

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

HC02C00120

[2001] EWHC 1051 (CH)

Royal Courts of Justice
Thursday, 9th May 2002

Before:

MR. JUSTICE LIGHTMAN

B E T W E E N:

HURST Claimant

- and -

LEEMING Defendant

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THE CLAIMANT appeared in person.

MR. P. HESLOP Q.C. and MR. A. TWIGGER (instructed by Messrs.
Reynolds Porter Chamberlain) appeared on behalf of the
Defendant.

JUDGMENT

(As approved by the Judge)

1 MR. JUSTICE LIGHTMAN: The claimant, Mr. Hurst, a solicitor, was a
2 partner in the later dissolved firm of Martin Janus. Disputes
3 arose between Mr. Hurst and his former partners, and this led
4 to proceedings by Mr. Hurst against them. Mr. Hurst acted in
5 person in those proceedings until a few days into the trial,
6 when, through solicitors he had retained, Messrs. Penningtons,
7 he instructed the defendant, Mr. Ian Leeming Q.C.

8 Amongst the many claims made by Mr. Hurst in that case
9 was a claim for the taking by the court of an account.
10 Mr. Hurst failed in his claims in that action, both at first
11 instance, on appeal to the Court of Appeal, and in the House
12 of Lords. Orders for costs were made against him. The
13 failure in those proceedings led to his bankruptcy. He is
14 practically ruined. Mr. Hurst attributed the failure in the
15 proceedings and his subsequent ill-fortune to the legal advice
16 and representation in those proceedings. He could not sue
17 Mr. Leeming under the law as it stood until the decision of
18 the House of Lords in Arthur J.S. Hall & Co. v. Simons [2000]
19 3 W.L.R.543, which I shall refer to as "Hall". Prior to that
20 date counsel were believed to enjoy immunity from suit for
21 negligence in the conduct of proceedings.

22 Mr. Hurst accordingly, to get round the consequence of
23 this immunity, sued Penningtons in the Chancery Division in
24 effect as vicariously liable for the negligent conduct of the
25 proceedings by Mr. Leeming. The actions was struck out as
26 hopeless by Mr. Justice Pumfrey, and the Court of Appeal
27 refused permission to appeal. Mr. Hurst, undaunted, then
28 commenced fresh proceedings against Penningtons in the Queen's

1 Bench Division. Master Rose struck out that action as an
2 abuse of process.

3 With the decision of the House of Lords in Hall
4 removing Mr. Leeming's immunity, Mr. Hurst then sued
5 Mr. Leeming for negligence. I have before me applications for
6 summary judgment in that action, both by Mr. Hurst and by
7 Mr. Leeming. Mr. Hurst appears in person, Mr. Leeming is
8 represented by Mr. Philip Heslop Q.C.

9 When Mr. Hurst opened his application, he and I had a
10 frank exchange of views on the merits of the case, and this
11 exchange led us both to conclude that the action had no merit
12 and must be dismissed. I must make it clear beyond any doubt
13 that there is no ground for any criticism of Mr. Leeming. For
14 what it is worth, on the material before me I would have
15 reached the same conclusion that he did, and acted in exactly
16 the same way. Mr. Hurst is to be commended for his fair and
17 sensible decision in this regard at the hearing. This
18 decision, namely that the action had to be dismissed, left
19 outstanding the single issue of the costs of the action.

20 In the ordinary way, Mr. Leeming would, without
21 question, be entitled to his costs, but Mr. Hurst submits that
22 no such order should be made because both before and after the
23 commencement of the proceedings he invited Mr. Leeming to
24 proceed to mediation, but Mr. Leeming refused.

25 It is unnecessary to examine in detail the
26 correspondence between the parties; it is sufficient if
27 I state the following as the material facts.

1 1. Mr. Hurst's claims were of professional negligence
2 by Mr. Leeming.

3 2. Mr. Leeming vehemently denied those claims.

4 3. The claims in fact lacked any substance or merit.

5 4. Mr. Leeming gave full and detailed answers to each
6 and every allegation made against him, explaining fully his
7 actions and refuting those allegations.

