Case No: CO/1091/2016

Neutral Citation Number: [2017] EWHC 101 (Admin)

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2017

Before :

MR JUSTICE EDIS

- -

Between :

JOHN TAYLOR	**Claimant**
- and -	
HONITON TOWN COUNCIL	**Defendant**
- and -	
EAST DEVON DISTRICT COUNCIL	**Interested Party**

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- -

Wayne Beglan (instructed by **Pardoes Solicitors LLP**) for the **Claimant**
Jonathan Wragg (instructed by **Foot Anstey LLP**) for the **Defendant**
Jeremy Phillips (instructed by **Henry Gordon Lennox, Straegic Lead (Legal and Licensing and Democratic Services) and Monitoring Officer)** for the **Interested Party**

Hearing date: 21st December 2016

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Judgment

Mr. Justice Edis :

1. On 21st December 2016 I handed down my judgment on the substantive judicial review claim, [2016] EWHC 3307 (Admin). I then heard oral submissions on costs from Mr. Beglan for the claimant and Mr. Wragg for the defendant. Each had filed written submissions on costs having seen the judgment in draft and on 20th December 2016 I was supplied with a bundle of correspondence and other documents running to 127 pages containing documents which passed between the parties between 25th April 2016 and the eve of the hearing on 7th November 2016. There are also documents relevant to the parties' efforts to resolve the case in the Hearing Bundles which pre-date 25th April 2016. Some of these documents are set out in the history of the proceedings and analysis of the issues which appears at paragraphs [23]-[28] of the main judgment and I will not repeat that here.

2. Costs in the Administrative Court are often dealt with on written submissions and it is quite unusual for judgment to be reserved after an oral hearing on costs. This occurred partly because there was another case in the list on 21st December and there was very limited time to deliver an extempore ruling but also because this is in some ways an unusual case, or at least one where the underlying facts bearing on the exercise of discretion in relation to costs require some analysis. I have carefully reviewed a lengthy correspondence and identify parts of it below. My findings at 27 below are based on the whole of the material, and I have set out below only enough to explain why I have come to those conclusions.

3. It will be apparent from the main judgment that I concluded that the issues between the parties were very narrow and that it was arguable that they did not require resolution in order to determine the claim. It was agreed in Honiton's Acknowledgment of Service (and elsewhere) that the decision of Honiton identified at paragraph [21] of the main judgment was to be quashed. Honiton had said on many occasions that it did not intend to implement it, and that it was revoked. As early as 19th January 2016 Honiton had said that the sanctions would not be imposed in full and it was apparent from that point onward that they were rowing back from the Decision so far as sanctions were concerned. That was the only part of the Decision for which they were responsible, as I have held.

4. The pre-action protocol letter to Honiton was dated 8th February 2016 and closely foreshadowed the claim when it was later issued. There had been previous threats in relation to proceedings against East Devon, but not, I think, against Honiton. On 16th February 2016 Honiton responded saying

> "The Town Council is currently seeking advice from a barrister specialising on local government law. Counsel is currently reviewing the papers and we would be grateful for your agreement to extend the time for a substantive response to your pre-action letter which will be no later than 5pm on 26th February."

5. That seems to me to have been an eminently sensible request in the circumstances. Honiton had been dealing with the claimant's solicitors through its officers up to this point and it now sought external advice. The October Policy had been adopted contrary to the advice of the Officers and applied against the claimant in the way I

have described in paragraphs 13, 14 and 21 of the main judgment. There is no doubt that the October Policy was not a satisfactory resolution of the need to apply proportionate sanctions which fully reflect the importance of the councillor's right as an elected member of a local authority to express his views freely. It was adopted contrary to advice and it might be inferred from the chronology was adopted specifically in order to deal with the claimant whose case had by that time been investigated by Mr. Darsley and was awaiting decision by East Devon. It is unsurprising that it was abandoned as soon as external legal advice was taken. Mr. Beglan on behalf of the claimant relies on this conduct as relevant conduct for the purposes of the costs decision.

6. On the other hand, the defendant relies on the claimant's conduct before proceedings were issued as assisting its position. This was his conduct in writing the letter which caused all the trouble in the first place. I have described this in paragraph [42] of the main judgment as being properly regarded as a very serious error of judgment.

