Case No: B2/2014/3968

Neutral Citation Number: [2016] EWCA Civ 1455
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BIRMINGHAM CIVIL JUSTICE CENTRE
(HIS HONOUR JUDGE OWEN, QC)

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 22 November 2016

Before:

LORD JUSTICE LONGMORE

LADY JUSTICE KING

LORD JUSTICE DAVID RICHARDS

- -

COTTERHILL HITCHMAN SOLICITORS LLP **Respondent**

- and -

GUEST **Appellant**

- -

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8th Floor, 165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 704 1424
Web: www.DTIGlobal.com Email: TTP@dtiglobal.eu
(Official Shorthand Writers to the Court)

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The **Appellant** appeared in person

Mr T Watkin (instructed by Cotterhill Hitchman Solicitors LLP) appeared on behalf of the **Respondent**

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Judgment

(Approved)

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LORD JUSTICE DAVID RICHARDS:

1. This is an appeal against an order for the payment of unpaid solicitors' costs and disbursements amounting to £44,320.84 against a former client.

2. The client, Mrs Hazel Whitehouse Guest, instructed the respondent solicitors, Cotterhill Hitchman Solicitors ("the solicitors"), in October 2010 in respect of a boundary dispute with her neighbour. She commenced proceedings in the Birmingham County Court which proceeded to trial in April 2012. The trial started on 17 April 2012 followed by a site visit and the start of the appellant's evidence on 18 April 2012. Due to the judge's illness the hearing was adjourned to 30 May 2012. In the course of the next two days (on 30 and 31 May 2012) a compromise was reached between the parties which in effect involved the appellant abandoning her claim and agreeing to pay the defendant's costs, and an order giving effect to it was made by consent on 31 May 2012. Almost immediately the appellant repented of her agreement to this compromise and wrote in strong terms to the solicitors on 1 June 2012.

3. The appellant sought permission to appeal the order made in the boundary dispute proceedings but permission was refused both by the High Court and the Court of Appeal. She was highly critical of the handling of her case by the solicitors on a number of grounds and made a complaint to the Legal Services Ombudsman which in due course was rejected.

4. The present proceedings for payment of their outstanding bills were issued by the solicitors in March 2013. The appellant, who has acted for herself throughout these

proceedings, served a defence raising a number of matters. These included allegations that a cap on fees had been agreed, that she had been coerced into agreeing the compromise, that the consent order had been procured by collusion between her solicitors and her neighbour's solicitors and that her instructions on the consent order had been procured by the withholding of material information.

5. The case came before HHJ Robert Owen QC sitting in the County Court at Birmingham on 19 August 2014 when the evidence for both parties was given. The trial was adjourned to 10 September 2014 for closing submissions. The judge gave judgment for the solicitors on 10 September 2014. The appellant lodged an appellant's notice in December 2014 and time for doing so was subsequently extended. The grounds of appeal largely repeated the pleaded defences.

6. In February 2015 Floyd LJ refused permission to appeal, giving as his reasons:

> "The judge's approach to an overall evaluation of the claim for invoiced solicitors' costs does not display any arguable error. Whilst I feel sympathy for the claimant, who has lost her boundary dispute at great expense, the judge was entitled to find that she would have pressed on with it even if firmer negative advice had been given earlier. To give permission to appeal would merely expose her to further costs, when there is no realistic prospect that the Court of Appeal would interfere."

7. The appellant's oral renewed application for permission to appeal was heard by Kitchin LJ on 8 October 2015. He concluded that the appellant had no real prospect of success on any of the grounds of collusion, wrongly procured consent, caps on fees and so on that had been rejected by the judge below. He did however conclude that there was a real prospect of success justifying permission to appeal on one ground. The

ground was that the solicitors had failed to give proper advice to the appellant at an earlier stage before the trial to the effect that her case had very low prospects of success. It was suggested that this might have become apparent to them if they had looked closely at the title deeds and if, as they failed to do, they had visited the site themselves. In those circumstances it was at least arguable that the appellant would not have proceeded further with her claim and would thereby have avoided some or most of the costs and disbursements for which the solicitors have obtained judgment.

8. Kitchin LJ said in his judgment giving permission to appeal:

> "12. The applicant has, however, raised a ground of appeal which, in my judgment, at least arguably has greater merit. This concerns the very late stage at which she was advised that her prospects of success were poor. As I have explained and as Judge Robert Owen related, it was not until the trial, indeed while the trial was underway, that it dawned upon [the solicitors] and counsel that, when put to basic scrutiny, the claim was lacking in merit. He continued, as I have said, that when the applicant's assertions were simply tested by reference to the deeds and layout of the site her case appeared to collapse.
>
> 13. In my judgment, the concern and hesitation expressed by Judge Robert Owen at this state of affairs is readily understandable. In the event he put those concerns to one side and concluded that it was not possible for him fairly or properly to find that any financial loss had been occasioned by any material breach of duty by [the solicitors] for two principal reasons: first, the applicant was not in his judgment a reliable witness of fact, and second, he appears to have attached weight to the submission advanced on behalf of [the solicitors] that the applicant was intent on taking the case as far as she could until it was clear that the end of the road had been reached.
>
> 14. In my judgment, it is arguable that Judge Robert Owen fell into error in so finding. There can be no doubt that the applicant did, at the end of the day, sign the consent order and that she did so in the light of the negative advice that she had been given following what the judge had described as the simple testing of her assertions by reference to the deeds and layout of the site. But it is far from clear to me that any satisfactory explanation was ever given for the failure by [the solicitors] to carry out a site inspection at a much earlier stage and

