[2021] EWHC 834 (QB)

Case No: QB-2020-002026

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 April 2021

Before:

DEPUTY MASTER HILL QC

- -

Between:

BURLEIGH HOUSE (PTC) LIMITED

Claimant

-and-

IRWIN MITCHELL LLP

Defendant

- -

Stephen Hackett (instructed by Griffin Law) for the **Claimant**
Simon Goldstone (instructed by Kennedys) for the **Defendant**

Hearing date: 10 March 2021

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Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10.30 am on 12 April 2021.

DEPUTY MASTER HILL QC:

Introduction

1. By an application notice dated 2 November 2020 the Defendant seeks an order granting summary judgment pursuant to CPR 24.2. The underlying claim is one of alleged professional negligence by the Defendant law firm. The Claimant is a corporation domiciled in the British Virgin Islands. It brings the claim as purported assignee of the Defendant's former client Paul Baxendale-Walker. The application was supported by two witness statements from Jonathan Sachs. The Claimant relied on a witness statement from Neil Kelley.

The factual background

2. In mid-March 2013 APL Management ("APL") loaned Mr Baxendale-Walker £3,865,042 to re-mortgage Burleigh House, his Surrey mansion.

3. The loan was secured by a legal charge over the house. It was payable at an extremely high monthly flat rate of 2.8% on the balance for the duration of the loan (ie. 33.6% per annum). In the event that interest payments were made within seven days of falling due (and no arrears were outstanding) interest would be reduced to the flat rate of 1.4% per month (ie. 16.8% per annum). The term of the loan was 12 months and, if the principal was not paid after that time, the loan would continue but be terminable on three months' notice.

4. On 9 April 2013 Mr Baxendale-Walker began making payments under the loan.

5. In May/June 2014, on the Claimant's case, Mr Baxendale-Walker was given two offers to re-finance the loan: one with Aeriance (at a rate of 9% per annum) and one with APL itself (which offered to match the Aeriance offer).

6. On 9 July 2014 Mr Baxendale-Walker stopped making payments under the loan.

7. On 21 July 2014 Mr Baxendale-Walker retained the Defendant. Although the exact terms of the retainer are in dispute, he broadly wished to explore challenging the APL loan as in breach of the relevant consumer credit legislation.

8. The terms of the retainer are derived from the signed engagement letter and the Defendant's standard terms and conditions.

9. The engagement letter stated: "*You have instructed us to advise you on matters relating to the loan of £3.8 million by [APL] in March 2013 and in particular to advise on breaches of the Consumer Credit Act 1974 by [APL]*". The agreed next step was for the Defendant to "*…correspond with APL Management Limited to inform them that the loan is unenforceable for breaches of the Consumer Credit Act 1974 and thereafter to enter into no doubt without prejudice negotiations…*".

10. Of the Defendant's standard terms and conditions, the following are relevant to this application:

(i) Clause 15.11: "*You may not assign all or any part of the benefit of, or your rights and benefits under, the agreement of which these standard terms and condition [sic] form part*"; and

(ii) Clause 17.3: "*We accept instructions from you on the basis that services provided by [us] are provided solely for your benefit and we do not assume any liability to any person other than you in relation to the advice we give you…No person who is not a party to the agreement embodied in these standard terms and conditions and the relative covering letter(s) shall, in the absence of express provision to the contrary, have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any of its terms, but this does not affect any right or remedy of a third party which exists or is available other than under that Act*".

11. On or around 14 October 2014 County Court proceedings were issued on Mr Baxendale-Walker's behalf which sought to challenge the validity and/or enforceability of the loan.

12. In early 2015 Mr Baxendale-Walker dis-instructed the Defendant. He instructed two further sets of solicitors.

13. In 2016 the claim against APL went to trial. It was almost entirely unsuccessful. By an order dated 3 January 2017 HHJ Lamb QC made a declaration to the effect that the balance due from Mr Baxendale-Walker as at that date was £6,759,495.

14. APL duly commenced possession proceedings. On 23 March 2018 Mr Justice Henry Carr made a possession order in respect of Burleigh House. Mr Baxendale-Walker was declared bankrupt in 2018.

15. On 30 July 2019 Mr Baxendale-Walker signed a Deed of Assignment purporting to assign his causes of action against the Defendant to the Claimant.

