Percy v Merriman White and Mayall [2022] EWCA Civ 493: Contribution and the right to a fair trial

Introduction

1. The facts of *Percy v Merriman White and Mayall* [2022] EWCA Civ 493 raise a scenario that will be familiar to any experienced litigator. The Claimant, Mr Percy, blamed the two Defendants, Merriman White and Mr Mayall, for various losses. The two causes of action against the two Defendants, although arising from the same general factual background, raised subtly different issues (and thus different litigation risks). Mr Percy ultimately proceeded by discontinuing against Mr Mayall and by settling his claim against Merriman White for £250,000. Merriman White, evidently considering that Mr Mayall bore some responsibility for what had happened, duly sought a contribution from him.

2. These contribution proceedings, which have now been resolved at Court of Appeal level, have raised fundamental issues as to what a contribution claimant has to prove, in order to recover contribution. In this note, references to paragraph numbers are to the corresponding paragraphs in the Court of Appeal judgment.

Facts

3. The relevant facts can be very briefly summarised:
   a. Merriman White and Mr Mayall were, respectively, Mr Percy's former solicitors and counsel, who had represented Mr Percy in Companies Act proceedings in or around 2011.
   b. Having received legal advice from the Defendants, Mr Percy had then sought permission to bring a derivative claim.[1]
   c. However, by a judgment handed down on 30 June 2011, the court (rightly or wrongly) refused Mr Percy permission to bring a derivative claim.
   d. Mr Percy subsequently settled the underlying Companies Act litigation for £65,000.
   e. The nub of Mr Percy's case against Merriman White and Mr Mayall was that, with non-negligent advice and representation, he would have secured a more favourable result, possibly, for example, by accepting a £500,000 settlement offer made at a 2010 mediation.
   f. On any view, there were factual distinctions between the advice given, and the roles played, by the two legal Defendants. For example, while Merriman White had represented Mr Percy during the aforementioned mediation, Mr Mayall had not, and a factual dispute thus arose as to whether Mr Mayall had even been instructed to advise on acceptance of the £500,000 offer (see [24]).

[1] Broadly speaking, this is where an individual – here, Mr Percy – seeks permission to bring a cause of action otherwise vested in a company (the point usually being that the person or persons controlling the company will not bring the claim themselves).

The contribution proceedings

4. It is orthodox and settled law that (in general terms) a contribution claimant need not prove **his own** liability to the underlying claimant. This point flows from section 1(4) of the Civil Liability (Contribution) Act 1978, which reads as follows:

> *"(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established."*

5. Put simply, if a contribution claimant enters into a bona fide settlement in respect of a claim which, on its alleged facts, disclosed a genuine cause of action against him, the contribution defendant cannot argue that the underlying claim against the contribution claimant was 'wrong'.

6. However, in these proceedings, Merriman White further advanced a more ambitious proposition. That proposition was that Mr Mayall could not dispute **his own** liability to Mr Percy either.

7. Merriman White founded this proposition largely on *WH Newson Holding Limited v IMI Plc v Delta Limited* [2017] Ch 27, [59]. In that case, the Court of Appeal (in the context of contribution proceedings) had stated as follows (emphasis added):

> *"59. The proviso of course shows that D1 must still prove at least something in order to succeed against D2. That is that 'he would have been liable [to C] assuming that the factual basis of the claim against him could be established.' In my judgment the sense of that is that* ***all that D1 needs to show is that such factual basis would have disclosed a reasonable cause of action against D1 such as to make him liable in law to C in respect of the damage. If he can do that, he will be entitled to succeed against D2****. There may of course remain issues as to quantum, as to which section 1(4) makes no assumptions."*

8. Here, Mr Percy had plainly disclosed a reasonable cause of action against Merriman White, and the same had been resolved by a bona fide settlement. Accordingly, Merriman White argued that, per *Newson*, it was *"entitled to succeed"* in contribution proceedings

against Mr Mayall without showing anything more (and, in particular, without proving Mr Mayall's liability to Mr Percy).[2]

9. At first instance, the High Court accepted this analysis, concluding as follows:

> *"81 … I conclude for the reasons given, and based on the permitted assumed facts, the breach of a duty of care pleaded in the Negligence Claim resulting in loss and damage gives rise to a reasonable cause of action between Mr Percy and MW. It follows, without more, that MW is entitled to a contribution from Mr Mayall."*

10. Accordingly, the High Court concluded that Merriman White was entitled to a contribution. The High Court further concluded, in the alternative, that the defences raised by Mr Mayall would have failed in any event.

11. On appeal however, the Court of Appeal (Sir Julian Flaux C, Lewison and Andrews LJJ) unanimously reversed this result.

