IN THE COUNTY COURT AT MANCHESTER | Claim No. C00AL007

Manchester Civil Justice Centre
1 Bridge Street West
Manchester

Tuesday, 20th September 2016

Before:

DEPUTY DISTRICT JUDGE HAMPSON

Between:

ELLIS

Claimant

-v-

LARSON

Defendant

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Counsel for the Claimant: MR. LATHAM

Counsel for the Defendant: MR. PAUL

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JUDGMENT APPROVED BY THE COURT

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APPROVED JUDGMENT

1. THE DEPUTY DISTRICT JUDGE: In this matter of Ellis v Larson, the matter comes before me at an RTA stage 3 oral hearing. It had previously been before the court at a hearing where a Mr Sisto sought to exercise rights of audience at that hearing for the claimant. The defendant raised objection to that, submitting that he had no rights of audience. The matter is now listed before me for a stage 3 hearing, but also to deal with the issue of rights of audience and to make a decision on that particular point.

2. I have read the skeleton arguments of both parties on the matter and I have been referred to the additional authority of *Crane v Canons Leisure Centre [2007] EWCA Civ 1352 (19 December 2007)*, and also referred to the judgment of DJ Peake in the matter of *McShane v Lincoln (Birkenhead County Court 28th June 2016)*, although of course that latter matter does not bind me by the nature of its level of decision.

3. The basic starting point for this of course is the Legal Services Act 2007, which regulates the issue of the rights of audience. Section 12 states that the exercise of a right of audience is a reserved legal activity, and section 13 states that to carry on a reserved legal activity, the person must be authorised or exempt. The parties accept that Mr Sisto was not authorised, and the claimant relies on him being exempt. The claimant does not seek to persuade me that the court should exercise the discretion that it has in these particular proceedings which statute gives the court the power to do, that power – i.e. to grant in an individual case for particular reasons a right of audience. The reliance is upon the exemption. Therefore for Mr Sisto to be exempt, he must satisfy the requirements of schedule 3, paragraph 17, which says this:

> "The person is exempt if—
>
> (a) the person is an individual whose work includes assisting in the conduct of litigation,
>
> (b) the person is assisting in the conduct of litigation—
>
> (i) under instructions given (either generally or in relation to the proceedings) by an individual to whom sub-paragraph (8) applies...
>
> (ii) under the supervision of that individual, and
>
> (c) the proceedings are not reserved family proceedings and are being heard in chambers."

I did not read the rest of that section as it is not relevant to the issues in this matter.

4. Effectively therefore, to be exempt he must satisfy the requirements of schedule 3, paragraph 1(7) (a), (b) and (c). Of course, all of those constituent parts – (a), (b) and (c) – must be satisfied. If any one of them is not, then he has no rights of audience.

5. The three questions therefore the court must answer today in relation to paragraph (7) are:

(1) Did his work include assisting in the conduct of litigation?

(2) Was he under instructions and supervision of an authorised person? Schedule 3, paragraph 8 deals with the issue of a person authorised for the conduct of litigation, but in this case it is essentially the issue of supervision rather than instruction.

(3) Are the proceedings being heard in chambers?

6. It is to be noted in a matter of this kind that if a person is not entitled to carry on a reserved activity, then if that person does so, then it is potentially a criminal offence.

7. The parties themselves have dealt with the issues, the three questions, in a different order than actually set out in the statute, and I will deal with them as the parties have addressed them. The first issue is the matter of what one might call 'chambers'. Were these proceedings being heard in chambers? There is, of course, no definition in the Legal Services Act 2007, nor indeed in the CPR of 'chambers'. The defendant's essential position is that by virtue of CPR 39.2(1):

> "The general rule is that a hearing is to be in public."

That complies with the Human Rights Act 1998, article 6 requirement for the same.

8. The defendant submits that a hearing which would have been in chambers prior to the CPR would now be a hearing in private. That is the distinction here, not one of physical location of the hearing in a courtroom or chambers. The defendant's counsel refers me to the authority of *Regina v Bow County Court [1999] EWCA Civ 2004 (28 July 1999)* in support of his submission. Furthermore, there is a relevant provision in the CPR with regard to rights of audience, and in particular those provisions are at PD39 1.9 and 1.14. In particular, 1.14 says this:

> "References to hearings being in public or private or in a judge's room contained in the Civil Procedure Rules (including the Rules of the Supreme Court and the County Court Rules scheduled to Part 50) and the practice directions which supplement them do not restrict any existing rights of audience or confer any new rights of audience in respect of applications or proceedings which under the rules previously in force would have been heard in court or in chambers respectively."

What that effectively means is that there should be no change in the rights of audience from under the old rules to those under the new. The problem is in this particular type of matter today is that stage 3 hearings did not exist under the old rules.

9. What the claimant says is that they do not contend that stage 3 is a private hearing. They say it is indeed a public hearing, but that CPR PD39 1.14 refers to the three possibilities – public, private or judges' rooms – and that indeed judges' rooms can be public hearings.

10. The claimant says that what we should do is to look back to the previous rules situation and essentially which type of hearing is a stage 3 hearing most akin to in its procedure, and that if that is a chambers type proceedings then whether they are public or not, that effectively it is a chambers type of hearing and that that really means that the old rights of audience which would have applied should apply now.

