Appeal No. UKEAT/0529/05/ZT

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 10 February 2006
Judgment handed down on 3 March 2006

Before

THE HONOURABLE MR JUSTICE KEITH

MR D CHADWICK

DR S R CORBY

MEADOWSTONE (DERBYSHIRE) LTD APPELLANT

(1) RICHARD KIRK
(2) ROBERT HILL RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BENJAMIN UDUJE (Of Counsel) Instructed by: Messrs Eversheds LLP Solicitors 1 Royal Standard Place Nottingham NG1 6FZ
For the First Respondent	MR ROHAN PIRANI (Of Counsel) Instructed by: Messrs Jackson Quinn Solicitors 2nd Floor 46 Carrington Street Nottingham NG1 7FG
For the Second Respondent	MRS HILARY WINSTONE (Of Counsel) Instructed by: Messrs Thompsons Solicitors Price House 37 Stoney Street The Lace Market Nottingham NG1 1NF

SUMMARY

Unfair Dismissal: Reasonableness of Dismissal

Employers failed to show reason for dismissal, with result that pre-condition for determining whether dismissal was fair was not satisfied.

THE HONOURABLE MR JUSTICE KEITH

Introduction

1. The Claimants, Richard Kirk and Robert Hill, were dismissed from their employment with the Respondent, Meadowstone (Derbyshire) Ltd. ("the Company"). An Employment Tribunal at Nottingham upheld their claims of unfair and wrongful dismissal. They were awarded compensation for their unfair dismissal and damages for their wrongful dismissal. Mr Hill was also awarded his legal costs to be assessed by a district judge unless otherwise agreed. The Company now appeals against the findings of unfair and wrongful dismissal, and against the order for costs.

2. The Tribunal's decision was drafted in an unconventional fashion. The facts are usually set out in such a way as enables the reader to understand the background to the dispute which arose, and the events which led up to it. The decision is intended to be a "free-standing" document, making it unnecessary for the reader to have to go to the documents which were before the Tribunal to understand the context in which the acts complained of took place. Unfortunately, the Tribunal did not do that in this case. The Tribunal's summary of the background would have been entirely understandable to the litigants, who would have brought their own knowledge of the case to their reading of the decision. But someone unfamiliar with the litigation would have had considerable difficulty understanding the nuances of the case from the decision without reverting to the documents. To give just one example of many, James Kaberry is first mentioned in the decision without any words of introduction explaining where he came into the story.

3. There was, regrettably, another problem with the decision. The Tribunal explained in a few sentences the issues which arise on a claim for unfair dismissal, but not those which arise on a

claim for wrongful dismissal. And when it came to consider whether the claims succeeded or failed, it should have considered each of the claims separately, bearing in mind that different issues arose on each of them. The Tribunal did not do that, and this made it susceptible to the criticism that it conflated the two claims. However, that is not necessarily a fatal flaw. If the findings of fact which the Tribunal made could result only in the conclusion that the Claimants' claims had to succeed, such conflation of the two claims as there might have been would not have affected the overall result.

The Relevant Facts

4. The Company manufactures architectural and ornamental cast stone products. It was founded in 1988 by Alan Smart. He was its chairman and with members of his family he owned 85% of its shares. Mr Kirk was the Company's managing director. He joined the Company in 1989 shortly after its formation, and he owned 10% of its shares. Mr Hill was the Company's financial director. He joined the Company in 1995, and he owned 5% of its shares. Mr Kirk and Mr Hill had service agreements with the Company entitling them to 12 months' notice of the termination of their employment, and the service agreements contained conventional clauses prohibiting them from using or divulging the Company's confidential information. Some years ago, Mr Smart decided to go into semi-retirement, and he left the day-to-day management of what he regarded as "his" company to Mr Kirk and Mr Hill. However, he continued to guarantee the Company's debts, as did Mr Kirk and Mr Hill.