8 5. Mr. Leeming gave a series of reasons for refusing
9 to proceed to mediation, first, the legal costs already
10 incurred in meeting the allegations and the threat of
11 proceedings; secondly, the seriousness of the allegations of
12 professional negligence; thirdly, the total lack of substance
13 of the claims made; fourthly, the lack of any real prospect
14 of a successful outcome to the mediation proceedings, having
15 regard, in particular, to the plain object of Mr. Hurst in
16 proposing mediation of obtaining a substantial financial
17 payment from Mr. Leeming when in fact there was no merit in
18 the claim; and fifthly, the character of Mr. Hurst as revealed
19 by the actions he commenced and his response to the
20 explanation of Mr. Leeming's conduct already provided. That
21 character, Mr. Leeming says, was of a man obsessed with the
22 notion that an injustice had been perpetrated on him, who
23 would not be able or willing to adopt in the course of a

1 mediation the attitude required if a mediation was to have any
2 prospect of success.

3 The professional negligence pre-action protocol lays
4 down that in proceedings for professional negligence, if one
5 party offers to proceed to mediation, the other party, if he
6 refuses, should state his reasons. Implicit in that protocol,
7 and explicit in two decisions of the Court of Appeal, Frank
8 Cowell v. Plymouth City Council and Dunwich v. Railtrack, is
9 the proposition that a party who refuses to proceed to
10 mediation without good and sufficient reasons may be penalised
11 for that refusal and, most particularly, in respect of costs.

12 Mediation is not in law compulsory, and the protocol spells
13 that out loud and clear. But alternative dispute resolution
14 is at the heart of today's civil justice system, and any
15 unjustified failure to give proper attention to the
16 opportunities afforded by mediation, and in particular in any
17 case where mediation affords a realistic prospect of
18 resolution of dispute, there must be anticipated as a real
19 possibility that adverse consequences may be attracted.

20 I have according to consider whether Mr. Leeming was
21 justified in refusing to proceed to mediation. I do not think
22 that the fact that heavy costs had already been incurred was
23 afforded any form of justification. This was merely a factor
24 to be taken into account in the mediation process. Nor do
25 I think it sufficient that there was an allegation of
26 professional negligence. Practically all allegations of
27 negligence against a professional many or body are serious,

1 but that is no reason why an attempt should not be made at
2 mediation. The reflection on the professional competence of a
3 party may need to be reflected in the course of the
4 negotiations and in any settlement, but cannot of itself take
5 any ordinary case outside the purview of mediation. The fact
6 that a party believes that he has a watertight case again is
7 no justification for refusing mediation. That is the frame of
8 mind of so many litigants. Nor is it necessarily sufficient
9 of itself that a full and detailed refutation of the opposite
10 party's case has already been supplied, though this may well
11 be a very relevant consideration.

12 The critical factor in this case, in my view, is
13 whether, objectively viewed, a mediation had any real prospect
14 of success. If mediation can have no real prospect of success
15 of a party may, with impunity, refuse to proceed to mediation
16 on this ground. But refusal is a high risk course to take,
17 for if the court find that there was a real prospect, the
18 party refusing to proceed to mediation may, as I have said, be
19 severely penalised. Further, the hurdle in the way of a party
20 refusing to proceed to mediation on this ground is high, for
21 in making this objective assessment of the prospects of
22 mediation, the starting point must surely be the fact that the
23 mediation process itself can and does often bring about a more
24 sensible and more conciliatory attitude on the part of the
25 parties than might otherwise be expected to prevail before the

1 mediation, and may produce a recognition of the strengths and
2 weaknesses by each party of his own case and of that of his
3 opponent, and a willingness to accept the give and take
4 essential to a successful mediation. What appears to be
5 incapable of mediation before the mediation process begins
6 often proves capable of satisfactory resolution later.

7 Mr. Hurst now accepts (as he must) that his case was
8 hopeless. He argues that, if Mr. Leeming had agreed to the
9 mediation which he sought, the mediator could have had the
10 same frank exchange of views with him which I have had, and
11 this would have enabled the case to be resolved without the
12 costs involved in this action. This is a formidable argument,
13 but, after anxious consideration, I am persuaded that, quite
14 exceptionally, Mr. Leeming was justified in taking the view
15 that mediation was not appropriate because it had no realistic
16 prospect of success. My reasons, in a word, are that on the
17 material before the court (as on the material before him Mr.
18 Leeming) it is plain that Mr. Hurst has been so seriously
19 disturbed by the tragic course of events resulting from the
20 dissolution of the partnership that his judgment in respect of
21 matters concerning the partnership and partnership action, and
22 the conduct of that action on his behalf is seriously
23 disturbed: he is a person obsessed with the injustice which he
24 considers has had been perpetrated on him and is incapable of
25 a balanced evaluation of the facts.

