B1/2002/2348, Neutral Citation Number: [2003] EWCA Civ 867

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
OXFORD COUNTY COURT
(HIS HONOUR JUDGE CHARLES HARRIS QC)

Royal Courts of Justice
Strand
London, WC2

Monday 9th June, 2003

B e f o r e:

LORD JUSTICE BUXTON,
LORD JUSTICE DYSON

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NEIL EDWARD YORKE

Claimant/Respondent

− v −

ANTOINE KATRA

Defendant/Appellant

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(Computer−Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
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Official Shorthand Writers to the Court)

MISS ANNA BURNE appeared on behalf of the Appellant on a pro bono basis.
MR A HEGLIN (instructed by Porter & Co, Surrey SM1 4DA) appeared on behalf of the Respondent

J U D G M E N T
(Approved by the Court)

1. LORD JUSTICE BUXTON: This appeal has had a most unfortunate history, as have the proceedings out of which it arises. It is deplorable that in an action which is a small claim in respect of building work (the sum in issue being some £2,800) where proceedings were issued as long ago as 18 December 2000, we are still, in the year 2003, dealing in the Court of Appeal with what is effectively an interlocutory matter. It is equally unfortunate that through various mistakes, some of them on the part of the parties, the matter has so far occupied the time of two district judges, two circuit judges and two judges of this court. In order to explain briefly how that has come about it is necessary to say something about the history of the matter.

2. Before doing that, however, we wish to make it plain that no criticism is to be attached to the advocates who appeared before us today. Miss Anna Burne was instructed on the part of the appellant at very short notice, he having obtained the assistance of the Citizens Advice Bureau in this building, who in turn caused Miss Burne to be instructed pro bono through the Bar pro bono scheme, and she has admirably served the appellant in that capacity. It was originally envisaged that because of the small amounts involved the respondent should appear by solicitor even though the solicitor concerned did not have a right of audience before this court and we gave permission for that to happen. As things have turned out that gentleman has an overriding prior engagement today and he has caused to be instructed on the respondent's part Mr Heglin, who has equally assisted us in a sensible and well−judged way, if we may be permitted to say so.

3. The history is that the claimant, Mr Yorke, issued proceedings in December 2000 to recover from the defendant, Mr Katra, the sum we have already mentioned, in respect of building work that had been performed by Mr Yorke. There was a strong and detailed dispute about the quality of that work and it is the issue as to the quality of the work that is the centre part of this case. Matters were confused by the fact that Mr Katra has, for the most part but not entirely, acted in person, and is a gentleman whose command of the English language, although good, is not perfect, and there have been occasions when he has found it difficult to reconcile himself to some parts of the court procedure.

4. It was decided, very sensibly, that in order to elucidate the complaints about work a joint expert should be instructed and the claim was stayed by District Judge Enzer on 17 April 2001 pending such instructions. There were considerable difficulties about agreeing the terms of the instruction to the joint expert. In the end District Judge Enzer,on 15 October 2001, ordered that the defendant should sign a letter of joint instruction originally drafted by the claimant's solicitors, as we understand it, addressed to the expert, and furnish it to the other side's solicitors. The defendant did sign the letter but he excised from it two sentences prior to delivering it. Those sentences, as it seems to us and as it seemed to my Lord when he heard this case first, had little or nothing to do with the task that the expert was to perform. They were by way of background indicating the contractual contentions of the two parties and the claims that they made. Mr Katra mistakenly considered that by signing the letter with those sentences unamended he would in some way have been conceding or acknowledging the validity of the contractual analysis put forward by the claimant. That of course was not the case; but it is a misapprehension that one can understand a litigant in person falling into.

