King (and others) v DWF LLP (and others)

Introduction

Henshaw J has handed down judgment in *King (and others) v (1) DWF LLP (2) Peter Morcos (3) Alexander Hall Taylor KC* [2023] EWHC 3132 (Comm), a case in which the claimants alleged dishonest breach of fiduciary duty and negligence against their former legal advisors during a trial before Marcus Smith J in 2017.

The facts and the widespread allegations of dishonesty made by the Claimants against their former advisors were remarkable and probably unprecedented. Henshaw J ultimately concluded the allegations had *"not the slightest merit"* and were *"entirely without foundation"* [4].

Notwithstanding the extraordinary facts, the judgment is an important one for practitioners for the reasons which will be explored below.

The facts

The Claimants were shareholders in a security business ("KSG"), founded by James King and managed at all material times by his son Anthony King.

In or around 2013 KSG was in financial difficulty because of severe cashflow pressure. This led to the Claimants seeking investment for KSG ("the Transaction"), which was ultimately provided by Primekings Holdings Limited ("Primekings"), an SPV in which Robin Fisher and Peter Swain were beneficially interested, and which had access to funding from a South African billionaire.

On 18 December 2013, the day scheduled for completion of the Transaction, Mr Swain met with KSG's invoice discounting provider: GE Capital Bank Limited ("GE"). The GE facility was important for KSG's cashflow, but KSG was in breach of its agreement with GE and GE was lending money to KSG outside of its contractual formula on a short-term basis, in order to buy time for KSG to complete the Transaction, rather than go into administration.

By telephone on the afternoon of 18 December 2013, Mr Swain reported the content of his discussion with GE to Anthony King, James King and Mr Fisher, who were meeting in London to finalise the Transaction. At some point thereafter, Primekings concluded that they could not do the deal on the terms that had provisionally been agreed ("the Initial Deal") and renegotiated the deal in ways that were less advantageous to the Claimants ("the Final Deal"). The Transaction was concluded on 20 December 2013.

What Mr Swain said on 18 December 2013 would later become the subject of litigation between the Claimants and Primekings, Mr Fisher and Mr Swain ("the Misrepresentation Proceedings"). The Claimants alleged that Mr Swain had misrepresented GE's position by falsely representing that GE had decided to withdraw all funding from KSG and had lost complete confidence in KSG's management. The Claimants sought rescission of the Transaction, alternatively damages.

Primekings denied that Mr Swain represented the position in absolute terms, instead saying that Mr Swain had said that the KSG account with GE was frozen *"unless a deal is done"* and that Mr Swain's report of his meeting with GE was substantially true.

DWF had acted for the Claimants in the Transaction and acted for the Claimants in the Misrepresentation Proceedings. Alex Hall Taylor (now KC) acted for the Kings from the pleadings stage. Just before trial in 2017 ("the Misrepresentation Trial"), Peter Morcos was instructed as junior counsel.

The Misrepresentation Trial went disastrously for the Claimants. In particular, the evidence of Anthony King (given over five and a half days) was devastating, most particularly in respect of one key issue in the case. As set out above, the Claimants' case was that Mr Swain had reported that GE had withdrawn all funding from KSG (i.e., in absolute terms), whereas Primekings stated that the 'account frozen' statement was qualified by the words *"unless a deal is done"*. The Claimants' pleadings and witness statements had proceeded on the basis that the words *"unless a deal is done"* were not used by anyone on 18 December 2013.

However, on Day 6 of the Misrepresentation Trial, Anthony King gave evidence that he now recalled that Mr Fisher **had** used those words at a point after Mr Swain's representations, but alleged (for the first time) that this was because Mr Fisher had represented to Anthony and James King that he had subsequently spoken to GE and (falsely) managed to persuade GE to keep funding KSG [295-296].

As Henshaw J noted [297], this evidence (a) amounted to a new case, including a new allegation of fraud against Mr Fisher; (b) contradicted the Claimants' existing pleaded case that no such words were used; and (c) undermined the Claimants' case that they had relied on the Swain representation that GE had permanently withdrawn funding, when entering into the less advantageous terms of the Final Deal. Further, it seriously undermined the credibility of the Claimants' lead witness [520].

