12-64-02

IN THE CAYMAN ISLANDS COURT OF APPEAL

Civil Appeal No. 16 of 2001
(Grand Court No. 111 of 2001)

BETWEEN:

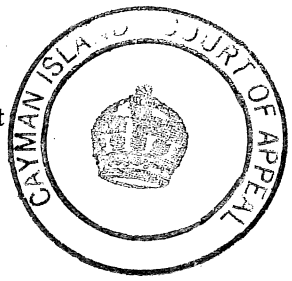
CHARNJIT SINGH GILL

Appellant

- and -

DON MARVIN SEYMOUR t/a THE ATTIC BILLIARD LOUNGE

Respondent



BEFORE: The Rt. Hon. Mr. Justice E. Zacca, P.C., President
The Hon. Mr. Justice I. Rowe, J.A.
The Hon. Mr. Justice M. Taylor, J.A.

Ramon Alberga Q.C. instructed by Steven Barrie of C.S. Gill and Company for the appellant.
James Chapman of Boxalls for the respondent.

Heard: November 28th 2001 Released: April 12th 2002

REASONS FOR JUDGMENT

ZACCA, P.

The appellant is an attorney-at-law and the principal of C.S. Gill and Co., Attorneys at Law. The appellant's firm are the attorneys of record for the plaintiff, Robert Wilson, in Grand Court Cause No. 111 of 2001.

The plaintiff in his statement of claim alleged that there was a contract of employment between himself and the defendant. In the result there was a claim for arrears of salary and wages.

A summons dated September 13th 2001 was filed on behalf of the defendant for an order that summary judgment be entered for the defendant pursuant to order 14, rule 12(1).

At the hearing of this summons Graham J. indicated to Mr. Steven Barrie of C.S. Gill and Co., who appeared on behalf of the plaintiff, that the pleadings did not support the claim made by the plaintiff in his statement of claim. The learned judge was of the view that the defendant's application was certain to succeed.

Despite the objections of counsel for the defendant, Graham J. granted the plaintiff an adjournment to the next day in order to give the plaintiff an opportunity to amend his statement of claim.

A draft amended statement of claim was placed before Graham J. on the following day when the application for leave to amend was granted. An order for wasted costs was made against the appellant.

It is against the order for wasted costs that this appeal is before the court. In his reasons for decision, Graham J. stated that he exercised his discretion having been

satisfied that the defect in the pleadings arose out of the negligence of Mr. Barrie. The learned judge also stated:

> "The document referred to did not support the alleged contract and as the pleadings stood the application by the defendant to strike out the statement of claim was, as I judged it, certain to succeed.
>
> Instead of striking out the writ and statement of claim and despite the objections of the defendant I gave the plaintiff 24 hours in which to amend the statement of claim as I was told that a parol agreement was relied upon in addition to the document."

It is to be observed that the defendant's application before the Court was one for summary judgment pursuant to order 14, rule 12(1). There was no summons before the Court to strike out the writ and statement of claim. Different principles would apply in each case.

The purpose of O. 14 is to enable a plaintiff to obtain summary judgment without trial, if he can prove his claim clearly and if the defendant is unable to set out a bona fide defence, or raise an issue against the claim which ought to be tried. In order to defeat an application by the defendant for summary judgment under order 14, rule 12(1), the plaintiff need only show that he has a bona fide claim or a fairly arguable point which ought to be tried (Supreme Court Practice 1999 VI, p.171).

There is the issue as to whether or not the pleadings disclosed sufficient facts to establish an arguable cause of action against the defendant. This issue however was not explored or pursued.

The main ground of appeal argued by Mr. Alberga Q.C. was that Graham J. erred as a matter of law as there were no circumstances warranting an award of costs against the attorneys-at-law as their conduct had not been improper, unreasonable or negligent. In this case there was a finding of negligence on the part of the attorneys-at-law.

Mr. Chapman, who appeared for the defendant at trial, informed the court that he did not apply for an order for costs against the attorneys-at-law nor was he seeking to support the order of the judge.

The plaintiff in this case was a legally aided person. Graham J. in his decision stated that the order was made to compensate the defendant in the event that the plaintiff was legally aided.

Section 51 of the Supreme Court Act 1981 provides for the making of an order for wasted costs against a legal representative as a result of any improper, unreasonable or negligent act or omission on the part of such legal representative.