5. On 24 October District Judge Enzer, being informed that there had been non−compliance with her order by reason of Mr Katra not having agreed to the whole of the letter that the judge had previously approved, struck out the defendant's defence and counterclaim. We are told on both sides that the judge did that of her own initiative and not in pursuit of any specific application made by those representing Mr Yorke, the respondent. Thereafter and after some delay the application was made by the defendant to District Judge Raeside in the

same court to set aside that striking out order. The application was refused, as was permission to appeal to the circuit judge.

6. Judge Raeside, in addition, ordered the payment of the costs of the action which was assessed at some £2,800 "on the basis of the defendant's unreasonable conduct". It is an unfortunate reflection on this case that the sum of costs ordered to be paid at that, on one view, early stage of the proceeding so far as the order was concerned (although the end of the proceedings in respect of the appellant) almost exactly mirrored the amount of money that was in issue in the substantive application.

7. Faced with that application the defendant promptly issued an application to the circuit judge in which he sought to challenge the order of District Judge Enzer and District Judge Raeside. That came before His Honour Judge Hull on 19 April 2002. Judge Hull rejected that application and since it is that rejection of the application that forms the centre part of this appeal it will be necessary to come back to it.

8. The next event that occurred was an application not in the Epsom County Court where these matters had so far proceeded but in the Oxford County Court. That appeared to be, and was in terms, an appeal from the orders of District Judge Enzer and District Judge Raeside. That application was apparently made by solicitors acting on behalf of Mr Katra. It was misconceived. It came before his Honour Judge Charles Harris QC, who rejected it, saying that it was not open to him to hear appeals from district judges in a different court; and in any event he, having been apprised of Judge Hull's decision, took the view, in my judgement correctly, that the substance of the application to him was an attempt to appeal from, or otherwise go behind, the order of Judge Hull. He was, if I may respectfully say so, entirely right to say that that application was misconceived and he would not entertain it. He made certain orders as to costs and certain provisions as to costs to which I shall have to return.

9. How then did the matter reach this court? It came here originally as an attempt to appeal against the order of His Honour Judge Harris at the Oxford County Court. It was until recently, indeed still is, so entituled. In that shape it came before Dyson LJ in January of this year as an application for permission to appeal. The application had been accepted in this court in the belief, as I think it was, that the order of Judge Harris had been an original order and therefore susceptible to appeal to this court. It became clear, however, on scrutiny of the order, that it was no such thing and it was an inappropriate order to be appealed since, as Judge Harris had said, he was being asked to hear appeals from District Judge Enzer and District Judge Raeside. It would have been open to the court to have no more of the matter. My Lord, however, took the view when he heard Mr Katra in person in January of this year, that the matter was such as it should not go off simply because of the muddle (and I have to say considerable muddle) that had affected it thus far. He pointed out first of all that, as Judge Harris himself had perceived, the substance of the complaint was with the order of Judge Hull and not with the order of Judge Harris; and secondly, that that being the case the route of appeal from Judge Hull was now not to this court but to a judge of the High Court. In order to deal with the matter, therefore, my Lord took the view that it would be proper for him to reconstitute himself as a judge of the High Court in order to entertain the application. That was a power that he had under section 9 of the Administration of Justice Act 1981, the judges of this court being requested by the Lord Chancellor to act in the High Court where it appears to them appropriate so to do. My Lord therefore heard about the substance of the matter from Mr Katra without the benefit of representation from the other side, and took the view on the merits of the application before Judge Hull that it was strongly arguable that Judge Hull should have allowed that application. My Lord considered that the defects in the joint letter and Mr Katra's refusal to sign it without the striking out of the two sentences to which I have already referred were at best a technical matter and should not have been

allowed to stand in the way of having the joint expert properly instructed, now stand in the way of his duty which was to resolve the dispute of the parties. My Lord considered it at least strongly arguable that Mr Katra should not have been turned away by the district judges and should not have been turned away by Judge Hull. He therefore made the following order, that he was minded to treat the appeal as an appeal from the decision of Judge Hull and to allow the appeal on paper and direct that a letter of instruction be sent to the expert in the form in which it had been signed by Mr Katra. He said that if the respondent, on being apprised of that course, should agree with it, then the appeal could be allowed by consent and no further steps needed to be taken. In the event those then advising the respondent when apprised of my Lord's order did not agree with it. They wrote a letter to the court on 24 February 2003 saying this:

> "We have considered very carefully the comments contained in the Judgment of His Lordship. However, we do feel that the relevant sentences are extremely material to the expert when considering his opinion both on what we should pay in quantum."