But worse was yet to come. James King had not been permitted to listen to Anthony King's evidence, and when he later gave evidence it was completely inconsistent with Anthony King's Day 6 revelation. James King maintained that the words *"unless a deal is done"* were not used by anyone on 18 December 2013 and that he was not aware that Mr Fisher had been speaking to GE [338]. This created a fundamental conflict in the evidence on this issue.

After the hearing of all but one of the Claimants' witnesses, Mr Hall Taylor and Mr Morcos ("the Barristers") advised the Claimants to discontinue, apologise to Primekings and pay indemnity costs, in the hope that some sort of relationship could be salvaged with Primekings. This advice was also committed to writing in a 35-page Advice to Discontinue.

The Advice to Discontinue highlighted the many problems with the evidence that had been given (including, but by no means limited to, Anthony King's Day 6 revelation referred to above), but also stated that the Barristers considered that they were professionally unable to advance the existing case, or any amended case based on Antony King's new recollection [364]-[372].

The Claimants discontinued their claim as a result, apologised to Primekings and agreed to pay costs on the indemnity basis.

The claim against DWF and the Barristers

In the present proceedings, the Claimants alleged that the true reason for the discontinuance was not the evidence given by the Claimants at the Misrepresentation Trial, but rather because of a mistake made by their legal team which had emerged during the Misrepresentation Trial, which created a conflict of interest for the legal team, and which Primekings sought to exploit.

The mistake related to the way that the Particulars of Claim had advanced the alternative claim for damages. The Particulars of Claim (albeit only impliedly) pleaded that one of the differences between the Initial Deal and the Final Deal was that payment of up to £3 million to James King and his wife Susan, by way of deferred consideration, would be paid by way of redemption of B shares in KSG, rather than being paid by Primekings directly.

On the afternoon of Day 4 of the Misrepresentation Trial, counsel for Primekings – Paul Downes KC – demonstrated that this was wrong, by showing Anthony King draft documents which showed that, even in the Initial Deal, the mechanism for payment of the deferred consideration was always going to be by way of redemption of B shares in KSG. Henshaw J found the passage of cross-examination to be *"entirely matter-of-fact"* and showed *"the very modest significance Primekings and* [Marcus Smith J] *attributed to the point"*.

This passage of cross-examination, however, became the foundation of the Claimants' case before Henshaw J. It was alleged this cross-examination exposed the mistake in the Particulars of Claim (which had followed through into some of the Claimants' witness statements and the Claimants' opening note) and that this allowed Primekings to *"*[intimate] *to the…legal team the possible consequences for them if the case continued to judgment"* [437]. Thereafter, the Kings put their case on three bases:

(i) that Mr Hall Taylor (to Mr Morcos' and DWF's knowledge) and Mr Downes reached an informal understanding that the Claimants' legal team would not be accused of improper conduct by Primekings if Mr Hall Taylor caused the case to be withdrawn [438];

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(ii) alternatively, the Barristers and DWF were so concerned by what Primekings had intimated that they collectively came to the view that discontinuance was necessary [491];

(iii) alternatively, the Barristers and DWF felt so professionally exposed by their own negligence (and aware of Primekings' threats) that their judgment was clouded giving rise to *"grossly negligent conduct"* [493].

Henshaw J rejected all these allegations. Among other matters, he found (a) it was inherently improbable that Mr Downes expressly or impliedly threatened the legal team, being serious professional misconduct for which Mr Downes had no motive; (b) the mistake in the Particulars of Claim had no bearing on the Claimants' primary claim (rescission), but was relevant only to the quantum of damages; (c) the mistake did not cause the Claimants any loss, in the sense that it merely meant that the quantum of the alternative claim had been overstated; (d) the mistake in the Particulars of Claim did not involve any improper conduct, but was a mere error; (e) the Claimants' legal team therefore had no reason to force their clients to discontinue [439-494].

Henshaw J also rejected the Claimants' fallback case that the Advice to Discontinue was negligent. He analysed a number of aspects of the Misrepresentation Proceedings in light of the evidence that had been given by the Claimants [508-544] and concluded that their underlying claim had *"no more than a negligible chance of success…realistically, probably a zero chance"* [564(ii)].

The difficulty of establishing negligence against legal advisors at trial

This case is a reminder of the difficulties of establishing negligence against any legal professional, where the question is a matter of judgment. In respect of claims against barristers, the classic expression of this point is found in *Saif Ali v Sidney Mitchell Co* [1980] A.C. 198, 214F:

"Much if not most of a barrister's work involves exercise of judgment—it is in the realm of art not science. Indeed the solicitor normally goes to counsel precisely at the point where, as between possible courses, a choice can only be made on the basis of judgment, which is fallible

and may turn out to be wrong. Thus in the nature of things, an action against a barrister who acts honestly and carefully is very unlikely to succeed".

