Case Note: *Moda International Brands Ltd v (1) Gateley LLP (2) Gateley Plc*
[2019] EWHC 1326 (QB)

Application of Loss of a Chance Principles Where Third Party Gives Evidence at Trial

Introduction

1. In the course of its judgment in *Perry v Raleys* [2019] 2 WLR 636 the Supreme Court re-affirmed the well-known principles of causation applicable in loss of a chance cases, as previously stated by the House of Lords in *Allied Maples v Simmons & Simmons* [1995] 1 WLR 1602. In summary:

    a. Issues of causation which depend on what the claimant would have done absent negligence, are to be resolved on the balance of probabilities;

    b. Issues of causation which depend on what a third party would have done absent negligence, are generally to be assessed on the loss of a chance basis.

2. One strand of the Supreme Court's reasoning in *Perry* was that *"obtaining of relevant evidence from witnesses might be impracticable"* (per Lord Briggs JSC, at [18]). What happens then, when such evidence is available because the third party whose actions are in question gives evidence at the trial?

3. This issue is not dealt with squarely in the authorities. It arose, however, in *Moda International Brands Ltd v Gateley LLP*. The conclusion of Freedman J was that the evidence available did not affect the manner in which the court approached the question of causation; the issue of what a third party would have done still had to be assessed on the loss of a chance basis.

Facts

4. This case concerned a joint property venture between the claimant, Moda International Brands Ltd ("Moda") and Mortar Developments (Nottingham) Ltd ("Mortar"). Moda and Mortar wished to redevelop a former Odeon cinema site in Nottingham ("the Site") into student accommodation. The Site was comprised of two plots of land: a small shop frontage on Angel Row ("the Angel Row Frontage") and the remainder of the Site.

5. Negotiations commenced in 2010 and were conducted mainly between Moda's agent, Mr W, and Mortar's Director, Mr M. Initially it was proposed by Mr M that profits after the development of the (whole) Site would be shared on a 75:25 basis in Mortar's favour. Mr W, however, held out for a 50:50 apportionment. A few months later, a deal structure was agreed whereby Mortar would be used as a special purpose vehicle for the deal and profits would be shared from the (whole) Site 65:35 in favour of Mortar. This was memorialised by the execution of a declaration of trust in August 2010, granting Moda a 35% interest in Mortar ("the Declaration of Trust").

6. In August 2012, it became necessary to agree a new deal structure, owing in large part to the influence of a creditor of Mr W's. Moda and Mortar therefore opted to enter into a participation agreement in substitution for the Declaration of Trust ("the Participation Agreement"). Moda instructed the defendant firm, Gateley LLP ("Gateleys") to effect this change in the deal structure.

7. Between August and November 2012, Gateleys dealt with Mr M in agreeing the precise terms of the Participation Agreement. During this process (and without explanation), the "Developer's Profit" came to be defined in terms which excluded the Angel Row Frontage. Moda was therefore deprived of any share of profit in relation to that part of the Site. This had not been the effect of the Declaration of Trust, which had granted Moda 35% of the profits from the whole of the Site. Neither Mr W nor Moda was advised of this material change in the terms of the deal before the Participation Agreement was agreed on 28 November 2012.

8. In August 2015, Mr W requested a 35% share in profits obtained from the Angel Row Frontage on behalf of Moda. Mortar refused to pay and the true terms of the Participation Agreement were discovered.

Issues

9. Freedman J found that Gateleys was negligent in failing to advise Moda that it would be deprived of the profits earned from the Angel Row Frontage. The following issues of causation then arose:

    a. If Moda had discovered the true terms of the Participation Agreement, would it have proceeded on the same terms in any event?

    b. If Moda would not have proceeded with the Participation Agreement as drafted, would Mortar have agreed to grant Moda a share in the profits from the Angel Row Frontage?

10. It was common ground that the first of those issues must be determined on the balance of probabilities. On that basis, Freedman J found (at [145]) that Moda would not have proceeded on the same terms.

11. The second issue would ordinarily be assessed on the loss of a chance basis. Gateleys, however, had summonsed Mr M to give evidence at the trial, in an attempt to establish that Mortar would not have agreed to share the profits in the Angel Row Frontage with Moda. Gateleys then argued in closing that the second issue should be determined on the balance of probabilities and that, applying that test, Moda should recover nothing because Mortar would not have so agreed.