I think, if I may say so, that the word "both" in that sentence should probably be omitted; however the meaning of it is clear.

10. My Lord made provisions for that eventuality because he had directed that if the order was not agreed by the respondents the application should be transferred to the Court of Appeal and dealt with as an appeal there. In making that direction my Lord was acting under Civil Procedure Rule 52.14(1) which is made under the authority of and supported by section 57 of the Access to Justice Act 1999. The rule says that an appeal can be transferred from the High Court to this court if it either raises an important point of principle or practice or there is many other compelling reason for the Court of Appeal to hear it. This case does not, in my judgement, raise an important point of principle or practice, but I entirely agree with my Lord that in view of the lengthy and unhappy history of this case there was compelling reason why this appeal should be heard by two judges of this court; and today, although originally on paper (before Mr Heglin was instructed) there was some disposition to suggest that this court does not have jurisdiction to hear these proceedings, Mr Heglin has sensibly, if I may say so, not sought to pursue that issue.

11. With that, I fear, extremely lengthy introduction I now come to the substance of the matter. I have already indicated why it was that District Judge Enzer struck out this defence and why it was that District Judge Raeside did not interfere with that order. The application to Judge Hull was made by Mr Katra, it would appear in person, on the form headed "Application Notice." In the part which was to be filled in, however, he says: "I Antoine Katra intend to apply for an order ... that ..." and then Mr Katra has put in manuscript:

> "for an appeal to the Circuit Judge at another court in Kingston. The expert's letter dated 5th Sept 2001 that I signed was untrue and missed the point".

He then set out an account of why he objected to the signing of the letter and said, among other things:

> "Is there a law saying that I cannot prepare a letter inviting the expert's report in this myself?"

That complaint was extended at some length in further written submissions, which I think is unnecessary to set out, except that they make it clear that there is a substantial degree of dissatisfaction with the way in which the matter had been discharged.

12. The matter came before His Honour Judge Hull on paper. His order records that he has read the application dated 18 March 2002 and then without a hearing dismissed the application, saying this:

> "This Order is made without a hearing because the Court does not consider that a hearing would be appropriate. The Defendant has plainly refused or failed to comply with the Order of DISTRICT JUDGE ENZER made on 15th October 2001, even when given a further opportunity to comply by DISTRICT JUDGE RAESIDE on 13th March 2002. The present application purports to be an appeal and is not made by a Notice of Appeal, does not seek permission to appeal, and complies with none of the requirements in the Civil Procedure Rules and Practice Directions.
>
> Any party affected by this Order may apply not more than seven days after its service on him to have it set aside, varied or stayed, in accordance with the provisions of Rule 3.3 of the Civil Procedure Rules."

13. It was that order in respect of which my Lord expressed concern when he heard the application in January. He took the view that the essential matter was the quality of the work; that the judge should have appreciated that he was faced by a litigant in person who had very strong views about certain aspects of the procedure; and that he should not have been handicapped by the striking out of the two sentences and because of which District Judge Enzer had dismissed the case.

14. That then appeared to be the issue before this court. It will have been noted that we were dealing with a case where the judge had a significant degree of discretion in discharging what was, although a final order, nonetheless an issue of procedure. That however was before the matter came into the hands of Miss Burne. She pointed out, which had escaped the attention of everyone concerned in the case, including myself when I read the papers for the first time, that the order of District Judge Enzer appears to have overlooked, and possibly taken a mistaken view on, the provisions of Civil Procedure Rule 35.8 in respect of the procedure for the instruction of a joint expert. Civil Procedure Rule 35.8(1) provides:

> "Where the court gives a direction under rule 35.7 for a single joint expert to be used, each instructing party may give instructions to the expert."