5. In 2002, the Company acquired the assets and goodwill of a company with a factory in Stoke. That had the effect of substantially expanding its business. But in 2003, the Company hit a bad patch. The integration of the business it had acquired into its core business was proving difficult, and the previous owner of that business was competing successfully with the Company.

The Company's overheads were high, its cash flow was poor and its turnover was down. An injection of funds was needed. One of the options considered was the sale of shares in the Company to a third party willing to invest in the Company.

6. One such potential investor was James Kaberry. He was introduced by Mr Kirk to Mr Smart towards the end of 2003. Mr Kaberry was provided with information about the Company to enable him to decide whether to invest in it. That information included financial information, such as the Company's cash flow, forecasts of its profit and loss, and its assets and liabilities, as well as commercial information about its customers and suppliers and the state of its order book. The Tribunal found that Mr Kaberry was not given any more information by Mr Kirk or Mr Hill than he should have had, and that such information as he was given had been with Mr Smart's knowledge and consent. In due course, Mr Kaberry offered to buy a controlling interest in the Company, but that offer was rejected by Mr Smart.

7. By the turn of the year, the Company's overdraft was at its limit and was unlikely to be extended. Its bankers insisted on the Company appointing a director to protect their interests. That was Mike Abbott. He was appointed in January 2004 from a list of candidates prepared by the bankers' accountants, PricewaterhouseCoopers ("PWC"). The Tribunal found that he was to be "the prime mover" in the events which followed.

8. Eventually, PWC advised the Company's board of directors that the Company should be put into administration, and that its business and assets should then be sold to a third party, or if there were no trade buyers to its management if a suitable "management buy-out" proposal was formulated. The board accepted PWC's advice. Accordingly, PWC prepared a memorandum containing information about the Company for the use of prospective purchasers ("the PWC

memorandum"). In addition, PWC drafted a letter for all prospective purchasers to sign agreeing to use that information only for the purpose of evaluating whether to make an offer for the Company's business ("the confidentiality letter"). A date for when the Company was to be placed in administration was set for 8 April 2004. It was said that this would be when the Company's bank balance was likely to be at its highest, so that the directors' personal guarantees of the Company's overdraft would not be at risk, but the Tribunal made no finding about that.

9. A management buy-out proposal was put together by Mr Abbott and Mr Smart with the assistance of Sterling Turnaround Partnership. This proposal was set out in a memorandum prepared by Sterling marked "Strictly private and confidential" ("the Sterling memorandum"). It offered to purchase from the administrators most of the Company's assets and goodwill for £527,259, but not the factory in Stoke. That would have taken the business back to where it had been prior to the acquisition. Mr Hill was to be included in the new management team but not Mr Kirk. The Tribunal found that "Mr Abbott was the prime mover in this scheme. If this scheme was the only realistical alternative presented to the administrators it would have to be accepted. The scheme's success depended on there being no alternative."

10. The Tribunal found that Mr Kirk and Mr Hill were genuinely concerned about this proposal. They were not looking at it through the prism of their own personal interests. They did not think that it was in the interests of the Company. In particular, they were worried about the effect which the proposal would have on the Company's workforce and on the smaller trade creditors, who would suffer under the proposal. Accordingly, Mr Hill decided to pull out of the proposal, and he and Mr Kirk resolved to put forward an alternative bid of their own with the assistance of Tenon Corporate Finance. There was an issue whether Mr Kirk and Mr Hill really wanted their proposal to be accepted. They said that it was not intended to be accepted. It was

intended to trump the proposal put forward by Mr Abbott and Mr Smart so that it would not succeed, and to stimulate interest in the Company's business with trade buyers. The Tribunal made no findings about that.

