Neutral Citation Number: [2016] EWCA Civ 1203
Case No: A3/2016/2285

IN THE COURT OF APPEAL (QUEEN'S BENCH DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
(HIS HONOUR JUDGE KAYE QC)

Royal Courts of Justice
Strand
London, WC2A 2LL
16 November 2016

B e f o r e :

LORD JUSTICE BRIGGS
Between:

Between:

KLENK AND OTHERS	**Applicants**
and	
THE BETESH PARTNERSHIP SOLICITORS AND ANOTHER	**Respondents**

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Mr Ben Hubble QC and Mr R Chapman (instructed by Ozon Solicitors Ltd) appeared on behalf of the Applicants
The Respondents did not appear and were not represented

HTML VERSION OF JUDGMENT APPROVED

LORD JUSTICE BRIGGS:

1. This is an appeal from a case management decision of His Honour Judge Kaye sitting as a judge of the High Court in the Chancery Division and made by order of 20 May of this year. By his order he gave permission to Mr Klenk and I think 64 others in multi-party litigation to amend their particulars of claim and ordered that the Betesh Partners Solicitors and its senior partner, Mr Michael Hewitt, who are the first and second defendants, should pay the claimants costs of the application for permission.

2. The defendants were refused permission to appeal by Kitchin LJ and this is their oral application by way of renewal for permission to appeal, and I have been assisted by receiving both written and helpful oral submissions by Mr Hubble QC for the appellants, who did not, I make it clear, appear in the court below.

3. The factual background needs a little explanation. In 2006 a company called Denison Limited decided to set up a scheme under which it would purchase the freehold of the Rivelyn Hotel in Scarborough and sell long leases of the hotel bedrooms to individual purchasers. Purchasers paid a staggered price depending on the size of the room to which their particular leasehold related. In return they would receive an income share representing a share of the income stream from their bedroom minus VAT and a management fee. In January 2007 the bedrooms were marketed through a property association, a members-only property agency which negotiates discounts on properties on behalf of their members in return for a fee. The most up-to-date marketing material sent out by the association stated the scheme had a guaranteed yield of, I think, 12 per cent on the initial purchase price of the bedrooms for the first six years and was accompanied by a valuation provided by a Mr Claude Elmer.

4. The claimants, who were all on the property association's mailing list, expressed interest in the scheme. The first defendant was appointed by the property association to act on the claimant's behalf in respect of conveyancing. Accordingly, the property association sent the second defendant a copy of the marketing material and valuation and in due course the second defendant, Michael Hewitt, came through the report on titles as well as a draft lease and management agreements.

5. By mid-2007 all the claimants had purchased bedrooms in the hotel for an alleged aggregate sum of some £2.9 million, and at some point in that same year Denison purchased the hotel. The date of the purchase and the sum paid are matters of dispute between the parties. In October 2009 Denison sold the freehold of the hotel to a company called Scarborough Hotel Ltd and the hotel closed in 2010. In 2011 the claimants collectively purchased the hotel through a company called the Rivelyn Owners Management Company Ltd ("ROMC") of which they were all equal shareholders. On 19 June 2013 ROMC sold the hotel for £1,750,000 and the net proceeds of sale were distributed back to the claimants. They obviously got very much less back than their original investments.

6. In 2015 the claimants commenced proceedings for breach of contract and negligent breach of professional duty, alleging that the defendants had failed to advise them sufficiently or at all on a number of issues which seriously impacted on the advisability, to use a neutral term, of the hotel scheme. In accordance with directions by Master Cousins in March 2016, eight of the claimants' claims proceeded as illustrative test cases and the matter was listed for trial before His Honour Judge Kaye.

7. On the first day of the trial the judge himself raised the issue whether the hotel scheme was an unregulated collective investment scheme under section 235 of the Financial Services and Markets Act ("FSMA") and therefore potentially unlawful. The claimants, who had not hitherto raised the issue, sought permission to amend their pleadings to add the allegation that the defendants negligently, or in breach of their retainer, failed to advise the claimants that the scheme might be a collective investment scheme, the allegation being that had they been so advised the claimants would have not have gone ahead with their investments.