7. It was unnecessary for the purposes of the substantive decision to analyse these two pieces of conduct or the parties' respective cases about them. The claimant says that he had legitimate concerns about the Beehive project and generated a very large amount of paper in the voluminous trial bundles to explain why. Pages 302-654 (Volume 2 of 6) are a copy of the JCT Standard Building Contract. No-one suggested at any stage that I should look at this, and I did not, although I am broadly familiar with such documents. It had no conceivable relevance to the claim. The claimant's evidence also seeks to justify his concerns. All of that was beside the point. No-one ever doubted that he was entitled as a councillor to take an interest in this project and to express his views about the competence with which it had been managed. The complaint against him was that he had disseminated a letter which contained allegations of serious criminal misconduct by the Town Clerk which were entirely without foundation. As a councillor he was aware of its disciplinary procedures and if he felt that Mrs. Jones, the Town Clerk, was guilty of misconduct of some kind he could have initiated a complaint, or he could have involved the police. To distribute a "leaflet" through a third party of the type involved in this case involved a lack of respect for her of quite a grave kind. Whatever the merits of the decisions made in relation to the Beehive project by Honiton he misrepresented her role in those decisions in a reckless way. She had not, as he said, taken the decisions he criticised herself. Honiton had done that.

8. The conduct of Honiton in adopting and applying the October Policy contrary to the advice of its own officers could also be described with the same adjective "reckless".

9. These observations about conduct are made for the purpose of this costs decision only, and I consider that they have a limited relevance to the costs decision, and that the weight to be given to them must be carefully judged by reference to the impact they had on the incurring of costs.

10. I consider that, generally, the kind of conduct most relevant to costs is the conduct of the parties in dealing with the dispute once it has arisen rather than conduct which caused it in the first place. This is by no means an inflexible rule, but as a principle is sound. The general rule is that the unsuccessful party pays the successful party's costs and this follows the resolution of the issues giving rise to the dispute. Conduct only becomes relevant where the court is invited to depart from that general rule.

11. The successful party in this case was Mr. Taylor in that he secured the quashing of the Decision. However, this is a case where, in my judgment, the interests of justice require a departure from the general rule on conduct grounds. It is an important function of the costs jurisdiction that it operates as an incentive to parties to resolve disputes where possible. In this case a long sequence of correspondence came into existence in which the parties debated how the dispute might be resolved. Of course, the longer that went on, the greater were the costs and the more difficult settlement became. The claimant's solicitors accepted, as will appear, as early as June 2016 that the only real issue between the parties was costs. How had that come about, and how then did the case remain contested until trial? It is also relevant that the claimant failed on the principal argument he made which was contested, namely his contention that Honiton, rather than East Devon was the decision maker in respect of the decision as to breach. That was an argument which neither local authority could accept.

12. The request for time until the 26th February was refused by the claimant. On 26th February Honiton did respond to the pre-action protocol letter and said that the sanctions were revoked. The claimant nevertheless issued his proceedings on 1st March and served them the next day.

13. The reason why he issued despite the request for time was, apparently, because he was concerned about the time limit for judicial review. The decision of East Devon was notified by letter of 1st December 2015. The decision of Honiton was notified by letter of 18th December. The meetings at which the decisions were made were dated the 30th November and 14th December respectively. The extension of time was, it seems, requested in order to preserve the claimant's position in relation to East Devon, not Honiton. The response to the request dated 17th February 2016 required confirmation that the relevant decision under challenge was that of 14th December (Honiton) and that no point would be taken on delay relating to the time by which time was extended. It was a matter for the claimant to decide which decision he wanted to challenge, and he had decided to challenge the decision of the 14th December in the end. This was the decision he had said he was going to challenge in his pre-action protocol letter of 8th February. This was also the decision which he did challenge in the claim form. His case has always been that East Devon took no decision and was merely giving advice. I rejected this case so far as the decision on breach is concerned. On that issue he lost. The claimant appears to have wanted some assurance from Honiton to protect a position against East Devon which he had no wish to take. Nothing Honiton said could have prevented East Devon from taking a time point and it was only the non-existent claim against East Devon which was in peril on that ground.

