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IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BRENTFORD COUNTY COURT
(HIS HONOUR JUDGE OPPENHEIMER)

Royal Courts of Justice
Strand
London, WC2
8 May 2003

B e f o r e :

LORD JUSTICE JUDGE
LORD JUSTICE DYSON

VOICE AND SCRIPT INTERNATIONAL LTD — **Claimant/Respondent**

-v-

ASHRAF ALGHAFAR — **Defendant/Appellant**

(Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

MR C CHRISTENSEN (instructed by Lloyd & Associates Solicitors) appeared on behalf of the Applicant}
MISS S JACKSON (instructed by Bird & Lovibond, Middlesex UB8 1RP) appeared Respondent

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HTML VERSION OF JUDGMENT
(APPROVED BY THE CROWN)

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Thursday, 8 May 2003

1. LORD JUSTICE JUDGE: This is an appeal by Ashraf Alghafar from the judgment of His Honour Judge Oppenheimer sitting at Brentford County Court on 26 June 2002. The judge was considering an appeal by Mr Alghafar from the decision of District Judge Jenkins reached at a disposal hearing on 13 June 2001. On that occasion District Judge Jenkins entered judgment against Mr Alghafar for damages assessed at £4,002.43, together with interest of £755.04 and costs assessed at £6,000. The total sum of £10,757.47 was to be paid forthwith. The counterclaim was dismissed. The counterclaim played no part in the issues with which we have been concerned nor in any of the hearings below. For all practical purposes we should ignore the existence of the counterclaim entirely.

2. The essential facts of the dispute are summarised in Judge Oppenheimer's judgment at paragraphs 2 to 4. I gratefully repeat and adopt them as part of this judgment:

> "2. The substance of the action is... essentially simple, namely, that the claimant subcontracted to the defendant or intended to subcontract to the defendant the subtitling of certain films. There was some form of oral agreement to that effect and that Mr Alghafar was to deal with that subtitling work. For that purpose various equipment was delivered to Mr Alghafar's house (I think in the form of two videos) and his computer was modified at the premises of the claimant by the addition of a video card. Everybody agrees that that is a bolt on piece on the back of a computer which inserts into the computer a card and the piece has various sockets and inlets and perhaps outlets.
>
> 3. The agreement was never really executed because the defendant, while doing one film for the claimant, did not do any more, one film being apparently a trial film, the claimant saying that it was not satisfied with Mr Alghafar's work. So it is alleged by paragraph 2 of the amended particulars of claim that on 20th January 1999 the claimant orally requested the return of the unit. It is called a subtitle preparation unit; I think I am going to call it a video card for short and that the defendant refused and/or failed to return it.
>
> 4. It is common ground that five days later the two videos were returned by courier and it is now common ground that... on 9th March 1999 the claimant's solicitors wrote to the defendant requesting the return of the video card. It is also common ground that if the video card is still bolted to the back of the computer it has never been returned. It is certainly said that an offer was made to return it by the defendant but most certainly it has never been returned."

   At the end of the judgment, for reasons to which I shall come in due course, the appeal was allowed in part. Damages were reduced to £2,502.43 with a consequent deduction in interest to £470. The judge further ordered that Mr Alghafar should be liable to pay two-thirds of the respondent's costs up to and including a hearing on 25 January 2001 before District Judge Jenkins. The consequent figure for costs was £5,000. He further ordered that the respondents should pay three-quarters of Mr Alghafar's costs of the appeal.

3. The essential question for decision in the present appeal relates to the costs order made in the proceedings before District Judge Jenkins on 13 June 2001, reduced as they were on appeal from £6,000 to £5,000. As is well known, orders for costs are very rarely disturbed. The principles are clear and well understood.

4. The essential point in this case arises from the submission that the costs ordered to be paid by Mr Alghafar should have been assessed as if the claim had proceeded as a small claims case. As the facts which I shall outline in a moment will show, this raises a point of principle of sufficient importance to justify a second appeal under Civil Procedure Rules 52, Rule 52.13.