8. By the time the application for permission to amend was first ventilated, two witnesses had been called on the first day of the trial. There was then a ten day adjournment to enable the application to be prepared and the defendants to formulate a response to the application for permission to amend. That all came back before His Honour Judge Kaye on 20 May 2016, by which time, I think it is common ground, the trial could not then have continued, whether permission to amend was given or refused. The trial period had been lost because of the grant of the ten day period during which the parties were both to formulate and consider a response for the application for permission to amend.

9. At the hearing on 20 May it was common ground that section 35 of the Limitation Act and CPR 17.4(ii) required the judge to consider three questions, namely (1) whether the allegation introduced by the proposed amendment was a new claim; (2) if it was a new claim whether it arose out of the same or substantially the same facts as the original claim; and (3) if either of the allegations did not amount to a new claim, or did amount to a new claim

but on the same or substantially the same facts, whether the court should exercise its discretion to allow the amendment.

10. By his decision the judge allowed the application and under those three headings held first that in his view the amended particulars were no more than particulars of a single cause of action in negligence and not therefore a new claim. Secondly, even if they were a new claim, they arose out of the same or substantially facts as the original claim, which he described as the purchase of bedrooms in a hotel in Scarborough on long leases. But he excepted a suggestion that in operating the scheme Denison may have committed a criminal offence and did not give permission to amend that particular allegation.

11. Thirdly, the judge concluded that it was appropriate for him to exercise his discretion in allowing this very late amendment. In his view, it was particularly relevant firstly that the defendants had realistically accepted that the allegation, if permitted, had a real prospect of success on its merits; secondly, that the issue as to collective investment scheme had been raised by the court itself at the very beginning of the trial; and, thirdly, that the case was a test case with wider proceedings involving a substantial number of claimants who might feel that injustice was being done if they were not allowed fully to state their case.

12. The appellants'notice raises three grounds. Firstly, that the judge was wrong about whether this raised a new cause of action; secondly, that the cause of action did not arise out of the same or substantially the same facts as the original claim; and thirdly, that if the court's discretion was engaged at all the judge had erred in exercising it in the claimants'favour, in particular by failing to give sufficient weight to the absence of any good reasons for, and the waste of resources caused by, the late application and the consequential loss of the trial date. By contrast it was suggested that the judge gave too much weight to the fact that the allegation arose out of his intervention, and to the status of the claims as test cases.

13. As I have said, Kitchin LJ refused permission to appeal. He considered that even if the amendment constituted a new claim it clearly arose out the same or substantially the same facts as already in issue, so that there was no real prospect of success on ground 2. In relation to ground 3 Kitchin LJ concluded that the judge's decision was within his case management discretion and disclosed no error of principle, irrationality or taking into account irrelevant matters.

14. Mr Hubble, who, as I say, has helpfully appeared this morning, has emphasised, under the heading of whether the claim arises out of substantially the same facts, the point that although the main facts about the scheme were already deployed in the proceedings, there would be a quite different focus on particular facts about the scheme for the purpose of testing whether it was a collective investment scheme and that each claim would involve new facts, namely whether the promoter of Denison was an authorised person under the Act and whether, alternatively, the relevant claimant was a high net worth individual who would have no claims or complaints arising out of the fact that it was an unauthorised collective investment scheme.

15. As to discretion, Mr Hubble sensibly acknowledged that the judge was taken to and referred in his judgment to the relevant recent cases on the discretion to permit very late amendments and in particular the *Swain-Mason v Mills & Reeve* case and the recent helpful summary of the principles by Carr J in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), but he failed to apply them. He briefly sought to make good the points made in the notice of appeal that too little weight had been given to the absence of a good explanation for the lateness of the amendment and, although the judge was right to acknowledge that the trial had already gone off by the time the application for permission to amend was considered, nonetheless it was the making of the application, or the wish to make the application, that had caused the loss of the trial and that therefore the claimants should be punished for having lost the trial date in that way so as to discourage others from seeking to make late amendments of a similar type at trial.