> properly to test her assertions, just as they were tested on the first and second days of the trial …
>
> 15. In my judgment, it is therefore arguable that Judge Robert Owen fell into error in failing to find that [the solicitors] failed properly to advise the applicant at a much earlier stage that her prospects of success were poor and that she has suffered financial loss as a result. Accordingly, I grant the applicant permission to appeal on this ground."

9. The solicitors were not represented before Kitchin LJ, nor so far as I am aware had they filed a statement in opposition to the application for permission to appeal. It is however fair to say that the ground on which Kitchin LJ gave permission to appeal does not clearly emerge from the proposed grounds of appeal filed by the appellant.

10. In response to this appeal the solicitors rely on three principal submissions. First, they submit that the alleged failure to give advice was never part of the appellant's case and no notice of any such case, whether in the defence or elsewhere, was given by the appellant before the trial or at any time before the evidence in the trial was concluded. They say it was the judge himself who raised concerns on this issue at the end of the first day of the trial after the evidence had concluded. They submit that the judge correctly acceded to the submissions made on behalf of the solicitors that it was not an issue that he could fairly determine at the trial. Secondly, the solicitors submit that there was in any event no breach of duty disclosed on the available evidence by the solicitors in failing to give at an earlier time the advice which was ultimately given. Thirdly, they submit that even if there were a breach of duty on their part in failing to give such advice, it is clear from all the evidence and the findings of fact made by the judge that the appellant would not have taken the advice but would have pursued her claim to trial.

11. At the start of the hearing of the appeal today we took the view that the first of these submissions raised a threshold issue. If the submission were well founded, it would follow that the appeal would have to be dismissed. We therefore invited the appellant and counsel for the solicitors to address us solely on that issue, following which we would determine it before proceeding further with the appeal. The issue is therefore whether a defence based on a negligent failure by the solicitors to advise at an earlier stage was before the court below and whether it was or would have been open to the court to deal with such a defence. It is I think clear that it was not raised by the appellant in her pleaded defence or in the witness statement that she filed for the trial.

12. Mr Watkin, who appeared as counsel for the solicitors at the trial as he does before us, has told us that it was not an allegation which the solicitors came prepared to meet at trial. He told us that it was raised for the first time by the judge following the close of evidence at the end of the first day and that the judge adjourned the trial to 10 September 2014 to enable the solicitors to prepare and file submissions dealing with it. Written closing submissions dated 3 September 2014 were prepared by Mr Watkin and filed with the court.

13. It appears clear from the terms of the judgment that the suggested failure to advise was indeed raised by the judge. In his judgment at paragraph 19 he said:

> "My concern, as indicated to Mr Watkin at the end of day one of this hearing, was that it appeared from the documents which I have summarised that it was not until the trial, indeed whilst the trial was underway, that it had dawned upon Miss Lee and Miss Meager that, when put to basic scrutiny the two bases for this claim (terms of the title deeds and adverse possession based on trimming the hedge) were indeed, as events transpired, lacking in merit.
> …

> My concern was that whilst there appeared to be no plausible evidential basis to support the pleaded assertions of collusion and fraud by the claimant or anyone and no coercion, collusion or duress, the defendant's consistent complaint made in lay terms discernible from her letters, statement and pleadings arguably did raise the issue as to whether or not there had been at least a partial failure of consideration in the sense that the clear advice given by the claimant and counsel in the conference of 30 May (and indeed query at previous conferences) was advice which ought reasonably to have been given by no later than, say, the very first conference on or about 3 April 2012.
> …
> My concern at that stage which I stress was simply a first impression, was that the state of the case as identified by the solicitors and counsel, say, if not in truth on the evening of 18 April, certainly 30 May, could reasonably have been identified before this case ever came to trial."

14. In paragraph 23 of his judgment the judge said:

> "Mr Watkin duly took instructions on these matters prior to the resumption of this hearing for the purpose of closing submissions and judgment. He lodged full written submissions, the essence of which was to invite the court to proceed cautiously with those reservations bearing in mind the fact that those reservations amounted to a cause of action based on professional negligence on the part of Miss Lee, Mr Hitchman, in particular, and also Miss Meager, in respect of which there had been no opportunity to respond and no opportunity for there to be additional evidence, leaving aside any requirement for a formal pleading on the point."

