



[2021] EWHC 3564 (Ch)

Case No: CH-2021-000048

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

15 October 2021

Before:

MRS. JUSTICE BACON

Between:

ZAHIR AZIZ

- and -

E&K SOLICITORS

Appellant

Respondent

MICHAEL HARTMAN for the **Appellant**
BENJAMIN WOOD for the **Respondent**

APPROVED JUDGMENT

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MRS JUSTICE BACON:

Introduction

1. This is the oral renewal of an application for permission to appeal against the judgment of Deputy Master Arkush dated 16 February 2021. Permission to appeal was refused on the papers by Green J on 25 June 2021.
2. The Appellant's renewal of his application addresses Grounds 1, 2 and 4 of his Grounds of Appeal. Ground 3 is no longer pursued. For the purposes of this hearing, I have before me an amended skeleton from the Appellant dated 29 July 2021, a supplementary skeleton argument from the Appellant dated 2 August 2021, a note from the Respondent dated 7 October 2021 and a reply note from the Appellant dated 9 October 2021.

Background

3. The dispute arises from a claim in negligence lodged by the Appellant, Mr Aziz, and his business partner, Mr Nawaz, against Birchfields Solicitors Limited on 12 October 2018. In that claim, the partners alleged that Birchfields had negligently breached its duty to properly advise the partners on the purchase of a property development site at Crossley Street, Manchester. The partners instructed the First Respondent, E&K Solicitors, to conduct the claim against Birchfields.
4. On 18 December 2019 the claim was dismissed by His Honour Judge Hodge QC. Permission to appeal was refused by Lewison LJ on 24 February 2020.
5. Thereafter, in a claim filed in August 2020, Mr Aziz brought a claim in negligence against E&K in relation to its conduct of the proceedings against Birchfields. Mr Nawaz declined to take part in that claim.
6. The essence of Mr Aziz's allegation was that E&K initially pursued the wrong Defendant, failed to obtain expert valuation advice showing the property's value at the time of purchase, and failed adequately to challenge Birchfields' allegation that Mr Aziz and Mr Nawaz, the two partners, were prepared to take a "gamble" or risk on the property development.
7. E&K applied for summary judgment on the majority of issues and for strikeout of the Particulars of Claim, and Mr Aziz sought summary judgment on the part of his claim for damages for the admitted error in advancing the proceedings against the wrong firm.
8. Deputy Master Arkush concluded that Mr Aziz could not bring his claim on behalf of the partnership because Mr Nawaz had declined to participate in the proceedings. In any event, while he noted that the error in proceeding against the wrong firm had been admitted by E&K, he declined to give summary judgment in favour of Mr Aziz on that issue, having regard to E&K's argument that the error was not so obvious as to be categorised as negligence.
9. As to the expert valuation point, the Deputy Master held that this had no realistic prospect of succeeding, since valuation evidence would have been irrelevant in light of

the judge's conclusion at trial that the partners had decided themselves that the site was worth at least twice as much as they had paid for it.

10. On the related point regarding the "gamble" on the development, the Deputy Master considered that this also had no realistic prospect of succeeding. The judge had concluded, on the basis of the evidence before him and the contemporaneous documents, that the partners had decided to proceed and take a risk on the development of the site. That was a clear conclusion and it was unrealistic to say that it would have been any different if a firmer challenge had been mounted to this at the trial.
11. The Deputy Master therefore refused summary judgment on the wrong defendant point and permitted that to go forward to trial on condition that it be pleaded and limited to Mr Aziz's half share of the alleged losses. The remainder of the claim was struck out, and Mr Aziz was ordered to pay E&K's costs summarily assessed at £45,000.

This appeal

12. CPR 52.6 provides that except where Rule 52.7 applies, permission to appeal may be given only where the court considers that the appeal would have a real prospect of success or where there is some other compelling reason for the appeal to be heard. It is not said in this case that there is a compelling reason for the present appeal to be heard irrespective of the prospects of success. The question is therefore whether the Grounds of Appeal now pursued have a real prospect of success.
13. As a preliminary point, I am afraid to say that the Grounds of Appeal and skeleton arguments are quite difficult to understand. I have reached my conclusions on what I understand of Mr Aziz's case from reading those documents, and on the basis of Mr Hartman's submissions today.

Ground 1

14. Ground 1, as set out in the Grounds of Appeal, relates to the Deputy Master's rejection of summary judgment on the wrong Defendant issue. The Deputy Master correctly set out the test for summary judgment and concluded that, on the basis of the matters raised by E&K, the answer to this issue is not straightforward as to be susceptible of summary judgment.
15. The Grounds of Appeal and the skeleton argument on this issue are, in my view, misconceived. To a large extent, they address the substance of the question as to whether E&K was negligent in this regard. But the Deputy Master did not decide this as a matter of substance; he merely decided that E&K had put forward enough in its defence to indicate that this was a point that needed to go to trial on the facts and could not be disposed of summarily. That was a conclusion that the Deputy Master was entitled to reach on the issues before him, and an appeal on that point does not have any real prospect of success.
16. Mr Hartman also raises in his first skeleton argument a reasons challenge. I reject that; the Deputy Master provided sufficient reasons for his findings on this point over the course of one and a half pages of his judgment.