16. I should add that in a respondent's written statement I was told that the defendants'professional indemnity insurers are now insolvent and in liquidation and that there is a real risk, which Mr Hubble confirmed, that the Financial Services Compensation Scheme might not be available in lieu of insurance cover, depending upon the relevant turnover of the defendant firm at the material time.

17. In my judgment, I should refuse this application. The question is whether a real prospect of success is disclosed or whether there is some other compelling reason for giving permission to appeal. I consider I should refuse it for substantially the same reasons as were given by Kitchin LJ.

18. As to the question whether the claim did or did not amount to a new claim for the purpose of section 35, I propose to say nothing save to note that if that was the critical issue I might have concluded that there was a real prospect of success that it did. But the critical issue is whether, if it did and if it was therefore a new claim, it arose out of the same, or substantially the same, facts as those pleaded in the original particulars of claim.

19. It seems to me, although the judge may be criticised for having put the question at a very high level of generality, (namely it all arose out the investment in bedrooms in a Scarborough hotel), in reality there is an almost complete factual overlap between the new claim, if it is a new claim, and the existing claim. The existing claim required there to be a fairly intense focus on the details of the scheme for determining whether the defendant solicitors had been negligent for failing to point out its lack of commerciality to their clients. The same detailed focus on the scheme would be necessary for the different purpose of deciding whether the detailed and sometimes difficult to construe provisions of section 235 of FSMA were applicable in relation to it, but it would be the same underlying facts about the details of the scheme that the court would have to be looking at. The supposed new facts, namely whether Denison was a regulated person under the Act and the question whether each claimant was a high net worth individual, seem to me to come very much at the periphery of the factual matrix out of which the two claims, if indeed they are separate claims, have emerged.

20. So in my view, the judge, although he may have expressed the test at an excessively high level of generality, nonetheless clearly got the right answer. The question for the court on a full appeal would not be whether the judge's chosen level of generality was correct but whether he had reached the right conclusion. In my judgment, there is no real prospect of showing otherwise than that he did. I would add that, if the question was finely balanced, it was a question which has an element of multi-factorial balancing in it, in relation to which the judge as the trial judge and who had already done the pre-reading for the trial, was very well placed to express and conclude as to the correct conclusion.

21. As for discretion, as Mr Hubble has acknowledged, there is no doubt that the judge was referred to and cited the relevant cases in which the discretionary considerations for giving permission for very late amendments is set out. He was plainly aware that this was one of those very late proposed amendments which had already wrecked the trial, albeit that the question whether to give permission or to refuse permission would do no further damage in that respect than had already been done.

22. It is axiomatic that this court is very reluctant to interfere with case management discretions by experienced judges, as this judge undoubtedly was, who should be, as far as sensibly possible, permitted to case manage their cases in accordance with their own discretion and their perceptions of the rights and wrongs or the justices and injustices of the matter in a way that furthers all aspects of the overriding objective.

23. It seems to me that it cannot be said that the judge omitted at all to consider and weigh in the balance any relevant factor. He plainly took into account the fact that there was no good explanation for the delay, save only for the slight mitigation that he raised the point rather than the party keeping it up his sleeve while knowing about it.

24. Mr Hubble does not suggest that it was irrelevant that this was a test case or irrelevant that the judge had raised the matter or irrelevant that the defendants had realistically conceded that, if allowed, the amendment stood a realistic prospect of success. Ultimately the complaint comes down to a dissatisfaction with the weight which the judge applied to the various considerations which he identified. But in the exercise of discretion, questions of weight are pre-eminently questions for the first instance judge and particularly in a case management context, so that it seems to me that there is no real prospect that a full court would decide to allow the appeal on the discretionary ground even if, as not infrequently happens, the full court might itself have taken a different view if it had been vested with the discretion itself.

25. The question for the appeal court in a situation of this kind is not whether the judge got it right or not but whether the judge's conclusion, it being a matter for him, fell within the broad ambit of the discretion conferred or whether it was undermined by the omission of relevant factors, the inclusion of irrelevant factors or a decision so obviously outwith the bounds of the discretion that it could properly be described as irrational. In my view, there is no real prospect that that would be established in this case. So for all those reasons, and notwithstanding Mr Hubble's valiant submissions, I refuse permission to appeal.

Order: Application refused