14. On 22nd February 2016 at 08:46am the claimant's solicitors said that since they had not received a reply to their email of 17th February they had instructed counsel to settle a claim form and other documents so that they could issue in early course. The Town Clerk responded at 0935am on 22nd February that no-one had seen the email of 17th February because she had been on annual leave and it had been sent to her email address and not to a Town Council address which would be monitored in her absence. She also said that she did not have authority to make the decision to agree the terms required by the 17th February email and that she would "get back to you later today". Rather than waiting to see what happened that day, Pardoes on behalf of the claimant responded by an email which accused the Town Clerk of being discourteous in

relation to her email address and disingenuous because her letter of 17th February she said that Honiton was seeking advice whereas their client had shown them an agenda for a meeting of Honiton on 23rd February at which the council was to be asked to consider appointing counsel. As appears from the minutes of that meeting, the position was that counsel had written to Honiton on 18th February setting out the terms of his appointment. No doubt it was necessary to secure a resolution to incur a liability to pay the fees. This makes it extremely likely that as at the 17th February the Town Clerk was indeed in the process of seeking advice from counsel, which is no doubt why he set out his fees in a letter of the following day. It is worth making some points about this unfortunate email:-

i) The allegation that the Town Clerk was acting disingenuously was without any sensible foundation and ought not to have been made. The fact that Honiton was being invited to resolve to appoint counsel and approve his terms of retainer did not mean that the process of "seeking advice" was not under way when the email of 17th February 2016 was sent. He may well have been reviewing the papers before being formally appointed.

ii) The allegation was made as a result of input by the claimant himself. The email says

> "In the circumstances it seems to our client and us that what you have said in your letter is somewhat inconsistent with what is said in Agenda item 4…It seems to us that you are being disingenuous…so we consider it entirely appropriate to instruct counsel to proceed….."

iii) The word used was "disingenuous" but the allegation was that she had said that counsel was reviewing the papers on 17th February 2016 when this was not true. "Disingenuous" in this context is a close synonym for "dishonest". The claimant was therefore associated with a second unmeritorious allegation of dishonesty against the Town Clerk, this time in a form directly related to the proceedings. This was despite the fact that his previous allegations had been criticised by East Devon.

iv) Whatever may have been the position on 17th February 2016 it was clear that if Honiton agreed on 23rd February counsel would be appointed and advice received. The third agenda item was for a resolution that decision making could be delegated by Honiton which would speed its response. Plainly Honiton was gearing up to comply with its timetable of a response by 26th February.

v) The claimant and his solicitors therefore failed to do the sensible thing which was to wait until 26th February. They had clearly decided that it was the 14th December decision which was to be challenged when they wrote their letter of 8th February 2016 which was settled by counsel. It was a considered decision and one which was reflected in the subsequent claim form which was issued without the benefit of the assurance demanded in the email of 17th February. There was time to wait before issue, but they did not. They preferred instead to base their chosen course of conduct on a further unmerited allegation of dishonesty against the Town Clerk. The proceedings were sent to Honiton on

29th February and Honiton responded with surprise, describing the decision to issue as "wasteful" and inviting the claimant to discontinue the proceedings and not to serve them. They were served on 2nd March.

vi) This email ends with these rather surprising words

> "We reserve the right to refer to this correspondence in court proceedings in relation to the question of costs."

15. The claimant's solicitors were told that the sanctions decision was revoked by letter of 26th February and by letter of 1st March 2016 Honiton told the claimant personally that all sanctions currently imposed on him had been withdrawn. The sanctions decision would be remade. On 7th March Honiton said that there was no decision to be challenged in the proceedings because the sanctions decision of 14th December had been revoked and again invited the claimant to discontinue and said that it would seek its costs of defending them on an indemnity basis if not.

16. That correspondence received a long reply dated 16th March which said that Honiton's position was unclear and that the revocation of the sanctions may have been done unlawfully. The letter is not, in my judgment, a genuine attempt to dispose of proceedings which were now unlikely to do either party any good. Rather it set out a series of complaints which appear to have been intended to keep them going. It raised four points on which the claimant sought an answer.

17. Honiton agreed that the Decision had to be quashed, in effect, on 19th March 2016, see paragraph [24(i)] of the main judgment. In its letter of that date, it also repeated its decision not to re-impose all the sanctions imposed on 14th December and to reconsider whether any sanctions should have been imposed at all. Honiton gave an assurance that any such sanctions would be limited "to those set out in the case law you have referred to" which means censure and publication of the censure, see the main judgment. Honiton also agreed to pay the claimant's costs on the standard basis to be assessed if not agreed. On that basis it proposed that the proceedings should be withdrawn.