11. Under the proposal put forward by Mr Kirk and Mr Hill, a new company would purchase from the administrators the Company's assets including the factory in Stoke for £1,410,000. Mr Kirk and Mr Hill would be included in the new management team, but not Mr Abbott or Mr Smart. The purchase would be financed by a substantial investment from Mr Kaberry. The Tribunal found that this proposal must have been worked out using information described by Mr Abbott and Mr Smart as confidential. The Tribunal did not identify what that was, but it must either have been the information contained in the PWC memorandum or that in the Sterling memorandum or both.

12. On 6 April 2004, a board meeting of the Company took place. It had been called by Mr Kirk. That was when his and Mr Hill's alternative proposal was to be put to the board, though Mr Abbott and Mr Smart were already aware of it, and that it was being financed by Mr Kaberry, since Mr Kirk, Mr Hill and Mr Kaberry had told representatives of PWC about it the previous day. There was a conflict of evidence about what was said at the meeting, but the Tribunal preferred the recollection of Mr Kirk and Mr Hill to that of Mr Abbott and Mr Smart. Their recollection was that they were both asked to resign. They refused to do so. Mr Abbott launched into what Mr Hill described as a "personal vitriolic attack" on him. Mr Kirk and Mr Hill attempted to explain their actions, but Mr Abbott continued to take an aggressive stance and asked them to leave. They were in effect being suspended.

13. In due course, the Company initiated disciplinary proceedings against the Claimants. Disciplinary hearings with Mr Kirk and Mr Hill took place on 6 and 12 May respectively. They

were presided over by Mr Smart with Mr Abbott taking notes. The upshot of the hearings was that both Mr Kirk and Mr Hill were summarily dismissed by letters dated 2 June, it being noted that they had fundamentally breached their contracts of employment, and so undermined the duty of mutual trust and confidence required between the directors of the Company that their continued employment with the Company was untenable. The conduct complained of was that they had provided Mr Kaberry with a copy of the Sterling memorandum when they should not have done so at all, that they had provided him with a copy of the PWC memorandum before getting him to sign the confidentiality letter, that they had failed to tell their fellow directors what they had done, and that they had used the confidential information in the Sterling and PWC memoranda themselves. In short, they had used confidential information about the Company to prepare their own bid for the Company's business, and had divulged that information to Mr Kaberry in order to secure funding for it. In the case of Mr Hill, it was also claimed that he had told the Company's receptionist that the business was being refinanced, and that he had invited the Company's commercial director to join the new management team. The decision to dismiss was alleged to have been taken by Mr Smart, and at the hearings in the Tribunal, the Company maintained that the Claimants had been dismissed for the reasons set out in the letters of dismissal.

The Claim for Unfair Dismissal

14. The Tribunal took a very dim view of Mr Abbott and Mr Smart. It found that the disciplinary hearings had been a sham. It said that it had no doubt about that. The decision had already been made to dismiss Mr Kirk and Mr Hill summarily. That amounted to a finding that the Company had simply gone through the motions of holding disciplinary hearings. The Tribunal described what had happened as "a transparent farce" in which the Company had "purported to

discipline" the Claimants. There is no challenge to that finding. It alone would have justified a finding that the dismissals had been unfair.

15. But the Tribunal went on to find that the dismissals were not simply procedurally unfair. They were unfair on their merits as well. It is here that the Tribunal's reasoning becomes a little opaque, but one thing is clear. The Tribunal found that the Claimants had not been dismissed for the reasons set out in the letters of dismissal. They had been a pretext to enable the Company to dismiss Mr Kirk and Mr Hill without having to pay them the equivalent of a year's salary and other benefits in lieu of notice. Mr Benjamin Uduje for the Company did not suggest that the Tribunal had found otherwise.

16. What is less clear is whether the Tribunal went on to find what the real reason for the Claimants' dismissal had been. Mr Uduje argued that the Tribunal had done that. That reason, he said, was the clash of personalities between the two factions on the board: the management of the Company could not thereafter sensibly continue under the current board when different groups of directors had promoted rival bids for the Company's business in the event of it going into administration. The mutual trust and confidence which had to exist between directors of a company had been irreparably compromised. On this scenario, it would not have mattered which of the two alternative bids the administrators were likely to have accepted, or which would have been the more advantageous for the Company, its workforce or its creditors. It was sufficient that different factions on the board had promoted rival bids. The loss of mutual trust and confidence between the two factions would, said Mr Uduje, have amounted to some other substantial reason of a kind to justify the Claimants' dismissal.

