

CA before Phillips LJ, Mummery LJ. 16th January 1997

JUDGMENT LORD JUSTICE PHILLIPS:

1. This is an application by the plaintiffs for leave to appeal against the order of His Honour Judge Gibbs QC, sitting as a judge of the High Court, made on 20th September 1996, whereby he refused the plaintiffs' application for leave to disclose a report by Mr David Allison, a solicitor, and to call him to give expert evidence at the trial of the action.
2. This action began as a claim in Stourbridge County Court by the plaintiffs, a firm of solicitors, for fees amounting to some £3000 for services rendered to the defendants in relation to the proposed sale of a company called Loach Manufacturing Company Limited. This claim was met by a defence and counterclaim which converted the action into High Court business. In essence it is alleged that the plaintiffs failed to give the defendants advice in relation to various commercial hazards implicit in the operation of selling the business, which in the event resulted in losses to the defendants which are, I think, now pleaded in the sum of some £58,000.
3. The action has been permitted by both parties to proceed at a very leisurely pace. The proceedings were commenced in June 1989. More pertinent are the steps taken in relation to expert evidence. On 26th November 1990 directions were given under which the parties were given leave to call both accountancy and solicitor experts. In October 1992 the plaintiffs decided to instruct a solicitor expert (a Mr James of the firm Martineau Johnson) as well as an accountancy expert and on 23rd October Mr James was formally instructed. The defendants for their part had also decided that they would call as an expert a solicitor.
4. On 10th November 1992 Mr James provided a first draft of his report to the plaintiffs. On 30th April 1993 he provide them with a further draft of his report. On 2nd November 1993 Mr James informed the plaintiffs that he was going to retire and would not wish to be involved in this litigation after 30th April 1995. In June 1994 Mr James provided a further draft of his report and in the following month the plaintiffs became concerned that the trial might not take place until after the date when Mr James was going to retire. But at this stage mediation was in contemplation and the plaintiffs decided to continue to instruct Mr James in the meantime. The parties then became involved in preparing their case for mediation and on 14th November 1994 it was agreed that experts' reports would be exchanged prior to mediation on the basis that, if mediation was unsuccessful, the plaintiffs would be at liberty to serve a supplemental expert's report dealing with amendments to the defence and counterclaim.
5. On 24th November the experts' reports were exchanged. Mediation then took place in December but without success. At that stage the plaintiffs' solicitors asked Mr James if he would reconsider his decision to cease to be involved after 30th April 1995 and in January 1995 Mr James informed the plaintiffs that, having done so, he had decided that he wished to stand by his decision.
6. This led the plaintiffs in July 1995 to give instructions to another member of the same firm, Mr Allison to give expert evidence in place of Mr James. Mr Allison produced an expert's report which differed to some extent from that of Mr James and did so in a manner more favourable to the plaintiffs. It was not until 15th July 1996 that the plaintiffs' solicitors informed the defendants' solicitors that Mr James had retired and would not be available to give expert evidence and sought their consent to rely on Mr Allison instead. The response of the defendants' solicitors was that in principle there would be no objection to this if the evidence that was to be given by the new witness was going to be the same as that of Mr James, but in order to consider the matter further they wished to see Mr Allison's report. When they saw it, and saw that it did not simply duplicate the evidence that Mr James had put in his report, they objected to the evidence being adduced.
7. It is, I think, common ground between the parties that between 17th January 1995 and 15th July 1996 the plaintiffs were at fault, and seriously at fault, for failing to inform the defendants that they were going to have to call a new expert and seeking leave to adduce the different expert evidence of this new witness. When the application was made to the judge for leave to call different expert evidence the material findings that he made were as follows:

"[Having read the reports they indicate] that the area of expertise of these particular experts is one in which, whilst it may be helpful to the court to hear expert evidence, it cannot be said to be essential. Matters as to the scope of the duty of a solicitor in general, and in this case in particular, are ones which the court could decide on its own as a matter of law without expert evidence. This applies all the more to the question of determining whether or not there has been a breach or have been breaches of such duty, which are questions of fact.

Against that background, and making a comparison of Mr James's and Mr Allison's reports, in one specific respect Mr James's report differs significantly in the plaintiffs' favour from Mr Allison's regarding the question of the extension of an overdraft. A concession is made by Mr James which is not repeated by Mr Allison as to a possible breach of duty by Mr Gilmore on the plaintiffs' behalf. As to the general tone of the two reports, without detailed analysis I accept that the tone of Mr James's report is such as to give more comfort, or perhaps more accurately less discomfort, to the defendants than the later report."