Judgment

12. Freedman J considered *Perry* and *Allied Maples* carefully. He held that the issue of what Mortar would have done was to be assessed on the loss of a chance basis notwithstanding the availability of Mr M's evidence at the trial. This was for the following reasons (at [176]):

    "(1) The distinction in case law is founded not on whether the Court has all the evidence that it requires, but upon a difference between what the Claimant proves about its conduct and the putative actions of a third party. […]

    (2) […] The reasoning cited from Lord Briggs in Perry indicates a pragmatism where it is impracticable to have a proof of all or nothing as opposed to a loss of a chance […];

    (3) There is an important distinction between the level of engagement of a third party and a party in litigation: only the latter has to give disclosure […];

    (4) If the distinction depended upon the third-party evidence having been provided, then it would follow that the same distinction should be made where the third party would be expected to have given evidence and did not: this would be very difficult to appraise."

13. The judge went on (at [198] to [199]) to assess Moda's lost chance of obtaining a share of the profits from the Angel Row Frontage as follows: (i) a 50% chance of obtaining a 65:35 split; (ii) a 30% chance of obtaining a 17.5:82.5 split; (iii) a 20% chance of the parties walking away from each other. This resulted in a recovery of 22.75% of the Angel Row Frontage profits, amounting to just over £221,000 (inclusive of interest).

Comment

14. This case illustrates well the problems that would arise if the balance of probabilities test were applied to the putative actions of a third party, even where that third party gives evidence. In particular, it was painfully apparent that Mr M did not have any interest in the outcome of this litigation and that his evidence did not greatly assist the court as a result. Freedman J observed the following (at [12]):

    "I found [Mr M's] evidence one of a person who was detached from the case as if he had no real involvement in the matters before the Court. He came across as a person who was rather irritated about having become involved in this dispute. I did not find him to be a particularly cooperative witness."

15. This was precisely what Stuart-Smith LJ feared in *Allied Maples*. He said this (at 1614F) regarding evidence which might be given by the third party in that case:

    "I have some doubt how helpful [such evidence] may prove to be because I suspect that [the third party] or [their solicitors] may well say that they cannot answer the hypothetical question, since it all depends on the perception of the strength of the other side's bargaining position and how strongly they felt on this point."

16. Mr M was being asked to answer questions which were purely hypothetical to him. He did not wish to be involved in the proceedings and provided only a witness summary initially, before receiving a witness summons from Gateleys. Further, as Freedman J recognised, the court had not been provided with full disclosure from Mortar because it was not a party to the proceedings.

17. The result was that the court could not rely on Mr M's evidence confidently in order to assess accurately what Mortar would have done absent negligence. The application of the all-or-nothing balance of probabilities test would have been likely therefore to produce an "absurd" outcome or, at least, injustice. Accordingly, it was appropriate for the court to assess the corresponding issue of causation (and therefore damages) using loss of a chance principles. That gave the judge full freedom to reflect the uncertainties in the evidence.

18. Conversely, there will be cases where there is evidence available which does direct the court clearly in one direction or the other. In such cases, the court can either make a full award of damages on the basis that the claimant has lost a 100% chance or, if it is shown that the lost chance was not "real or substantial," dismiss the claim. It is therefore possible to produce an all-or-nothing outcome in an appropriate case, by the application of loss of a chance principles. All will depend on the issues and evidence before the court. This is why Lord Briggs described the rule as "sensible, fair and practicable" in *Perry* (at [21]). It also explains why the evidence adduced at trial should not affect the test applied by the court.

19. Finally, it is also very difficult to see where the line would be drawn between the rule and the exception: precisely what evidence would a party have to adduce in order for a case to fall outside the ordinary loss of a chance assessment and into the balance of probabilities test? Would a single witness statement of the main protagonist for the third party suffice? Or would full disclosure be required, as if that entity were a party to the litigation?

Conclusion

20. This was a brave attempt to explore the limits of the law on loss of a chance. It is suggested, however, that the judge's decision was the correct one: it would not have been right to introduce an exception to the usual causation rules in loss of a chance cases where a third party has given evidence at trial. Such an exception would have been unprincipled and brought with it great uncertainty. In turn, it would have undermined the fair, bright-line rules of causation, so recently re-affirmed by the Supreme Court in *Perry*.

Jake Coleman
Hailsham Chambers, 29 May 2019