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Marino v FM Capital Partners Ltd [2020] EWCA Civ 245:

Credit Where Credit is Due?

Introduction

1. This is a significant decision about the circumstances in which a claimant will be required to give credit for a settlement achieved with one party in a multi-party claim against the remaining defendant(s).

2. It applies in the commonplace scenario where a claimant sues two (or more) defendants, alleging joint liability in one claim but also making a separate claim against one of them. If the claimant then settles against one defendant without making clear which heads of claim are being compromised, then the question arises as to whether, and if so, to what extent, the claimant should give credit for this settlement in the proceedings against the remaining defendant(s).

3. Although this issue is of obvious practical importance, *Marino* is the first case to consider it at appellate level in over 35 years.

Background

4. FM Capital Partners Ltd ("**FMCP**") managed investments on behalf of a Libyan sovereign wealth fund. Mr Marino and Mr Bessot were directors and shareholders of FMCP. Between 2009 and 2011, FMCP purchased US$240million-worth of structured financial products from the investment arm of Bank Julius Baer & Co ("**Bank Baer**"), which was initially operated by a Mr Ohmura. During that time, Mr Marino, Mr Bessot and Mr Ohmura each received substantial "introductory commissions" from Bank Baer via various intermediary companies in exotic jurisdictions. In 2014, FMCP therefore brought a claim against those three individuals alleging dishonest assistance, bribery and breach of fiduciary duty. FMCP claimed a total of US$83 million.

5. In February 2016, Mr Bessot settled all of FMCP's claims against him for US$2.8million. It appears the settlement was made on a global basis and did not contain any agreement as to how the monies should be apportioned between the various claims.

6. At a case management conference later in 2016, the claim was ordered to be tried in two phases. Phase 1 was to comprise all of the allegations involving Mr Ohmura. However, this included allegations made jointly against all three defendants (prior to Mr Bessot's settlement). Phase 2 was to comprise separate claims made against only Mr Marino and Mr Bessot (prior to his settlement). One of the reasons for the split was that unless Mr Marino was found to have significant undisclosed assets, it was unlikely he would be able to satisfy any judgment. It now appears improbable that the trial of the Phase 2 claims will take place.[1]

[1] *Marino* (CA), para.16

7. Following the trial of the Phase 1 claims, Cockerill J found that all three defendants had received bribes, holding Mr Marino and Mr Ohmura liable in dishonest assistance and in bribery.[2] Importantly, FMCP opted for restitution and an account of profits from Mr Marino,[3] which the judge calculated at approximately US$17.5million. FMCP also obtained judgment for about US$16million from Mr Ohmura. FMCP then elected to apply 83% of its $2.8million recovery from Mr Bessot to the (as yet un-tried) Phase 2 claims, so that Mr Marino and Mr Ohmura's liabilities under the Phase 1 claims were reduced only slightly. Cockerill J accepted that allocation of recoveries by (i) applying the approach taken by Evans-Lombe J in *Barings Plc v Coopers & Lybrand*,[4] and by Eder J in *Otkritie International Investment Management Ltd v Urumov*,[5] namely considering whether such allocation was "obviously unsustainable" and (ii) finding that the Phase 2 claims were not in fact "obviously unsustainable."

8. Mr Marino challenged both aspects of Cockerill J's decision on appeal, contending that the whole of the recovery from Mr Bessot should be applied to the Phase 1 claims, in order to reduce his liability substantially.

Judgment

9. The appeal was dismissed. A substantial part of the Court of Appeal's unanimous reasoning is devoted to its conclusion that, in the context of a claim for restitution of bribe monies, a defendant's liability will not be reduced by reference to sums received from another defendant.