17. We are inclined to think that the Tribunal did indeed go on to find what the real reason for the Claimants' dismissal had been, but we think it much more likely that the Tribunal found that

the reason for their dismissal had been something else entirely. That was that Mr Kirk's and Mr Hill's bid would have been much more attractive to the administrators than that of Mr Abbott and Mr Smart. Mr Abbott was sufficiently canny to have realised that, and he would therefore have regarded Mr Kirk and Mr Hill as having scuppered the proposal which he had put forward. He was just not prepared to have the men he saw as responsible for that associated with the Company for a day longer than was necessary. Having referred to Mr Abbott's abrasive style, and having said that "he wore, almost as a badge of pride, the fact that he was 'not fair'", the Tribunal talked about his personal animus towards Mr Kirk and Mr Hill. Why else would the Tribunal have referred to the fact that the Company did not in fact go into administration, since the effect of the alternative proposal had been that the administrators could not properly have accepted the original proposal, that the Company had since prospered so that it was then worth "in net terms about £3,000,000", and that Mr Abbott's proposed investment in the Company had been 25%? The whole tenor of the language which the Tribunal used in its reasons – which was unusually strong – suggests that Mr Abbott had it in for the claimants. As the Tribunal said, "they had crossed Mr Abbott and they had crossed the Chairman".

18. In the final analysis, though, none of this matters. It was for the Company to show the reason for the dismissal, and it did not do that. The reason it advanced was rejected by the Tribunal. No other reason for the Claimants' dismissal was advanced in the Tribunal other than the use and disclosure by the Claimants of the Company's confidential information, even though the label of "some other substantial reason" had been relied upon as an alternative to a reason relating to the Claimants' conduct in the Company's notices of appearance. The difference in label was not suggested in the Tribunal to have reflected a difference in the underlying reason for their dismissal. Since the Company had failed to show the reason for the Claimants' dismissals as required by section 98(1) of the **Employment Rights Act 1996**, there was no room for the

Tribunal to embark on the exercise required by section 98(4) – namely to consider whether their dismissals were fair – since the pre-condition for that exercise, namely that the Company had fulfilled the requirements of section 98(1), had not been satisfied. It follows that the challenge to the Tribunal's finding that Mr Kirk and Mr Hill had been unfairly dismissed must fail.

The Claim for Wrongful Dismissal

19. The conduct of the Claimants which was alleged to have amounted to such serious breaches of their contracts of employment as to justify their summary dismissal was that referred to in para. 13 above. However, the Tribunal said that "[t]he only matter of any substance [is] the allegation that both men had used confidential information upon which to base the second management buy-out scheme and … [had] pass[ed] it on to Kaberry". The Tribunal therefore rejected the criticism of Mr Hill relating to the Company's receptionist and its commercial director. As for the use the Claimants made of the information in the PWC and Sterling memoranda, and the disclosure of that information to Mr Kaberry, the Tribunal said that it accepted the arguments of the Claimants' counsel set out in para. 15 of her written closing arguments. In the Tribunal's view, those arguments "answered" the "charges" levelled against the Claimants. It held that there had been no "improper" breach of the duty of confidentiality.

20. A number of points were taken by Mr Uduje, but on analysis they boil down to three. Two can be disposed of quickly. First, it was said that by referring to an "improper" breach of the duty of confidentiality, the Tribunal was accepting that there had been a breach of the duty of confidentiality, but had nevertheless regarded that breach as "acceptable", thereby impermissibly bringing the statutory notion of reasonableness into the equation. We disagree. This is far too literal a reading of the Tribunal's language. The Tribunal was only saying that by making use of

the information themselves and divulging it to Mr Kaberry, the Claimants had not acted in breach of their duty of confidentiality to the Company, i.e. that they had done nothing improper.