18. The response from the claimant was sent by email on 22nd March 2016. It said that he proposed to continue his claim. It begins by saying that it was written on the claimant's instructions. His reasoning was set out (and I summarise)

i) He continued to demand evidence that the revocation of the sanctions was lawful. This issue was made part of these proceedings when he amended his Statement of Facts and Grounds as ordered by Hickinbottom J on 21st April 2016. That document is dated 4th May 2016. There is a somewhat unreal appearance to an argument by a person who is not subject to sanctions that he ought to be because their revocation was unlawful. It appears to me that this argument was sustained by a litigant who was seeking some reason to continue with his proceedings when there was no real purpose in doing so.

ii) He contended that he should be free of all sanctions in respect of the breach of the Code, including censure. He did not succeed in this in these proceedings. He also asked for an assurance from Honiton that it had no power to impose sanctions of a kind which it had already said it was not going to impose.

iii) He said that he proposed to continue with his proceedings because he did not think that the Town Clerk, who had written the letter of 19th March 2016, had authority to do so under the terms of the delegation of the 23rd February. Again, this posture speaks of a litigant wanting to find something to argue about, rather than trying to resolve a genuine grievance.

iv) Overall this is an extremely unimpressive response to a clear offer to abandon the sanctions, to reconsider them according to the law, and to pay the costs. The result of the litigation has been that the sanctions are quashed and Honiton is free to reconsider them according to the law. In so far as he succeeded he has not done better than this offer. On the real complaint in it, that he should not have been sanctioned at all and should not be in the future, he failed. The technical points about the lawfulness of Honiton's decision making were never resolved.

19. Honiton was therefore required to file an Acknowledgement of Service and did so on 23rd March. It accepted that the decision of 14th December 2015 should be quashed. It resisted certain contentions made by the claimant in support of that result, and said that this was important because the claimant sought declarations which would affect any further decision which Honiton sought to make. The claimant did not succeed in securing those declarations. It refers to its concessions in correspondence set out above.

20. On 29th March Honiton responded to the email of the 22nd March setting out its case and suggesting that there should be a consent order. It included a draft. This, again, included an offer to pay costs. The claimant did not do better than this offer at the hearing. The claimant responded with his own draft order which provided that the decision of 14th December should be quashed in so far as it had not already been revoked and that Honiton would pay the claimant's costs. It also recited the following undertaking

> "AND UPON the claimant undertaking not to impose any sanctions upon the claimant in respect of an alleged breach of the Code of Conduct governing members of the Council in respect of a complaint dated 27 January 2015 and made by Chetna Jones, the Town Clerk of the Council"

21. In other words the claimant continued to seek an order that he should never be censured for the breach found by East Devon. His use of the word "alleged" imports his failed argument that the decision by East Devon was not a decision, but only advice. This is an important issue to local authorities and one which they could not concede. The legal position is that the breach was not an alleged breach. The proper decision maker had found it proved. He was not entitled to this undertaking and failed to secure it by these proceedings. On the only issue which separated the parties by this stage he lost at trial. He wanted his conduct in writing the letter accusing the Town Clerk of criminal misconduct to be vindicated and this has not happened.

22. On 27th April 2016 Honiton made a further offer which included all the relief to which the claimant was entitled and an order that Honiton would pay the claimant's costs except for the costs after the 29th March 2016 and the costs of issues 2 and 3 in the claim form which Honiton rightly said were without merit. This was rejected because

the claimant feared that Honiton would once again impose unlawful sanctions (he did not say which) and that it would publish a statement saying what it had done again. Honiton's position throughout the litigation has been that the only sanctions available to it were censure and publication and that it would consider whether they ought to be imposed afresh in the light of the outcome of the litigation. By seeking to prevent publication the claimant was therefore seeking to avoid a principal sanction open to Honiton. The voters cannot take misconduct by a councillor at the next election into account if the censure has not been publicised. Honiton therefore declined to accept his counter-proposal in its letter of 4th May 2016.

23. I will not continue my recitation and analysis of this dismal correspondence. Consent Orders were exchanged but not agreed. By now, Honiton was seeking to limit its liability to pay costs to the date of its offer of 19th March and, later, sought payment of its costs from a certain date. Eventually, after many efforts to settle the claim Honiton instructed Foot Anstey, solicitors, to act on its behalf. By this stage, June 2016, the proceedings had been on foot for 3 months and the costs of both sides were already a significant sum. The opportunity to settle it when costs were at a reasonable level had been lost because of the claimant's refusal to compromise. Foot Anstey sought to deal with the matter by proposing a "drop hands settlement" by their letter of 28th June 2016 which agreed all the terms sought by the claimant except costs. By this stage, Honiton was able to rely on its offers and had an arguable case for orders in its favour which could be set against the claim for costs made by the claimant which had been conceded as recently as 29th March 2016.

