IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES

CHANCERY DIVISION

[2018] EWHC 727 (Ch)

No. HC14F02532

Rolls Building
Fetter Lane
London EC4A 1NL

Tuesday, 27th March 2018

Before:

KELYN BACON QC

(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

(1) COLIN ALI
(2) MELANIE DAVIS
(3) OWAIN GOLDING
(4) IAN McGREAVY — Claimants

- and -

ABBEYFIELD VE LIMITED — Defendant

MS B. STEVENS-HOARE QC and MS EBONY ALLEYNE (instructed by Owen White) appeared on behalf of the Claimants.

MR N. JONES QC (instructed by Geldards LLP) appeared on behalf of the Defendant.

J U D G M E N T

THE DEPUTY JUDGE:

1 The claimants are individuals who, during 2007 and 2008, entered into joint venture agreements with the defendant, Abbeyfield VE ('VE'), to establish and run Vision Express stores in Southport, Llandudno and Macclesfield. Their stores failed and eventually they terminated their agreements with VE and brought proceedings against VE claiming that they had entered into the JVs on the basis of misrepresentations made to them by VE. In total, the claimants alleged 12 separate misrepresentations, four in relation to each JV. They claimed damages in relation to their sunk investments in the JVs as well as claims for loss of earnings.

2 The claimants' primary case alleged fraudulent misrepresentations; their secondary case was that the misrepresentations were negligent. VE denied that most of the representations were made, said that even if they were made they were materially correct, denied that the representations were either fraudulent or negligent, and counterclaimed against the claimants for substantial sums in relation to the overdrafts outstanding on the JVs when they were terminated by the claimants.

3 The claims were heard at trial over a two-week period during December 2017, during which I heard evidence from all four claimants, two further witnesses for the claimants and three witnesses for VE. There was one further witness from VE whose evidence was agreed and he was not cross-examined, but all of the other witnesses were cross-examined. It was put to the claimants in no uncertain terms that their evidence was untrue, and it was likewise put to VE's main witness, Mr Higginbottom, that his evidence was untrue.

4 At the close of the trial I indicated to the parties that my own court commitments in early 2018 meant that I would be unable to start on the judgment before the end of January, but I would endeavour to hand down judgment before Easter. In the event, a draft judgment was sent to the parties on 15th March 2018, in which I found for the claimants in relation to all 12 misrepresentations.

5 On the basis of the evidence that I set out in detail in my judgment I found that those misrepresentations were all fraudulent, on the basis that VE either knew that the representations were false, or was reckless as to whether they were true or false. I therefore awarded the claimants damages, although I did not find for them in the full extent of their monetary claims.

6 On 19th March 2018, I received an email from leading counsel for both parties indicating that the parties were in the course of settlement discussions and stating that the result of those discussions might be that they asked me not to hand down judgment. I gave the parties until Friday, 24th March 2018 to send me written submissions with their position on this. I duly received on that day a joint submission drafted by all counsel on behalf of all parties to the dispute, stating that the parties had reached a global settlement agreement in relation to all aspects of the claim, but that the agreement was conditional upon the court not handing down judgment. I was asked to give effect to that agreement and not hand down judgment. Various reasons were put forward in favour of this course, which I will come to shortly.

7 I asked counsel for the parties to attend court today in order to discuss with them further the reasons for their request. I have heard submissions from Ms Stevens-Hoare QC for the claimants and Mr Jones QC for the defendant. Having considered carefully the parties

written submissions and their further oral submissions today I have concluded that this is a case in which I should proceed to hand down judgment, notwithstanding the parties' joint request to the contrary.

8 It is now well established that the judge has a discretion as to whether to proceed to hand down judgment in a situation such as the present. In the case of *Prudential Assurance Company v McBains Cooper* [2000] 1 WLR 2001, the Court of Appeal upheld the decision of His Honour Judge Richard Havery QC to hand down judgment in the action, notwithstanding that the parties had settled their dispute following receipt of his draft judgment, and had requested that on that basis he should refrain from handing down the final judgment. The court noted that the issue could not have arisen before the introduction of the practice of sending the parties a confidential draft of the judgment shortly before it was handed down formally. At p.2008E the court said that the purpose of this practice is not "to allow the parties to have more material available to them to help them to settle their dispute". Rather the purpose is to give the parties time to consider and agree the terms of any consequential orders, and to abbreviate the process of delivering judgment by avoiding the need to read it orally in court.