15. We have looked at the written submissions to which the judge there refers, and they do indeed make in clear terms the submissions that the judge records.

16. The further submission made on behalf of the solicitors, reflecting the third issue raised on this appea,l was recorded by the judge in his judgment at paragraph 28. The alternative argument of Mr Watkin was that, in those circumstances, not only was there no breach of duty and no professional negligence whatever reservations the court might

have, and indeed whatever lessons might be learned by the professionals involved in dealing with the boundary dispute and what they describe as an "awkward client", but any such breach could not have caused any loss. The defendant was intent on taking this case as far as she could, until it was clear that the end of the road had been reached at trial, and that these costs would have been incurred by the defendant and these services would have been provided by the claimant pursuant to her instructions up to and including 31 May in any event.

17. The conclusion reached by the judge as regards the possible line of defence based on an allegation of negligence was stated by him at paragraph 29:

> "For the reasons submitted by Mr Watkin, and despite my continuing reservations, I am satisfied that it is not possible for me fairly or properly to find that there was proved financial loss occasioned by any material breach of duty which could justify an interference in the invoices claimed by the claimant."

18. At paragraph 31 the judge said this:

> "Since the issues within my reservations had not been dealt with by either party, including a non-party, counsel, and given the defendant's unreliable evidence that she had at no time been advised as to the lack of merit in her case, I am unable fairly or arbitrarily to reduce the sum claimed."

On this basis the judge gave judgment for the entire sum claimed by the solicitors.

19. In the passages which I have cited containing the judge's conclusion as regards any possible defence based on negligence, the judge has to a considerable extent conflated

the submissions made on behalf of the solicitors. Nonetheless, once one has read the written closing submissions of counsel for the solicitors, in my judgment it is clear that the judge accepted that the suggested line of defence had never formed part of the appellant's case and that therefore the solicitors had not had an opportunity of dealing with it in their evidence. As a consequence the judge held that he could not fairly deal with it at the trial.

20. In my view that conclusion was clearly right. The first difficulty for the solicitors was to know the case that might be put against them, in particular as to the time when it is said that advice should have been given. Mr Watkin's closing submissions for the trial record in paragraph 11:

> "At the conclusion of the hearing on 19 August the court raised concerns in particular about the advice of counsel, Ms Meager, given to the defendant in conference on 29 March 2012 and/or 21 May 2012."

There is no reason to suppose that those dates were not at that stage the focus of the judge's concerns, but his judgment records concerns over a longer period. I am left with the impression that his thinking on the relevant suggested negligence on the part of the solicitors developed over time.

21. The second difficulty concerns the evidence and preparation for trial. If the suggested line of defence had been advanced by the appellant before or even at the start of the trial, the solicitors would unquestionably have wished and been entitled to adduce evidence directed to this issue. As was clear from Mr Watkin's submissions, they would have called two solicitors from within the firm, a Mr Thomas and a Ms Lee, who

dealt with the case respectively from October 2010 to February 2012 and from February 2012.

22. In her submissions to us the appellant pointed out that in July 2014, shortly before the trial, she had served a witness summons on Ms Lee which was set aside by the judge in early August 2014 on the solicitors' application. But that of course was before the trial and before any issue of any negligent failure to advise had been raised. The solicitors would also have called Ms Meager, the counsel who was instructed for the boundary dispute trial. They would have wished to go through the documentary evidence directed specifically to this issue. It is apparent from even a cursory perusal of the documents in the appeal bundles before us that there are a number of highly relevant documents. It cannot seriously be said that this was an issue which could be decided without evidence directed to it. Further, the solicitors would have wished and would have been entitled to cross-examine the appellant in relation to this allegation.

23. In the light of these factors it is in my judgment clear that the judge was right to conclude that a defence based on an allegation of negligence in the advice given or not given by the solicitors could not fairly be determined by him at the trial. It might have been open to him to adjourn the trial to enable the issue to be properly dealt with, and that could only have been done on the basis of a clearly stated case to which the solicitors could respond. In giving permission to appeal it would appear that Kitchin LJ understood that the issue of negligence was properly before the judge and that he arguably fell into error in failing to find that appropriate advice had not been given at an earlier stage than during the trial. Kitchin LJ did not have the benefit of seeing that the closing submissions made to the judge by counsel for the solicitors or having an

explanation of how and when the issue had arisen. The judgment under appeal is not clearly expressed in this respect and the judge's meaning becomes clear only when the full background is known and counsel's closing submissions are taken into account.

24. I therefore conclude that the judge was right in deciding that he could not fairly determine any issue of negligent advice at the trial and that the appeal must therefore be dismissed.

LADY JUSTICE KING:

25. I agree.

LORD JUSTICE LONGMORE:

26. I agree also.

Order: Application granted; appeal dismissed