21. Secondly, it was said that by simply adopting counsel's arguments, the Tribunal had failed to meet

(a) the requirements of rule 30(6)(e) of the Employment Tribunals Rules of Procedure, which required the Tribunal's judgment to explain how its findings of fact and the applicable law had been applied to determine the issues in question, and

(b) the minimum standards by which every judgment should be measured, which are that "the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained" (per Lord Phillips MR in **English v Emery Reimbold & Strick Ltd.** [2003] IRLR 710 at [19]).

Again, we disagree. It is better practice for a Tribunal to spell out in its own words the reasons for any conclusion which it reaches, but there is nothing to prevent a Tribunal from adopting the arguments advanced on behalf of one of the parties if it accepts those arguments and has nothing to add to them.

22. The real question is whether the Tribunal erred in law in accepting those arguments. That is Mr Uduje's third point, and it is necessary to consider the arguments relating to the two memoranda separately. As for the PWC memorandum, the argument which the Tribunal accepted was as follows:

> **"The PWC information memorandum was described by Mr Abbott in his oral evidence as 'an estate agent's blurb' … PWC could have informed Mr Abbott and Mr Smart that a confidentiality agreement had been entered into on 5 [April] verbally and a backdated document signed by all parties soon after. In any event, Mr Smart was not particularly**

concerned about confidentiality – he had authorised and encouraged the disclosure of huge amounts of confidential information to Mr Kaberry just a few months previously without checking to see whether a confidentiality agreement was in place."

Mrs Hilary Winstone, who represented Mr Hill at the hearing before us but who represented Mr Kirk as well in the employment Tribunal, told us that this referred to the evidence which both Mr Kirk and Mr Hill had given that on 5 April Mr Kaberry had signed the confidentiality letter, and that Mr Kirk and Mr Hill had a week or so later signed it on behalf of the Company which on their proposal, was to buy the business of the Company, but that this letter had been backdated – presumably to 5 April. Since the letter signed by Mr Kaberry had not been found by the time the hearing in the Tribunal took place, Mrs Winstone relied simply on Mr Kaberry's oral agreement to keep the information in the PWC memorandum confidential, since such an agreement must have preceded his signing of the confidentiality letter.

23. Even if the Tribunal had accepted the evidence on which these arguments were based, we think that the Claimants must still have been in breach of the terms on which the PWC memorandum was issued. The confidentiality letter had to be signed before the contents of the memorandum could be disclosed. On the way Mrs Winstone was putting the Claimants' case, that had not happened. The fact that Mr Smart had been content for Mr Kaberry to be provided with information about the Company a few months earlier when Mr Kaberry was thinking of buying shares in the Company does not mean that Mr Smart would have been content for Mr Kaberry to be provided with information about the Company – whether the same or slightly different – when he was thinking of investing in a bid for the Company's business which rivalled Mr Smart's own. And the fact that Mr Abbott likened the memorandum to "an estate agent's blurb" does not mean that it did not contain useful information in it.

24. As for the Sterling memorandum, Mrs Winstone's argument was that it was not intended for the eyes of members of the board or the administrators only. It was "intended to assist all

prospective purchasers". That was the effect of the following sentence in it: "The information contained herein is being supplied to assist in the formulation of indicative offers for the Company." It could therefore be shown by Mr Kirk and Mr Hill to Mr Kaberry in order to enable him to decide whether to invest in their bid for the business of the Company. So although the memorandum was marked "Strictly private and confidential", that simply meant that prospective purchasers who were issued with it had to keep it private and confidential.

