Dunnett v Railtrack plc (in railway administration)

[2002] EWCA Civ 303

COURT OF APPEAL, CIVIL DIVISION

BROOKE, ROBERT WALKER AND SEDLEY LJJ

22 FEBRUARY 2002

Costs – Order for costs – Discretion – Disallowing costs of successful party – Alternative dispute resolution (ADR) – Adverse costs consequences of party rejecting ADR when latter suggested by court – CPR 1.3, 1.4.

A single Lord Justice granted the claimant permission to appeal to the Court of Appeal from the dismissal of her claim for damages against the defendant. He suggested, however, that she ought to explore the possibility of alternative dispute resolution (ADR). That suggestion was in accordance with CPR 1.4[a] which required the court to further the overriding objective of the CPR by active case management, including encouraging the parties to use an ADR procedure if the court considered that appropriate. In response, the claimant indicated that she would be in favour of exploring the possibility of ADR if the defendant was also willing to do so. She referred the suggestion to the defendant, but the latter flatly rejected it, even though CPR 1.3[b] required the parties to help the court to further the overriding objective. Instead, the defendant made offers to pay the claimant a sum in settlement of her claim, but she did not consider the sum offered to be reasonable or fair. Accordingly, the appeal proceeded to a hearing. After the appeal was dismissed, the defendant sought its costs, referring to the offers that it had made. When pressed by the court to explain its unwillingness to contemplate ADR, the defendant stated that that would necessarily have involved the payment of money, which it was not willing to contemplate, over and above the sum that it had already offered.

Held – Having regard to their duties under CPR 1.3, parties and their lawyers might have to face uncomfortable costs consequences if they turned down out of hand the chance of ADR when suggested by the court. Skilled mediators were now able to achieve results satisfactory to both parties in many cases which were quite beyond the power of lawyers and courts to achieve. When the parties were brought together on neutral soil with a skilled mediator to help them resolve their differences, it could very well be that the mediator was able to achieve a result by which the parties shook hands and felt that they had gone away having settled the dispute on terms with which they were happy to live. In the instant case, the defendant appeared to have misunderstood the purpose of ADR. Given its refusal to contemplate ADR at a stage before the costs of the appeal started to flow, it was not appropriate to take into account the offers that had been made.

a Rule 1.4, so far as material, provides: '(1) The court must further the overriding objective by actively managing cases.
(2) Active case management includes … (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure …'

b Rule 1.3 provides: 'The parties are required to help the court to further the overriding objective.'

Taking into account all the circumstances of the case, the appropriate order on the appeal was no order as to costs (see [13]–[18], below).

Notes

For the overriding objective under the CPR, see 37 *Halsbury's Laws* (4th edn reissue) paras 60–62.

Appeal

The claimant, Susan Jane Dunnett, appealed with permission of Schiemann LJ granted on 11 August 2000 from the decision of Judge Graham Jones in the Cardiff County Court on 1 December 1999 dismissing her claim against the defendant, Railtrack plc, for damages for negligence arising out of the death, on 17 July 1996, of three of her horses who had been struck by an express train on the Swansea to London line near Bridgend. The facts are set out in the judgment of Brooke LJ.

Simon Levene (instructed by the *Bar Pro Bono Unit*) for Miss Dunnett.

Tim Lord (instructed by *Beachcroft Wansbroughs*, Bristol) for Railtrack.

The three members of the court delivered judgments dismissing the appeal (see [2002] EWCA Civ 302, [2002] All ER (D) 314 (Feb)). After further argument as to the costs of the appeal, the following judgments were delivered.

BROOKE LJ.

[**1**] When the appeal was dismissed, Mr Lord (on behalf of Railtrack plc) asked for his clients' costs. He showed us letters written by his clients' solicitors in relation to this matter. The first was dated 13 March 2001, after Schiemann LJ had given leave to appeal. The letter read:

> 'We refer to recent exchange of e-mails and now have our client's instructions on your suggestion that this action could be compromised. As will appear from the skeleton arguments served with the accompanying letter, our clients are confident that your appeal will fail and that an order for costs of the appeal will be made against you. Nevertheless, they are prepared to offer to you the sum of £2,500 as a lump sum in full and final settlement of all your claims in this action including interest and costs.'

[**2**] Attention was drawn to CPR Pt 36.

[**3**] We have also been shown a later exchange of e-mail correspondence this month. It was initiated by Miss Dunnett and followed by an e-mail from Railtrack referring to an offer whereby, if she was to discontinue the appeal, their clients were prepared not to enforce their entitlement as to costs and extending the time in which that offer might be accepted. Miss Dunnett responded that she—

> 'would be happy to settle this matter outside of a court action thereby avoiding your clients having the expense of preparing for the court date and minimising the stress of this matter resulting in another day in court for myself.'