24. On 29th June 2016 Pardoes, on behalf of the claimant, said in an email

> "Our client accepts that there is always costs risk in litigation and particularly now in this litigation where the difference between us appears to relate to costs…"

25. The litigation was apparently being driven by the claimant. Earlier in this email, Pardoes said this

> " Further evidence perhaps of your client's unreasonable stance is to offer in your correspondence received today a "drop hands" when your client has previously offered to pay our client's costs on a standard basis up to 26th February 2016 and so it is reneging and back tracking on its previous position and for no apparent reason disclosed to us.
>
> "You will appreciate that your offer is rejected by our client as we anticipate you expected it would be so on grounds it is not as good an offer as previously regarding costs and so to describe your client's drop hands offer as "reasonable" our client considers is risible and a bit of a try on. Our client would venture to suggest that the costs your client is incurring are not caused by any unreasonable conduct on his behalf, none admitted, but by reason of its unlawful actions in sanctioning our client."

26. This extract is typical of the correspondence. It appears that the basic rule of contract that an offer which is rejected is no longer available for acceptance was not explained to the claimant. He had had his chance to settle on terms that his costs would be paid, not until the 26th February but until the date of the settlement if it had occurred. He had rejected that offer, and it was not "reneging" or "back tracking" to make a different and lower offer when things changed as they did when the continuation of the proceedings meant that the bills on both sides were climbing fast, and when the offer was rejected. The last sentence makes it clear that the claimant was still really trying to secure a result which meant that he should not have been sanctioned at all as a result of his misconduct which he has failed to achieve. He seems to have thought that, having been subjected to unlawful sanctions between the 14th December 2015 and their withdrawal on 19th January 2016 and their repeated revocation over the months which followed, he could conduct the proceedings as he wished and recover all his costs however unmeritorious some of the contentions were. In this respect he was wrong.

27. This is a very unsatisfactory case. Very substantial costs have been incurred on both sides. This need never have happened. On the basis of all the material I have read, including the parts I have referred to specifically above, I find:-

i) That these proceedings were issued too quickly because of a fear of a time limit which was never a difficulty for the claim which was then contemplated and the only claim which was ever brought. The justification for this unnecessary haste included an inappropriate allegation of dishonesty against the Town Clerk. These considerations are relevant to costs.

ii) That Honiton substantially resolved the dispute by its decision in its letter of 26th February 2016 which preceded issue. The loose ends could and should have been agreed after that without the need for any proceedings.

iii) That the subsequent offers to pay costs on 19th and 29th March should have been accepted. The claimant has achieved nothing of value since then. It is unsurprising that Honiton has changed its position on costs since then given the matters I have set out above. The claimant's failure to take this into account on 29th June 2016 when he had appreciated that the only issue between the parties was costs was unreasonable, see [24] and [25] above.

iv) That the conduct of the proceedings by the claimant has not been characterised by a genuine attempt to compromise them on the basis of the law as properly understood. His real motive from a very early stage has been to avoid the consequences of the decision of East Devon by preventing Honiton from censuring him and publicising that action after their withdrawal of the original sanctions. He has used a variety of arguments to attempt to achieve this which have lacked merit. He has failed in that regard.

v) Nevertheless I should make an order which reflects the fact that the claimant has succeeded in securing the quashing of a sanctions decision which was imposed on the basis of a policy adopted contrary to the advice of council officers and which has since been revoked. Given my finding at (i) above, the order I intend to make may be thought generous. Nevertheless, it appears to me to achieve broad justice. The defendant's letter of 19th March 2016 is a

key document. It was clear enough, but any possible doubt was resolved by the letter and draft order of 29th March 2016. From that point on the claimant's continuation and conduct of these proceedings was unreasonable.

28. I therefore make the following order:-

1. The defendant will pay the claimant's costs of the proceedings on the standard basis to be assessed if not agreed in so far as those costs were incurred up to and including the 19th March 2016.

2. The claimant will pay the defendant's costs of the proceedings on the standard basis to be assessed if not agreed in so far as those costs were incurred on and after 20th March 2016.