B2/2012/0611

Neutral Citation Number: [2014] EWCA Civ 238
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand,London WC2A 2LL

Wednesday, 12 February 2014

B e f o r e:

LORD JUSTICE FLOYD

LORD JUSTICE DAVIS

- - - - - - - - - - - - -

Between:
MARK COLWILL

Appellant

v

EUROPEAN HERITAGE LIMITED

Respondent

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DAR Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

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Mr M Colwill appeared in person
Mr C Stirling (instructed by David Tagg & Co) appeared on behalf of the **Respondent**

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J U D G M E N T

1. LORD JUSTICE FLOYD: By his order following a trial on 23 and 24 February 2012, HHJ Reid QC, sitting in the Guildford County Court, dismissed the claim of Mr Colwill and ordered him to pay the costs in the amount of some £23,000. However, he purported to award the defendant, European Heritage Limited, the sum of £1,580 on a counterclaim, when that sum had only been raised by way of a potential set off. As the claimant failed, no question of a set off could arise.

2. Mr Colwill served a notice of appeal seeking to set aside the judge's order dismissing the claim, ordering him to pay costs and awarding the sum of the purported counterclaim. The claim concerned whether the defendant was liable for rent in respect of premises at Parsons Green in London. The details of the claim are not relevant for the purposes of this appeal.

3. At an oral hearing on 17 October 2012 Toulson LJ, as he then was, firstly refused permission to appeal against the dismissal of the claim. Having carefully considered the grounds argued, Toulson LJ said this:

> "In summary I conclude that the appeal against the dismissal of the claimant's claim is hopeless and that permission must be refused."

Toulson LJ also refused permission to appeal against the judge's costs order.

4. Toulson LJ did, however did grant permission to appeal in respect of the money judgment in favour of the defendant on the purported counterclaim. About that, he said this:

> "I turn to the money judgment, which the judge made in favour of the defendant. Here there was a plain irregularity. The indebtedness of the defendant to the claimant had been pleaded as a set off and not a counterclaim. That this was no mere oversight or technicality is clear from the defendant counsel's written opening in which he said:
>
> 'The defendant would finally note that there is a set off sought if any sums are due to the claimant as a result of unpaid invoices by Bath 1959 owed to the defendant in the sum of £1,058.34. It is not clear if these are disputed. However, this is not pleaded as a counterclaim and absent any liability of the defendant to the claim of the claimant, this need not trouble the court.'.
>
> So the defendant was making expressly clear that this indebtedness was advanced only by way of set off and not by way of counterclaim if the claim itself failed. One can only surmise that the judge must have not recollected this when he gave his judgment. He took it as being simply not a matter of dispute that the money was owed and, regrettably, nobody pointed out to the judge at the conclusion of his judgment that there was no counterclaim."

5. As to that last point, Mr Stirling, who appears on behalf of the defendant today, accepts that he did not draw this point to the attention of the judge at the conclusion of the trial.

He says, and for my part I accept, that it was an oversight on his part. Toulson LJ went on to say this:

> "On that limited ground there must, in my judgment, be permission to appeal. I therefore give permission to appeal against the dismissal of the claim but only against the judgment on the counterclaim. It makes no difference to costs.
>
> I direct that a transcript of this judgment should be sent to the defendants and they should notify the court within 21 days whether they intend to resist the appeal. I strongly imagine they will not. It would be ludicrous if the time of the full court were taken up on an issue of £1,500. I hope therefore that the matter can be resolved very quickly by the defendants agreeing that this should be corrected.
>
> I do not think this of itself should give rise to any question of costs, although formally the parties can make submissions in writing on the point if they wish and if, as I anticipate, the defendants agree that the appeal against the counterclaim should be allowed."

6. It is clear from the papers that, even before the transcript was sent to them, the solicitors for the respondents wrote to acknowledge to the appellant that they had no counterclaim. They did that on 25 October 2012. They asked the claimant to forward a proposed consent order to dispose of the appeal by return for their consideration. The appellant's response was to write back to say, amongst other things, that costs were not agreed. Surprisingly in that letter it was said that costs were not agreed both for the appeal and for the case in the county court. The letter also began what was a long sequence of correspondence complaining about the failure on the part of the defendants at the trial to disclose certain documents held at Ashley Wilson Solicitors. That, of course, was quite outside any question on which permission to appeal had been granted.

7. We asked Mr Colwill, the claimant, in the course of the hearing this morning what he wanted those documents for. His claim is that, in some way, the withholding of those documents would have led to a different result before the judge. He complains that the judgment, in effect, was obtained by fraud.

8. We have also enquired in the course of this morning about whether any specific request was made for those documents at or before the trial. We have been shown certain documents but it is, to say the least, unclear whether there was any such request. In any event, however, the documents were not relevant to any issue for which Toulson LJ had given permission to appeal.

9. The approved transcript was sent to the respondents under cover of a letter from the court dated 7 December 2012, which they received on 11 December. They immediately responded to the court with great propriety. They conceded the appeal on the issue for which Toulson LJ had given permission but reserved their position on costs if the appellant continued with the appeal.

10. In a letter of the same date to the appellant they said this:

> "It would be wholly wasteful of costs for you to proceed [with the appeal] although it appears to be your intention to proceed in any event, notwithstanding our client's consent to the appeal in the light of your letter of 29 October 2012. You are invited to reconsider your position and take note of what is said in the approved judgment by Toulson LJ, particularly at paragraphs 19 to 21. If you continue with the appeal when you are aware our client consents to it, then our client's position must necessarily be reserved concerning costs should you needlessly persist with the appeal."

