TRANSCRIPT OF PROCEEDINGS

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The Royal Courts of Justice
Strand
London WC2A 2LL

20th January 2021

Before

THE HONOURABLE MR JUSTICE MARTIN SPENCER

IN THE MATTER OF

MR H TV LIMITED (Claimant/Applicant)

- v -

ARCHERFIELD PARTNERS LLP (Defendant/Respondent)

MR A HUTTON QC appeared on behalf of the Claimant/Applicant
MR N BACON QC appeared on behalf of the Defendant/Respondent

JUDGMENT
20th JANUARY 2021
(AS APPROVED)

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MR JUSTICE MARTIN SPENCER:

1. This is an application for permission to appeal against a decision of Master McCloud of 21 October 2019 whereby she decided that a detailed assessment of the costs incurred by the claimant was dispensed with because the claimant, through its director Mr Hendricks, had given appropriate informed consent to the costs of the solicitors being £3.6m. This engaged Part 46.9 of the Civil Procedure Rules, which concerns the basis of assessment of solicitor and client costs and sub-rule (3) provides—

> "Costs are to be assessed on the indemnity basis but are to be presumed—
> (a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;
> (b) to have been reasonably incurred in amount if their amount was expressly or impliedly approved by the client."

2. It was the Master's decision that the costs of £3.6m were incurred with the express approval of the client and were reasonable because the amount had been expressly approved by the client.

3. The basis of this application for appeal is that although the decision of the Master was a decision on a question of fact, that decision was essentially reached on the basis of interpretation of documents which, it is contended, no reasonable Master could have interpreted in the way that Master McCloud did and that because that interpretation betrays or implies an approach to the negotiations on the part of the other side (ITV2) which would have been illogical or fanciful in the circumstances, given the judgment which had already been obtained, the Master should have interpreted the documents in a different way which meant that there was no such informed consent on the part of the client.

4. If I consider that the claimant has a real chance of successfully persuading the court that that is correct, then that is the test for me to apply in deciding whether to grant permission to appeal.

5. Although permission to appeal has been refused by Stacey J, I understand that she made that decision without the benefit of seeing the claimant's skeleton argument in respect of which there had been an application for an extension of time and it may be that there was some misunderstanding on the part of court in that regard. In any event, I have not had regard to the decision of Stacey J in making the decision I have in this case, but I have considered the matter de novo on the merits as represented by the skeleton argument of Mr Hutton QC and his oral arguments supplementing his skeleton.

6. Although there are 5 grounds of appeal, it is agreed that the heart of the case and the meat of the appeal lies in ground 4.

7. Ground 1 is an overarching ground which adds nothing to the substantive grounds in 2 to 5.

8. Ground 2 is a point taken in relation to the applicability (or not) of *Griffiths v Evans* [1953]. However, Mr Hutton accepts that any presumptions in relation to disputes between solicitors and client (which that case represents) are really in this case overtaken by the actual findings of the Master having heard the witnesses and her acceptance of the evidence of the defendant's witnesses in preference to the evidence of the claimant's witnesses and, therefore, the presumptions represented by *Griffiths v Evans* cannot take him any further. Thus, even if the Master was wrong to have decided that *Griffiths v Evans* did not apply because this was not a dispute over the retainer, that decision made no difference to the outcome as the case unfolded.

9. Ground 3 relates to a point that the Master, dealing with the law in advance of her consideration of the facts, can, it is said, be seen to make her determinations of law upon the assumption that the disputes of fact would be resolved in favour of the defendant. It is said on behalf of the applicant that this was to put the cart before the horse, in effect. It is said that the correct approach would have been to have set out her findings of law dependent upon which of the parties' contentions in relation to fact were accepted.

10. In fact it is not clear to me that the Master did approach the law on the basis of an assumption of the defendant's case being correct, but, as Mr Bacon QC has pointed out in his skeleton argument, the judgment needs to be read as a whole, and when she set out her exegesis of the law the Master would have known that in fact her findings of fact were going to be in favour of the defendant. It is inconceivable that she had not already made that determination (at least in her mind) before setting it out in the judgment. Therefore, it could be said that enunciation of the law in the light of the findings of fact made was acceptable, although I agree that it would normally have been done the other way (the findings of fact being made first and the consequences for the law being set out subsequently). Again, though, Mr Hutton accepts that this only takes him part of the way and he describes this as really being a flavour of the case.

11. In relation to the principal part of the application, whilst Mr Hutton accepts that in any case a party seeking to overturn findings of fact has a difficult burden to satisfy, he submits that the usual rule is modified or mitigated where the findings of fact are based on the documents and their interpretation. He puts the issue in the following way, namely whether the other party (ITV2) specifically agreed to pay the claimant's costs of £3.6m when they settled this case for £8.6m or whether they simply agreed to settle on the basis of a global sum without any reference to the costs. Mr Hutton accepts that if, on the interpretation of the documents, ITV2 did agree to pay £3.6m, then his client (Mr Hendricks) accepted that he was so liable and so the Master's finding was impeachable.