5. There are secondary issues raised in the notice of appeal and the skeleton argument in relation to the order for interest which it is said should be set aside. There is also an attempt to resuscitate some of the factual disputes raised before Judge Oppenheimer. Today, for the first time, a point was taken that the particulars of claim did not disclose any cause of action. I can see no arguable basis for permitting any further appeal or discussion of these secondary issues. None has been demonstrated and the applications for permission to appeal in respect of all points, save for the costs question, have already been dismissed.

6. The proceedings began with particulars of claim dated 15 April 1999. Using slightly different language to the detailed pleadings without altering the meaning, damages were particularised as follows: the valuation of the video card £3,820.50; costs of purchasing a substitute video card, £3,820.50; estimated loss of earnings for the plaintiff's business, £1,500. The total claim, exclusive of interest, was £9,140. As pleaded this claim was substantially in excess of the small claims figure. Three further points immediately identify themselves. First, the claim for the valuation of the video card and the cost of purchasing a substitute represented a claim for double recovery. Second, although the fact only emerged much later in the proceedings the figure £3,820.50 was wholly mistaken. The figure 3,820.50 in fact represented dollars, not pounds sterling. The pounds sterling equivalent of $3,820.50 was £2,502.43p. Third, the claim for "loss of earnings for the plaintiff's business" was unsustainable and was subsequently amended in May 2001 to a claim for the identical amount as loss of profits. In the result, although upheld by District Judge Jenkins, on Judge Oppenheimer's findings this head of claim was not established. The end result was that a single head of claim was proved - £2,502.43, with appropriate interest, to represent the costs of purchasing an alternative video card. The claim based on the valuation of the video card whether in pounds or the sterling equivalent of $3,820.50 was not in the end pursued. The claim for loss of earnings or loss of profits was, on the evidence, not sustained.

7. The route to this outcome was arduous and, on the face of it, wholly disproportionate either to the amount claimed in the original particulars of claim or the eventual amount which the claimant recovered from Mr Alghafar.

8. After proceedings were taken on 15 April 1999, on 20 May Mr Alghafar was ordered to file and serve a detailed defence and counterclaim by 27 May, together with a listing questionnaire by 17 June. It was ordered that costs should be costs in the case. On 2 July default judgment was entered against Mr Alghafar for £9,140 together with £102.80 interest and £740.49 costs. Liberty to apply within seven days of service of the order was granted.

9. On 7 October an application to set this judgment aside was adjourned until 13 October with costs reserved. On that date the judgment was indeed set aside with no order as to costs. It was much later said by District Judge Jenkins that this first judgment "ought never to have been entered in the first place". There was, as the district judge and Judge Oppenheimer were both to note, fault on both sides in the way in which the proceedings were conducted.

10. On 12 May 2000 the parties were ordered to file allocation and listing questionnaires by 26 May. On 12 June an "unless" order was made, requiring Mr Alghafar to file his listing questionnaire by 23 June, in default the defence would be struck out. On 6 July this order was set aside and a second "unless" order was made, requiring the listing questionnaire to be filed and served by 26 July. In default the defence would be struck out and the respondents would be at liberty to enter judgment without the need for further order. On 25 August default judgment was entered against Mr Alghafar in the sum of £10,257.70. The increase in the judgment from £9,140 was represented by additional interest and further costs. On 19 October an application to set this judgment aside was dismissed with further costs added to the judgment debt. On 1 November Mr Alghafar attended the court office explaining his intention to seek to set aside the decision of 19 October. The position was complicated but I do not propose to visit in this judgment hearings relating to a charging order absolute. None of the dates are critical to the issues we have to consider but it is fair to Mr Alghafar to record that he was expressing concern about errors emanating from the court office. Eventually in late December 2000 it was confirmed to him that his application to set aside the charging order would be heard on 25 January 2001.

