Neutral Citation Number: [2016] EWCA Civ 1168

Case No. A3/2015/1810 & A3/2015/1810(A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MANCHESTER DISTRICT REGISTRY
(HIS HONOUR JUDGE BIRD)

Royal Courts of Justice
Strand
London, WC2A 2LL

8 November 2016

B e f o r e :

LORD JUSTICE DAVID RICHARDS
Between:

Between:

HANLON & ANR	**Respondents**
v	
RAYSON & ANR	**Applicants**

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

Mr J Small (instructed by Josiah Hincks Solicitors) appeared on behalf of the Applicants
The Respondents were not present and were not represented

HTML VERSION OF JUDGMENT (APPROVED)

Crown Copyright ©

LORD JUSTICE DAVID RICHARDS:

1. This is a renewed application for permission to appeal against an order of His Honour Judge Bird sitting in the Manchester District Registry of the Chancery Division whereby on 15 May 2015 he dismissed an application by the First Defendant, Mr Carl Rayson, to strike out paragraph 6 of the reply and parts of the Claimant's witness statements. Paragraph 6 of the reply referred to a meeting between Mr Rayson and the First Claimant, Mr Hanlon, and others held on 16 December 2013 which Mr Rayson alleged was a without prejudice meeting held with a view to compromising the dispute which existed between the parties.

2. The judge held, having considered the documentary evidence and having heard oral evidence, that the meeting on 16 December 2013 was not a without prejudice meeting. He went on to hold that if he was wrong on that, then the privileged nature of the meeting had been waived as a result of the service by Mr Rayson of a witness statement in which he referred to and dealt with that meeting. Mr Rayson did so in circumstances where at that time the reply contained the paragraph to which I have referred and indeed the witness statement served by or behalf of the Claimant's also dealt with that meeting.

3. The application to strike out paragraph 6 and the relevant passages in the Claimant's witness statements was issued virtually simultaneously with the service of the witness statements. They, the witness statements, were served pursuant to directions which had been given by Judge Pelling.

4. The dispute between Mr Hanlon and the other Claimant, Devereaux International Foundation, a body controlled, as I understand it, by Mr Hanlon on the one hand and Mr Rayson on the other, related to a loan or loans made to Mr Rayson. The background to this was that Mr Hanlon had transferred substantial sums to a company or firm of accountants run by his nephew, a Mr Ryder, and as it appears, Mr Ryder had fraudulently disposed of a significant part of those sums.

5. The records available to Mr Hanlon indicated that substantial sums in the amount of approaching £500,000 had been advanced to Mr Rayson or the companies associated with him, whereas Mr Rayson denied that sums on that scale had been advanced by him, but did accept, as I understand it, that some sums had been advanced by him. The background, therefore, to the dispute is a little different from that which often arises where in this case the Claimant, Mr Hanlon, did not have direct knowledge of the facts relevant to his claims or possible claims.

6. The parties met, as I have mentioned, on 16 December 2013. According to the findings made by the judge, there was quickly resolved between Mr Hanlon and Mr Rayson the amounts which had in fact been advanced by or behalf of Mr Hanlon to Mr Rayson. In short, Mr Rayson accepted that a sum of £85,000 had been advanced to him and that Mr Hanlon or Devereaux International Foundation was the creditor in respect of that loan. It was also agreed that it had been advanced on terms as to interest at a rate of 1 per cent a month.

7. The case advanced by Mr Rayson before Judge Bird was that this was a meeting held with a view to trying to settle the dispute between the parties, that the negotiation occurred in the course of the meeting, that as a result of the meeting a document entitled "Settlement deed and release" was drafted for execution by the parties and that that included the agreement between the parties that Mr Hanlon or Devereaux agreed to accept the sum of £100,000 in full and final settlement of the loan of £85,000. The figure of £100,000 represented the principle of £85,000 plus some, but not all, of the accrued interest at the rate of 1 per cent per calendar month. I think the full amount of outstanding interest would have given a figure of, I think I was told, £107,500.

