Case No: CH/2008/PTA/0493
CH/2008/PTA/0814

Neutral Citation Number: [2009] EWHC 993 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 22 April 2009

BEFORE:

MR JUSTICE MORGAN

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BETWEEN:

Claimant

MASTERCIGARS DIRECT LIMITED

- and -

Defendant

WITHERS LLP

- - - - - - - - - - - - - - - - - - - -

MR J BROWN appeared on behalf of the CLAIMANT

MR J MORGAN QC appeared on behalf of the DEFENDANT

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APPROVED JUDGMENT

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MR JUSTICE MORGAN:

1. The hearing today follows the handing down of judgment in this case on 30 March 2009. The neutral citation of that judgment is [2009] EWHC 651 Ch. At today's hearing Mr Brown again appeared on behalf of Mastercigars Direct Limited and Mr Morgan QC appeared on behalf of Withers LLP.

2. At the outset of today's hearing Mr Brown applied to me to give further reasons in addition to those set out in the written judgment I handed down and he also asked for clarification of the judgment in various respects. In support of his two applications he referred me to the passage in the 2009 White Book, beginning at page 1072, which indicates the circumstances in which it is appropriate, and the circumstances in which it is not appropriate, to clarify or amplify the reasons given for a judgment that has been delivered. I have been taken by Mr Brown in his written skeleton argument to certain passages in the transcript of the hearing of this appeal. The hearing took place over two days in January 2009 and Mr Brown has made various submissions as to the need for, or the desirability of, the giving of further reasons or the giving of clarification of the reasons already provided.

3. I am satisfied that it is not appropriate in this case for me to add to the written reasons which appear in the judgment as handed down. That was a reserved judgment. I took a little time to consider my decision. I carefully formulated the reasons which appeared to me to be the right reasons. Having read Mr Brown's written submissions on those points, I remain of the view that the reasons which I gave are the reasons I intended to give, that they are clear, they are at an appropriate length and no further reasons or clarification is called for.

4. However, the discussion about further reasons or clarification brought to the surface a point which Mr Brown wishes to make, in particular concerning the next step which is to be taken to resolve this highly contentious, long running question of the amount of costs payable by Mastercigars to its former solicitors. It will be remembered that in paragraphs 90 to 92 of the judgment I gave, I considered the next steps to be taken, I identified the way forward as I saw it, I identified in particular that the court should decide the underlying dispute between the parties and that that dispute need not be and should not be remitted for the decision of Master Simons or another costs judge.

5. I also identified that the way forward was for me to invite one of the assessors sitting with me, namely, the senior costs judge, to prepare a report on relevant questions arising with a view to my having the

assistance of that report and taking it into account when I came to the ultimate decision on the underlying dispute. In the course of paragraph 90 of the judgment I referred to this point having been raised with counsel in the course of argument and the fact that no jurisdictional or other impediment was identified to the court proceeding in that way. Indeed in the written submissions prepared by Mr Brown for today's hearing, Mr Brown did not suggest that the suggested course of action would go outside my jurisdiction, but he did make submissions as to why such a jurisdiction should not be exercised in that way and he contended for a different approach to that which had been identified in the judgment.

6. Further, I have seen in the course of today's hearing the appellant's notice which has been served by Mastercigars in relation to the judgment I have given. In paragraphs 9 and 10 of the grounds of appeal references are made to the decision I have made as to the way forward. There are various points made but I find in paragraph 10 of the grounds of appeal a statement that I did not have jurisdiction to make an order of the kind which I indicated I intended to make. This question of jurisdiction has been ventilated in the course of argument at the hearing today. Although this jurisdiction point was not argued before at the hearing in January and although I assumed jurisdiction in my decision on 30 March 2009, it seems to me that I need to make my own decision today on whether I do or do not have jurisdiction. That is because I have not yet made an order in this case and I ought not to make an order if it were to be the case that I did not have jurisdiction to make that order. Accordingly, I have heard submissions from both Mr Brown and from Mr Morgan as to the scope of my jurisdiction.

7. The rules of court which are relevant are those contained in CPR rule 52.10 and 52.11. I will not read out the full text of those rules, but I will draw attention to certain features which appear to me to be relevant. Rule 52.10(1) states that: "In relation to this appeal the appeal court [that is this court] has all the powers of the lower court", so I have all the powers of Master Simons and of any other costs judge to whom I might otherwise think fit to remit the matter.

8. Rule 52.10(2) in particular identifies various powers which the appeal court has. As I read the rule, that does not detract from the earlier statement that the appeal court has all the powers of the lower court. These are specific powers. They may be further powers which are not available to the lower court but they are in any case not intended to be an exhaustive statement of the only powers which are available to the court today.

9. The matter is taken a little further by rule 52.11 which indicates how

an appellate court should approach an appeal against the decision of a lower court. One of the things which the appellate court may do, that is has power to do, is to hold a rehearing if in the circumstances of an individual appeal the court considers that a rehearing would be in the interests of justice. So a rehearing is something that this appellate court can determine to do. Further, under rule 52.11(2) the appeal court has power to receive oral evidence and other evidence which was not before the lower court. That seems to indicate that an appellate court, before it finally disposes of the appeal before it, is entitled to conduct a rehearing of the dispute, the subject of the appeal, and for that purpose to admit evidence which was not before the lower court and then, having admitted that evidence, assess it and take it into account and make findings on the basis of it, leading to an overall determination of the underlying dispute.