11. That letter unfortunately did not lead to a swift disposal of the appeal. The appellant applied to re-open the appeal and obtain permission on those matters on which he had been refused permission by Toulson LJ at the oral hearing. Toulson LJ considered the matter on the papers on 28 March 2013. He said this:

> "The application falls far short of showing a proper case for [re-opening the appeal]."

12. A proposed consent order indicating that the appeal was allowed with no order as to costs was sent to Mr Colwill on 19 February 2013. That gave the appellant until 27 February to agree and pointed out that they would not necessarily consent to such an order after that date. Instead, in April 2013, Mr Colwill sent a proposed consent order in which he again sought disclosure of files. The hearing was approaching on 22 May and he proposed an adjournment of that hearing.

13. On 16 May the respondent served a skeleton argument and an index to the bundle. No proper bundle or skeleton had been supplied by Mr Colwill. In May 2013 Mr Colwill lodged a skeleton argument of his own, saying that he would consent to an order disposing of the case, as suggested by Toulson LJ, if he received full disclosure of certain files from the respondent. That, as it seems to me, recognises the collateral nature of the disclosure which he was seeking. If the appeal was allowed on that basis then no issue remained to which the disclosure would be relevant.

14. The hearing in May 2013 did not go ahead because there was no proper appeal bundle filed. Aikens LJ directed that the appeal should be adjourned. Directions for the filing of proper bundles were given on 8 October 2013 to be filed by 23 October. Mr Colwill did not do that and the court extended those time limits again.

15. In November Mr Colwill launched a fresh application within the appeal for disclosure. He supported it by a four page witness statement. He confirmed, strangely, that he would discontinue the action if these files were disclosed, a fact again which emphasises that the requested disclosure had nothing to do with the appeal.

16. On 10 December 2013 this application was refused by Aikens LJ on the papers. His reasons were, not surprisingly, that an application for disclosure can only be made within the context of an appeal in relation to the subject matter of the appeal. The

proposed disclosure was irrelevant to the only issue in the appeal for which Toulson LJ gave leave. Aikens LJ may not have been aware that the only live issue had been conceded by the claimant almost 12-months earlier. He reduced the time limit for the appeal to 30 minutes on that basis.

17. In his January 2014 skeleton argument Mr Colwill still maintains that we should consider his requests for disclosure. He maintains that before us in argument this morning. He also says that the responsibility for the judge's error lay with the respondents who should have pointed it out to the judge and the costs order should reflect this.

18. As to this latter point, it is fair to point out, as Mr Stirling has this morning, that the point about the counterclaim versus set off was not prominent in the grounds of appeal or the skeleton argument. The only way in which one could detect that that was a cause of complaint was from the fact that, in the appellant's notice itself, it was sought to overturn the order in the defendant's favour.

19. Against the point made by Mr Colwill, one can justifiably say that as soon as the point was squarely drawn to the attention of the respondents they very promptly and properly conceded it.

20. To my mind, it is most unfortunate that this court should be dealing with this appeal at all. The only issue is costs. CPR44 sets out the principles on which costs are to be awarded. In one sense Mr Colwill has won his appeal, but his victory is a small one in the context of the appeal which he was seeking to launch as a whole and there is nothing to suggest that the respondents would not have conceded it earlier had it been squarely drawn to their attention. Since then he has needlessly caused the respondents to run up costs by pursuing his collateral and wholly unjustifiable request for disclosure.

21. To my mind, the respondents are right when they say that they should have an order for costs in their favour. In their skeleton argument they recognise that it might be unfair to Mr Colwill to have their costs from the precise date of Toulson LJ's judgment. They identify a date of 1 May 2013 and submit that there should be no order as to costs up to that date and thereafter the appellant should pay the respondent's costs up to and including the date of this hearing. It seems to me, subject to hearing counsel on the question of the assessment of those costs, that in view of the history of this matter that would be the correct order to make. I recognise that Mr Colwill is a litigant in person but the matters to which I have referred were fairly and squarely drawn to his attention on several occasions. The respondents have quite unnecessarily been caused to incur these costs and it is right that they should have them in these circumstances.

22. I will therefore allow the appeal by consent but make an order in favour of the respondents for their costs from 1 May.

23. LORD JUSTICE DAVIS: Mr Colwill is plainly much aggrieved about the failure of the company to produce a file which he says should have been produced, in particular a legal file. He has today shown us certain copy letters written before trial which he says

reflect his request for production of the documents from the respondent. I have to say those letters are rather inconclusive on that particular point and it is also completely unclear to me why this particular legal file would have had any true relevance to the issues which had to be decided in the County Court. He also says that he raised the point before the County Court but nothing was done about it and no order was made by Judge Reid for production of the file he wanted.

24. Whatever the position is, I do not think it can assist Mr Colwill. Either he did specifically seek production of these documents before or at the trial and production was refused, in which case his true cause of complaint was to raise a ground of appeal on that point; or he did not fairly and squarely seek production of that particular file, in which case it is too late for him to raise the point now. When one looks at the grounds of appeal, skeleton argument and other points advanced by counsel then appearing on his behalf on the proposed appeal, there is no reference to a complaint about non-disclosure. Ultimately, when Mr Colwill did seek to raise the point, after very limited permission to appeal had been granted by Toulson LJ, his request for discovery was flatly refused by Aikens LJ. As Aikens LJ said:

> "The proposed disclosure related to all sorts of other issues and were irrelevant to the sole issue of the appeal."

25. In such circumstances, it seems to me that Mr Colwill's continuing complaint about non-disclosure is entirely beside the point for the purposes of this particular appeal. His attitude, regrettably, has run up needless costs. In those circumstances, whilst this appeal must be allowed by consent on the one short point, I agree that the order for costs should be as indicated by my lord.