Neutral Citation Number: [2023] EWHC 2925 (Ch)

Case No: BL 2020 001327

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 17 November 2023

Before :

HHJ JOHNS KC
Sitting as a Judge of the High Court

- -

Between :

(1) NEXT GENERATION HOLDINGS LIMITED
(2) AMBON BROKERS LIMITED

Claimants

- and -

(1) ALEC FINCH
(2) ROBERT ANDREW FINCH
(3) KEELY DALFEN

Defendants

- -

MR JAMES POTTS & MS ANCA BUNDA (instructed by Devonshires Solicitors LLP) for the **Claimants**

MR YASH KULKARNI KC (instructed by Ward Hadaway) for the **First and Second Defendants**

MR ROBIN SOMERVILLE (by Direct Access) for the **Third Defendant**

Hearing date: 13 November 2023

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APPROVED JUDGMENT

This judgment is handed down by email to the parties' representatives and release to The National Archives at 10.30 am on Friday 17 November 2023

HHJ JOHNS KC:

Introduction

1. This is my judgment on consequential matters in this case. I adopt the definitions employed in my main judgment (neutral citation number [2023] EWHC 2383 (Ch)) handed down on 27 September 2023 following the trial.

2. By paragraph 2 of my order of that date, three issues were to be determined: (1) What, if any, pre-judgment interest was payable by the Finches on the judgment sums. (2) The Finches' application for permission to appeal the judgment against them. (3) Questions of costs as between KD and the Finches.

3. By the time of the consequential matters hearing, the first issue, being the question of interest, had been agreed. And the Finches accepted there should be an order for them to pay KD's costs of the additional claim to be summarily assessed on the standard basis. The disagreement was merely as to the sum in which those costs should be assessed.

4. Accordingly, only the questions of permission to appeal and the summary assessment of KD's costs remain to be decided. I will deal with those in turn.

Permission to appeal

5. Key to my entering judgment against the Finches for NGHL and AFL in the sum of £3,216,836.31, and for AFL alone in the further sum of £2,907,593.71, was a central conclusion of fact that there was a substantial deficit in AFL's client money account at the time of the SPA, being 14 September 2017. I found further, among other things, that the

deficit was known to the Finches and was in the sum of £3,510,000; £3.64m having been injected to pay insurance creditors and only £130,000 remaining.

6. The principal features of the evidence which led me to the central conclusion as to the existence of a substantial client money deficit were (1) the clear and detailed evidence of KD, financial controller and the CFO of AFL in the years preceding the share sale, that there was such a deficit, (2) the evidence that around £3.5m was injected and used to pay insurance creditors, and (3) there had been clear raids on the client money account at both the beginning and the end of the period of alleged false accruals forming part of the alleged fraud. As I endeavoured to make clear, there were also other features of the evidence which supported that conclusion. Not least, a series of contemporaneous emails, which also pointed to the Finches being aware of the deficit.

7. Permission to appeal was sought by the Finches on the ground that I had made an error of law in the way I had approached the evidence. It was submitted that there was a rule of law that more serious allegations, such as fraud, required more cogent evidence to prove them.

8. I rejected any such rule of law by my judgment at [32]. I do not consider that was an error. That there is no such rule of law seems to me to be clear from at least two decisions of the Supreme Court – see *Re J* [2013] UKSC 9 at [35] & [36], and *Re S-B* [2009] UKSC 17 at [9]; Baroness Hale JSC referring to the principle that serious allegations require more cogent evidence as a rejected "nostrum" and as involving a misinterpretation of earlier authority. And I note that my understanding is supported by at least two textbooks in the specialist area of civil fraud. The editors of *Grant & Mumford, Civil Fraud – Law, Practice & Procedure,* quote at 34-003 observations that where fraud is alleged cogent evidence is

needed to prove it and then say at 34-004, "*However, these observations are not to be understood as laying down a rule of law*." *Re S-B* and *Re J* are cited. *Fraud and Breach of Warranty* has this at 7.14, footnote 6: "*Earlier suggestions that especially cogent evidence is required for fraud should no longer be followed*". *Re S-B* is among the cases cited.

9. In any event, the evidence for the existence of a client money hole was cogent. Any such rule of law would therefore have been satisfied in this case.

10. The application for permission to appeal was also put on the basis that my central conclusion was unsupported by the evidence, else was a conclusion no reasonable judge could have reached.

11. I do not consider that any of the detailed points made in support of that submission by Mr Kulkarni KC give the Finches a real prospect of meeting that high bar for a successful appeal on this finding of fact. Two principal points were made.

12. The first was that there was no evidence at all for the finding that of the £3.64m injected, only £130,000 remained after payment of the insurance creditors. Mr Kulkarni submitted that this figure came only from a document accompanying the Claimants' skeleton argument (though that seemed to be a reference in fact to the updated schedule of loss in the trial bundle). But that is not correct. The finding came from Mr Esser's evidence, given at more than one point during his cross-examination, that £130,000 was the sum remaining. When I drew that evidence to Mr Kulkarni's attention, the submission became instead that I was wrong to accept that evidence. But that is a very different submission, and one that I do not consider is sustainable, particularly as there was little or no challenge to that

evidence when given. In any event, this point goes to the precise amount of the client money deficit, not to my central conclusion that a substantial deficit existed.