11. What the claimant says is, "Well, look at the nature of stage 3 hearings. There are no witness statements, there is no live evidence, it is a papers, judge and submissions situation. That is most akin to a chambers hearing. Therefore, this particular hearing, as a stage 3 hearing, should be in chambers and the qualification confirmed."

12. The defendant says that under the old system, "Well, no. Actually, what these proceedings are most akin to is the assessment of damages hearing. At that hearing, the judge and the parties' representatives would be robed; there would live witnesses. It was effectively the final hearing of the action to determine the question of damages, and that particular type of hearing, under the old system, was in open court and not chambers. Therefore, these proceedings now, a stage 3 hearing, are most akin to that. We are determining the final assessment of damages in the matter and concluding the proceedings, notwithstanding the nature of documents only and no witnesses *et cetera*."

13. The claimant also submits that, effectively, the position is similar to that in detailed assessment proceedings, which were previously taxation (as was the old word for it) and they were in chambers. However, they – i.e. detailed assessment hearings – are now in public. Therefore, it is not really this public or private issue; it is 'what is the nature of the proceedings?' and the claimant, as I say, prays in aid the comparison with the old taxation hearing, compared to the detailed assessment hearing now.

14. My view is that these proceedings – i.e. stage 3 proceedings – are not akin to a taxation hearing and the detailed assessment hearing situation. They are most akin to an assessment of damages hearing and that essentially, in my view, the taxation and detailed assessment hearing is not an appropriate comparable. Therefore, because the basic CPR rule applies that hearings are in public, then, in my view, that position prevails. That would be sufficient in the circumstances to terminate matters for the claimant's right of audience position, because all of the three questions have to be answered affirmatively, but I will nonetheless go on to deal with the other issues for the purpose of the judgment.

15. What the rule says of course, as I have said, is that the person is an individual whose work includes assisting in the conduct of litigation. The defendant says that the exercise of the rights of audience and the conduct of litigation are entirely distinct. The claimant says that a person can conduct or assist in the conduct of litigation without rights of audience. However, if you have rights of audience, that in itself is assistance in the conduct of litigation. There have been comments made about the interpretation, and the test that should be applied is, in my view, clear from the authorities that this should be a narrow test that the court applies to this definition.

16. The claimant says that dealing at court on the day of the hearing with matters such as offers, such as costs, extends the work undertaken by that advocate to assisting in the conduct of litigation. The claimant also refers to that in the conduct of cost proceedings, detailed assessments *et cetera*, that there may well be an involvement of different persons in those proceedings. I have been referred to the authority of *Crane*, as I have mentioned before, and in particular paragraph 36. That case was on the issue of what the cost draftsman's fees were – were they disbursements or were they solicitor's work? In that sense, that particular authority is not directly on the point.

17. What I think one can draw from that authority is that, clearly, this matter before the court today is not a matter of whether a person is or is not an employee. In cost proceedings there is, in my view, a very specific interaction between the cost draftsman

and the solicitor within the cost proceedings. Whereas in a matter of this kind (a stage 3 hearing), the advocate is exercising rights of audience very much on a standalone basis. This accords, in my view, with the distinction that the defendant submits for (that is that there is an entirely different position as to somebody as between rights of audience and as between the conduct of litigation).

18. In my view, at the hearing, the person exercising the rights of audience, the advocate is not involved in the conduct of the litigation generally, or assisting it. One has to make the point that it does not say "in the conduct of *this* litigation"; it says "in the conduct of litigation". However, in my view, what I am saying is that the advocate at the hearing is not involved in the conduct, or assisting in the conduct, of litigation generally, or indeed in the particular litigation in which he is appearing. The fact that he may be involved in negotiations or costs does not, in my view, affect the basic position that he is representing a party at a hearing. These are, in my view, aspects of the representation at the hearing, not assisting in the conduct of litigation generally. There is no connection for this advocate with the work undertaken in progressing that litigation to hearing and, in my view, the purpose of the legislation was to protect parties in respect of those who might simply present matters and represent parties at a hearing.

19. In support of that position also, I would refer to the fact that schedule 3, paragraph 1(2) gives the court a specific discretion to grant rights of audience in an individual case and, in my view, that supports the distinction between conduct of litigation and rights of audience are entirely clear. Therefore, on that basis I find that the representative of the claimant, his work did not include assisting in the conduct of litigation.

20. The last point is in relation to if they are assisting with the conduct of the litigation, they have to be under instructions and under the supervision of the individual who is authorised. There is no issue in this matter that clearly the instructions were given by that person; the issue is one of supervision.

21. In my view, supervision must, as I have said, be by the person who gives the instructions and who is authorised in respect of the activity. The defendant says that Mr Sisto was not supervised by that individual at court and submits that supervision must mean more than giving instructions because the section itself refers to instructions, so there must be more to it than that. The defendant says that Mr Sisto was not supervised. The claimant says that Mr Sisto was in contact with the authorised individual with regard to issues and negotiations and costs. There is, I must say, no evidence before the court that in this particular case – and it is this particular case that we are dealing with – that that occurred and that was the case here. Therefore, I am not satisfied that in this case therefore, due to that lack of evidence, that that was the case.

22. However, in any event, in my view the actions that the claimant's counsel today refers to, such as having to get instructions on questions of costs and offers and the like, that is what that is. It is getting instructions. It is not supervision of the conduct of the work being done – i.e. the advocacy. Therefore, I am not satisfied that the claimant's representative satisfies the test in respect of rights of audience.

*(End of judgment)*

*(Proceedings continued)*