25. We do not think that it was open to the Tribunal to accept this argument. The Sterling memorandum contained the details of Mr Abbott's and Mr Smart's proposal. It is absurd to suppose that Mr Abbott and Mr Smart would have been content for that information, which would have been of immense value to a rival bidder, to be disclosed to other prospective purchasers. The only sensible interpretation of the sentence in the memorandum which talked of the information in it "being supplied to assist in the formulation of indicative offers for the Company" was that it was being supplied to those who intended to invest in Mr Abbott's and Mr Smart's proposal. Since Mr Kaberry never had any intention of investing in their proposal, there was no justification for Mr Kirk and Mr Hill to have disclosed the memorandum to him.

26. However, all of this begs one crucial question. By using the information in the two memoranda themselves and by disclosing them to Mr Kaberry, Mr Kirk and Mr Hill may well have been in breach of the terms on which the two memoranda were disclosed to them. But were they in breach of the confidentiality obligations in their contracts of employment? We cannot see how they can have been. It was in the Company's interests for attractive offers to be made for its business, and the Company must be regarded as having sanctioned the use of its information and the disclosure of it to a third party if its use and disclosure had only been for the purpose of enabling prospective purchasers of the Company's business to decide whether to make an offer for

it and on what terms. We do not see how the prohibition on use or disclosure of the Company's confidential information – namely its financial and commercial information – included a prohibition on the disclosure to Mr Kaberry of the terms of Mr Abbott's and Mr Smart's bid. The simple fact is that it was the interests of Mr Abbott and Mr Smart, and not those of the Company, which would have been damaged by what Mr Kirk and Mr Hill did. So on the findings of fact which the Tribunal made, there was no question of the Claimants having acted in breach of the confidentiality clauses in their service agreements. In the circumstances, they were to be treated as having been authorised by the Company to do what they did. It follows that the challenge to the Tribunal's finding that Mr Kirk and Mr Hill had been wrongfully dismissed must fail.

The Error in the Tribunal's Reasons

27. In one respect, the Tribunal's reasons contained a serious error. One of the witnesses called on behalf of the Claimants was Paul Bevan of Tenon Corporate Finance. He had helped to put their proposal together. He gave evidence about the respective merits of the rival bids, and said unsurprisingly that the one he had put together was more in the Company's interests. However, if the Tribunal's reasons are anything to go by, the Tribunal misunderstood his role. At one stage, the Tribunal referred to Tenon as "the selling agents". At another, the Tribunal referred to Tenon as "the Company's financial advisers". So the Tribunal appears to have thought that the Company's advisers were saying that the claimants' bid was the better of the two.

28. The Chairman of the Tribunal was to claim that he and his colleagues were aware of the true position. Although the Tribunal had reserved its decision, it chose to read its decision when it was promulgated. After the decision had been read, Mrs Winstone pointed out the error to the Tribunal. Her recollection is that the Chairman said that they had been aware of Mr Bevan's true role all along, and that the error would be corrected when the reasons were transcribed. Mr

Abbott's recollection is different. He thinks that the Chairman looked bemused and said that it would be sorted out later, or words to that effect. But whatever was said, the error was not corrected, and the reasons were promulgated with the error still in them.

29. We do not have to decide whether the Tribunal misunderstood Mr Bevan's real role when it came to its decision. That is because, if error it was, it was not made on an issue which was important. Which bid was more advantageous to the Company would only have been relevant if it had been necessary for the Tribunal to decide what the real reason for the Claimants' dismissal had been. For the reasons given in para. 18 above, that was not necessary. So the Tribunal's error, if error it was, could have had no impact on the eventual outcome.