11. That hearing took place before District Judge Jenkins. Before the hearing began counsel for the respondent handed to Mr Alghafar a witness statement from his instructing solicitor in which the solicitor accepted that the judgment entered against Mr Alghafar was incorrect, containing, as it did, what was described as "an element of double entry". The solicitor apologised to the court and to Mr Alghafar for the error. District Judge Jenkins then ordered that judgment for the claimant should be entered for a sum to be determined by the court, together with costs. He further ordered that the charging order should be discharged and made directions for the exchange of documents and statements with a listing for a disposal hearing after 1 March 2001. On the basis of this concession the total claim originally pleaded at £9,140 plus interest was reduced to £5,320 plus interest.

12. During the course of examining the documents which had been provided by the respondent in fulfilment of District Judge Jenkins' order, Mr Alghafar discovered that the invoice representing the purchase of the replacement video card was $3,850.50. He wrote to the court on 23 April 2001, pointing out that although the amount originally claimed was pounds sterling this was in substitution for United States dollars. Naturally he complained at the inflation of the claim.

13. When the case came on before District Judge Jenkins for the disposal hearing on 13 June 2001 Mr Alghafar's contention was vindicated. The substitution of pounds for dollars was conceded. Accordingly the claim for consideration by the judge was reduced yet again, this time from £5,320 to £4,002.54, together with interest. On any view that represented the fullest possible value of any claim arising in these proceedings against Mr Alghafar. That is less than half the original claim and now well below £5,000. If the issue of allocation had been addressed on the basis of that valuation allocation to the small claims track would have been inevitable. The claim was a perfectly straightforward case falling within Part 26.6.3. If so, the successful party's entitlement to costs on the basis of an order in its favour would have been subject to the limitations in part 27.14(2), in particular paragraphs (a) and (d) and 27.14(3). The crucial parts provide:

> "(2) The court may not order a party to pay a sum to another party in respect of that other party's costs except-
>
> (a) the fixed costs payable under Part 45, attributable to issuing the claim...
>
> (d) such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably.
>
> (3) The court may also order a party to pay all or part of-
>
> (a) any court fees paid by another party;
>
> (b) expenses which a party or witness has reasonably incurred...
>
> (c) a sum not exceeding the amount specified in the relevant practice direction for any loss of earnings...
>
> (d) a sum not exceeding the amount specified in the relevant practice direction for an expert's fees."

14. As the case was listed for disposal on 13 June no allocation to track was made then, nor was it ever made or sought. The court itself did not make any order or inquiry on its own initiative. When the hearing before District Judge Jenkins was concluded the advocate acting on behalf of the claimant sought an order for costs. A figure was produced to the judge. When the costs issue was canvassed before District Judge Jenkins, Mr Alghafar, acting by now in person, clearly highlighted the point that the amount came "under the small claims". The district judge rejected any such point in a very brief observation. He said:

> "No, because it was never allocated to a track because a judgment was entered."

That is all that was said on this topic.

15. The schedule of costs produced by the claimant's advocate in the sum of £8,000 was reduced to £6,000. Beyond that, although it was factually correct that the case had never been allocated to the track, it is clear from that single observation that the judge was plainly treating the absence of an allocation to track as determinative or conclusive.

16. Judge Oppenheimer on appeal approached the costs issue by taking as a relevant date for dividing his order, 25 January 2001. Mr Alghafar was ordered to pay two-thirds of the costs up to and including that date and the remaining costs in full. The judge observed:

> "... I have found this part of the case the most difficult because it is a sheer exercise of the court's discretion. It is entirely the fault of the claimant that this case was not a small claims case from the very beginning. It became a small claims case in effect, certainly in size, by 25th January 2001..."

The judge then went on to note the district judge's observation:

> "No, because it was never allocated to a track because a judgment was entered."