The Court Costs Rules 2001 which apply to the Grand Court and the Court of Appeal were gazetted on October 22nd 2001. These rules are to come into effect on

January 1st 2002. Part III provides for wasted costs orders similar to the provision in the English Supreme Court Act.

Even assuming that the pleadings in cause 111 of 2001 were sufficient, one cannot blame Mr. Barrie for acceding to the suggestion by the judge that he should amend his pleadings. Faced with the prospect of the judge striking out the statement of claim, Mr. Barrie would have been ill advised not to apply for an adjournment to amend his statement of claim.

Some six cases in which wasted costs orders were made against a number of legal representatives came before the Court of Appeal in England in *Ridehalgh v. Horsefield* and other consolidated appeals [1994] 3 All ER 848.

The reasons for the various orders are set out in the judgment of the Court of Appeal. In all these appeals wasted costs orders were vacated.

Sir Thomas Bingham MR gave the judgment of the court. At page 856 he made reference to the case of *Myers v. Elman* [1939] 4 All ER 484, a House of Lords decision. Sir Thomas Bingham, at page 856 and 857 stated that the case was authority for five fundamental propositions. These were:

(1) The court's jurisdiction to make a wasted costs order against a solicitor is quite distinct from the disciplinary jurisdiction exercised over solicitors.

(2) Whereas a disciplinary order against a solicitor requires a finding that he has been personally guilty of serious professional misconduct the making of a wasted costs order does not.

(3) The court's jurisdiction to make a wasted costs order against a solicitor is founded on breach of the duty owed by the solicitor to the court to perform his duty as an officer of the court in promoting within his own sphere the cause of justice.

(4) To show a breach of that duty it is not necessary to establish dishonesty, criminal conduct, personal obliquity or behaviour such as would warrant striking a solicitor off the roll. While mere mistake or error of judgment would not justify an order, misconduct, default or even negligence is enough if the negligence is serious or gross.

(5) The jurisdiction is compensatory and not merely punitive.

Ridehalgh v. Horsefield was a case which involved an action by a landlord against a tenant for possession. It appears that there was an agreement between the parties that the hearing should be confined to the single factual issue as to whether the notice had been duly served or not. It turned out that this conclusion was unsound. In addition this was what was regarded as a case 19 position and the proceedings should have been

commenced within the three-month limit. The Court of Appeal allowed the appeal on the ground that the agreed basis upon which the case had been fought in the court below was fundamentally unsound. Unfortunately for the landlord, the proceedings under case 19 had not been commenced within the three-month time limit. Had it been brought within the time limit, the landlord would have succeeded in the court below if the case had been argued on the correct basis.

It was never suggested that the solicitors had acted improperly or unreasonably in concluding that the case should be decided on the agreed single issue. It is not disputed that the landlord's solicitor had been negligent in failing to bring case 19 proceedings in time and the tenants solicitors had been negligent in failing to take the point. The court stated that in all the circumstances it would not stigmatize the solicitor's error as negligent and it had not resulted in wasted costs.

Sir Thomas Bingham stated at page 863:

> "A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail. As Lord Pearce observed in *Rondel v. Worsley* [1967] 3 All ER 993 at 1029, [1969] 1 AC 191 at 275:
>
> > "It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it

would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter."

Again at page 863:

"It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on an *ex parte* application or knowingly incomplete disclosure of documents.

It is not entirely easy to distinguish by definition the hopeless case and the case which amounts to an abuse of process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it."

In reference to legally aided cases, Sir Thomas Bingham at page 864 said:

"It is incumbent on courts to which applications for wasted costs orders are made to bear prominently in mind the peculiar vulnerability of legal representatives acting for assisted persons, to which Balcombe L.J. adverted in *Symphony Group plc v. Hodgson* and which recent experience abundantly confirms. It would subvert the benevolent purposes of this legislation if such representatives were subject to any unusual personal risk. They for their part must bear prominently in mind that their advice and their conduct should not be tempered by the knowledge that their client is not their paymaster and

> so not, in all probability, liable for the costs of the other side.