10. Mr Brown submits that the circumstances in which the court can admit further evidence which was not before the lower court are restricted to the circumstances which were identified in the well-known decision of the Court of Appeal in Ladd v Marshall [1954] 1 WLR 1489. However, as the notes in the White Book, in particular at page 1508, make clear, the criteria in Ladd v Marshall are not restrictions on the scope of the jurisdiction of the court to admit evidence. The criteria in Ladd v Marshall have always been and continue to be statements of common sense and good guidance as to the way in which the jurisdiction which exists ought to be exercised. So, having reviewed the rules, they appear to say in relatively straightforward terms that the court does indeed have the jurisdiction which I indicated in my judgment I was minded to exercise.

11. There does not appear to be anything in the notes to these rules which is of particular relevance on the question of jurisdiction. However, my attention was drawn to a decision of the Court of Appeal, U v Liverpool City Council [2005] 1 WLR 2657. As it happens, that was another appeal concerning the obligation to pay the costs of litigation. As it also happens, Master Hurst, who has assisted me as an assessor in the present case, assisted the Court of Appeal in the Liverpool City Council case. I need not go to the detailed issues in the Liverpool case. I draw attention however to the fact that at paragraph 3 of the judgment of the court, Brooke LJ indicated that the court in that case, no doubt for good reason, decided that the appeal should proceed by way of rehearing.

12. Furthermore, at paragraph 4 he referred to the fact that the Court of Appeal conducting a rehearing had admitted evidence that was not before the first instance judge. It is fair to record that Brooke LJ said there was no "sustained objection" to the admission of this evidence.

That I think indicates that the court felt it had jurisdiction to act in the way it did act and in the absence of sustained objection it was prepared to exercise that jurisdiction. I do not read the reference to "no sustained objections" meaning that the court only had jurisdiction by consent of all relevant parties. If that had been what Brooke LJ was saying he would have expressed himself in different terms. So, although the Liverpool City Council case is not a clear authority where the question of jurisdiction was argued out, I do find it offers some support to the conclusion I have reached and it is certainly a comfort to me that the course that I feel I have jurisdiction to take is not unprecedented and does not appear to be contrary to any relevant decision. Accordingly I find, contrary to the submissions put forward by Mastercigars, that I do have jurisdiction to deal with this appeal in the way that I identified in paragraphs 90 to 92 of the judgment which I gave.

13. I perhaps should add this: one of Mr Brown's submissions today was that I had jurisdiction to act in that way in a case where I allowed the appeal against Master Simons' decision on the grounds that he had acted in a way which was procedurally unfair, but I had no jurisdiction to act in the way I proposed if I allowed the appeal on other grounds. It seems to me that distinction is without any foundation and I do not accept that submission.

14. Having held for those reasons that I do have jurisdiction to proceed in the way that I earlier indicated I would wish to proceed, the next question perhaps for me is whether I should act in the way previously identified. I gave my reasons for that view in my earlier judgment. The matter has been argued afresh today. I see no reason based on the arguments today to alter the conclusion that I earlier expressed and the reasons which I then gave. Accordingly, I will proceed in the way that I indicated I was minded to proceed in those paragraphs of my earlier judgment.

15. What those paragraphs left open for further argument was the identification of the questions which are to be the subject of the further determination by the court following a report by Master Hurst. The parties have drafted questions and they have failed to agree on the questions which are appropriate. In the course of the argument different formulations of the questions have now emerged and the questions which I direct will be the subject of the determination are the following four questions: (1) what is a reasonable sum for the work reasonably done by Withers, the subject of the two contested bills? (2) What work was done during the estimated period which was not covered by the estimate? (3) What is the impact of Mastercigars' reliance on the estimate? (4) In the light of the impact referred to above and any other material considerations, what sum is it reasonable

for Mastercigars to pay?

16. I will add one or two short words of explanation in relation to those questions. When the first question is addressed, a reasonable sum for the work reasonably done, the estimate will have a part to play. It will have the part described in the authorities as being used as a yardstick and the greater the divergence between the sum in the estimate and the sum in the bill, the greater is the need for an explanation of that divergence. It has also been suggested in the course of argument that a figure stated in a listing questionnaire as the predicted costs of Mastercigars might also be relevant, possibly as a similar yardstick. I am not ruling that in or out, it will be a matter for later decision as to the usefulness of the estimate in the questionnaire.

17. As to question (2), what work was done during the estimated period which was not covered by the estimate, I have already indicated my conclusion that the estimated period began on 1 May of the relevant year and not 6 May as has been earlier stated. Questions (1) and (2) will be the subject of a report by Master Hurst. I will not, for reasons which I will go on to describe, give detailed directions today as to the next steps which will lead to the preparation and finalisation of that report.

