

[2016 Gib LR 198]**AN v. GN**

SUPREME COURT (Butler, J.): September 29th, 2016

Family Law—financial provision—costs—costs of non-party—non-party ordered to produce documents for inspection may be awarded costs (English Senior Courts Act 1981, s.51 and CPR, r.46.2 apply (Supreme Court Act, s.12))

A non-party applied for its costs in financial relief proceedings.

The applicant company had been ordered to produce documents for inspection in financial relief proceedings between the petitioner (the husband) and the respondent (the wife). It sought to recover its costs from the respondent. The court considered whether it had power to order costs in favour of a non-party in financial relief proceedings.

Held, ordering as follows:

(1) The court had power to make the order sought. Although the Matrimonial Causes Act and the Family Proceedings (Matrimonial Causes) Rules did not provide express or implied power to award costs to non-parties, s.12 of the Supreme Court Act provided that the court “shall in addition to any other jurisdiction conferred by this or any other Act . . . possess and exercise all the jurisdiction, powers and authorities which are from time vested in and capable of being exercised by Her Majesty’s High Court of Justice in England.” In England and Wales, the Senior Courts Act 1981, s.51 provided for costs orders in favour of or against non-parties. Rule 46.2 of the Civil Procedure Rules provided that, when the court was considering whether to make such an order, the non-party must be added as a party for the purposes of costs only. Rule 46.2 and s.51 applied in Gibraltar by virtue of the Supreme Court Act. For the avoidance of doubt, the court did not have inherent jurisdiction to make a costs order for or against a non-party in financial relief proceedings (paras. 8–19).

(2) The applicant would be joined as a party to the financial relief proceedings solely for the purpose of making its application for costs. The respondent would be ordered to pay the costs in the total sum of £17,000. In the circumstances of the present case, the court had jurisdiction to award costs only insofar as the applicant had acted non-voluntarily and under compulsion (paras. 20–23).

Cases cited:

(1) *B v. B (Costs: Order against non-party)*, [2013] EWHC 1956 (Fam);

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[2013] P.T.S.R. 1579; [2013] 5 Costs L.R. 738; [2016] 1 FLR 92; (2013), 3 F.C.R. 318, applied.

(2) *Jones v. Simoni*, 1995–96 Gib LR 45, referred to.

Legislation construed:

Family Proceedings (Matrimonial Causes) Rules 2010, r.67: The relevant terms of this rule are set out at para. 16,

Matrimonial Causes Act 1962, s.9: The relevant terms of this section are set out at para. 3.

Supreme Court Act 1960, s.12: The relevant terms of this section are set out at para. 8.

s.15: The relevant terms of this section are set out at para. 7.

Civil Procedure Rules, r.46.2: The relevant terms of this sub-rule are set out at para. 16.

Family Procedure Rules 2010, r.28.1:

“The court may at any time make such order as to costs as it thinks just.”

Senior Courts Act 1981 (c.54), s.51:

“(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings . . . shall be in the discretion of the court.”

“(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.”

K. Azopardi, Q.C. and *K. Power* for the applicant;

L. Armstrong and *J. Evans* for the petitioner;

The respondent did not appear and was not represented.

1 **BUTLER, J.:** This is an application for costs against the respondent wife in bitterly contested financial remedy proceedings in which I ruled last year. The fine details of that ruling are not relevant to this application.

2 These points involve consideration of complex legal argument. Whilst I have had the benefit of detailed submissions from Mr. Azopardi, Q.C. on behalf of C.R. Ltd., the wife has not been represented for this application and has not made any detailed submissions in relation to the legal issues arising or the extent of the costs claimed. She has continued to avoid attendance in this court.

Power to order costs in favour of a non-party in financial remedy proceedings following divorce

3 In Part III of Gibraltar’s Matrimonial Causes Act 1962 (“the Act”), headed “Practice, Powers and Evidence,” s.9 (itself headed “Practice and Procedure”) provides that—

“the jurisdiction vested in the court by this Act shall so far as regards procedure, practice and powers of the court be *exercised* in the manner provided by this Act and by any subsidiary legislation made hereunder; and where no special provision is contained in this Act or in any such subsidiary legislation with reference thereto, any such jurisdiction shall be exercised in accordance with the practice, procedure and powers for the time being in force in the High Court of Justice in England with reference to matrimonial proceedings.” [Emphasis supplied.]

4 (i) Mr. Azopardi, Q.C. has been unable to point to any express or implied provision in the Act or in Gibraltar’s Family Proceedings (Matrimonial Causes) Rules 2010 (“the Rules”) which gives any express or implied power to award costs to non-parties.

