Case No: BL-2018-000837

Neutral Citation Number: [2019] EWHC 392 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The Rolls Building
7, Rolls Buildings
Fetter Lane
London EC4A 1NL

Friday, 18 January 2019

BEFORE:

CHIEF MASTER MARSH

BETWEEN:

FINANCIAL CONDUCT AUTHORITY

Claimant

- and -

SKINNER & OTHERS

Defendants

MR PURCHASE appeared on behalf of the Claimant
The Fifth and Sixth Defendants appeared in person

JUDGMENT
(As Approved)

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8th Floor, 165 Fleet Street, London, EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

1. CHIEF MASTER MARSH: The application I am dealing with today is an application made on behalf of the third, fourth, fifth and sixth defendants under CPR Part 14 to withdraw admissions that they made in their defence to this claim.

2. The third and fourth defendants are two companies; the fifth and sixth defendants are respectively their directors. For the purposes of today we can proceed on the basis that the relevant acts of the companies were authorised or carried out by the directors.

3. The claim brought by the Financial Conduct Authority ("FCA") arises under sections 19 and 21 of the Financial Services and Markets Act 2000 ("FSMA") and section 89 of the Financial Services Act 2012. Section 19 is a general prohibition against carrying on a regulated activity, unless it is carried out by an authorised person. Section 21 is a restriction on financial promotion. Subsection (2) does not apply if the promotion is carried out by an authorised person or approved by an authorised person.

4. The case in brief, as against the relevant defendants, is that the companies have contravened sections 19 and 21 of FSMA and that the individuals, the directors, were knowingly concerned in those breaches.

5. The relevant activity relates to funding and investment obtained in relation to a company called Our Price Records Limited. That company raised substantial sums from investors, running into many hundreds of thousands of pounds. The company subsequently failed and the investors all lost their investments. The claim has been on foot for a significant period of time. On 31 May 2018, a composite defence was filed on behalf of the relevant defendants, the statement of truth signed by the fifth and sixth defendants on behalf of themselves and on behalf of the two companies.

6. The thrust of the defence is that the material allegations against the companies and the directors about the activities complained about by the FCA are admitted. In a number of instances, facts which must have been obtained from instructions given by the defendants are pleaded by way of mitigation.

7. The defence includes a proposal that the defendants will cooperate with the claimant in respect of restitution and remediation measures and, as I read the defence, the thinking behind it was that the defendants would attempt to minimise their exposure when the court came to consider what a just amount of compensation was likely to be.

8. The claimant made an application for an interim payment which then prompted the defendants to reconsider their position. They have now made applications seeking to withdraw the admissions. The applications are contained in documents in exactly the same form on behalf of the individual defendants and the two companies and dated 9 January 2019, They say, having explained what changes they wish to make to the defence:

> "The reason for the changes are that we did not understand the wording of what we were admitting. We thought that we admitted breaches with Our Price had happened due to Leigh Carr not having the correct authorisation. It is only after the FCA

mentioned about an interim payment that we found out that the word 'knowingly concerned' meant we committed breaches and we did not and we knew we did them."

9. Leigh Carr is a firm of chartered accountants and the defendants have consistently said they believe that Leigh Carr was authorised and, therefore, the activity was not in breach of the provisions of FSMA.

10. The defendants seek to make a number of changes to their defence. With a view to keeping this judgment brief, I will gratefully adopt the table very helpfully prepared by Mr Purchase, who appears for the claimant, which sets out in the left-hand side the claimant's case. On the right-hand side, the material part of the defence, as it was originally pleaded, and then the changes that are sought to be made.

11. When considering an application of this type, the court is required to have regard to the factors that are set out in paragraph 7 of Practice Direction 14, at least so far as they are material. These factors include: the grounds of the application; the conduct of the parties; the prejudice caused in both directions; the stage the proceedings have reached; prospects of success; and the interests of the administration of justice. That last point plainly requires the court to have regard to the overriding objective.

12. The grounds are, without, I hope, being unfair to Mr Miller and Mr Mongalar, rather thin. It is, to my mind, quite clear that the defence was drafted on their instructions by solicitors, with the involvement of counsel. There is no evidence to lead the court to the conclusion that the defence does not reflect the instructions that were given when the defence was drafted.

13. In light of the very detailed way in which the defence is drafted, such that it includes a considerable volume of facts pleaded that the defendants rely on, it is inconceivable (or at least there is no evidence to the contrary) that it was not very carefully considered by the legal advisers with the defendants.

14. I am unable to accept, as it is now suggested, that there was a misunderstanding about the position. I do not consider that conduct is an important factor in relation to this case. Prejudice, however, is of significance.

15. So far as the claimant is concerned, plainly there would be significant prejudice if the defendants were now to put forward a viable defence. It would involve substantial reworking of the claim altogether and there is, as well, potential prejudice to investors who have lost money as a result of the activity. Plainly, if there was a viable defence that could be put forward now, which the defendants are unable to put forward, that indeed would be prejudicial to them.

16. The desire to change the defences to withdraw admissions, is not put forward at a particularly late stage in this claim. Trial will not take place until April 2020. But the claim has proceeded on the basis of the defence now for a considerable period and the catalyst for the change is clearly the recognition that immediate liability may be faced.

17. The prospects of success are a matter that is of profound importance. Without, I hope, oversimplifying the legal position, the claim is based on sections 19 and 21 which involve the authority proving facts under section 19: that regulated activity was carried on by a person who was not authorised and under section 21 they seek to prove that in the course of business communications and other activities which were not authorised were undertaken.

18. So far as the individual defendants are concerned, they seek to show that because the two companies undertook that activity, they were thereby knowingly concerned in that activity.

19. In relation to the claims that are made, it is not directly relevant or a defence if the defendants believed that the accountants were authorised. That belief would not undermine the case based on the events which were carried out. The substance of the amendments is that in each case the defendants seek to rely on their understanding or belief about what occurred. Without going through each amendment in detail, the effect of the withdrawal of the admissions would be to change what is an entirely clear basis, namely that the facts pleaded are accepted and relevant admissions are made to a bare denial based on what is not in fact a defence to the claim. That is clearly not an attractive basis for permitting the withdrawal of the admissions to take place.

20. Looking at the matter overall and having clear regard to the requirements of justice and the needs of the overriding objective, I am satisfied that it would not be right at this stage to permit the defendants to withdraw these admissions, if for no other reason than that to do so would not in fact further their cause. It would merely create confusion by permitting them to put forward a defence which, on the face of it, has no real prospect of success.

21. I will, therefore, dismiss the application.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400

Email: civil@epiqglobal.co.uk

This transcript has been approved by the Judge