Miss Burne also drew attention to the notes to CPR 35.8 in the White Book where it is clearly envisaged that both parties may give instructions to an expert even though he is a joint expert.

15. That puts the matter and the approach of District Judge Enzer in a completely different light. One can perhaps understand why the judge wanted there to be a single letter of instruction, but for my part it would not appear that she had jurisdiction to insist on that, as in fact she did, in view of the ability of each party to give separate instructions: and that, manifestly, is what Mr Katra wanted to do. He wanted the expert to have instructions from one side and from the other, and had produced instructions of his own, which was in fact in accordance with what was envisaged by the rules. So to the question that I have quoted from Mr Katra's application to Judge Hull: is there a rule that says that I must be bound by the instructions formulated by the other side? the answer is no, there is no such rule even though the court below appeared to proceed on the basis that there was. This matter having been overlooked not only by Mr Katra, which is understandable, but also by those advising Mr Yorke and also by the district judges, it is scarcely surprising that it did not impinge itself on Judge Hull when the matter came before him. He simply thought that there had been failure to comply with an order of the court and it was within the jurisdiction of the district judges to strike out

the claim for that reason. That may well have been so were it not for the provisions of Rule 35.8. Granted that the law is as set out in that rule it is, in my judgement, inescapable that District Judge Enzer proceeded on a mistaken basis and should have given Mr Katra the latitude that he sought. That being so, had Judge Hull appreciated that − and I emphasise he cannot possibly be criticised for not appreciating it − it would not have been possible for him to deal with the matter in the way that he did when it came before him. He ought to have appreciated that the underlying disobedience which had caused the striking out had in fact been mistaken.

16. Mr Heglin realistically accepts that he cannot quarrel with any of those sentiments, set out as they are in Miss Burne's skeleton. He does however say that it was still within the discretion and jurisdiction of Judge Hull to strike out the application. He was entitled to do that for the reasons set out in his order, namely that the wrong form had been used and no permission had been sought to appeal as should have been in accordance with the rules. Although Mr Heglin rightly accepted that that was a technical approach he said it was an approach which fell within the judge's jurisdiction and therefore his discretion. He also pointed out that it would have been open to Mr Katra to return to court in order to have the order set aside.

17. I fear that I cannot agree with either of those contentions. Because of the misunderstanding about the basis of the jurisdiction, Judge Hull, in my view, proceeded on a completely mistaken basis. His criticism of Mr Katra for using the wrong form, even though in substance it was clear what he was doing, appealing from the district judge, could not possibly stand on its own as a reason for rejecting his application or appeal to Judge Hull. I have no doubt at all that Judge Hull's reference to the form of the matter was strongly influenced by his belief that the order of District Judge Enzer had been complete and correct in every respect. He would not have proceeded solely on the basis of the form in which the appeal to him had been made; and I have to say that if he had proceeded solely on that basis that would be an exercise of discretion that would not be open to him in a case such as this.

18. That being so, as we indicated to the parties we are constrained to allow this appeal. The only procedural order (subject to any applications) that I would make is that which was foreshadowed by my Lord in paragraph 11 of his judgement of 16 January, that is to say, that the letter of instruction should be sent to Mr Randall in the form in which it was originally signed by Mr Katra.

