Neutral Citation Number: [2020] EWHC 189 (Ch)

Case No: CH-2019-000134

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION (APPEALS)
On appeal from the order of Master Teverson dated 29 April 2019

The Rolls Building
Fetter Lane, London, EC4 1NL

Date: 07/02/2020

Before :

HIS HONOUR JUDGE JARMAN QC

- -

Between :

LILLO SCIORTINO	**Appellant**
- and -	
MARC BEAUMONT	**Respondent**

- -
- -

Mr Alexander Hill-Smith (instructed by **Osmond & Osmond Solicitors**) for the **claimant**
Mr Nicholas Davidson QC (instructed by **Clyde & Co**) for the **defendant**

Hearing date: 15 January 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

HIS HONOUR JUDGE JARMAN QC

JUDGE JARMAN QC :

1. For ease of reference I shall refer to the parties to this appeal as claimant and defendant respectively, as they are in the claim. By a claim form issued on 25 October 2017, the claimant alleges that the defendant, a barrister, was negligent in representing him in bankruptcy proceedings in 2011. One of the allegations is that the defendant's written advice dated 26 October 2011 that a proposed appeal by the claimant had a good (55% to 60%) chance of success was negligent as it is alleged that such an appeal was hopeless. The subsequent application for permission to appeal was dismissed, which led to an increase in the amount payable to discharge the bankruptcy. On 29 April 2019, Master Teverson struck out this allegation on the basis that it was statute barred, as although the advice was given within six years of the issue of the claim, the master took the view that it was merely confirmatory of advice given in May and earlier in October 2011.

2. The claimant accepts that any claim in respect of those earlier advices is statute barred, but now appeals against the striking out, and says that it is arguable that the 26 October 2011 advice gave rise to a new and separate cause of action and should be permitted to proceed to trial. The defendant has filed a respondent's notice, seeking to support the strike out on the alternative basis that even apart from the limitation point, the allegation that no reasonably competent barrister would have given such advice has no real prospect of success. The master did not strike out the allegation on this basis, saying that that issue was not purely about the merits of a legal argument, but about the appropriateness of the advice in context.

3. The background is that the claimant was made bankrupt in June 2007 on a petition by HMRC. At the time he owned his home in Woodham Lane, New Haw, Surrey (the property). In June 2010 the trustee in bankruptcy applied for possession and sale of that property.

4. Section 283A of the Insolvency Act 1986 (the 1986 Act) requires that such applications in respect of the bankrupt's principal dwelling are made within a reasonable timescale. The relevant provisions are as follows:

> "(1) This section applies where a property comprised in the bankrupt's estate consists of an interest in a dwelling house which at the date of the bankruptcy was the sole or principal residence of –(a) the bankrupt…
>
> (2) At the end of the period of three years beginning with the date of the bankruptcy the interest mentioned in subsection (1) shall -
>
> > (a) cease to be comprised in the bankrupt's estate, and
> >
> > (b) vest in the bankrupt (without conveyance, assignment or transfer).
>
> (3) Subsection (2) shall not apply if during the period mentioned in that subsection –

(a) the trustee realises the interest mentioned in subsection (1),

(b) the trustee applies for an order for sale in respect of the dwelling house,

(c) the trustee applies for an order for possession of the dwelling house,

…

(4) Where an application of a kind described in subsection (3)(b) to (d) is made during the period mentioned in subsection (2) and is dismissed, unless the court orders otherwise the interest to which the application relates shall on the dismissal of the application –

(a) cease to be comprised in the bankrupt's estate, and

(b) vest in the bankrupt (without conveyance, assignment or transfer).

…

(6) The court may substitute for the period of three years mentioned in subsection (2) a longer period –

(a) in prescribed circumstances, and

(b) in such other circumstances as the court thinks appropriate."