Contributory Conduct

30. The Tribunal decided that the Claimants' dismissal was not caused or contributed to by any action on their part, or that their conduct was not such that it would be just and equitable to reduce their compensation. In the light of the Tribunal's findings of fact, and since the Claimants had therefore to be treated as authorised by the Company to use the information contained in the PWC and Sterling memoranda and to disclose it to Mr Kaberry, there is no basis for challenging that finding. The only point taken by Mr Uduje related to a comment made by the Tribunal to the effect that "any conduct capable of criticism by the claimants paled into insignificance compared to the unfairness of the [Company's] action". The criticism of the Tribunal is that it reached its conclusion on the issue of contribution by comparing the Claimants' blameworthy conduct with that of the Company, and dismissed any suggestion of contribution on the claimants' part on the basis that the Company had behaved far worse. Such an approach was said to be impermissible.

31. We agree with Mr Uduje to this extent. Such an approach, had it been the approach of the Tribunal, would have been impermissible. It is well established that in deciding whether to reduce either the basic award under section 122(2) or the compensatory award under section 124(6) for the employee's contributory conduct, it is only his conduct which can be taken into account. The conduct of the employer or other employees is irrelevant: see, for example, **Parker Foundry Ltd. v. Slack** [1992] ICR 302. But we think that Mr Uduje's reading of the Tribunal's decision is again far too literal. The Tribunal was simply making the point that it hardly lay in the Company's mouth to criticise the Claimants. In the next paragraph in its reasons, the Tribunal went on to say that there had not been any conduct on the part of the Claimants which justified criticism. There was, we think, no question of the Tribunal deciding that this was not a case for a finding of contributory fault just because the Company had behaved worse.

Mr Hill's Costs

32. If the Tribunal was to award Mr Hill his legal costs, the Tribunal had to find that the Company conducted the proceedings vexatiously, abusively, disruptively or otherwise unreasonably, or in a way which was misconceived: see rule 40(2) of the Employment Tribunal Rules of Procedure. It found that the Company had conducted the proceedings vexatiously and unreasonably, and that its defence was misconceived. That finding is challenged on the basis that the Tribunal only made an order for costs to punish the Company for throwing mud at Mr Hill for nearly a year at the instance of Mr Abbott who it described as the Company's "hatchet man".

33. We entirely agree that considerations of punishing the Company were entirely irrelevant to the question of costs: see, for example, **Davidson v. John Calder (Publishers) Ltd**. [1985] ICR 143 at p.146E. But we do not think that the Tribunal fell into that trap. The Tribunal expressly disavowed that it was punishing the Company. When the Tribunal referred to mud having been

thrown at Mr Hill, it was referring to allegations of misconduct on the part of Mr Hill other than those relating to his conduct in connection with the rival bid which he and Mr Kirk had mounted. The Company was eventually to accept that (a) it had no proof of those allegations and (b) they had not been the reason for Mr Hill's dismissal. The Tribunal's point was that in raising it in the Tribunal when it could not be proved and was irrelevant to whether Mr Hill had been unfairly dismissed, the Company had acted unreasonably. There is no basis for saying that this was a finding which it was not open to the Tribunal to make, though it was a finding which would have justified the Tribunal in ordering the Company to pay only that part of Mr Hill's legal costs which had been incurred in defending himself against the allegations of misconduct which were accepted to have had nothing to do with his dismissal.

34. But the Tribunal also found that the Company's defence to Mr Hill's claim was misconceived. That is what it said. Otherwise it could not have awarded Mr Hill all his legal costs. That can only have been a reference to the Company's ploy to use a pretext to conceal the true reason for dismissing him. The Company had not been candid about why it had dismissed him. It fought the case on the basis of a lie. Tribunals have, of course, to be extremely cautious about awarding costs when the losing party's case lacks merit. The Tribunal was aware of that. That was why it said that it "would never wish any party to be forbidden for arguing good [or even middling] points". Costs could only be appropriate if the losing party knew that its case lacked merit. Even then, this was not simply a case of the Company knowing that its defence was unmeritorious. This was a case of the Company knowing that its defence was untrue. In these circumstances, it is not possible to characterise the Tribunal's decision to award Mr Hill his legal costs as perverse.

Conclusion

35. For these reasons, this appeal must be dismissed.