HUNT V ANNOLIGHT LTD AND ORS [2021] EWCA CIV 1663

Background

Mr Hunt, through his solicitors Walker Prestons, brought a claim for noise-induced hearing loss ("NIHL") against six defendants, including Annolight Ltd, Double T Glass Ltd, and Paragon Trade Frames Ltd.

Part 18 questions were raised of Mr Hunt and a signed response stated *inter alia* that (1) Mr Hunt had never been a director of Annolight, and (2) ear plugs had been introduced during the course of Mr Hunt's employment with Paragon.

There was documentary evidence which contradicted Mr Hunt's assertion that he had never been a director of Annolight, albeit Mr Hunt had maintained that he had no recollection of signing the same. Further, Mr Hunt's medical expert, Dr Zeitoun, had proceeded initially on the basis that ear protection had been furnished by Paragon but had subsequently been advised by Walker Prestons that this was incorrect.

The matter came for trial before HHJ Godsmark QC. Counsel for Mr Hunt denied that he had signed the Part 18 response and informed the court that Mr Hunt was discontinuing his claim in its entirety. The three Defendants identified above set out that they wanted QOCS disapplied by reason of Mr Hunt having been fundamentally dishonest and/or for Walker Prestons to pay their wasted costs of proceedings. Applications were duly made to that effect, albeit in somewhat generic terms.

A witness statement was filed and served by the supervising partner for Mr Hunt's claim, Mr Sarwar. It was set out therein that it responded only to the application by Annolight (this had been limited solely to the issue of directorship), that Walker Prestons were limited in addressing matters of privilege, that there was no evidence either way as to whether instructions were taken on Mr Hunt's directorship, and that the Part 18 replies were signed by Mr Hunt by way of electronic signature.

At a further hearing before HHJ Godsmark, an Order was made that the Defendants' respective applications be adjourned to a further date for oral evidence to be heard. In the context of that hearing, such oral evidence was to be an effective trial of Mr Hunt's fundamental dishonesty and a cross-examination of Mr Sarwar.

Initial Appeal

Walker Prestons appealed the decision of HHJ Godsmark to require Mr Sarwar to attend for cross-examination. The appeal was refused by Saini J who concluded he had "*no doubt that it is a proper exercise of discretion to require Mr Sarwar's attendance*". In reaching that conclusion, he considered the following to be of pertinence:

(1) Walker Prestons were no longer acting for Mr Hunt.

(2) Privilege appeared to have been waived by Mr Hunt.

(3) There were radically different factual accounts being given by Mr Sarwar and Mr Hunt.

(4) He was satisfied these could be managed in accordance with the Overriding Objective, so as to avoid significant satellite litigation.

Court of Appeal

By the time the matter came before the Court of Appeal, the positions of the parties had perhaps become clearer. Both Annolight and Paragon accepted that there was insufficient evidence to suggest Mr Hunt's signature had been forged on the Part 18 replies or that they had been signed without his authority. Rather, Annolight's position was that Walker Prestons had failed to take proper instruction as to Mr Hunt's directorship. Paragon's position was that Walker Prestons knew or should have known that the correction they asked Mr Zeitoun to make to his report was untrue.

Walker Prestons' position was that (1) it will never be appropriate for a lawyer against whom a wasted costs order is sought to be cross-examined, but (2) even if that is incorrect, HHJ Godsmark should not have exercised his discretion to require Mr Sarwar to attend for cross-examination in the present case.

Newey LJ, delivering the lead judgment, had little difficulty concluding that court did have jurisdiction to order a lawyer facing a wasted costs application to attend for cross-examination (see CPR 32.7), nor that this was a jurisdiction which could be exercised. However, requiring attendance for cross-examination in such circumstances should very much be the exception, rather than the rule. The wasted costs procedure should be as "*simple and summary as fairness permits*".[1]

It would generally weigh against cross examination, that the lawyer to be cross-examined would be facing allegations of improper, unreasonable, or negligent conduct. In ordinary professional negligence proceedings, such allegations would be clearly defined by pleadings and relevant documentation would be disclosed in advance of cross-examination. Lacking such safeguards, a court should be wary to order cross-examination.

Even where there was to be cross-examination, it should be limited to the contents of any witness statement. Where there was no such statement, there could be no cross-examination. Cross-examination was to support a case, not a fishing expedition to create a new case. Further, careful consideration needed to be given to legal professional privilege and whether cross-examination could be fairly conducted without disclosure of privileged documents.

Newey LJ was clear that the present case was not an exception to the general rule against requiring cross examination:

(1) The allegations against Walker Prestons were not adequately defined. As much was demonstrated by both Annolight and Paragon dropping their concerns as to the signature on the Part 18 replies only before the Court of Appeal. Mr Sarwar could therefore not be cross-examined on this issue at the very least.

(2) The Part 18 replies aside, Annolight had no other basis on which to cross-examine Mr Sarwar. If there was evidence as to whether Walker Prestons had taken instruction from Mr Hunt on his directorship, that did not require cross-examination to be relied upon either way.

(3) Mr Sarwar's witness statement explicitly dealt with only Annolight's application. Paragon could not seek to cross-examine on matters outside of the witness statement and for which they had adduced no other evidence. To do so would amount to a fishing expedition.

(4) At the time of HHJ Godsmark's initial decision, Mr Hunt had not waived privilege. There had been no subsequent order dealing with possible disclosure of privileged documents which would likely be of relevance to any cross-examination and hearing.

(5) Mr Hunt and Mr Sarwar had not given radically different accounts. Other than orally at the initial hearing, Mr Hunt had not disagreed that he had signed the Part 18 replies – his concern seemed to relate to the evidence of directorship. Mr Sarwar had not commented on any directorship.

Summary

Hunt v Annolight reinforces the need for wasted costs proceedings not to spiral out into significant satellite litigation. It is a streamlined procedure with clearly defined stages (see 46 PD 5). Whilst cross-examination of a legal representative might be warranted in exceptional circumstances, this should generally not be required and is an affront to the need for simplicity. The aim is to keep wasted costs proceedings as simple as possible without grossly compromising justice.

To bastardise Antoine de Saint Exupéry, perfection is not achieved when there is nothing left to add, but when there is nothing left to take away… without compromising the fairness of wasted costs proceedings.

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[1] Newey LJ was citing Ridehalgh v Horsefield [1994] Ch 205, approved by the House of Lords in Medcalf v Mardell [2002] UKHL 27.