no *pro bono* representation. They also submit that the practical effect of the order sought by Manolete would be to place the burden of paying the AJF upon the party who was represented *pro bono*, who *ex hypothesi* is unlikely to be able to pay, and that this would be unjust and would defeat the legislative policy that underlies section 194.

Analysis

17. The first point to make is that the power to make an order under section 194(3) is discretionary. Although, under section 194(4), the court is obliged to "have regard to" the order it would have made if "P" had not been represented *pro bono*, contrary to Manolete's submissions, this does not amount to a requirement that the court make an order in favour of the AJF that exactly, or even so far as possible, corresponds to the costs order it would have made in the absence of *pro bono* representation.

18. Secondly, if Mr. White had been paying for his solicitors and counsel, Manolete's basis for seeking an order that it could set off its liability for the costs of the appeal against the Judgment Debt would also have been the exercise of discretion by this Court. That

discretion would have derived from section 51 and would have been exercised to achieve a just result: see e.g. the discussion in R (Burkett) v Hammersmith LBC [2004] EWCA Civ 1342 at [37]-[48] and the cases referred to therein. As is the case with the order for payment and set off of the costs below and of the filing of the Notice of Appeal, it is very likely that such an order would have been made. However, it would be wrong to start from the assumption that Manolete would have had any legal rights of set off in such circumstances, or that the applicants under section 194 had any burden of persuading the Court to displace them.

19. Thirdly, although often called a "*pro bono* costs order", an order under section 194 is not a conventional order for costs made under section 51 and CPR 44. It does not, for example, conform to the indemnity principle that underlies conventional costs orders. As such, while section 194(4) in effect requires the court to have regard to the principles that apply to such costs orders, the power to make an order under section 194 must also be exercised having regard to the legislative purposes behind the enactment of that section.

20. The legislative purposes of section 194 are relatively easy to see. Before the introduction of section 194, a privately funded party who was litigating against a person who was represented *pro bono* had the tactical advantage that they were not exposed to the usual risks of an adverse costs order. The introduction of section 194 was designed to put the parties on a more equal litigation footing by exposing the privately funded party to a similar risk of adverse costs. In addition, the identification of a charity as the beneficiary of an order under section 194 and the designation of the AJF makes clear the intent that orders under the section should provide a source of funding to support organisations involved in the provision of free legal help to a wider cross-section of the public who might be in need.

21. Fourthly, Parliament must have enacted section 194 in the knowledge that the majority of litigants who obtain *pro bono* representation do so because they do not have the financial means to pay for legal services. Parliament therefore could not have envisaged that an order for payment to the AJF should be made conditional upon such litigants finding the money to pay legal fees, because the practical result of imposing such a condition would be that in most cases, no payments would be required to be made to the AJF. This would defeat the statutory purposes which I have identified.

22. The conditional order sought by Manolete suffers from similar defects. It would make Manolete's obligation to pay the AJF dependent upon Manolete's own willingness to pursue enforcement of its Judgment Debt and upon whether Mr. White had the assets with which to pay it up to the amount of the order under section 194. But Manolete has not sought to enforce its Judgment Debt to date, and it adduced no evidence as to the existence or whereabouts of Mr. White's assets or his prospects of obtaining further assets in the future to contradict his assertion of impecuniosity.

23. Moreover, because the AJF would be required to be paid first from any recoveries up to the amount of the order under section 194, there would have to be a sufficient prospect of a significant surplus being available over and above that amount before Manolete would be likely to think it worth taking any such enforcement action. In this regard it should also be borne in mind that Manolete has an obligation to share its recoveries with the liquidator of Mr. White's failed company.

24. In those circumstances, agreeing with the submissions by Mr. White's legal team, I think that the conditional order proposed by Manolete gives rise to too much uncertainty and would not fulfil the legislative purposes behind section 194.

25. I therefore consider that, even having regard to the likelihood that if Mr. White had not been represented *pro bono*, a set off order would probably have been made, it would nevertheless be just and appropriate to make an unconditional order for Manolete to pay a sum of money to the AJF under section 194.

26. In determining the appropriate amount, I consider that it would not be appropriate to order a detailed assessment of the costs bill put forward by the *pro bono* solicitors and counsel. The appeal hearing lasted for only one day and the costs, though not insignificant, are not huge in the general run of commercial litigation. Nor are they excessively burdensome for a large commercial organisation such as Manolete. It is also unclear who would have the interest to participate in a detailed assessment apart from Manolete: Mr. White has no interest in doing so, and it is unrealistic to expect Mr. White's *pro bono* team or the AJF to spend time and money on such an exercise.

27. In these circumstances, I would adopt a broad brush which errs on the side of caution. The order sought is for just over £120,000. I would make an order under section 194 that Manolete pay £85,000 to the AJF.

Lord Justice Green:

28. I agree.

Lady Justice Asplin:

29. I agree with Lord Justice Snowden for all the reasons he has given. As he points out, the underlying purpose of section 194 is not only to place parties on an equal footing by putting the privately funded party at risk of an adverse costs order but also to provide a source of funding for and to encourage the provision of free legal assistance to those in need of it. In my judgment, a conditional order of the kind which is now sought, would be contrary to that very important, albeit underlying purpose, for all the reasons which Lord Justice Snowden gives.