8. As I have mentioned, the judge heard this application as the trial of a preliminary issue in May 2015 over two days, following which he reserved judgment and delivered his judgment some 10 days later. He had before him all the relevant documentary evidence and as I say, he heard oral evidence from some of those who had attended the meeting. He concluded as follows in paragraph 28:

> "I am satisfied that there was at the meeting no genuine dispute between the parties and no offers of settlement. At the start of the meeting, the parties did not agree on the extent of the loans made or the identity of the lending party. Those matters were resolved, in my judgment, quickly. The resolution was not a matter of negotiation. It seems to me that both sides treated the meeting as a fact-finding exercise. The context of the meeting is important. Mr Hanlon did not know the extent of the fraud that had been visited on him by his nephew and had few, if any, reliable records. He did not know what money had been left. Mr Rayson knew what had been received and told Mr Hanlon. Neither party, in my judgment, offered a compromise. Each simply set out his case. Common ground was arrived at and the parties moved on."

9. Presenting the application for permission to appeal today, Mr Small, who appeared below as counsel, in his

economical and attractive submissions has argued that overall finding of the judge is undermined both by specific findings made by the judge and also by the fact that at the start of the meeting the parties were not agreed and by the end of the meeting they were agreed.

10. He drew attention to the findings of the judge in paragraph 10(1) that the judge found that before the meeting it was clear that Mr Hanlon and Mr Rayson disagreed about the amounts loaned and to whom any monies should be repaid. He drew attention to paragraph 10(4) where the judge quotes from an e-mail sent shortly before the meeting by Mr Hanlon's daughter noting that:

> "Mr Rayson was willing to sign any paperwork stating that the money came from us [that is to say Mr Hanlon], but only as long as we do not pursue him any further over the £250,000. Obviously, I have not agreed to this."

11. Also, paragraph 10(5)(e), which quotes from a note prepared by Mr Hanlon's solicitor of the meeting in which he records that Mr Rayson was happy to enter into confirmatory documentation confirming the loan together with a settlement agreement. Further reference is made to a settlement agreement.

12. Against that background, Mr Small submits that the Appellant has a real prospect of success in setting aside the judge's first conclusion, namely that the meeting on 16 December 2013 was not a without prejudice meeting.

13. In my judgment, the finding made by the judge in paragraph 28 of his judgment is a finding that was open to him on the evidence before him. He, as I mentioned, not only had the documentary evidence, but he heard the evidence of some of those who had been present, including in particular Mr Hanlon and Mr Rayson. The judge was, therefore, in a very good position to get a good grasp of what really occurred at the meeting, the purpose of the meeting and to reach conclusions as to the meeting.

14. I do not accept that the fact that in this particular case the parties were not agreed as to the relevant facts at the start of the meeting means that the meeting was without prejudice. Because of the particular circumstances of the case, Mr Hanlon in particular did not know the relevant facts and having put evidence such as his bank statements before him, Mr Hanlon accepted that Mr Rayson had not received the loans which the unfortunately fraudulent records prepared by his nephew indicated. The resolution, if that is the word, was, as the judge said, not a matter of negotiation. It was a matter of looking at the evidence and reaching a common position as a matter of fact.

15. I therefore do not consider that the judge's conclusion in paragraph 28 is at odds with the other findings made by him, but on the contrary is, as I have mentioned, a conclusion to which he was entitled to come on the evidence. That being so, there is no prospect, certainly no real prospect, of this court interfering with the judge's findings of fact.

16. In order to obtain permission to appeal, Mr Rayson would also have to demonstrate that he had a real prospect of success on the second issue. It is, however, not necessary for me to go into that particular issue, although I would record that if that had been the only issue, I would have been inclined to give permission to appeal. But, as I say, Mr Rayson must satisfy me that he has a real prospect of success on the first ground and he has failed in that respect.

17. Accordingly, I refuse permission to appeal.