This must apply all the more so in the crucible of a hotly-contested trial, where judgments have to be made regarding the performance of witnesses and their effect upon a case. This is a process which is typically dynamic, arduous and highly time-pressured.

Yet further, where that exercise of judgment also involves regard for professional conduct obligations (such as whether a case in fraud can any longer be pursued in light of the evidence), the court will surely be even slower to find negligence.

The way the Claimants' evidence emerged at the Misrepresentation Trial presented clear and inescapable professional conduct issues to the Barristers. This was not merely a case where the case was weakened by the evidence. Rather, Anthony King's new revelation, not supported by James King, effectively destroyed the existing case and led to clearly conflicting accounts between these two key witnesses. Any application to amend to accommodate Anthony King's new revelation would have required an amended pleading which James King could not sign. Meanwhile, the existing case was so comprehensively destroyed that the Barristers were entitled to take the view that it no longer had prospects of success and therefore could not act if the case was to be continued [544].

Judicial signals

Interestingly, one of the matters of judgment referred to by Henshaw J was the art of reading the court, holding that *"part of counsel's job is to read judicial signals and advise the client appropriately"* [357] and that *"as every advocate knows, lines of judicial questioning may provide indications of concerns in the court's mind about aspects of a party's case"* [358]. This is precisely the sort of *"art not science"* that the court had in mind in *Saif Ali* (above) and the kind of instinct for which the client pays when he instructs counsel to conduct a trial.

While it was accepted by all parties that Marcus Smith J, hearing the Misrepresentation Trial, gave no indication of having decided the case, Henshaw J considered that Mr Hall Taylor could reasonably have formed the view that the court appreciated the difficulties that had emerged

in the Claimants' case at trial and that the court's questions tended to clarify matters in a way adverse to the Claimants [358].

This approach echoes the views of Anderson J in *Karpenko v Paroian & others* (1981) 117 DLR 383, a case of allegedly negligent advice about settlement, approved by the House of Lords in *Moy v Pettman Smith* [2005] 1 WLR 581:

"What is relevant… is that an industrious and competent practitioner should not be unduly inhibited in making a decision… by the apprehension that some judge, viewing the matter subsequently, with all the acuity of vision given by hindsight and from the calm security of the Bench, may tell him he should have done otherwise. To the decision to settle a lawyer brings all his talents and experience both recollected and existing somewhere below the level of the conscious mind, all his knowledge of the law and its processes".

It is submitted that this would apply with equal force to a decision to advise clients to discontinue.

The trial process

Bingham MR famously remarked in *Ridehalgh v Horsefield* [2004] Ch 205 (a case concerning wasted costs) that:

"Any judge who is invited to make or contemplates making an order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him [on the basis of negligence]*"*.

One of the main points of interest in the present case is that it provides a "worked example" of how the principles identified by Bingham MR play out in the context of a difficult case which fell to pieces as the evidence came out; and as to the dangers posed by the *"acuity of vision given by hindsight"*. None of the test cases decided in *Ridehalgh* exhibited these features. In particular, Henshaw J was clear that the Claimants' consistent attempts to erect a case against the lawyers on the basis of various very specific references in the wealth of documentation available was unreal. This approach demonstrated the dangers of hindsight: given the fast moving and deteriorating position within the Misrepresentation Trial, it is submitted that such an approach was clearly unfair and unrealistic.

Reliance on counsel

The judgment shows also that it will be difficult to sue solicitors in cases which fail at trial (where the negligence concerns the performance of counsel) or are discontinued mid-trial on the advice of counsel. The general rule is that a solicitor is entitled to rely upon the advice of counsel, but must not do so blindly, and must advise if he considers that counsel's advice is obviously or glaringly wrong [424].

Henshaw J did not find that the Advice to Discontinue was negligent, but held that if he had done, he would not have found DWF liable because: *"it concerned the type of issue where a solicitor would be entitled to rely on the view reached by trial counsel, given the complexity of the case and the evidence, and especially when the advice related to counsel's view as to their professional obligations"* [545].