In contrasting the English legislation on wasted costs with the immunity of an advocate, the Master of the Rolls at page 865 states:

> "Although we are satisfied that the intention of this legislation is to encroach on the traditional immunity of the advocate by subjecting him to the wasted costs jurisdiction if he causes a waste of costs by improper, unreasonable or negligent conduct, it does not follow that we regard the public interest considerations on which the immunity is founded as being irrelevant or lacking weight in this context. Far from it. Any judge who is invited to make or contemplates making an order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of development on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. <u>It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him.</u>"

The issue in this appeal relates to a finding that the attorneys-at-law were negligent. The Master of the Rolls in *Ridehalgh's* case sets out the court's view as to the meaning of "improper, unreasonable and negligent". At page 862 he states:

> "The term negligent was the most controversial of the three. It is argued that the 1990 Act, in this context as in others, used "negligent" as a term of art involving the well-known ingredients of duty, breach, causation and damage. Therefore, it was said, conduct cannot be

> regarded as negligent unless it involves an actionable breach of the legal representative's duty to his own client, to whom alone a duty is owed. We reject this approach. (1) As already noted, the predecessor of the present Ord. 62, r. 11 made reference to "reasonable competence". That expression does not invoke technical concepts of the law of negligence. It seems to us inconceivable that by changing the language Parliament intended to make it harder, rather than easier, for courts to make orders. (2) Since the applicant's right to a wasted costs order against a legal representative depends on showing that the latter is in breach of his duty to the court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of his duty to his client. We cannot regard this as, in practical terms, a very live issue, since it requires some ingenuity to postulate a situation in which a legal representative causes the other side to incur unnecessary costs without at the same time running up unnecessary costs for his own side and so breaching the ordinary duty owed by a legal representative to his client. But for whatever importance it may have, we are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession. In adopting an untechnical approach to the meaning of negligence in this context, we would however wish firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence."

Orchard v. South Eastern Electricity Board [1987] 1 All ER 95 was a case in which the court refused to make an order for wasted costs against a solicitor representing a legally aided client. The defendant was successful and argued that the plaintiff's claim was so obviously bizarre and unlikely to succeed that the solicitor had been guilty of serious misconduct in bringing and continuing the litigation. The defendant's appeal was dismissed.

Sir John Donaldson M.R. in his judgment stated at page 100:

> "That said, this is a jurisdiction which falls to be exercised with care and discretion and only in clear cases. In the context of a complaint that litigation was initiated or continued in circumstances in which to do so constituted serious misconduct, it must never be forgotten that it is not for solicitors or counsel to impose a pre- trial screen through which a litigant must pass before he can put his complaint or defence before the court.
>
> On the other hand, no solicitor or counsel should lend his assistance to a litigant if he is satisfied that the initiation or further prosecution of a claim is *mala fide* or for an ulterior purpose or, to put it more broadly, if the proceedings would be, or have become, an abuse of the process of the Court or unjustifiably oppressive."

Whilst the court itself may initiate the inquiry whether a wasted costs order should be made, it should be slow to do so except in the most obvious case. Where a trial is to take place, the application is best left until after the end of the trial save in exceptional circumstances. The procedure must be fair and as simple and summary as fairness permits. The respondent attorney-at-law must be clearly told what he is said to have done wrong and what is claimed. He must also be given every opportunity to respond.

In the appeal before us the plaintiff's attorney-at-law was acting on the instructions given to him. The defendant's application before the court was one for summary judgment. The court would have to consider whether there was an arguable case and if so could not grant summary judgment. It is unfortunate that this issue was not raised before Graham J. The attorney for the plaintiff would have been given the

opportunity to attempt to convince the court that there was an arguable case. As observed above, this was not in issue before the court.

The appeal would therefore have to be decided on the decision of the court below as to the issue of negligence. It is not unusual for the court to grant adjournments to enable a plaintiff or defendant to amend their pleadings. This may be done by adding causes of action or merely adding particulars.

In our view it would require exceptional circumstances to warrant a wasted costs order against an attorney-at-law in applications for an adjournment to amend pleadings unless it could be shown that his conduct was unjustified.

An attorney-at-law pleads his case on instructions received from his client. He does so to the best of his ability. The mere failure to plead facts which might sustain a cause of action is not in itself to be regarded as a negligent act. A mere mistake or error of judgment does not amount to negligence in the sense required for an order for wasted costs.

In the circumstances of this case, the conduct of the attorney-at-law cannot be regarded as unjustifiable nor could it be regarded as an abuse of the court. Graham J. appears to have considered the fact that the plaintiff was legally aided in coming to his decision in making a wasted costs order. This in itself is not a good reason for making a wasted costs order.

We are of the opinion that the facts of this case fall well outside the requirements for a finding of negligence. The learned trial judge was in error in holding that the conduct of Mr. Barrie amounted to negligence.

It was for these reasons that we allowed the appeal and vacated the order made.

Zacca, P.

Rowe, J.A.

Taylor, J.A.