He ended this part of his judgment by observing:

> "I am not saying that if this matter had come before this court this court would necessarily have made the same order but this court is a reviewing court. It simply looks to see whether the District Judge was wrong in the exercise of his discretion. I hold that he was not."

In effect, therefore, he concluded that District Judge Jenkins had not misdirected himself.

17. As already indicated, as to the costs of the appeal hearing before Judge Oppenheimer himself, the judge ordered that three-quarters of the costs of the appeal was to be paid by the respondent to the appellant. We have not been invited to interfere with, and there is nothing which would justify interfering with, the decisions about which party should carry costs liabilities at different stages of the proceedings. We are concerned only with the level of assessment made on 13 June 2001, ground on which we should tread with the greatest possible circumspection. Perhaps by way of emphasis, however, neither the district judge nor Judge Oppenheimer were concerned with a claim in excess of £5,000 which failed on the evidence to produce an award in excess of that amount. Costs issues in such cases are resolved day-by-day up and down the country without difficulty, and I intend to say nothing which could or possibly be regarded as affecting the ordinary conduct of such litigation. Here, however, the costs order related to an unsuccessful claim for a sum originally pleaded in excess of £5,000 which was only advanced in that amount as a result of mistake or oversight or carelessness. There is, perhaps I should emphasise, no evidence of bad faith. Nevertheless, even on the most successful possible outcome from the claimant's point of view, whether the result of a fully contested trial or a default judgment, an award in excess of £4,003 should not and could not in fact have been made.

18. District Judge Jenkins appears not to have applied his mind to these facts, apparently on the single basis that the case had never been allocated to any track. The submission by the respondents before us, apart naturally from focussing our intention on the undesirability of this court interfering with decisions based on the judge's view of how costs should be allocated and counselling against any inappropriate interference with such decisions, is essentially founded on the absence of any allocation order. In effect, therefore, it is contended that District Judge Jenkins' decision was right for the reason that he gave. In the absence of any such allocation order the small claims costs regime need not apply.

19. We need not pause too long to discuss whether an application to allocate to the small claims track before it was demonstrated and accepted that the claim indeed could come within that track would have been successful, or the likely response of the claimants if any such application had been made. It was not until the disposal hearing itself that it was conceded that the true maximum value of this claim fell under £5,000. I should add that I see no reason to criticise anyone who attended that court hearing who overlooked the need for an allocation order at such a late stage in the proceedings.

20. With that lengthy and slightly involved background I can turn briefly to the principle, which seems to me to be perfectly clear. By treating the absence of allocation to track as conclusive, in my judgment District Judge Jenkins misdirected himself. The omission may have meant that the small claims costs regime did not follow as a virtually automatic starting point, but it did not preclude the court even from considering whether it would be reasonable to make an assessment consistent with the small costs regime or, for that matter, to apply the regime to a claim which should never have exceeded and never was anything more than a small claim. If that approach is not expressly stated in the Civil Procedure Rules, it follows from two essential principles, first, the discretionary nature of costs orders, and second, the overriding requirement of proportionality in civil litigation generally, and also as an essential ingredient for consideration when any question of costs arises: see Home Office v Lambs EWCH 365.

21. In my view in the absence of any specific factors suggesting otherwise, in a case like this where, if sought, an allocation would have been made to small claims track the normal rule should be that small claims costs regime for costs should apply. While respecting Judge Oppenheimer's hesitation about interfering with a decision which he personally would not have reached, in my judgment he should have done so on the basis of the misdirection which I have identified. I should therefore allow the appeal.

22. LORD JUSTICE DYSON: I agree.

(Appeal allowed; appellant to be awarded 80 per cent of costs of the appeal; costs of the appeal in full assessed in the sum of £3,000; the question of costs up to and including 13 June 2001 will be remitted to the district judge for decision unless the parties reach agreement; time will not start to run in relation to that last part of the order until after 14 days from today; the order for payment of such costs should be on the basis of the small claims regime).

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