18. Dealing with the third question, which refers to the impact of Mastercigars' reliance on the estimate, the parties are not entitled to have a second go or a third or fourth go to improve their respective cases on this question of the reliance by Mastercigars. The parties are to be bound by Master Simons' findings of fact on the fact of reliance. I have already in the course of argument made various comments as to how far Master Simons' findings do go, but it is not necessary for me to repeat that in this present judgment.

19. In relation to the second question, which is the work done during the estimated period which was not covered by the estimate, there already has been considerable work done by the parties on that topic. I refer to two things in particular. The first is the evidence which was heard by Master Rogers at an earlier round of this dispute when he heard evidence in cross-examination as to certain matters which Withers say, and Mastercigars do not admit, went beyond the work in the estimate. The other piece of work that has been done, by Withers at any rate, is that, pursuant to an earlier order made by the costs judge, they served a very detailed statement of reasons for the differences between the estimate and the bill. That work has been done and it seems to me that that work should be available to the parties to be used. However, I express the hope that the parties will approach the decision on these questions in a proportionate way and will exercise self-restraint in

relation to the amount of material they wish to examine and challenge and if the parties do not exercise self-restraint in those respects it is to be expected either that Master Hurst will give directions which limit the range of the dispute to be investigated by him or I will give directions with the same object in mind.

20. In the absence of a stay of the order I make in these respects I think I would be prepared to go further and lay down a detailed timetable for the steps to be taken to lead to an early determination of this long outstanding matter. However, before I consider the question of directions I ought to consider the application which has been made by Mastercigars for a stay pending further developments in the Court of Appeal. I have been given some information about what those developments might be. I have been taken to the previous appeal and the outcome of that earlier appeal, that appeal being against my decision of November 2007. I have also been shown the appellant's notice in relation to the decision I made on 30 March 2009. Mr Morgan would wish to persuade me that there really is very little prospect of those developments in the Court of Appeal ever amounting to anything and in particular ever amounting to the grant of permission to Mastercigars to appeal. Mr Brown has urged upon me the strength of his argument as to why not only will permission be granted but that the appeal will be an overwhelming success.

21. I do not intend for one moment to form any assessment of either side's prospects in such an appeal. However, there is on any view in existence an application by Mastercigars for permission to appeal the decision of 30 March 2009. It is therefore relevant for me to consider whether I should grant a stay of the order I will make as to the further steps to be taken until the outcome of that application is known.

22. There are good reasons why I should grant a stay and there are good reasons why I should not grant a stay. The reasons for granting a stay are that if the appeal is ultimately allowed it might well be the case that these further steps will turn out to be of no relevance, but yet they will have cost the parties certain sums in order to prepare themselves, to be represented and argue their cases during these further stages. The second reason for a stay is that I have been given certain information about the financial position of Mastercigars which persuades me that they will be in financial difficulty in having to represent themselves or be represented at these further stages and I think it would be unfortunate if I put them to that expense only to find that the expense was wasted in the event of a successful appeal.

23. The other side of the coin which militates against the grant of a stay is that this case has been going on for a considerable time. The parties

still do not know the outcome as to what Withers will get if they win and what Mastercigars will have to pay if Mastercigars win. The position is still unclear. That was a factor that seemed to weigh with Lloyd LJ when he refused permission to appeal against my earlier decision of November 2007. There is a great deal to be said for the view that it would be of assistance to the parties, it would focus their minds, it might produce an earlier conclusion to this matter, if the parameters of the various outcomes were established. I have to balance those various considerations. The way I do it is in favour of the grant of a stay. I am impressed by the point that it would be unfair to Mastercigars to impose upon them the burden of expenditure which might be wasted at a time when they will have great difficulty in funding that expenditure.

24. The stay will be in the following terms. The stay is pending the final determination of the application for permission to appeal the decision of 30 March 2009. By final determination I mean that if Mastercigars are refused permission on paper but they renew their application for an oral hearing, then there has not yet been a final determination.

25. I also intend this consequence: if permission is not given at final determination of the application, then the stay will automatically fall way. But if permission is given, then the stay I am granting today will also fall away and it will be for the Court of Appeal or the relevant Lord Justice to decide whether to continue the stay or not. For example, it occurs to me that the Lord Justice might take the view that even though the matter is going to the Court of Appeal, it would be of assistance to the Court of Appeal and to the parties for the range in the the outcome to be established pursuant to the steps that I have otherwise ordered should be taken.

26. I think then the final matter for treatment in this judgment is: what is to happen to the costs of the appeal to date? Mr Morgan on behalf of Withers asks me to reserve the costs. Mr Brown on behalf of Mastercigars asks for an order for costs in his favour, but if I am not persuaded in that regard, to reserve the costs to see what later happens in this matter. I think all that I ought to say at this point is that it appears to me that I should reserve the costs. I can make the decision here and now that it is not appropriate for Mastercigars to have the entirety of their costs. I am not thereby indicating that they are entitled to a part of their costs, all I am doing is dismissing the suggestion that I should make an order for Mastercigars' costs. Otherwise the costs are reserved and they will be looked at later. At that time all proper arguments can be considered.