17. Finally, Mr Hartman seeks to challenge the Deputy Master's finding that Mr Aziz had to replead to make clear that the claim was pursued only on his own behalf and not on behalf of the partnership. That conclusion is, however, unimpeachable. The Particulars of Claim had stated, in terms, that the claim was brought "with the agreement of Mr Nawaz and on behalf of the partnership". The Deputy Master recorded that it was clear in argument before him that Mr Aziz was *not* bringing a claim in the name of the partnership. The judgment also recorded that there were at least two expressions from Mr Nawaz in emails that he did not wish to play any part in the claim, would not be doing so and did not wish to have any liability in costs. Mr Hartman accepts that this record of the evidence was correct.
18. The statement in the Particulars of Claim that the claim was brought with the agreement of Mr Nawaz and on behalf of the partnership was therefore clearly incorrect, and the Deputy Master was manifestly entitled to order that it be struck out and replaced by Particulars of Claim that recorded that the claim was brought by and on behalf of Mr Aziz alone.

Ground 2

19. Ground 2 relates to the expert valuation point. The essential argument appears to be that if an expert valuation report had been before the court in sufficient time in the original negligence trial, that would have undermined the judge's conclusion at that trial that the partners had been advised of the effect of the adverse terms.
20. The Deputy Master did not err in finding that this would have made no conceivable difference. As he pointed out, the judge's findings as to the advice given to the partners was based on detailed evidence from both partners and from Mr Iqbal at Birchfields. The allegation was that Mr Iqbal had failed to advise the partners on the title problem that brought down the value of the property. On the basis of the evidence before him, the judge concluded that Mr Iqbal had advised on that point, and that the partners' case was inconsistent with the documents.
21. On the basis of that unambiguous and robust conclusion, reached on the evidence before the judge, including both documentary evidence and detailed witness evidence from the person who gave the advice in question, it is quite obvious that valuation evidence would have made no difference at all. It was not in dispute that the title problem had a serious effect on the value of the property. The issue is whether the evidence before the judge indicated that Mr Iqbal had advised on the issue or not.
22. On that point, the judge's conclusion was not at all equivocal. On the contrary, he said that he was sure that Mr Iqbal would have advised on this point and was entirely satisfied that the partners' case was contradicted by the contemporaneous documents.
23. That being the case, Ground 2 is, as the Deputy Master correctly found, essentially an attempt to relitigate a finding of fact which was made by the judge at trial on the basis of evidence before him, and in relation to which permission to appeal was refused by the Court of Appeal. I agree with Green J that it has no real prospect of success.

Ground 4

24. That leaves Ground 4, which contends that the Deputy Master misunderstood the case as pleaded in relation to the “gamble” taken by the partners. The underlying submission is said to have been that there was not a proper assessment of the true value of the site compared to its cost, and if there had been, there would have been a real chance of the court concluding that it was unlikely that the partners had been properly advised of the adverse terms of the agreement.
25. I am not persuaded that the Deputy Master did mischaracterise the case pleaded in the Particulars of Claim. What is said there is that E&K was on notice that causation was an issue in the claim against Birchfields, that the underlying basis for Birchfields’ submissions on causation was that the partners were gambling on the property transaction, and that E&K in those circumstances should have defended that allegation more robustly on the bases set out in the Particulars of Claim.
26. In any event, what is clear from the Particulars of Claim, however they are characterised, and what is indeed clear from Mr Hartman’s skeleton argument, is that Ground 4 comes down to a similar contention to that raised under Ground 2: namely that E&K ought to have sought timely permission to put in an expert valuation of the site, since if that had been in evidence at the trial it would have shown that the partners would have been very unlikely to make the gamble alleged.
27. As with Ground 2, this is an attempt to go behind the judge’s findings of fact that whatever the partners had been told or advised as to the non-assignability of the lease agreement and/or any zoning for industrial use, they would have been prepared to take the risk in the hope of a profit from onward sale to a developer. That being the case, the Deputy Master correctly found that evidence of the value of the site at the point of sale would have been irrelevant in the same way that it was irrelevant to Ground 2.
28. This Ground of Appeal therefore likewise has no real prospect of success.

Conclusion

29. I therefore find that none of the Grounds of Appeal pursued by Mr Aziz has any real prospect of success. As already noted, it is not suggested that there is any other compelling reason for the appeal to be heard. Permission to appeal is therefore refused.

This judgment has been approved by Bacon J.