26 The grounds for my view are as follows: first,

1 Mr. Hurst, though a solicitor, has appeared quite unable or
2 unwilling to appreciate the full and clear explanation given
3 refuting his claim. It needed no mediator to help him to
4 evaluate the claim when furnished with the explanation by
5 Mr. Leeming. I do not accept that as a mere "IT" solicitor he
6 could not be expected to understand the partnership law issues
7 involved.

8 Secondly, prior to the present action Mr. Hurst had
9 already commenced two hopeless, and in my view vexatious,
10 actions against Penningtons. I do not think that the
11 commencement of those proceedings can have reflected a
12 balanced view of their likely outcome.

13 Thirdly, Mr. Hurst is a bankrupt and has (and knows
14 that he has) nothing to lose in the proceedings.

15 Fourthly, the evidence and pleadings in this case
16 reveal that what is really "biting" Mr. Hurst, is the
17 conviction that his former partners were fraudulent, and the
18 conduct of the trial by his legal advisers let them get away
19 with it. Yet at no time did Mr. Hurst ever plead or even
20 allege fraud in the partnership action.

21 Fifthly, Mr. Hurst was out to obtain a substantial sum
22 in the mediation process. He was not likely to accept any
23 mediation which did not achieve that result, though his claim,
24 as I have said, plainly entitled him to nothing.

25 In short, as it seems to me, Mr. Leeming reasonably
26 and fairly took the perfectly justifiable view on the facts

1 that, by reason of the character and attitude of Mr. Hurst,
2 mediation had no real prospect of getting anywhere. That is
3 not a view which is easily sustainable in any case, but, on
4 the facts of this case, it is, sustained. For this reason I
5 do not think that Mr. Leeming should be penalised or should be
6 deprived of his full entitlement to costs.

7 I therefore award costs of the action, including the
8 costs of these two applications, in favour of Mr. Leeming,
9 which I summarily assess at £55,000.

10 MR. HESLOP: My Lord, I am much obliged. I have in fact an order
11 prepared. Would it be convenient if Mr. Hurst had a look at
12 it, and a copy was handed up to your Lordship? (Document
13 handed)
14

15 This draft, my Lord, provides in the first three
16 paragraphs that it be made by consent, given Mr. Hurst's
17 position, and then deals with the position of costs, and the
18 figure should then be put in at £55,000, in para.4.
19

20 MR. JUSTICE LIGHTMAN: Yes.
21

22 MR. HESLOP: And I am not sure there is anything else, my Lord,
23 that needs to be added.
24

25 MR. JUSTICE LIGHTMAN: No. Mr. Hurst, I do not think there is
26 anything that you can say, is there?
27

28 MR. HURST: I am not sure whether it is appropriate to order me to
29 pay within 14 days, because I cannot.
30

31 MR. JUSTICE LIGHTMAN: All I can do is -- what is the position if
32 he cannot pay?
33

34 MR. HESLOP: Given his bankruptcy, my Lord, the ordinary steps --
35 14 days I believe under this mechanism is the normal time put
36 in an order, and certainly I have seen that done on many other
37 occasions, and ordinarily then one would be able to get
38 judgment enforced. But given that Mr. Hurst is a bankrupt,
39 I think that things are a bit more complicated, and therefore
40 it may all turn out to be academic. Certainly if Mr. Hurst
41 cannot pay now, making it 21 or 28 days does not help.
42

43 So I would respectfully suggest that the order is left

1 in this form and matters will take their course.
2
3 MR. JUSTICE LIGHTMAN: The simple position, Mr. Hurst, is if you
4 have not got the money they are not going to be able to
5 enforce it.
6
7 MR. HURST: I just do not want it alleged that I am in contempt of
8 court, my Lord.
9
10 MR. JUSTICE LIGHTMAN: The answer is you will not be in contempt,
11 and I am sure your opponent will entirely agree, if you cannot
12 afford to pay it.
13
14 MR. HESLOP: It will just become a debt, if he does not pay it,
15 which is unpaid.
16
17 MR. JUSTICE LIGHTMAN: That is what I will do. Mr. Hurst, I am
18 very sad at what has happened, but I am afraid that is the
19 only outcome, and I hope that life treats you a little bit
20 better in the future.
21
22 MR. HURST: I am much obliged, my Lord.
23
24