13. That is also true of the second point. It was that KD's evidence was not sufficiently reliable for a conclusion to be reached as to the amount of the client money deficit. The further answer to this point is that my conclusion as to the precise amount did not rest on her evidence. It was arrived at instead for the reasons set out in my judgment at [96].

14. It may help to address two of the other miscellaneous points made by Mr Kulkarni in seeking to challenge my central conclusion.

15. One was that my judgment at [40] involved a misunderstanding of Mr Parry's evidence. I said, "*Even Mr Parry seemed to be of the view at the close of his oral evidence that this showed there was a deficit in the client money account, though it did not establish how it had come about*". I do not consider there was any misunderstanding. Not only was that the clear impression he gave, it is borne out by the transcript. I referred to the evidence that having to put a lot of money in for insurers to be paid out of the client money account revealed the extent of any black hole, to the evidence that around £3.5m was used for that purpose, and asked him whether that impacted his opinion about a deficit in the client money account. His answer was this: "*No, we still don't know how it arises*". There was then a discussion about how else it could have arisen, other than by taking out premium instead of commission using false accruals. He therefore answered by shifting the focus to how the apparent deficit arose rather than rejecting the idea that the evidence pointed to the existence of a substantial deficit.

16. Another point was that the funding lock did feature in the cross-examination of KD. However, what is important and is reflected in my judgment at [79] is that, while the RiskPro funding lock was referred to in the course of cross-examination, it was never suggested to KD or Mr Lindsay that this would have revealed any client money hole early on. That deprives that suggestion, when made in submissions, of any real weight; particularly given that KD was working to mask the client money hole by making amendments to the RiskPro CMCs – see the judgment at [36] and [58].

17. Criticisms were also made as to my findings in relation to false accruals and the knowledge of the Finches. But there was plenty of evidence supporting those findings. I did not ignore that some money was received in relation to accounts on which false accruals had been made nor that some accruals were entered by brokers. But accruals, including false accruals, were also entered by KD, and there was much discussion of accruals between KD and the Finches, as I found.

18. Finally, it was submitted that the awarding of trading losses as damages could not stand, as the taking of client money could have no connection to such losses. But there was a sufficient connection in this case between the wrongdoing and the trading losses claimed as I sought to explain in my judgment at [152] to [160]. That was an assessment made on the evidence and applying the legal approach outlined at [152] which is not said to have been wrong.

19. Overall, I consider an appeal, being one against my findings of fact or my conclusion on causation, has no real prospect of success. And there is no other compelling reason for an appeal to be heard. Permission to appeal is refused.

20. The Finches asked for a further extension of time for an appellant's notice having regard to Mr Kulkarni's other professional commitments. I do not grant any such further extension. First, the time for an appellant's notice has already been extended very significantly. By my order of 27 September 2023, made on delivery of judgment, time was extended to 21 days after the consequential hearing. Second, it is plain from the application for permission to appeal before me that a great deal of work has already been done in relation to a prospective appeal. Third, it is in the interests of finality that the period for appealing in this case comes to an end sooner rather than later.

Summary assessment

21. I turn to summarily assess KD's costs of the additional claim which are to be paid by the Finches.

22. KD asks for the sum of £65,640 plus VAT for the advice and representation by Mr Somerville, a direct access barrister. That includes £52,500 for trial.

23. Both Mr Kulkarni for the Finches and Mr Somerville for KD invited me to take a broad-brush approach to the summary assessment. Mr Kulkarni said that there should be some reduction as there is always a reduction. Further, he criticised the sum sought for trial preparation and trial; arguing that Mr Somerville's hourly rate from March 2023 of £495 was too high and the time allowed for preparing for trial, being five days, was too long.

24. In my judgment, the figure for KD's representation at trial, being £52,500, is reasonable. It covers the cost of preparing for, and appearing at, a complex fraud trial heard over three weeks and which involved extensive documentation. It is true that Mr Somerville had a

more limited role at trial than the other two teams, in large part because Mr Potts was also appearing against the Finches. But five days of preparation is not at all unreasonable for the role he did play. Nor is the hourly rate of £495 too high. Approached as a brief fee, the equivalent figure for preparation and the first day of trial is (using Mr Somerville's assumption of seven-hour days) around £21,000. Not an unreasonable fee for such a trial. And I note the hourly rate is less than the guideline rate for an equivalent solicitor, being £512. The other costs making up the remainder of the sum sought are also reasonable.

25. As to proportionality, this was complex and valuable litigation. In circumstances where the Finches were found liable for a sum, before adding interest, in excess of £6m, and were arguing that KD must make a contribution of over 50 percent of that liability, the value of the claim which KD was defending was greater than £3m. I consider the total costs sum of £65,640 is well within the range of proportionate figures for such a case.

26. While only a factor, and acknowledging the more limited role played by Mr Somerville in the trial, the costs apparently incurred by the Finches for their own representation show just how reasonable and proportionate are KD's costs. Those, according to the Finches' Precedent H, total £525,425 before VAT for counsel's fees alone.

27. Having decided that KD's costs are reasonable and proportionate, there should be no reduction on summary assessment. To award a lower figure just because reductions are often made would be wrong. I therefore summarily assess KD's costs of the additional claim in the sum of £65,640 plus VAT. Those will be payable in 14 days as usual. I do not see a justification for the forthwith order asked for by Mr Somerville and which would, in any event, be likely to make little practical difference to KD.