Case 13
Hurst
v
Leeming

Neutral Citation Number: [2001] EWHC 1051 (CH)
High Court of Justice, Chancery Division
9 May 2002

Before:
Lightman J

Headnote

In this action an allegation of professional negligence was brought by the claimant, a solicitor, against Leading Counsel. The action was dismissed leaving the outstanding single issue the question of costs. The court considered whether the entitlement to costs of the defendant should be extinguished because both before and after the commencement of proceedings the defendant was invited to proceed to mediation but refused.

Judgment

1. **LIGHTMAN J:** The claimant, Mr Hurst, a solicitor, was a partner in the later dissolved firm of Martin Janus. Disputes arose between Mr Hurst and his former partners, and this led to proceedings by Mr Hurst against them. Mr Hurst acted in person in those proceedings until a few days into the trial, when, through solicitors he had retained, Messrs Penningtons, he instructed the defendant, Mr Ian Leeming QC.

2. Amongst the many claims made by Mr Hurst in that case was a claim for the taking by the court of an account.

3. Mr Hurst failed in his claims in that action, both at first instance, on appeal to the Court of Appeal, and in the House of Lords. Orders for costs were made against him. The failure in those proceedings led to his bankruptcy. He is practically ruined. Mr Hurst attributed the failure in the proceedings and his subsequent ill-fortune to the legal advice and representation in those proceedings. He could not sue Mr Leeming under the law as it stood until the decision of the House of Lords in *Arthur JS Hall & Co* v *Simons* [2000] 3 WLR 543, which I shall refer to as "*Hall*". Prior to that date counsel were believed to enjoy immunity from suit for negligence in the conduct of proceedings.

4. Mr Hurst accordingly, to get round the consequence of this immunity, sued Penningtons in the Chancery Division in effect as vicariously liable for the negligent conduct of the proceedings by Mr Leeming. The actions was struck out as hopeless by Mr Justice Pumfrey, and the Court of Appeal refused permission to appeal. Mr Hurst, undaunted, then commenced fresh proceedings against Penningtons in the Queen's Bench Division. Master Rose struck out that action as an abuse of process.

5. With the decision of the House of Lords in *Hall* removing Mr Leeming's immunity, Mr Hurst then sued Mr Leeming for negligence. I have before me applications for summary judgment in that action, both by Mr Hurst and by Mr Leeming. Mr Hurst appears in person, Mr Leeming is represented by Mr Philip Heslop QC.

6. When Mr Hurst opened his application, he and I had a frank exchange of views on the merits of the case, and this exchange led us both to conclude that the action had no merit and must be dismissed. I must make it clear beyond any doubt that there is no ground for any criticism of Mr Leeming. For what it is worth, on the material before me I would have reached the same conclusion that he did, and acted in exactly the same way. Mr Hurst is to be commended for his fair and sensible decision in this regard at the hearing. This decision, namely that the action had to be dismissed, left outstanding the single issue of the costs of the action.

7. In the ordinary way, Mr Leeming would, without question, be entitled to his costs, but Mr Hurst submits that no such order should be made because both before and after the commencement of the proceedings he invited Mr Leeming to proceed to mediation, but Mr Leeming refused.

8. It is unnecessary to examine in detail the correspondence between the parties; it is sufficient if I state the following as the material facts.

1. Mr Hurst's claims were of professional negligence by Mr Leeming.
2. Mr Leeming vehemently denied those claims.
3. The claims in fact lacked any substance or merit.
4. Mr Leeming gave full and detailed answers to each and every allegation made against him, explaining fully his actions and refuting those allegations.
5. Mr Leeming gave a series of reasons for refusing to proceed to mediation, first, the legal costs already incurred in meeting the allegations and the threat of proceedings; secondly, the seriousness of the allegations of professional negligence; thirdly, the total lack of substance of the claims made; fourthly, the lack of any real prospect of a successful outcome to the mediation proceedings, having regard, in particular, to the plain object of Mr Hurst in proposing mediation of obtaining a substantial financial payment from Mr Leeming when in fact there was no merit in the claim; and fifthly, the character of Mr Hurst as revealed by the actions he commenced and his response to the explanation of Mr Leeming's conduct already provided. That character, Mr Leeming says, was of a man obsessed with the notion that an injustice had been perpetrated on him, who would not be able or willing to adopt in the course of a mediation the attitude required if a mediation was to have any prospect of success.

9. The professional negligence pre-action protocol lays down that in proceedings for professional negligence, if one party offers to proceed to mediation, the other party, if he refuses, should state his reasons. Implicit in that protocol, and explicit in two decisions of the Court of Appeal, *Cowell* v *Plymouth City Council* and *Dunwich* v *Railtrack*, is the proposition that a party who refuses to proceed to mediation without good and sufficient reasons may be penalised for that refusal and, most particularly, in respect of costs. Mediation is not in law compulsory, and the protocol spells that out loud and clear. But alternative dispute resolution is at the heart of today's civil justice system, and any unjustified failure to give proper attention to the opportunities afforded by mediation, and in particular in any case where mediation affords a realistic prospect of resolution of dispute,

there must be anticipated as a real possibility that adverse consequences may be attracted.

10. I have accordingly to consider whether Mr Leeming was justified in refusing to proceed to mediation. I do not think that the fact that heavy costs had already been incurred was afforded any form of justification. This was merely a factor to be taken into account in the mediation process. Nor do I think it sufficient that there was an allegation of professional negligence. Practically all allegations of negligence against a professional man or body are serious, but that is no reason why an attempt should not be made at mediation. The reflection on the professional competence of a party may need to be reflected in the course of the negotiations and in any settlement, but cannot of itself take any ordinary case outside the purview of mediation. The fact that a party believes that he has a watertight case again is no justification for refusing mediation. That is the frame of mind of so many litigants. Nor is it necessarily sufficient of itself that a full and detailed refutation of the opposite party's case has already been supplied, though this may well be a very relevant consideration.