8. Later in his judgment he turned to deal with the question of prejudice. He said:

"It is not a happy story, and the issue arises as to whether the defendants have probably suffered from prejudice, and if so whether it really amounts to no more than inconvenience which can be compensated for by adverse orders for costs. I conclude that there has undoubtedly been some prejudice; prejudice in the consideration, for example, of a payment into court in relation to the counterclaim in the intervening months when the defendants and the court were being kept in the dark; and prejudice in preparing the case on the basis of the disclosed report without knowledge that an attempt would be made to substitute another; and the defendants being led into thinking that the positions in the case as far as this type of expert evidence were concerned was settled. The degree of prejudice would depend in part on how much weight was to be attached to the expert evidence. But subject to that, I conclude that there is at least a very strong degree of possibility that the prejudice suffered goes beyond anything that can be compensated for by costs. I must approach this matter, of course, with great care, in spite of the degree of lapse which has emerged. This is a counterclaim against a professional person for negligence and one must think carefully before refusing a procedural application which might substantially disadvantage such a party.

I must also weigh the prejudice that the plaintiffs might suffer by being disadvantaged in not being able to call anyone other than an unwilling Mr James against the other factors which have been urged upon me on behalf of the defendants. The plaintiffs would suffer some potential disadvantage and a risk of some actual disadvantage; but because of the views I expressed at the outset of this brief judgment about the nature and value of expert evidence in this particular field, I have concluded that such disadvantage would not be of an extent and scope which in justice requires me to overlook their default. I think that the enormity of their default on this occasion, coupled with the degree of prejudice that the defendants may suffer or have suffered is such that I should refuse the application."

9. That was the decision reached by the judge in his discretion and Mr Joffe for the applicant has a hard row to hoe in seeking to persuade the court to interfere with a decision on a matter of discretion by the judge. The way he seeks to do so is by arguing that the reference to the possible prejudice in relation to payment into court was not supported by any evidence but only by counsel's submissions when the matter was being argued.
10. Mr Nicholls for the respondents has been instructed at short notice and for that reason is in some difficulty in dealing with that submission. But he has been able to submit that, quite apart from the question of consideration of payment into court, his clients have been proceeding on the basis of the picture painted by Mr James's report when giving advices to their client and to the Legal Aid Board, and that therefore there is justification for the finding of the judge that their preparations have been made on the basis of Mr James's report. He further urges that the decision of the judge does not turn simply on the question of prejudice but on his finding or reference to the enormity of the default on this occasion.
11. I would concur in the observations made by the judge at the outset of his judgment in relation to the area covered by this expert evidence. It does seem to me that expert evidence on the ambit of a solicitor's duty is a luxury rather than a necessity and that the trial judge will or would be able without expert assistance to reach proper conclusions on these issues.

12. I was initially concerned at the potential injustice of a trial judge having before him expert evidence called by the defendants in relation to this without any expert evidence at all on behalf of the plaintiffs. But it has occurred to me that that position could be remedied simply by an application to put in Mr James's report under the Civil Evidence Act and Mr Nicholls has indicated, as I would expect, that it is unlikely that such an application would be resisted. Mr Joffe says that that would not be satisfactory because Mr James's report does not deal with matters raised by way of amendment to the pleadings. But it seems to me that Mr James's report does deal with what is the essence of the issue between the experts, namely whether or not the plaintiffs were under a duty to give advice in relation to the commercial implications of the negotiations.
13. For these reasons I have reached the conclusion that Mr Joffe has not succeeded in demonstrating that the exercise of the discretion of the learned judge in this case was wrong in principle and that, accordingly, this application should be dismissed.

LORD JUSTICE MUMMERY: I agree.

Order: Application dismissed with costs; legal aid taxation of respondents' costs; application for leave to appeal to the House of Lords refused.

MR VICTOR IOFFE (instructed by Messrs Pinsent Curtis, Birmingham) appeared on behalf of the Applicants (Plaintiffs).

MR PAUL NICHOLLS (instructed by Messrs Wright Hassall, Leamington Spa) appeared on behalf of the Respondents (Defendants).