PERCY v MERRIMAN WHITE and DAVID MAYALL

This is an insightful decision on contribution claims, for anyone involved in professional negligence claims or litigation more broadly.

The Chief Insolvency and Companies Court Judge Briggs found a barrister liable for 40% of the settlement agreement reached between a firm of solicitors and their former client, where the barrister had advised on strategy from the outset of the failed litigation.

The background facts

Mr Percy had engaged MW and Mr Mayall to advise him in litigation including a derivative claim against his former business partner, rather than applying to wind up their joint venture company. In a mediation, Mr Percy was offered the sum of £500,000 to settle his derivative claims. Mr Mayall advised in conference shortly afterwards but did not give clear advice to accept the offer. Mr Percy was denied permission for the derivative claim against the joint venture company at a permission hearing before Mr Donaldson QC sitting as a Deputy High Court Judge.

Mr Percy made a claim against Merriman White ("MW"), his former solicitors, and Mr Mayall, his former barrister, for negligent advice during the course of the failed litigation. By the time of trial, MW had settled the claim brought by Mr Percy and the only claim which remained was MW's contribution claim against Mr Mayall.

Could Mr Mayall raise a collateral defence to argue that he was not liable for the same damage?

Judge Briggs held that MW, a firm of solicitors, did not have to prove that they would have been liable to Mr Percy in order to bring their contribution claim pursuant to the Civil Liability (Contribution) Act 1978, following *WH Newson Holding Limited v IMI Plc & Delta Limited* [2016] EWCA Civ 773. In that case Sir Colin Rimer held that the premise of a contribution claim based on section 1(4) of the 1978 Act was that there has been a bona fide settlement between the claimant and the defendant where there has been a payment from the defendant to the claimant. The central feature of section 1(4) is that in any such claim there will be no question, and therefore no inquiry, as to whether or not the defendant was in fact liable to the claimant.

All the defendant needs to show is that such factual basis would have disclosed a reasonable cause of action against the defendant such as to make him liable in law to the claimant in respect of that damage. If he can do that, he will be entitled to seek contribution in respect of that liability.

Judge Briggs in following *Newson* held that MW was entitled to a contribution from Mr Mayall whether or not MW was in fact liable [para 76]. The court need not test the facts that Mr Percy asserted to support his claim against MW and led to the compromise. The task for the court was to determine if the claim made by Mr Percy disclosed a reasonable cause of action against MW such as to make MW liable in law.

Mr Mayall asserted that he was not liable to MW because MW would have had a complete defence to Mr Percy's claim due to the "no reflective loss" principle. The "no reflective loss" principle generally prohibits claims being brought by shareholders as a result of actionable loss suffered by their company. One example of where the "no reflective loss" principle did not apply, as stated by Lord Reed in the leading authority of *Marex Financial Ltd v Sevilleja* [2020] 3 WLR 255, was for a claim made by a person who is a shareholder and a creditor, which is not barred as reflective loss.

Judge Briggs found that this defence failed on three grounds. First, the judge considered whether the argument that Mr Percy was seeking to recover for "reflective loss" was a collateral defence which MW might have had to his claim. In *Newson,* the Court of Appeal held that such a limitation defence was a collateral defence that could not be raised as a defence to a contribution claim pursuant to section 1(4) of the 1978 Act. This constituted an investigation into whether or not the person bringing the contribution claim was actually liable to the original claimant. Similarly, in this case, Judge Briggs held that Mr Mayall was unable to avail himself of a "collateral defence" because no factual assumptions may be made in respect of the asserted defence of the "no reflective loss" principle.

Second, Judge Briggs continued to say that if he were wrong and "collateral defences" were available to Mr Mayall, the defence of "no reflective loss" would have failed in any event. Primarily, Mr Percy was a shareholder-creditor and so was not barred from bringing the claim by the "no reflective loss" principle. Secondly, Mr Percy's loss arising out of the engagement of MW and Mr Mayall to "protect his interests" was distinct from the loss suffered by the company. Mr Percy on the assumed facts had a reasonable cause of action against MW for a variety of reasons (including that he had engaged MW in his own name). On this basis, the

argument that Mr Mayall was not responsible for the "same damage" failed in law and on the facts. The damage suffered by Mr Percy arose from the failure to protect his interests.

Other failed defences to the contribution claim

Mr Mayall also asked the court to go behind the judgment of Mr Donaldson QC (which was not appealed) and find that he was not negligent because Mr Percy's claims should have been permitted to succeed. He also suggested that any failures of his did not cause loss. Unsurprisingly, both of these arguments were given short shrift.

Assessment of contribution

The assessment of contribution is a particularly important section of the judgment for practitioners because it highlights the types of factors that are relevant to apportionment [paras 101 to 110].

When considering the attribution of responsibility for the loss and damage suffered by Mr Percy, Judge Briggs found [at para 102] that the responsibility fell more on the shoulders of MW than Mr Mayall because:

a) Prior to Mr Mayall's instruction, there had been an offer to settle the dispute, but MW had failed to critically analyse the vast sums sought by Mr Percy and had failed to provide informed advice as to the merits of accepting the offer [para 103].

b) The responsibility for a failure to accept the offer of £500,000 made at mediation rested with MW because Mr Mayall was not present, nor did he participate in the mediation. The offer was rejected without reference to him.

c) MW was not entitled to take the advice provided by Mr Mayall to "press on with the proceedings" at face value. It was incumbent on the legal team to warn that the proceedings would come to an end, taking away any reasonable leverage at the negotiating table, if the court were to refuse permission to continue. MW failed to provide a clear warning that the court would look at the merits of the application from the company's point of view (*Jessni v Westrip Holdings Ltd*).

Mr Mayall bore some of the responsibility because:

a) He failed to properly analyse the options available to Mr Percy in pursuing the dispute including winding up and arbitration.

b) He failed to advise on the derivative claim, not only from the shareholder's point of view but also from the perspective of the company. The court needs to be convinced that it is right for the company to indemnify the costs of the action, and it asks at the permission stage whether no director acting in accordance with his statutory duties under section 172 of the Companies Act 2006 would seek to continue the claim. He needed to take full account of the company's position.

c) Mr Mayall conceded he was aware of the offer of £500,000 when giving advice in conference prior to the final permission hearing. He had to bear some of the responsibility for failing to advise that the offer should be revisited when advising about a range of acceptable offers. There was a reasonable prospect that an offer would be available. As he was instructed to advise whether to continue with the proceedings and generally, the offer made at mediation should not have been left out of account. There was sufficient time to reflect (and gain information regarding the costs position) and provide valuable informed advice, unlike in *Moy v Pettman Smith* [2015] UKH 7 where the barrister had to give advice at the court door.

d) Mr Mayall advised to "press on with the proceedings". MW was entitled to defer to Mr Mayall for an assessment of the legal merits of "pressing on". The responsibility for taking the case to a hearing lay predominantly with Mr Mayall.

Taking into account all the factors above, Judge Briggs held that MW was entitled to a contribution at 40% of the settlement sum, because Mr Mayall was liable for the "same damage".

Conclusion

This judgment is authority for the proposition that it will rarely (if ever) be possible to assert the rule against recovery of reflective loss as a defence to a contribution claim because this is

classed as a collateral defence. The correct enquiry of the court is whether there was a bona fide settlement between the original claimant and the defendant which brings the contribution claim, not whether the claim would have succeeded.

The decision is also of wider application. It is rare to see a contribution claim arising out of professional negligence proceedings, and this will provide important guidance as to factors which may affect the contribution between solicitors and barristers, as well as other types of professionals.

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