11. The critical factor in this case, in my view, is whether, objectively viewed, a mediation had any real prospect of success. If mediation can have no real prospect of success a party may, with impunity, refuse to proceed to mediation on this ground. But refusal is a high risk course to take, for if the court find that there was a real prospect, the party refusing to proceed to mediation may, as I have said, be severely penalised. Further, the hurdle in the way of a party refusing to proceed to mediation on this ground is high, for in making this objective assessment of the prospects of mediation, the starting point must surely be the fact that the mediation process itself can and does often bring about a more sensible and more conciliatory attitude on the part of the parties than might otherwise be expected to prevail before the mediation, and may produce a recognition of the strengths and weaknesses by each party of his own case and of that of his opponent, and a willingness to accept the give and take essential to a successful mediation. What appears to be incapable of mediation before the mediation process begins often proves capable of satisfactory resolution later.

12. Mr Hurst now accepts (as he must) that his case was hopeless. He argues that, if Mr Leeming had agreed to the mediation which he sought, the mediator could have had the same frank exchange of views

with him which I have had, and this would have enabled the case to be resolved without the costs involved in this action. This is a formidable argument, but, after anxious consideration, I am persuaded that, quite exceptionally, Mr Leeming was justified in taking the view that mediation was not appropriate because it had no realistic prospect of success. My reasons, in a word, are that on the material before the court (as on the material before Mr Leeming) it is plain that Mr Hurst has been so seriously disturbed by the tragic course of events resulting from the dissolution of the partnership that his judgment in respect of matters concerning the partnership and partnership action, and the conduct of that action on his behalf is seriously disturbed: he is a person obsessed with the injustice which he considers has been perpetrated on him and is incapable of a balanced evaluation of the facts.

13. The grounds for my view are as follows: first, Mr Hurst, though a solicitor, has appeared quite unable or unwilling to appreciate the full and clear explanation given refuting his claim. It needed no mediator to help him to evaluate the claim when furnished with the explanation by Mr Leeming. I do not accept that as a mere "IT" solicitor he could not be expected to understand the partnership law issues involved.

14. Secondly, prior to the present action Mr Hurst had already commenced two hopeless, and in my view vexatious, actions against Penningtons. I do not think that the commencement of those proceedings can have reflected a balanced view of their likely outcome.

15. Thirdly, Mr Hurst is a bankrupt and has (and knows that he has) nothing to lose in the proceedings.

16. Fourthly, the evidence and pleadings in this case reveal that what is really "biting" Mr Hurst, is the conviction that his former partners were fraudulent, and the conduct of the trial by his legal advisers let them get away with it. Yet at no time did Mr Hurst ever plead or even allege fraud in the partnership action.

17. Fifthly, Mr Hurst was out to obtain a substantial sum in the mediation process. He was not likely to accept any mediation which did not achieve that result, though his claim, as I have said, plainly entitled him to nothing.

18. In short, as it seems to me, Mr Leeming reasonably and fairly took the perfectly justifiable view on the facts that, by reason of the character and attitude of Mr Hurst, mediation had no real prospect of

getting anywhere. That is not a view which is easily sustainable in any case, but, on the facts of this case, it is sustained. For this reason I do not think that Mr Leeming should be penalised or should be deprived of his full entitlement to costs.

19. I therefore award costs of the action, including the costs of these two applications, in favour of Mr Leeming, which I summarily assess at £55,000.

20. **MR HESLOP:** My Lord, I am much obliged. I have in fact an order prepared. Would it be convenient if Mr Hurst had a look at it, and a copy was handed up to your Lordship? (Document handed)

21. This draft, my Lord, provides in the first three paragraphs that it be made by consent, given Mr Hurst's position, and then deals with the position of costs, and the figure should then be put in at £55,000, in para 4.

22. **LIGHTMAN J:** Yes.

23. **MR HESLOP:** And I am not sure there is anything else, my Lord, that needs to be added.

24. **LIGHTMAN J:** No. Mr Hurst, I do not think there is anything that you can say, is there?

25. **MR HURST:** I am not sure whether it is appropriate to order me to pay within 14 days, because I cannot.

26. **LIGHTMAN J:** All I can do is – what is the position if he cannot pay?

27. **MR HESLOP:** Given his bankruptcy, my Lord, the ordinary steps – 14 days I believe under this mechanism is the normal time put in an order, and certainly I have seen that done on many other occasions, and ordinarily then one would be able to get judgment enforced. But given that Mr Hurst is a bankrupt, I think that things are a bit more complicated, and therefore it may all turn out to be academic. Certainly if Mr Hurst cannot pay now, making it 21 or 28 days does not help.

28. So I would respectfully suggest that the order is left in this form and matters will take their course.

29. **LIGHTMAN J:** The simple position, Mr Hurst, is if you have not got the money they are not going to be able to enforce it.

30. **MR HURST:** I just do not want it alleged that I am in contempt of court, my Lord.

31. **LIGHTMAN J:** The answer is you will not be in contempt, and I am sure your opponent will entirely agree, if you cannot afford to pay it.

32. **MR HESLOP:** It will just become a debt, if he does not pay it, which is unpaid.

33. **LIGHTMAN J:** That is what I will do. Mr Hurst, I am very sad at what has happened, but I am afraid that is the only outcome, and I hope that life treats you a little bit better in the future.

34. **MR HURST:** I am much obliged, my Lord.

The claimant appeared in person.

Mr P Heslop QC and *Mr A Twigger* (instructed by Reynolds Porter Chamberlain) appeared on behalf of the defendant.