[**4**] She asked if Railtrack could be asked 'if they have any offer of a settlement so that this matter may be dispensed with for the benefit of us all'.

[**5**] It appears that another offer of £2,500 was made, which Miss Dunnett did not consider to be a reasonable or fair offer.

[6] Throughout this time Miss Dunnett was acting as a litigant in person. It has only been very recently that she has had the good fortune of being assisted by Mr Levene, who has appeared for her as part of the Bar's pro bono scheme.

[7] In the usual way, it would follow that she should pay Railtrack's costs. However, Schiemann LJ, before whom she appeared on 11 August 2000, said in terms in his judgment:

> 'I have advised her that she ought to explore the possibility of alternative dispute resolution, so as to get shot of this case as soon as possible. She has indicated that she is in favour of doing that, if the other side are also willing to do that. I cannot say any more about that, beyond suggesting that she tries it.'

[8] Miss Dunnett referred this suggestion to Railtrack, who instructed their solicitors to turn it down flat. They were not even willing to consider it. They then instructed their solicitors to oppose Miss Dunnett applying for an extension of time for filing her notice of appeal. She was a little bit out of time.

[9] The matter came back before Schiemann LJ. We have seen the transcript of what he said. He was critical of Railtrack's solicitors in opposing this application. He said:

> 'I am conscious of the fact that Railtrack say that they have limited funds to deal with a litigant who may well not be able to reimburse them; but they would have been better advised if they had kept those limited funds for fighting the substance of the case rather than taking the point that she is a little out of time in filing a notice of appeal.'

[10] The court has not seen everything which passed between the parties. From something that Mr Lord told us, it appears that passions were running fairly high on Miss Dunnett's side in relation to the death of her horses and the attitude that Railtrack, no doubt on sound legal advice, were adopting. It appears to me that this was a case in which, at any rate before the trial, a real effort should have been made by way of alternative dispute resolution to see if the matter could be satisfactorily resolved by an experienced mediator, without the parties having to incur the no doubt heavy legal costs of contesting the matter at trial. There is no evidence that this was ever suggested by the court. I say nothing more about that except to say that it is understandable, in these circumstances, that passions may have been running fairly high.

[11] However, the time did come when this court in terms suggested that this was a case for alternative dispute resolution. CPR 1.4 reads:

> '(1) The court must further the overriding objective by actively managing cases.
>
> (2) Active case management includes … (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure …'

[12] In the helpful notes to that rule in the Autumn 2001 edition of the White Book (*Civil Procedure*), the editors write (at para 1.4.11):

> 'The encouragement and facilitating of ADR [alternative dispute resolution] by the court is an aspect of active case management which in turn is an aspect of achieving the overriding objective. The parties have a duty to help the court in furthering that objective and, therefore, they have a duty to

> consider seriously the possibility of ADR procedures being utilised for the purpose of resolving their claim or particular issues within it when encouraged by the court to do so. The discharge of the parties' duty in this respect may be relevant to the question of costs because, when exercising its discretion as to costs, the court must have regard to all the circumstances, including the conduct of all the parties (r.44.3(4), see too r.44.5).'

[**13**] The value of that observation is that it draws attention to the fact that the parties themselves have a duty to further the overriding objective. That is said in terms in CPR 1.3. What is set out in r 1.4 is the duty of the court to further the overriding objective by active case management, which includes the feature to which I have referred.

[**14**] Mr Lord, when asked by the court why his clients were not willing to contemplate alternative dispute resolution, said that this would necessarily involve the payment of money, which his clients were not willing to contemplate, over and above what they had already offered. This appears to be a misunderstanding of the purpose of alternative dispute resolution. Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide. Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimant's precious horses are killed on a railway line, by which an apology from a very senior police officer is all that the claimant is really seeking and the money side of the matter falls away.

[**15**] It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in CPR Pt 1 and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences.

[**16**] In my judgment, in the particular circumstances of this case, given the refusal of Railtrack to contemplate alternative dispute resolution at a stage before the costs of this appeal started to flow, I do not think that it is appropriate to take into account the offers that were made. In my judgment, taking into account all the circumstances of the case, as we are bound to do under CPR Pt 44, which applies as much to the Court of Appeal as it does to courts at first instance, the appropriate order on the appeal is no order as to costs.

ROBERT WALKER LJ.

[**17**] I agree.

SEDLEY LJ.

[**18**] I agree.

Appeal dismissed. No order as to costs of appeal.

James Brooks Barrister.