12. However, he argues that there is a real chance of him persuading the court that ITV2 did not so agree and that the Master's decision that they did was, in effect, perverse or one which no reasonable Master could have reached, such that this court, on appeal, would be entitled to reach a different decision.

13. At the heart of the dispute in this regard are the Master's findings from paragraph 64 of the judgment. At paragraph 64 the Master recorded that in his opening submissions for the claimant Mr Hutton had conceded that £3.6m was "Clearly mentioned many times during 2016 and 2017 as being the costs that were being presented to ITV ..." I think that should be

"ITV2" "... as the costs of the action." The Master observed that that was consistent with the position of Mr Bateman (the solicitor with the conduct of this matter for the defendant).

14. The Master found (at paragraph 65) that it was the duty of the defendant to keep its client (Mr Hendricks, in effect) informed and that this was correctly argued by Mr Hutton. She said:

> "But this case concerns the settlement and the nature and validity of consent to the eventual costs sums once known to Mr H TV during the settlement and is not a post-mortem as to the periods of time prior to that, so I do not accept that the point assists the claimant to a significant degree for present purposes."

15. She recorded Mr Hendricks' evidence that he had a concept of two types of offer to be considered in litigation which he characterised as either "two ladder offers" (offers which separate out the damages and the costs) and "global offers" or "one ladder offers" (where there is no such delineation between costs and damages but there is just an all-in total). Mr Hendricks gave evidence that, in his view, his solicitors (the defendants) had switched from one type of offer - that is an offer which spelled out damages and costs - to a global approach. This was what Mr Hendricks referred to in the course of his evidence as "going global," and it was at the core of his complaint that the solicitors had "gone global" (as he put it) without telling him and had therefore, in some unspecified sense, harmed his interests improperly, or even dishonestly.

16. The Master then carried out an analysis of the documents from paragraph 74 of her judgment. It is unnecessary for me to rehearse in detail those documents and what they said, but there was a meeting on 15 December 2015 between Mr Bateman (representing at that time the claimant) and Mr Hendricks where he discussed an offer of settlement that had been made by ITV2 with Mr Hendricks, and took instructions and that attendance note recorded a discussion of the fact that the total costs (including the success fee) were in the region of £3.5m or £3.6m.

17. In December 2015 ITV2 were making offers on the basis of damages plus costs to be assessed on the standard basis - a very common basis upon which to make Part 36 offers - for example on 17 December an offer of £2.6m plus costs to be assessed on the standard basis.

18. There was a meeting between Mr Bateman and his opposite number at ITV2 on 5 January (for which there is an attendance note) and at that meeting Mr Bateman advised his opposite number (Mr Davies) that a settlement would require £5m damages and £3.5m in costs. That was followed up by an email on 11 January from Mr Bateman to Mr Davies to the effect that the claimant's liability for costs was a sum expressed as £3,620,291.48. This led to Mr Davies emailing Mr Bateman back on 1 January 2016 noting that: "If the claimant's liability for costs was £3.6m and the same recoverable on assessment, then the Part 36 offer that had been made had a value of £6.2m or £6.6, as £400,000 had already been paid on account.

19. There were further exchanges of emails but, crucially, there was a meeting on 16 March between Mr Davies and Mr Bateman in which Mr Bateman recorded in an attendance

note of that meeting: "P.36 ..." meaning Part 36 offer "... = £3.6m + £2.6m offered (+0.4 paid. Therefore £6.6m."

20. The importance of this attendance note (and Mr Bateman's interpretation of it) was that it was clear to Mr Bateman (and he would say clear also to both his opposite number at ITV2, Mr Davies, and his client, Mr Hendricks) that the negotiations were being conducted on the basis that the costs were £3.6m and that any global sum on top of that represented damages if you deducted the £3.6m from such a sum.

21. On March ITV2 increased its offer to £6.2m (the £400,000 already paid which is the £6.6m) and that offer expressly referred back to the form of offer in December which had been a split costs and damages basis offer. Although the headline figure was £6.2m plus £400,000 (a total of £6.6m), the Master stated at paragraph 87 that it was clear how that headline figure was comprised.

22. As per the format of 11 December 2015 offer, which it modified as to the sums, it was now some £6.2m (being £2.6m for damages and £3.6m for costs plus the £400,000 already paid). She said that ITV2 had plainly decided to waive the need for assessment if settlement was reached on that basis and to make an offer that reflected a costs liability of £3.6m using the format of 11 December 2015 offer but varying the numbers in it.