(ii) He suggests that such power may be procedural but on balance it seems to me to be a matter of substance. It is not a question of the procedure for claiming, and the award of, costs but of the fundamental and substantial question of whether there is any right to claim costs or power to award them.

(iii) Section 9 is concerned with the *exercise* of practice, procedure or powers contained in the Act or the Rules. It is not, in my judgment, intended to import substantive powers to this court from the United Kingdom which this court does not otherwise have.

5 Rule 40 of the Rules deals with the right of a respondent, co-respondent or party cited to be heard on a question of costs. No reference is made to non-parties.

6 Rule 74 deals with costs orders in financial relief proceedings. It specifically provides that r.44.3(1)–(5) of the Civil Procedure Rules (in England and Wales) shall not apply to such proceedings. It sets out the rules to be applied as between parties in financial relief proceedings, the general rule being that there will be no order as to costs unless the conduct of a party makes a different order appropriate. If it does, sub-rule (4) sets out matters to which the court must have regard in deciding what order to make. There is again no mention of non-parties.

7 Gibraltar’s Supreme Court Act 1960, s.15 (headed “Practice and Procedure”) provides that—

“the jurisdiction vested in the court shall be exercised (as far as regards practice and procedure) in the manner provided by this or any other Act or by such rules as may be made pursuant to this Act or any other Act and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.”

This, of course, is similar to, though not exactly coincident with, s.9 of the Act. It is not, in my judgment, designed to add to the substantive powers of this court in matrimonial financial relief proceedings.

8 Section 12 of Gibraltar's Supreme Court Act (headed "Court to have jurisdiction of High Court in England") provides that this court—

“shall in addition to any other jurisdiction conferred by this or any other Act, within Gibraltar and subject as in this Act mentioned, possess and exercise *all the jurisdiction, powers and authorities which are from time vested in and capable of being exercised by Her Majesty's High Court of Justice in England.*” [Emphasis supplied.]

This contrasts with s.15 of that Act and s.9 of the Matrimonial Causes Act, in that there is no mention of practice and procedure or anything restricting it to matters of practice or procedure or restricting its application to non-substantive matters of law. I have been referred to the judgment of Harwood, A.J. in the case of *Jones v. Simoni* (2), in which he reached the same conclusion when finding that the power of the High Court in England to cancel the resealing of a grant of letters of administration was imported to this court by s.15, though this was not a matter of practice or procedure. (In passing, I agree with his observation that s.12 of the Supreme Court Act contains an obvious misprint and should read: “from time to time.”)

9 I do not consider that s.15 would give this court powers with which primary or subsidiary legislation in Gibraltar is inconsistent. I have therefore considered whether there is anything in such legislation which militates against UK law being imported into Gibraltar in this particular regard. I do not find that there is. Neither Mr. Azopardi, Q.C. nor Ms. Power has found any such thing.

10 It is, perhaps, somewhat surprising to find that new and substantive changes to English law should automatically find themselves imported into Gibraltar law and I have considered what limitations there may be to that principle. In the end I have not found it necessary to reach conclusions on that question since I find at least that English family law applies so far as this application is concerned, save as is otherwise provided by the substantive law of Gibraltar.

11 No point has been taken by the wife that this court does not have power to award costs in favour of non-parties but, she being unrepresented in this application, I have been concerned to satisfy myself that I do have that power. My conclusion is that I do.

The relevant law in England and Wales

12 Costs in family proceedings are governed by Part 28 of the Family Procedure Rules 2010 (“FPR”). The court may at any time make such

order as to costs as it thinks just. Costs in financial remedy proceedings are governed by r.28.3. The general rules governing costs in civil proceedings do not apply.

13 In *B v. B (Costs: Order against non-party)* (1), Cobb, J. ruled that the court had power to award costs against a local authority which was not party to private law proceedings but had been ordered to file a report under s.37 of the Children Act 1989. He held that the Senior Courts Act 1981, s.51 and the FPR, r.48.1 gave the court a wide discretion in relation to costs. Though such an order would be exceptional, he ordered the local authority to pay the father's costs.

14 From April 6th, 2011, the governing rule concerning costs in financial remedy proceedings is FPR, r.28.3. But that deals specifically with orders for costs between parties.

15 Rule 46.2 of the CPR provides that—

“(1) where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 to make a costs order in favour of or against a person who is not a party to proceedings, that person *must*—

- (a) be added as a party . . . for the purposes of costs only; and
- (b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further.”