5. The trustee's application was listed before District Judge Stewart on 19 July 2010. On 6 July, the trustee's solicitors wrote to the court saying that both parties had agreed that the application should be adjourned because the claimant was challenging the HMRC debt. They requested that the hearing should be vacated. Due to an oversight, a copy of that letter was not put before the district judge before the application was called on. The district judge ordered that the application be "…hereby struck out upon the non-attendance of the parties."

6. Upon being served with that order, the trustee's solicitors wrote again to the court on 22 July referring to their earlier letter. District Judge Stewart was made aware of this correspondence, and on 29 July 2010 made a further order as follows:

"1. The hearing on 19 July 2010 be vacated.

2. The order made on 19 July is set aside.

3. The matter be relisted on …11 October 2010…"

7. The application was not heard until 7 March 2011, by which time a further insolvency practitioner had been appointed as joint trustee. The application was successful and an order for possession and sale of the property was made. The claimant, who until then

had not been represented by lawyers, instructed a solicitor, Rachel Bastin, at Kingston and Richmond Law Centre. She applied for legal aid to instruct a barrister, which was granted by the Legal Services Commission (LSC) on an emergency basis with a cost limitation on 7 April 2011. She then arranged a conference with the defendant on 20 April 2011.

8. In that conference, of which there is full attendance note, the defendant said that he thought the order made on 19 July 2010 was caught by section 283A (4), and that upon striking out, the property vested in the claimant. He considered the 29 July 2010 order but pointed out that at no stage had the court said that the property was not to re-vest in the claimant. The defendant also said that an appeal against the March 2011 order was out of time, but that an application could be made to extend time. He said that if the trustee fought the appeal and it was lost, then the equity in the property would be eroded away, but that an appeal could be launched, and the parties could then negotiate. There was discussion that the trustee's own costs were over £20,000 plus solicitor's costs, and about what sort of offers should be made and how the claimant could raise the money. It was agreed that there would be an immediate application for permission to appeal, which the defendant would draft. The defendant said a fight would be risky, but it was winnable.

9. By email dated 4 May, the defendant informed Ms Bastin that he had settled the papers for an appeal, including a skeleton argument. In the email, the defendant said this:

> "I have now settled the papers for an appeal. This raises a novel point of law. It has reasonable prospects of success in my view. However, the other side will fight this appeal. They will be upset by it. I strongly advise that we try to settle with them."

10. He asked for breakdowns of costs and a figure which the claimant could raise. He ended the email as follows:

> "Please remember that if we fight this case and do not succeed, there is a real risk that this will drive up the costs of the bankruptcy and that the Trustee will seek to get a costs order enforced against the proceeds of the sale of the house. The best time to settle this case is if and when permission to appeal is granted."

11. On 23 May 2011 Ms Bastin wrote to the claimant to confirm the advice given in conference, in which she repeated that the defendant had referred to the litigation risk, although an appeal was winnable, and had encouraged the claimant to do a deal.

12. The application for an extension of time came before Vos J, as he then was, who considered that matter on the papers and granted the extension on 14 July 2011. He listed the application for permission to appeal for a hearing and gave directions for the trustees to file evidence. He stayed the order of March 2011 pending the determination of the appeal. In his written reasons he said this:

> "The points made in the Appellant's skeleton argument require a detailed response and explanation from the Respondent. In particular, the Respondent must explain (a) why his solicitors did not apparently contemporaneously copy to the Appellant their letters dated 22nd and 27th July 2010 to the Court, and (b) why they did not think it appropriate to draw the significance of section 283A(4) of the Insolvency Act 1986 to the attention of the Appellant before the hearing on 7th March 2011, bearing in mind that he was acting in person.
>
> The stay is appropriate since there appears, in the absence of an explanation from the Respondent, to be a properly arguable point to found the appeal.
>
> I have not granted permission to appeal at this stage in case there is some answer to the Appellant's point, either in fact or law, that does not appear from the materials placed before the court by the Appellant. In particular, I can see that it may be arguable that it was open to the District Judge to withdraw his order of [19th] July 2010, and that the effect of his doing so was to reverse the effect of section 283A(4). This will, if the Respondent wishes, need to be argued at the hearing."