It is submitted that this finding is entirely orthodox. Notwithstanding the fact that in modern litigation, lawyers work as a team, and the rigidity of the distinction between the role of the advocate and the role of those instructing him or her is no longer, the fact remains that solicitors entrust counsel with the task of presenting the case and seeking to persuade the judge. Solicitors are entitled to expect counsel to take primary responsibility for the matters which Henshaw J identified.

Fiduciary duties

The claim was primarily brought as one of breach of fiduciary duty. The Claimants alleged that the defendants owed fiduciary duties to act in good faith in the best interests of their clients, not to knowingly or recklessly mislead their client, and to avoid conflicts of interest. They alleged that the claim was property over which the lawyers held control.

Henshaw J was not persuaded that either the Barristers or DWF owed fiduciary duties in relation to the conduct of litigation. He noted that barristers must make their own professional judgment as to what submissions they can advance, with regard to their professional duties (without regard to the client's interests). Both barristers and solicitors provide advice but do not otherwise exercise power or control over their clients' property or affairs [430].

Henshaw noted the fact that Hollander, *Conflicts of Interest*, (6th ed.) 16-003 considers it clear that barristers must owe fiduciary duties and that the Code of Conduct imposes what amount to fiduciary duties (*"you must promote fearlessly…the client's best interests…without regard to your own interests"*). Hollander also considers that *"the existence of a duty to the court does not affect the existence of a fiduciary obligation – it merely subjugates the duty to the client to that owed to the court"*. However, Henshaw J stated that he would hesitate before concluding whether such regulatory duties necessarily equate to fiduciary duties as a matter of law [431-432].

However, because the fiduciary duties pleaded did not add anything to the common law duties the defendants clearly owed, Henshaw J did not consider it necessary to resolve this issue. The question of whether barristers or solicitors owe fiduciary duties in their conduct of a trial will therefore remain of interest, at present.

It is submitted, however, that Henshaw J's doubts (in the context of counsel engaged to conduct a matter in court) are well founded. It is easier to see that a fiduciary duty might be owed where counsel is retained to advise: for example, counsel engaged to advise on a novel tax scheme would owe a fiduciary obligation not to reveal the nature of the scheme to other clients whose business was generally to promote such schemes. But counsel conducting a case in court is not entitled to mislead the court (in particular by omission) by keeping information

belonging to his client confidential, if the effect of that step is to permit the Court to proceed on a false basis. It is also not clear (given Henshaw J's view of equitable compensation, considered immediately below) what practical difference an analysis based on breach of fiduciary duty might make.

Equitable compensation and loss of a chance

By bringing a claim primarily for breach of fiduciary duty, the Claimants hoped to establish a more favourable basis of assessing loss. This was based on their case that, prior to the Misrepresentation Trial, DWF had allegedly advised them that their case had 100% chance of success and that this was a true reflection of the merits [564(i)].

Henshaw J found on the facts that no such advice was given [183]. However, he also found that any such advice could not form the basis of assessing equitable compensation in any event. Rather, any compensation could only properly be for what had in fact been lost, applying by analogy the approach to equitable compensation for breach of trust set out in *Target Holdings v Redferns* [1996] A.C. 421 [564(i)].

This meant that the court would apply orthodox loss of a chance principles, assessing all of the evidence that had been given at the Misrepresentation Trial and deciding whether the Claimants had lost a claim of any value [564(ii)].

Further, Henshaw J held that *"this is not a case where the court would have had any difficulty in assessing the value of any claim the* [Claimants] *might be said to have lost, or has been deprived of any relevant evidence"*.

It is a very rare loss of a chance case where the court can evaluate the pleadings, the witness statements, the parties' opening submissions and almost the entirety of the Claimants' evidence. Henshaw J had already set out, earlier in the judgment, all of the many difficulties that had arisen at the Misrepresentation Trial and therefore felt able to come to the conclusion that the Claimants' prospects of success were no more than negligible and that no compensation would therefore have been payable in any event.

Conclusion

It is unlikely that a case with such remarkable facts will come before the courts again.

Nevertheless, solicitors and barristers acting in stressful circumstances at trial can take comfort from Henshaw J's application of well-established principles that *"the court will make allowance for the circumstances in which the impugned decision was made, and it will only be negligent if it was outside the range of possible courses of action that in those circumstances reasonably competent members of the profession might have chosen to take"* (*Saif Ali* (above)).

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Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.