19. We then have to consider questions of costs, a number of which arise before us and which we have had submissions about. First, so far as the costs of this appeal are concerned Mr Heglin argued that the normal order should not follow for a number of reasons, not least of which was the joint misapprehension that had persisted until last week about the basis of the case, a misapprehension only corrected by Miss Burne's intervention and her drawing attention to Rule 35. Had that been done earlier, as it should have been if Mr Katra had been properly advised by those then advising him, this appeal might not have happened at all. There is some difficulty about that in the fact that, when finding himself here, Mr Heglin did not of course concede the appeal; but did argue it, albeit with proper diffidence and discretion. There is a further difficulty, however, in that before this point arose my Lord had given the clearest possible indication that he was considerably concerned about the general merits of the case and whether the decision of Judge Hull had in any event been a proper exercise of his discretion. He invited the parties to consider that seriously. Those advising Mr Yorke did indeed consider it seriously and returned the answer that I have already set out. It is therefore clear that until a late stage of the proceedings this appeal was going to have to occur anyhow, in order to determine whether or not it was correct that the statements struck out of the letter were in fact "extremely material" to the determination of the expert. In those circumstances it seems to me that the balance of procedural difficulty is largely the same on both sides. I have

not overlooked that Mr Katra, or those advising him, pursued the matter by an inappropriate route, but having eventually arrived at this court I do not think that that would be a reason for depriving them of their costs.

20. For my part, therefore I will order that so far as the costs of this appeal are concerned they should follow the event in the normal way. I shall also say as a matter of housekeeping that I would grant the application to amend the notice of appeal to be an appeal from His Honour Judge Hull rather than His Honour Judge Harris.

21. Since Mr Katra has succeeded in setting aside the orders of District Judge Enzer, District Judge Raeside and Judge Hull, it seems to me that he should have the costs of those applications and that the order of Judge Raeside requiring the defendant to pay the claimant's costs of the action should be set aside.

22. So far as the hearing before Judge Harris is concerned different issues arise. I have already said that that was a mistaken application. Judge Harris ordered as follows:

> "No order for costs. Claimant at liberty to apply in relation to costs."

We were invited to disturb that order to the extent of awarding the claimant costs of that application. However we do not feel able to do so for two reasons. First, because it seems to us − as is conceded − that Judge Harris having retained the matter, and there being no appeal from that order in front of this court, we cannot interfere with it. Secondly, perhaps more practically, it is for the county court to form a view as to the correct level of costs in that court rather than this court. We therefore do not disturb that order. The claimant remains at liberty to apply to Judge Harris, or otherwise in the Oxford County Court, in relation to the costs of the mistaken application to Judge Harris made by Mr Katra or those then advising him. We would only venture to say this. Judge Harris is likely to be assisted if such an application is accompanied by an agreed view of what the amount of costs might properly be. A sum was suggested in this court which, speaking entirely for myself and not in any way constraining Judge Harris, seemed not to be an appropriate amount; but that is for the judge, not me, to decide.

23. Finally this. Mr Katra has been a litigant in person for some (not all) of these proceedings. He is entitled, in so far as costs orders have been made in his favour, to compensation in respect of the expenditure of his time on two possible bases. Those who are now advising and helping him will I fear have to explain to Mr Katra that any costs application that he now makes under the orders of this court as made will have to set out quite clearly the amount of time for which claims are made and the basis upon which they are made. That is a fairly detailed exercise in respect of which I trust that Mr Katra can obtain further help from very valuable services provided by the Citizens Advice Bureau in this building. We order that the assessment of those costs be conducted in the Epsom County Court, not in this court; but before anybody does anything in that regard Mr Katra will have to produce a schedule of time that I have endeavoured to set out.

24. I trust that the latter part of this judgment deals with any ancillary matters that arise from our order but counsel are of course at liberty to draw anything else to our attention.

25. LORD JUSTICE DYSON: I agree that this appeal should be allowed for the reasons given by my Lord. I also agree with the orders for costs that he has proposed.

(Appeal allowed; Respondent do pay Appellant's costs of the appeal; Claimant do pay Defendant's costs of the action in the court below; the order of Judge Raeside in the court below requiring the Defendant to pay the Claimant's costs of the action to be set aside;

charging order set aside).