10. However, the Court's findings regarding the allocation of recoveries are likely to be of greater practical significance, particularly given the dearth of recent appellate authority on the issue. Here, the Court drew a distinction between two types of case, according to the extent of the trial judge's knowledge of the settled claim:

    a. In cases where a trial judge is able to assess the strength of the claims that have been settled because of the nature of the evidence heard in the trial, the judge would be entitled to form a view regarding allocation. This might require the settled claims to have been "sustainable on the facts and in law" and to "have been likely to succeed at a trial" (see e.g. *Glenn v Watson*);[6]

    b. Conversely, in claims where the judge was not able to assess the strength of the settled claims, all the claimant needs to show is that the apportionment is not "obviously unsustainable".[7] This reflects wider policy considerations favouring the encouragement of compromise even where a claim is unfounded and worthless.

[2] *Marino* (CA), para.17
[3] *Marino* (CA), para.20
[4] [2003] PNLR 34
[5] [2014] EWHC 755 (Comm)
[6] [2018] EWHC 2016 (Ch) and *Marino* (CA), paras.64 to 69
[7] *Marino* (CA), para.73

It would be a disincentive to settlement if claimants were still required to prove the strength of settled claims.[8]

11. On the facts of the case, the Court found that that the trial judge's finding that she could not assess the strength of the settled claims was correct, as evidence regarding the Phase 2 claims had been excluded from the Phase 1 trial.[9] Accordingly, it found that Cockerill J had been correct to apply the "obviously unsustainable" test. The Court also upheld her finding that the Phase 2 claims were not obviously unsustainable.

Discussion

12. This decision provides welcome clarity. Earlier appellate authority had held that the evidential burden lay on the claimant to establish that sums received by way of a settlement related to the several claim rather than the joint claim: see *Townsend v Stone Toms & Partners*.[10] However, in *Barings* and *Otkritie*, experienced High Court judges had declined to follow *Townsend*, opting instead for the "obviously unsustainable" test. In *Glenn*, Nugee J had said: *"I have great difficulty in seeing how [Evans-Lombe J's analysis in Barings] is reconcilable with what the Court of Appeal said in Townsend."* [11] The Court of Appeal's decision in *Marino* now gives the "obviously unsustainable" test appellate support.

13. However, some uncertainty remains as to when the Court will apply the differing tests. Given that, by definition, the Court will not be conducting a trial on the settled claims, when will it have sufficient evidence to move from the "obviously unsustainable" test to that of whether the settled claim "would have been likely to succeed at trial"? This will, of course, be a highly fact-sensitive question.

14. The option which provides most certainty for claimants would be to record in the settlement agreement with the settling defendant to which heads of loss the settlement sum will be allocated. This approach was originally set down by Oliver LJ in *Townsend.* In *Marino*, the Court of Appeal confirmed that this will be conclusive absent evidence of collusion or a lack of good faith. In practice, however, defendants who are settling are unlikely to consider that it would be in their interests to admit publicly that they are jointly liable to the claimant, as this may place them at risk of contribution proceedings from the remaining defendant(s).

15. The alternative option for claimants will be to stay silent in any settlement agreement on the basis that the settling claimant will get the benefit of the doubt on apportionment, unless its contentions are "obviously unsustainable". This requires confidence that a Court would not be able to form a view as to the strength of the settled claims at an eventual trial with the remaining defendant(s).

16. In our view, a claimant who settles close to trial with some but not all of the defendants on a global basis may be vulnerable to attempts by the non-settling defendant(s) to

[8] *Marino* (CA), para.70
[9] *Marino* (CA), para.72
[10] (1984) 27 BLR 26
[11] Ibid, at para.579

attribute the settlement monies in its favour, whereas a claimant who reaches a similar settlement at an early stage should not be. In practice, it seems to us that the Court is unlikely to conclude it has the requisite evidence to determine the strength of the settled claim at least until after disclosure, and most probably following the service of evidence of fact. Nevertheless, solicitors acting in multi-party litigation where some but not all of claims settle will wish to keep these matters in mind.

Heather McMahon and Jake Coleman

Hailsham Chambers

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