13. In September 2011 a respondent's notice was served in which the trustees stated that the March 2011 order should be upheld, but alternatively asked the court to review the order of 19 July 2010 under section 375(1) of the 1986 Act. That provides:

> "Every court having jurisdiction for the purposes of the Parts in this Group may review, rescind or vary any order made by it in the exercise of that jurisdiction."

14. Both trustees, pursuant to the directions of Vos J, filed a witness statement, together with a witness statement from their solicitor. Copies of these and the respondents' notice were forwarded to the defendant.

15. By letter dated 28 September 2011, the LSC notified the claimant that the cost limitation on his certificate had been raised to allow legal representation at the permission hearing. The next day Ms Bastin emailed the defendant saying that she would send the respondent's notice to him and asked him for a fee estimate for the permission hearing "together with a short advice for Legal Aid purposes." Later that day she emailed again saying that she was waiting for a response regarding the settlement money which the claimant had available. Accordingly, it appears that at this point there had been no significant progress with negotiations.

16. The defendant replied on 19 October as follows:

> "I have read the so-called Respondent's Notice. I do not see it is any such thing. The evidence seems to me to be inadmissible on appeal. There is no application to adduce it. Say nothing about that please. Plainly the appeal has merit of, I think, 60 per cent prospects."

17. On 26 October, the defendant emailed Ms Bastin to say that she needed to extend further the limit on the LSC certificate. Ms Bastin replied as follows:

> "I think I will need a short advice on merits from the LSC – without it I don't think they will agree to a further extension. I will also need to know your fee for prep/ the hearing in Nov."

18. The defendant replied that he was doing the advice that day. That afternoon he emailed again saying "urgent advice herewith" and attaching a copy. It ran to 28 paragraphs in which the defendant set out the history of matter. He expressed the view that the 19 July 2010 order engaged section 283A (4) and the property was vested in the appellant. The court did not subsequently order otherwise so that position was not reversed by the order of 29 July 2010. Ms Bastin faxed a copy of the advice to the LSC and the further extension of the cost limit was obtained.

19. The permission hearing took place before Mr Mark Cawson QC sitting as a deputy judge of the Chancery Division on 15 November 2011, when the claimant was represented by the defendant, and the trustees were also represented by counsel. The judge refused permission to appeal, and the essence of his reasoning is set out in paragraphs 47 and 48 of his judgment as follows:

> "In the circumstances, indeed it is difficult to see what conceivable basis the bankrupt could have had for resisting the making of the order of 29th July 2010. There had been a plain error given that the letter of 6th July had not got onto the court file. The purpose of the adjournment sought was to assist the bankrupt in order to pursue his dispute with HMRC. It seems to me that it would have been a grave injustice if the order made by mistake on 19th July had not been set aside.
>
> I turn then to consider the effect of the order of 29th July and it seems to me that the order of 29th July was plainly intended to be retrospective. In other words the District Judge was plainly intending that the order of 19th July 2010 should be treated as never having been made. One will never know whether the District Judge specifically had in mind section 283A(4) and the potential effect of that section, although there must be all likelihood that he did, bearing in mind that it had been referred to in the correspondence that he would have had before him."

20. Thereafter, the defendant advised that there were clear grounds to set aside the March 2011 order on an application under section 375 of the 1986 Act and legal aid was granted to make such an application which was made in December 2011, but eventually dismissed in October 2012. In February 2013 the trustees gave notice of their intention to a apply for a warrant of execution, and the claimant after obtaining a stay of execution eventually handed over the keys to the property which was sold in November 2013.

21. As the defendant had warned, the refusal of permission had the effect of substantially diminishing the amount available to the claimant out of the proceeds of sale of the property, because the trustees' costs of the appeal were deducted from them.