9 At H on the same page the court noted that the logical consequence of the arguments of the parties was that the parties could prevent the court from delivering judgment, even if it contained findings of serious fraud or serious negligence, if the defendant was willing to pay the claimants large sums of money to suppress them. At p.2010B the court said that "The wishes of the parties are just one factor, but not an overriding factor, which a judge should take into account in deciding how to exercise his discretion."

10 That judgment was applied by Sales J in *F&C Alternative Investments v Barthelemy* [2011] EWHC 1851 (Ch), [2012] BLR, where he likewise proceeded to hand down judgment despite the parties' requests that he not do so in view of their settlement of the dispute. He referred to four aspects of the public interest which he considered outweighed the interests of the parties and the countervailing public interest in favour of suppressing the judgment in order to bring the litigation to an end. The first and second factors were, essentially, that the judgment contained a detailed review of the conduct of various entities and individuals with approvals from the Financial Services Authority and subjected many of them to criticism in varying degrees. He considered that it was in the public interest that the FSA should have the final judgment available to it, with his detailed examination of the complaints made, so that it could consider the significance of the findings made.

11 The third factor was that there were interests of persons other than the parties which should be taken into account, and he noted that various witnesses had had their credibility and honesty attacked in open court, in the public forum of a trial, but were found by the judge to be completely honest and credible witnesses. He said that "where a court has reached firm conclusions in a final form judgment which exonerates witnesses from such serious charges publicly levelled against them, it is in the public interest that the judgment should be handed down so that the extent to which their evidence has in fact been found to be truthful by the court can be seen."

12 His fourth reason was that the judgment addressed a range of legal issues which in his view it would be in the public interest to be made the subject of a published judgment. He also commented that he thought the parties' concerns about the extent of their exposure to further litigation were overstated, on the basis that he was doubtful that an appeal would get off the ground, and he considered that the time and effort required to establish the sums due to the

defendants as a result of his judgment and absent a settlement was not particularly great. There were, therefore, he thought, grounds for thinking that there was scope for settlement even if judgment was handed down, and the same might also be true in relation to any costs issues.

13 A few days after Sales J handed down that judgment, the Court of Appeal handed down judgment in *Barclays Bank v. Nylon Capital* [2011] EWCA Civ 826, another case where the parties had settled. In that case the settlement had been notified to the court after the draft judgment had been prepared by one of the judges and circulated to the other two, but before it had been sent to the parties. The court said that the concerns of the parties to the litigation were relevant and sometimes very important and if, for their own legitimate reasons, they did not wish a judgment to be given that request should be given weight by the court. Nevertheless, the court held that the argument for handing down in the case before it was compelling. The reasons for that set out by Lord Neuberger MR at para.78 were these:

> "First, by the time we were informed that the parties had settled their differences, the main judgment, representing the views of all members of the court, had been prepared by Thomas LJ, in the form of a full draft which has been circulated to Etherton LJ and me. Secondly, a number of the issues dealt with in that judgment are of some general significance. Thirdly, although we are upholding the judgment below, we are doing so on a rather different basis, so it is right to clarify the law for that reason as well. Fourthly, so far as the parties' understandable desire for commercial privacy is concerned, we have not said anything in our judgments which are not already in the public domain, thanks to the judgment below. Finally, so far as the parties' interests otherwise are concerned, no good reason has been advanced for us not giving judgment."

14 I have considered the comments in those cases and I have given careful and serious consideration to the arguments that have been put forward by Mr Jones and Ms Stevens-Hoare. As I have said, however, I have concluded that, as with the cases that I have just cited, this is a case in which my judgment ought to be handed down.

15 First, the judgment finds that the claimants have established their case in relation to a series of fraudulent misrepresentations made to them by VE, which induced them to enter into joint venture agreements with VE. These are serious findings reached on the basis of evidence which I considered to be compelling, and which may well be of relevance to others in similar positions to the claimants. There may, of course, be limitation issues in relation to other possible historic claims, but it is in the public interest that findings of this nature, when crystallised in a judgment, should be published. The historic nature of the allegations does not, I consider, undermine that public interest or undermine the interests that similar third parties may have in reading this judgment.

16 The fact that the judgment may well be of interest to third parties is, I imagine, precisely the reason, or at least one of the main reasons, why VE has sought to settle the dispute on terms that are conditional on the judgment not being handed down. That risk, however, is one that VE took when it robustly rejected the claimants' claims in their pre-action correspondence and defended the claims that the claimants subsequently brought in these proceedings.