12. The Chancellor considered that Merriman White's contention, if legally correct, was 'startling' ([88]). At [120], Lewison LJ gave the simplest and clearest explanation as to why, noting that it would *prima facie* rob Mr Mayall of the right to a fair trial:

> *"120. If Mr Mayall's liability were to be conclusively determined against him by a settlement made between two parties who are suing him (without any determination by a court) that would, on the face of it, deprive him of his right to have his liability determined by an independent and impartial tribunal. It is not, of course, incompatible with article 6 for Merriman White's own liability to be determined by an agreement to which it is a party, because it is always open to one party to waive its rights under article 6. But Mr Mayall has not waived his."*

13. Lewison LJ further reasoned that Merriman White's position, if correct, would produce *prima facie* strange results if applied to far simpler factual scenarios (of the kind seen in county courts across the land every day):

> *"116. … Take a simple example. Suppose that three cars are involved in a road traffic accident in which one of the drivers is injured. He brings a claim against the driver of one of the other two cars. In turn that driver settles the claim with*

[2] As a matter of strict completeness, all this is subject to a further requirement that contribution can only be made in respect of the 'same damage', per section 1(1) of the Civil Liability (Contribution) Act 1978. This point was further argued on the specific facts of this case, and this note does not discuss it further.

> *the claimant and claims a contribution from the owner of the third car. It is surely open to the contribution defendant to say that he was not in fact the driver; or that the accident was entirely caused by the fact that the contribution claimant was driving on the wrong side of the road."*

14. Further, *Newson*, said the Court of Appeal, had been taken out of context. In *Newson*, the contribution defendant had already been found, in principle, to be liable to the underlying claimant.[3] Accordingly, the specific argument being run by the contribution defendant was that the underlying claim against the contribution claimant had been debarred by limitation (see [88]). Paragraph 59 of *Newson* was thus a correct statement of the law in the specific context where the contribution defendant's liability to the underlying claimant was not in dispute. The Chancellor thus concluded, (at [89]) as follows, in relation to the second sentence highlighted in bold in the citation in paragraph 7 of this note:

> *"89 … I do not consider that that sentence [in Newson] can be taken out of context and made to stand for the proposition that, in every case where D1 makes a bona fide settlement with the claimant and the proviso to section 1(4) is satisfied, D2 is liable to make contribution, without the need to establish whether or not D2 was liable to the claimant, which in a case such as the present means establishing that D2 was negligent and that any such negligence was causative of the claimant's loss. In other words, in a case such as the present, that fourth sentence of [59] falls to be qualified by adding words such as: "as regards his own liability to the claimant"."*

15. Accordingly, this case now stands as clear authority for the proposition that, in contribution proceedings, whilst a contribution defendant cannot (in general) challenge the contribution claimant's liability to the underlying claimant provided the contribution claimant would have been liable if the facts alleged by the underlying claimant were proved against him, the contribution defendant can however dispute **his own** liability, just as he would have been able to in any underlying proceedings brought against him by the underlying claimant.

16. In this case, the Court of Appeal further reversed the finding that Mr Mayall's substantive defences would have failed in any event. The Court's analysis largely turns on the specific facts of the case,[4] but the author considers that three points are of more general interest:

[3] More specifically, the contribution parties had already been found by the European Commission to have been part of an unlawful cartel (see [88])
[4] Analysis is further hampered by the fact that the High Court made limited findings on this point, the same being only a secondary alternative basis for the first instance judgment.

a. Firstly, the Court emphasised the classic principle that there is a critical distinction between whether any legal advice given was 'wrong' and whether the same was 'negligent' (see [123]). Even if Mr Mayall had given 'wrong' advice, in the sense that the underlying court dealing with the derivative claim had not done what Mr Mayall had predicted it would do (by refusing permission for the derivative claim), it did not follow, without more, than any such advice had been negligent. The Chancellor considered that this was an area where different tribunals would legitimately take different views ([95]), whereas Lewison LJ considered that the High Court had simply not addressed why any advice given was negligent, rather than merely wrong ([124]).
b. Secondly, the Court demonstrated the (relative)[5] ease with which litigants can challenge previous court findings, provided that they were not parties to those proceedings. Here, Mr Mayall had been entitled to argue that the court in 2011 had been wrong to refuse permission for the derivative claim ([94], [127]), and the High Court had been wrong to simply dismiss that argument as an abuse of process.
c. Thirdly, the Court considered that, on the facts of this case, even if breach of duty by Mr Mayall could be established, causation simply could not be established without oral evidence from Mr Percy, establishing what (if anything) he would have done had he received the alleged non-negligent advice. However, Merriman White had not called Mr Percy to give evidence at first instance. The Court thus considered that this omission created a fatal evidential lacuna which Merriman White simply could not overcome ([107]). Accordingly, the Court not merely allowed Mr Mayall's appeal but dismissed the contribution claim in its entirety, holding that it would be unfair to give Merriman White a second bite of the cherry by allowing them now to call Mr Percy to give evidence ([110]).

Conclusions

17. The *Newson* decision caused some doubt as to what a contribution claimant needs to prove to establish the liability of a contribution defendant. This new decision dispels any such doubt. Future contribution claimants have been clearly warned: contribution defendants are free to dispute their own liability, and contribution claimants may need to rely on external oral evidence – possibly even from the underlying claimant – in order to prove the contribution defendant's liability to the underlying claimant.

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[5] Such conduct certainly can be an abuse of process in principle, but the Court of Appeal made very clear that something more is required to render it abusive than the mere challenge itself (see [135]).