22. This claim was eventually issued, and the particulars of claim dealt with the 26 October 2011 advice at paragraph 68 as follows:

> "The Defendant was in breach of duty and negligent in advising on 26 October 2011 that the section 283A application should be pursued and that it had a good (55% to 60%) and/or advising in his email advice of 4 May 2011 that it had reasonable prospects of success…"

23. Eight particulars are then set out, including that the appeal was hopeless, that the order of 19 July 2010 had been set aside and that there was no need for any re-vesting in the order of 29 July 2010, or if there was then it could be done retrospectively. It was also said that the defendant should have advised not to bring an appeal but instead to try and negotiate and/or to apply to the court to reduce the figure given as the amount required to discharge bankruptcy liabilities, and that there was no alternative to a sale of the property as the claimant could not raise sufficient monies to pay the amount needed to discharge the bankruptcy.

24. That was responded to in the defence by saying that any claim for losses incurred as a result of such advice is barred by section 2 of the Limitation Act 1980. The section provides that an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. In the reply, it is admitted that the cause of action in respect of the email of 4 May 2011 is barred by that provision, but pleaded that the advice of 26 October 2011 was given within the six year period prior to the issue of the claim form and is not so barred.

25. In rejecting that latter argument and concluding that the claim under paragraph 68 of the particulars is so barred and fell to be dismissed, Master Teverson set out his reasoning in paragraphs 51 to 56 of his judgement as follows:

> "It is in my view not possible in the context of the allegations of breach of duty and negligence pleaded under paragraph 68 to treat the written advice given on 26 October 2011 by the Defendant as a new and supervening act or omission giving rise to a new cause of action. On the Claimant's case, the advice was part of the same wrongful acts on the part of the Defendant. The test is not whether the advice was an independent piece of work for which a duty of care was owed. It is whether it gave rise to a new cause and separate of action. In my view it was part and parcel of the same cause of action and that is how it is pleaded.
>
> It is in my view significant that in paragraph 68 the allegation of breach of duty and negligence is pleaded both by reference to the written advice on 26 October 2011 and with reference to the email advice of 4 May 2011. That email coincided with the settling of the papers for appeal by the Defendant and accompanied the draft documents. It is in the context of the advice to bring the appeal that the breaches of duty and allegations of negligence under paragraph 68 are framed. This appears most clearly from the underlined parts of sub-

> paragraphs (vi), (vii) and (viii). By the time of the written advice on 26 October 2011, the appeal had been served and responded to on behalf of the trustee.
>
> It is not sufficient for the Claimant to argue that the written advice given by the Defendant was causative of its own loss. The question is not when the loss occurred but when the cause of action accrued.
>
> There may be cases in which further or supplemental advice given by counsel or a solicitor gives rise to a fresh cause of action but not as it seems to me where the advice is merely confirmatory of advice that has already been given and has already caused one and the same cause of action to accrue. The pattern of advice was continuous as is made clear by the email of 19 October 2011."

26. The sub paragraphs referred are those in which it is alleged that the defendant should have advised against an appeal.

27. Mr Hill-Smith in pursuing this appeal on behalf of the claimant submits that this reasoning is wrong or arguably wrong and paragraph 68 should not have been struck out. He maintains that the advice of 26 October 2011 was an independent piece of work, as a result of which the cost limitation on the legal aid certificate was extended so as to allow the claimant to be represented by counsel at the permission hearing, and in respect of which the defendant owed to the claimant a duty of care. It was given after new material, not available in April or May 2011 was considered by the defendant, namely the reasons given by Vos J, the respondent's notice and the witness statements filed on behalf of the trustees.