17 Secondly, this is not litigation that was brought overnight. The claimants' pre-action letters were sent in 2012 and 2013, and the proceedings were not filed by the claimants until June 2014, with the case only coming to trial in December 2017. There was therefore a significant period of time during which the dispute could have been settled. The parties

could also have settled the dispute during or immediately after the trial, particularly given my indication that there would be a period of some six weeks after the trial before I could start writing my judgment.

18 It would also have been possible, if settlement was contemplated at that stage, for the parties to notify me during that period that this was being discussed, with a request that I postpone any further work on the judgment for a short time in order to allow their discussions to conclude. The fact that it was only upon receipt of my draft judgment that the parties notified me that settlement discussions were under way suggests that my draft judgment was essentially being used by them as an aid to settlement. As the Court of Appeal noted in *Prudential v McBains*, that is not the purpose of a draft judgment.

19 Thirdly, while I fully appreciate that the claimants have an interest in a full and final settlement of their claims at this stage, avoiding further disputes about costs and the risk of an appeal, like Sales J in *F&C Alternative Investments* I consider that those risks are somewhat overstated in the parties' submissions to me. While I understand that there are issues regarding the costs budgets and a potential claim for indemnity costs, these are standard consequential issues that can be dealt with by me on the basis of written submissions and/or a costs hearing if the parties request that. I will also be able to make appropriate orders for interim payments of costs pending detailed assessment. I may need to hear evidence in relation to indemnity costs, but I am familiar with the facts of the case by now.

20 As for the prospect of an appeal, while Mr Jones has said that he has not entirely focused on this to date, he has referred me to one point at least which he considers might be worthy of an appeal. Again, like Sales J, I consider that this risk is somewhat diminished by the fact

that my findings on the misrepresentations alleged as well as the parties' reliance on those misrepresentations turn on issues of fact, including straightforward findings as to the credibility of the opposing accounts of the witnesses for the claimants and the defendant respectively.

21 Fourthly, there is no reason why the handing down of my judgment should prevent the parties from continuing to reach a full and final settlement of their dispute. Both parties have told me that it is in their interests to do so. On the claimants' part their interest is to bring the litigation to an end promptly with a sufficient financial payment to them. On VE's part I am told that the figure that has been agreed is comfortably below the sum that would be awarded to the claimants if they were to prevail on all outstanding issues. VE will also, I am told, be able to accommodate the settlement sum in its current year accounts and maintain no reserves against future uncertainties. Both parties therefore have every interest in settling this dispute now, and they can do so after my judgment is handed down.
I appreciate that for the reasons that Mr Jones has referred me to this morning there may well not be a settlement, but it is still open to the parties to settle the outstanding issues and I do urge them to do so.

22 Fifthly, while as I have said my findings on the alleged misrepresentations turn on findings of fact rather than disputed points of law, my judgment does set out in some detail the relevant principles applicable to claims of both fraudulent and negligent misrepresentations and other legal issues which are issues of general significance.

23 Finally, I need to address the parties' argument that they are both concerned not to take a course which could damage the commercial interests of other joint venture partners currently operating. They say that the handing down of my judgment may cause collateral

damage to the commercial reputation of the network as a whole, which may have a knock-on effect on other JV partners and the value of their investments. This is a point that both Mr Jones and Ms Stevens-Hoare have particularly urged on me today. This is a rather odd submission in light of the fact that the claimants chose to bring a claim which raised as the primary case allegations of fraudulent misrepresentation, and the fact that both parties, as I have set out above, pursued the case to trial, heard in open court in circumstances in which they must have known the risks to the reputation of VE if judgment was given and the claims succeeded.

24 In any event, I do not consider that this point is sufficiently compelling to outweigh the other matters I have set out above. It is clear from my judgment that the findings that I have made concern events which occurred ten years ago or more. Nothing that I have said in my judgment is or could be interpreted as a criticism of VE's products or the management of its individual stores. The findings that I have made concern, rather, the way in which VE recruited its JV partners, and in particular the claimants, at the time in question. All of the findings concern misrepresentations made to the claimants by a single individual at VE, who has now left the company. I have not seen any evidence or representations from any other JV partner as to the effect that those findings might have on their businesses.

25 For all of those reasons I consider that the right course is to proceed to hand down judgment.

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This transcript has been approved by the Judge