16 I am satisfied that r.46.2 and s.51 apply in Gibraltar by virtue of Gibraltar's Supreme Court Act. By sub-rule (2)(b), that rule does not, however, apply “in proceedings to which rule 46.1 applies (pre-commencement disclosure and orders for disclosure against a person who is not a party).” It does not seem to me that r.46.1 applies to this case. In so far as application was made against C.R. Ltd. for disclosure (in fact it was for the production and lending of documents for inspection by an expert), I am unsure under what provision the husband's solicitor made the application but anticipate that it must have been made under Gibraltar's FPR, r.67:

“(2) At the hearing of an application for financial relief the Court shall investigate the allegations made in support of and in answer to the application, and may take evidence orally and may at any stage of the proceedings, whether before or during the hearing, order the attendance of any person for the purpose of being examined or cross-examined and order the disclosure and inspection of any document or require further statements.

...

(4) Any party may apply to the Court for an order that any person attend an appointment (an ‘inspection appointment’) before the Court and produce any documents to be specified or described in the order, the inspection of which appears to the Court to be necessary for disposing fairly of the application for financial relief or for saving costs.”

17 FPR, Part 20.2(c) gives the court power to make an order for the inspection of relevant property, the taking of a sample of relevant property and the carrying out of an experiment on or with relevant property. In any event, it must have been under those provisions that I made any order.

18 For the avoidance of doubt I do not accept that this court has inherent jurisdiction to make a costs order for or against a non-party to a financial remedy application in matrimonial proceedings. The issue is anyway covered by the law as I have analysed it in this ruling.

19 I conclude that—

(a) C.R. Ltd. should not be entitled to its costs save in so far as it was not acting entirely voluntarily and in so far as it did so under compulsion. I do not think that this court has jurisdiction to provide for its costs otherwise than to that extent in the circumstances of this case, though I do not rule out the possibility that circumstances may arise rarely in other cases in which a third party adversely affected by the conduct of a party in a financial remedy case may successfully apply for an order under s.51 of the Senior Courts Act.

(b) C.R. Ltd. was almost certainly party to the application for an order pursuant to r.67 of the Rules.

(c) As a party to that application it is probable that this court has jurisdiction to award it its costs relating to that application without further procedural requirement to join C.R. Ltd. as a party.

(d) As a matter of caution, however, I shall order that C.R. Ltd. be joined as a party in order to make its application for costs.

(e) I shall do so in order to remove any doubt about the matter and because I am not convinced that the whole of the costs sought relate to defending the r.67 application. Partly the costs have been incurred in reacting to orders made in the financial remedy proceedings between the parties other than strictly relating to the r.67 application.

(f) The wife has had every opportunity to argue her case relating to this application and has not contested the power of this court to award costs but has argued the case on its merits (to which I shall turn in due course). I cannot think it likely that she has any further submissions to make but as a matter of caution, since she is unrepresented, I shall allow her a further 21 days from the date of service of this order upon her to apply for a

hearing at which she may put forward any further representations which she wishes to make with regard to the law.

20 I have given particular consideration to the powers of this court, despite their not having been contested, also because of the possible ramifications of my ruling in other cases. The circumstances in which costs orders will be made in favour of or against non-parties in financial remedy cases are likely to be rare.

21 During the course of submissions I was told that the application was made on behalf of MN, KN and C.R. Ltd. The application was, however, only issued on behalf of C.R. Ltd. and I propose to deal with it on that basis.

Order

22 (1) For the avoidance of doubt C.R. Ltd. shall be joined forthwith as a party to the financial remedy proceedings for the purpose only of making its application for costs as set out in this ruling. (The wife has had full opportunity to make her submissions on the application. I find it difficult to envisage that she has anything to add to those submissions. I have reduced the amount claimed substantially without any submissions from her relating to the amount claimed, given that she is unrepresented and I must do my best to reach a fair decision without the assistance from her which I would expect if she were represented.)

(2) The wife shall pay the costs of C.R. Ltd. in the total sum of £17,000.

(3) I appreciate that this is not an easy time for her. It will cause no hardship to C.R. Ltd. if I give her some time to pay. I order that she pay at the rate of £1,416 per calendar month commencing on September 1st, 2016. That will give her one year in which to make full payment. In default of any payment, the whole amount will become immediately due and enforceable.

(4) From an abundance of caution I direct that this order shall not be drawn up and become final until 1 p.m. on July 29th, 2016. The wife shall have until then to make any final submissions which she wishes to make. She should not repeat any submissions which she has already made and must restrict herself to matters relevant to this costs application.

(5) The husband has incurred costs relating to this application but it has been clear that the application was effectively against the wife. Given the result of the main financial remedy proceedings, his costs in this application are insignificant. As between the parties, I do not propose to make any further order. It is not usual to make orders for costs as between parties in

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this type of litigation and I do think that it is preferable that my main order should be regarded as the final resolution of their dispute.

Order accordingly.