28. Mr Hill-Smith submits that Master Teverson was similarly in error in a previous case *St Anselm Development Company Limited v Slaughter and May* (A Firm) [2013] EWHC 125 (Ch). In that case the defendant solicitors acted for the claimant as immediate landlord in negotiating new leases in respect of two separate flats and advised that it was not necessary to dwell too much on the detail of the draft lease submitted by the freeholder's solicitors. However, the claimant was entitled to insist that the new leases contained equivalent indemnity provisions in respect of service charges. The defendant considered the indemnity provision in respect of the draft new lease of the first flat and did not re-visit the issue when considering the draft new lease in similar terms of the second flat. Master Teverson concluded that there was a single cause of action.

29. In overturning that conclusion on appeal, David Richards J, as he then was, at paragraph 50 referred to the fact that the correspondence showed that the defendants had been separately instructed in respect of each lease. He said this at paragraph 61:

> "…The defendant solicitors accepted instructions to protect the interests of the claimant in respect of the new lease of flat 26. In accordance with those instructions, it considered the terms of the draft lease in early June 1999 but did so negligently, as it must be assumed for present purposes. That breach of duty of

> care led later in 1999 to the loss in respect of flat 26 against which it was their duty to protect the claimant. The fact that, incidentally, proper performance of their duty in June 1999 would also have led to the prevention of loss in respect of flat 27 does not change their duty in regards flat 26 into a duty as regards both flats. There are separate causes of action in respect of each flat, and the cause of action in respect of flat 26 was not completed until November 1999 when agreement was reached on the terms of the new lease for flat 26."

30. Mr Hill-Smith, whilst accepting that each case turns on its own facts, submits that that reasoning is applicable to the facts of the present case. Indeed, he submits that the present case is stronger as here the defendant was paid separately for the advice of 26 October 2011 whereas in *St Anselm* there was only one payment made. He submits that that advice was not merely confirmatory, but even if it was, it can still give rise to a cause of action if acted upon and causative of loss.

31. He also criticizes Master Teverson for referring in the present case to *Khan v Falvey* [2002] EWCA Civ 400, where defendant solicitors had failed to prosecute claims in a timely manner which were accordingly struck out for want of prosecution. The Court of Appeal held that the cause of action arose when the delay was such that there was a serious risk of dismissal on that ground. The principle was applied that claimants cannot defeat the statute of limitations by claiming in respect of damage which occurs within the limitation period if they have suffered actual damage from the same wrongful acts outside that period.

32. Mr Hill-Smith submits that that was a case of non-feasance, of failing to proceed with the claims, whereas the present case is one of mis-feasance, of giving negligent advice. In non-feasance cases there is normally no new cause of action on each day that the failure to act continues, whereas here the advice of 26 October 2011 was specifically requested and given, and a new cause of action arose. He accepts the principle applied in *West Wallasey Car Hire Ltd v Berkson & Berkson* (A Firm) [2009] EWHC B39 Mercantile, that there is no continuing duty in law upon legal advisors to continually revisit their previous advices to check for latent mistakes, but submits that that principle has no application on the facts of the present case, because of that specific request.

33. Mr Davidson QC for the defendant, submits that it is clear from the pleaded case and from the documents that the relevant negligent advice alleged was to appeal against the March 2011 order when such an appeal was hopeless. That advice was given in April and May 2011 and acted upon by the commencement of the appeal in the latter month. Costs in that appeal started to be incurred by the trustees straight away and continued in September 2011 when the trustees prepared and filed documentation in the appeal. Even the defendant's email of 19 October 2011 amounted to advice on request which, although short, was not casual. A further written advice was required to confirm that as Ms Bastin took the view that that is what the LSC would require to raise further the costs limitation on the certificate. The advice was not new, and although there was further documentation in the appeal that did not materially change the advice which was consistent throughout. The particulars pleaded in paragraph 68 of the particulars of claim relate to matters which existed at the time of the 4 May 2011 email.

34. Mr Davidson also submits that the *St Anselm* case is distinguishable because there were separate instructions in respect of each flat. The present case is closer to the *West Wallasey* case where the negligence was alleged to be the bringing of a fundamentally flawed claim. HH Judge Simon Brown QC sitting as a judge of the High Court held that it followed that loss had been suffered when the claim was issued, and costs incurred, and the claim was statute barred.

35. In my judgment, it is the latter submissions which are to be preferred. The negligence alleged in paragraph 68 is advising the claimant to bring a hopeless appeal. The particulars make it quite clear that the claimant says that the advice should have been not to appeal. Had that advice been given then no appeal would have been made and no costs incurred because of it. Assuming that the advice in fact given was negligent, then loss occurred as soon as the appeal was filed and costs were incurred because of it, which had the effect of diminishing the amount eventually available to the claimant from the proceeds of sale of his home. Certainly, significant costs were incurred by the end of September 2011 when the trustees prepared and filed their evidence. The fact that the 26 October 2011 advice led to the financial limit on the LSC certificate being raised and further costs being incurred at the permission hearing, does not alter the fact that costs had already been incurred in respect of the appeal outside the six year period.

36. There was only one relevant appeal, and in my judgment Master Teverson was justified in concluding that the pattern of advice in respect of the prosecution of the appeal was continuous from April 2011 and continued with the advice of 26 October 2011. He was also justified in concluding that the cause of action in respect of the alleged hopeless appeal had already accrued before the 26 October 2011 advice, and that the claimant had no prospect of succeeding on this part of the claim as it is statute barred, and in dismissing the same on this basis pursuant to CPR rule 3.4(2)(a) and/or CPR rule 24.2.

37. Mr Davidson made an application in the course of his submissions to adduce the Funding Code made by the LSC as required under section 8 of the Access to Justice Act 1999. This was not before Master Teverson. Mr Hill-Smith objected to the application on the basis that it was new evidence and could and should have been put before the master, but he agreed that Mr Davidson could make his points on the code and that I would deal with the application in my written judgment. In my view a statutory code such as this does not amount to evidence within the rule of *Ladd v Marshall* [1954] 1 WLR 1489, and Mr Davidson was entitled to make his points in respect of it. In essence, they are that applications for legal representation in respect of a client's home will be refused if the prospects of avoiding an order for possession are poor, defined as less than 50% so that the client is likely to fail. In the event however, I would have come to the conclusion I have on the issue of limitation even without sight of the code.

38. That conclusion makes it strictly unnecessary for me to deal with the alternative ground relied upon by Mr Davidson, that quite apart from the limitation point, the allegation in paragraph 68 has no real prospect of success because the view taken by the defendant was a tenable one even if in the event it was rejected. However, for the sake of completeness it may be helpful if I express my view upon it, which in the circumstances I shall do quite shortly.

39. It was common ground that the appropriate test for a successful claim in negligence against a lawyer is that identified by the House of Lords in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, namely that the error was such that no reasonably well informed and competent member of the profession would have made.

40. Master Teverson dealt with that issue shortly. He said he should resist the temptation to conduct a mini-trial and he was not in a position to assess the instructions that the claimant gave to the defendant or the impression that came across in conference as to the claimant's appetite for risk or his ability to understand the potential practical consequence of seeking to save is home. At paragraph 62 he said this:

> "My conclusion is … that the issue is not purely about the merits of a legal argument, but about the appropriateness of the advice in context."

41. Mr Davidson submits that it is a legal point and it is clear from the documentation what the defendant was asked to do and what he did. Whilst I have some sympathy with Mr Davidson's points on this issue, in the end I would not have differed from the view taken by Master Teverson on them.

42. However, it follows from the above that the appeal is dismissed.

43. I am grateful to each counsel for his clear and helpful submissions.

44. The parties should file an agreed draft order within 14 days of the hand down of this judgment, and/or written submissions on any consequential matter which cannot be agreed, within the same time frame. I shall then determine such matters on the basis of the written submissions.