23. She said that Mr Bateman's response to ITV then stressed that damages were the real problem which needed to be addressed and the 22 March offer did nothing to improve upon the damages element of ITV2's proposal. That response was wholly consistent with an acceptance by Mr Bateman, and his perception of ITV2's acceptance, that it was agreed between the parties that the costs element of the settlement was to be £3.6m and that the negotiations related to the amount to be paid on top of that representing the damages. The response would have made no sense in the absence of an effective agreement between the parties that the costs were to be £3.6m.

24. Thereafter, ITV2 made increased offers, including an increased offer of £7.2m on 26 April 2016. At paragraph 90 the learned Master said this:

> "In my judgment it is abundantly clear that the offer format of 11 December 2015 by which damages and costs were separately spelled out was consistently applied in the thread of negotiation that led to this offer of £7.2m. Taking as a whole, the breakdown had plainly arisen to £3.6m damages and £3.6m costs, based on the negotiations viewed above."

25. Mr Bateman, obviously, put to his client the offer that was being made and they discussed the making of a counter-offer on 28 April, of which Mr Bateman made an attendance note of that discussion. The Master said:

> "As recorded in that note, Mr Hendricks gave Mr Bateman instructions to make an offer to accept £8.6m 'Split as £5m damages and £3.6m costs as per email? Y."
> "Y" meaning "Yes."

26. Again that note only makes sense if it was being accepted by Mr Hendricks that, although he was instructing Mr Bateman to make a global offer of £8.6m, the basis of that offer was that the damages would be £5m and the costs would be £3.6m. Thus that attendance note (and Mr Bateman's instructions in relation to it) made it quite clear that there had been no shift on the part of Mr Bateman from making what Mr Hendricks would refer to as "two ladder offers" to "going global" but that the global offers that he was instructing Mr Bateman to make were premised upon and based upon the understanding that the costs were agreed at £3.6m.

27. The Master (paragraph 93) did not accept Mr Hendricks' evidence in relation to the offer and the events of 28 April 2016. The offer of £8.6m was made on 5 May and the Master said:

> "Yet he [Mr Hendricks] agreed that the offer of 5 May 2016 was made on his instructions, arguing instead that his consent was only because Mr Bateman had given him the impression that ITV2 had agreed costs at £3.6m. As I find, he was correct in having gained that impression in the sense that that was the very basis upon which the parties were dealing. He was correctly informed of the material provisions to be proposed and gave his instructions to proceed with them.
> 94. An Attendance Note dated 8 September 2017 then records Mr Bateman asking Martin Davies to take instructions on '£8.6m as previously offered in light of above (on basis discussed re amounts)...'. Mr Martin Davies finally responded on 10 October 2017 to confirm that ITV2 were willing to settle at that level and on that basis. Mr Bateman gave evidence which confirmed that throughout these negotiations £3.6m of the settlement sum was to be a component to reflect Mr H's liability for costs, though based on the documentary material leaving aside the oral evidence such as I think clear in any event."

At paragraph 96 the Master went on to say:

> "I agree with the submission made to me that once the figure for costs had been accepted as £3.6m and was not going to change in the event of settlement (as a result of agreement between AFP and Mr H TV) there was no longer a need for the parties to repeat how each of offer was comprised in each subsequent offer and it was clear from the exchanges what was meant."

28. There was a further important finding of the Master at paragraph 98 of her judgment. Having referred to some evidence of Mr Hendricks on day three of the trial where he said:

> "So now we are at: ITV have agreed £3.6 on your ladder, and £5m on mine, that is what I'm signing off on," she

> said: "Mr Hendricks, when he said that, was correct. He was, at all material times after March 2016, working on the basis that ITV2 had agreed to pay £3.6m in respect of costs as a component part of the settlement offers being discussed, as he himself explained repeatedly in oral evidence."

29. In my judgment the Master's findings in this regard were entirely ones which she was entitled to make on the basis of the documents which she was presented with and the evidence of Mr Bateman, which she accepted, contrary to the evidence of Mr Hendricks, which she rejected. In my judgment there was every reason for the Master to find that as from March 2016 the parties were discussing global sums upon the basis or understanding that £3.6m of those global sums would always be the figure in respect of costs and that Mr Hendricks fully understood this when he gave instructions to his solicitors to make global offers, in particular the offer of £8.6m which was eventually accepted. Indeed, I would go further and say that any interpretation of the documents to the contrary would have been arguably perverse on the part of the Master.

30. In those circumstances, I do not consider that there is a real chance of the claimant successfully persuading the court that the Master's decision was wrong in this regard. On the contrary, I consider that there is no chance of the claimant so persuading the court.

31. In those circumstances, permission to appeal is refused.

32. I have not dealt with the fifth ground - which is the fact that the eventual form of settlement only specified a global figure - but in my judgment the fact that the final settlement figure was in a global form makes no difference to the substance of this judgment and the issues which would arise on appeal. It was simply a further argument on the claimant's part which it was said fortified their interpretation of the documents and the basis of the settlement, but in my judgment it did not in fact do so.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge