Commercial: ILLEGALITY: fraudulent claimant entitled to damages from negligent solicitors

Winston Jacob

Did the claimant's participation in a mortgage fraud prevent her recovering damages for professional negligence from her conveyancing solicitors? No, said the Court of Appeal in *Stoffel & Co v Grondona* [2018] EWCA Civ 2031.

G purchased a property from her business associate, M, with the assistance of mortgage finance. The transaction was not intended to be a transfer of M's beneficial interest in the property; merely a way for him to obtain finance that he could not obtain in his own name. In pursuance of the transaction, G committed a mortgage fraud.

G's solicitors, S, failed to register the transfer and the legal charge in favour of G's lender. G subsequently defaulted in payments to her lender. Due to the registration failures, G's borrowing was unsecured and her lender sued her for a money judgment. G claimed damages against S for failing to register the relevant documents.

S admitted negligence but defended the claim on the basis that the purpose of the transaction was illegal, as it involved a mortgage fraud. It was common ground that in deciding this issue the Court of Appeal should apply the test set out in the Supreme Court decision in *Patel v Mirza* [2017] A.C. 467.

As the transfer had not been registered, G had only an equitable interest in the property; namely, the right to be registered as legal owner. Nevertheless, she fell within the general principle that, once an interest in property had passed to an illegal transferee, she had all of the remedies available to her as the valid holder of that interest. S was therefore obliged to protect G's equitable interest and her liability to her lender by registration. The illegal features of her agreement with M were irrelevant to that obligation.

It was necessary to consider whether, applying the three criteria in *Patel v Mirza*, there was any reason why G should not be entitled to recover damages from S. As to those criteria:

(1) The underlying purpose of the prohibition transgressed: mortgage fraud was a canker on society and it was extremely important that dishonest mortgage applicants were not empowered to abuse the system. However, there was no public interest in allowing negligent solicitors who were unaware of the illegality to avoid their professional obligations.
(2) Other relevant public policies which might be rendered less effective by denial of the claim: there was a genuine public interest in ensuring that clients were entitled to seek civil remedies for negligence/breach of contract against their solicitors arising from a lawful retainer.
(3) Proportionality: it would be entirely disproportionate to deny G's claim. Among other matters, her illegal conduct was irrelevant to the otherwise legitimate retainer with S, and she was not intending to profit from her fraud. There was no risk that her claim would undermine the integrity of the justice system.

Commercial: Mitchelled? Should a solicitor withdraw from acting?

Richard Power

In *Garbutt -v- Edwards* [2006] 1 WLR 2907 the Court of Appeal rejected the submission that failure to provide a client with a costs estimate required by the *Solicitors' Practice Rules 1990* rendered the retainer between solicitor and client unlawful and unenforceable.

Today the *SRA Code of Conduct*, like the *Solicitors' Practice Rules*, has statutory force: *Swain -v- The Law Society* [1983] 1 AC 598 and *Mohammed -v- Alaga & Co* [2000] 1 WLR 1815. Chapter 3 deals with conflicts of interest and includes a prohibition against acting where there is an 'own interest conflict':

> "You can never act where there is a conflict, or a significant risk of conflict, between you and your client".

In detailed assessment proceedings before Master Rowley, the claimants had been Mitchelled for failing to serve Precedent H and the court had imposed the sanction prescribed by CPR 3.14 limiting recoverable costs to court fees only. Subsequently, the defendants had accepted Part 36 offers, entitling the claimants to 50% of their costs pursuant to CPR 36.23.

The defendant paying party argued that:

a) the failure to file and exchange Precedent H was a cast iron beach of duty;

b) if the claimants won the case, they would have a claim against their solicitor for 50% of their costs;

c) if the claimants lost the case, they would not recover costs and would have no claim against their solicitors;

d) it was therefore in the solicitor's interest to lose the case;

e) there was therefore an 'own interest conflict'; and

f) the solicitor was obliged to withdraw;

g) failure to withdraw was in breach of the *SRA Code of Conduct* rendering the retainer unlawful and unenforceable, so not even 50% was payable.

Since *Swain -v- The Law Society* and *Mohammed -v- Alaga & Co*, the Supreme Court has, in *Patel -v- Mirza* [2017] AC 467, overhauled the law concerning contracts tainted with illegality.

Master Rowley is to decide whether:

a) a solicitor is bound to withdraw if Mitchelled; and

b) whether the retainer is enforceable if the solicitor does not.

The Court of Appeal did not suggest in *Mitchell -v- News Group Newspapers* [2014] 1 WLR 795 or *Denton -v- White* [2014] 1 WLR 3926 that the solicitors should have withdrawn.

Commercial: ABUSE OF PROCESS: claim in deceit permitted following unsuccessful claim in negligence

Winston Jacob

Was it an abuse of process to bring a claim in deceit following an unsuccessful claim in negligence? Not where the basis of the claim in deceit had been speculative and inferential at the commencement of the negligence claim, said the Court of Appeal in *Playboy Club London Ltd v Banca Nazionale Del Lavoro SpA* [2018] EWCA Civ 2025.

The Appellant (A) operated a casino that granted credit to a gambler on the basis of a reference purportedly given by an employee of the Respondent bank (R). The gambler obtained credit of over £1 million from A on the basis of cheques that were subsequently dishonoured. A sued R for negligent misstatement in providing the reference. Ultimately, the claim failed, as R did not owe A a duty of care.

A issued a separate claim in deceit against R, alleging that the reference had been given fraudulently. It did so on the basis of further information that it had obtained both during oral evidence in the negligence claim and subsequently. R applied to strike out the deceit claim as an abuse of process on the basis that it should have been made within the original proceedings.

It was common ground that A *could* properly have included the claim in deceit in the negligence claim. The question was whether it *should* have done, on pain of losing the opportunity to plead it later.

The Court of Appeal decided the position had to be considered as at the start of the trial of the negligence claim. It would have been unreasonable to expect counsel to apply to amend to plead fraud in the middle of the trial in light of evidence emerging in cross-examination. So considered, it could not be said that the deceit claim should have been pleaded in the earlier claim. Pleading fraud was a serious step, with serious ramifications going beyond a claim in negligence. Parties were well-advised to be reticent before pleading fraud. Although A could have pleaded fraud, it acted reasonably and properly in deciding not to do so on the speculative and inferential basis that would have been available at that stage.

This was not a case where a party had decided for tactical reasons to keep material up its sleeve in relation to the deceit claim until after the negligence claim. Rather, important new evidence had come into its hands after commencement of that claim. Although A had declined to waive privilege of the advice it had received both before and after the negligence claim, it was a fair inference that it had proceeded to bring the deceit claim by reason of its receipt of highly material and strongly supportive new evidence.

Commercial: Joint Tortfeasorship in IPR claims – Still a "Grenade" in the Tail for Directors?

Tim Sampson

In a decision handed down in 2016 – *Grenade (UK) Ltd. Grenade Energy Ltd. & another [2016] EWHC 877 (IPEC)* – HHJ Hacon considered the position of the directors in 'one-man' companies when the

director is sued alongside the company as a joint tortfeasor in a claim for trade mark infringement; albeit it is clear from recent judgments that the principles enunciated in Grenade will apply to all other IPR related claims: for example passing off and infringement of EU registered designs was at issue in *The Zockoll Group Ltd. & Anr. v Mr Handy & Ors* [2018] EWHC 324 (IPEC).

In the brief judgment in *Grenade* the learned judge accepted two propositions of law:

(1) A director of a company is not automatically to be identified with his / her company for the purposes of a claim in tort, however small the company and however powerful the director's control over that company: *MCA Records Inc. v Charley Records [2001] EWCA Civ 141*; [2002] FSR 26, at [41]; and

(2) Joint liability between the director and the company in tort requires that the director's actions must have a "*knowing, willing or a wilful quality*":

HHJ Hacon then quoted directedly from his earlier judgment in *Vertical Leisure Ltd. v Poleplus Ltd.* [2015] EWHC 841 (IPEC), which sought to apply the principle's set out by Lord Sumption in his judgment in *Sea Shepherd UK v Fish & Fish [*2015] UKSC 10, where he said:

> "`*I interpret this to mean that in order to fix an alleged joint tortfeasor with liability, it must be shown both that he actively co-operated to bring about the act of the primary tortfeasor and also that he intended that his co-operation would help to bring about that act*…." [66].

The Judge also concluded that where the company has a sole director this will raise and **evidential presumption** that the acts of the company were done at the instigation of the director. Clearly, such an evidential presumption will be very hard to displace – effectively resulting in a position where a director in a single director company will be assumed (absent proof to the contrary) to have incurred joint tortious liability with the company for acts of IPR infringement, even when the court specifically holds that the director is not personally liable for the primary tortious act; see *The Zockoll Group* at [17]. The question in cases of joint tortfeasance (if the decision in Grenade is correct) claimed against a sole director is whether or not the director takes the decisions for the company – whether the buck stops with him or her. A proposition that is in stark contrast with the far more restrictive view of a director's personal liability in relation to contractual claims.

However, some further consideration and elaboration on HHJ Hacon's decision in *Grenade* has been provided in the judgment of His Hon. Judge Biriss in *Federation Internationale De L'Automobile v Gator Sports Ltd. & Ors* [2017] EWHC 3564 (Pat). It is worth quoting his Lordship's decision in relation to *Grenade* in full:

"*If Grenade v Grenade went as far as the claimant's submission suggested, then I would respectfully disagree with it. The simple fact that a company has a single director, irrespective of what other individuals might be involved in the company, cannot and should not in my judgment be taken to raise an evidential burden on that director to disprove allegations of personal liability. However, it is plain in my judgment that HHJ's decision in Grenade does not go that far at all. It was a case in which the company has a sole director and sole shareholder, the same person, and was described by the judge as a "one-man" company (paragraph 23), by which I understand him to mean a company with no employees or any other individuals involved at all. The only human being involved at all seems to have been an individual, Mr Chawla. In that case the judge held that there therefore arose an evidential presumption that all acts done by the company were done at the instigation of Mr Chawla alone and that he was under an evidential burden to show why, contrary to what one might expect, the acts complained of were not initiated by him*" [23].

It should though be appreciated that despite the finding that defendant was not a "one-man" company – in the way that term was used in *Grenade* – the judge still concluded that the director was a joint tortfeasor with the company.

Conclusions

The question of joint liability between a director and company for acts of alleged IPR infringement is important but not one to which a simple answer can be given in light of the decisions in *Federation International De L'Automobile* and *Grenade*. However, it is possible to draw some conclusions.

(1) The "one-man" company referred to by HHJ Hacon in Grenade should be taken to mean a company with a single director and shareholder (not just a single director) and usually no other employees;

(2) The mere fact that a company has a single director – irrespective of what other individuals are involved in the company's operations - does not of itself raise an evidential burden on the director to disprove allegations of personal liability; and

(3) For a sole director to be jointly liable with the company there must be: (a) material assistance by the director in the primary act of tortfeasance; (b) the assistance must be in relation to a common design between the company and director, and (c) the primary act of tortfeasance must be proved.

What is not clear at present is what possible factual circumstances would in fact relieve or limit a director's liability for joint tortfeasorship in relation to claims for IPR infringement. And until we have a decision that deals definitively with the point the assumption must be that where a company is run by a single director there is every likelihood that were a company to be found liable for IPR

infringement the director will also be on the hook for the same liability – and such director's must be advised accordingly.