16. On 12 June 2020 the Claimant issued these proceedings against the Defendant in both contract and tort. In summary the Claimant alleges that the Defendant was negligent in failing to advise Mr Baxendale-Walker to accept the refinancing terms offered by Aeriance or APL or to explore what refinancing might be available. It is the Claimant's case that had the loan been refinanced, interest would have been payable at 9% rather than 33.6% per annum, the County Court proceedings would have been worth much less and likely settled, and Mr Baxendale-Walker would have salvaged some equity in Burleigh House.

17. The Defendant seeks summary judgment on the claim on three grounds: (i) Mr Baxendale-Walker's purported assignment of the causes of action against the Defendant to the Claimant was ineffective as it was expressly prohibited by the retainer (**"the 'no assignment' ground"**); (ii) the Defendant was under no duty to advise Mr Baxendale-Walker as to the potential option to refinance (**"the 'no duty' ground"**); and/or (iii) Mr Baxendale-Walker did not inform the Defendant of the existence of the alleged Aeriance or APL offers and so the Defendant was under no duty to advise him in respect of them (**"the 'no terms' ground"**).

The legal framework

18. Under CPR 24.2 the court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if (a) it considers that (i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.

19. Applications for summary judgment are to be determined in accordance with the principles formulated by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2010] Lloyd's Rep. I.R. 301 at [24]. These can be distilled as follows:

    (i) The court must consider whether the party defending the application has a "*realistic*" as opposed to a "*fanciful*" prospect of success (*Swain v Hillman* [2001] 1 All ER 91 at 92j, per Lord Woolf MR);

    (ii) A "*realistic*" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *E D & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [7-8], per Potter LJ;

    (iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain*;

    (iv) This does not mean that the court must take at face value and without analysis everything asserted by a claimant: in some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products* at [10];

    (v) In reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550;

    (vi) The court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] F.S.R. 3;

    (vii) It is not uncommon for an application under CPR 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it;

    (viii) If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn

up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

The 'no assignment' ground

The parties' submissions

20. In *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 A.C. 85 Lord Browne-Wilkinson considered it "*satisfactorily settled*" law that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such rights. He observed that were the law otherwise, it would "*defeat the legitimate commercial reason for inserting the contractual prohibition viz. to ensure that the original parties to the contract are not brought into direct contractual relations with third parties*".

21. The Claimant accepted that the non-assignment provision at clause 15.11 of the Defendant's standard terms and conditions relates expressly to contractual rights. The *Lenesta* principle means that Mr Baxendale-Walker's purported assignment of his right to sue for breach of contract to the Claimant was ineffective. The Claimant's position therefore appeared to be tantamount to an acceptance that the Defendant is entitled to summary judgment on the breach of contract claim, although no express concession to this effect was made in argument.

22. The main issue between the parties was whether the Claimant had a real prospect of showing that clause 15.11 permitted Mr Baxendale-Walker to assign his right to sue in tort.

23. The Defendant argued that clause 15.11 precluded assignment of Mr Baxendale-Walker's tortious cause of action because (i) if there had been no contract, there would have been no common law obligations; (ii) the alleged tortious acts overlap entirely with the alleged breaches of contract; (iii) the Claimant's common law tortious claims arise "*under the agreement*" (i.e. the retainer) and so fall within clause 15.11; and (iv) this approach is consistent with the wording of clause 17.3.

24. The Defendant drew support for this interpretation of "*under the agreement*" from *Fiona Trust & Holding Corp v Privalov* [2007] Bus. L.R. 1719. In *Fiona Trust*, the parties had agreed that disputes arising "*under*" a charter should be referred to arbitration. The appellant's case was that the arbitration clause did not apply to its claim, which was for a declaration that the contract had been repudiated: it only applied to claims for breach of contract. Lord Hoffman rejected that contention. At [12] he considered that previous cases in which distinctions had been drawn between disputes "*arising under*", "*arising out of*", "*under*", "*in relation to*", "*in connection with*" or "*under*" a contract "*reflect[ed] no credit upon English commercial law*". Rather, at [13] it was held the construction of an arbitration clause should start from the assumption that the parties, as rational businesspeople, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal; and "*very clear language*" would be needed to show a contrary intention.

25. Applying this approach to the retainer in this case, the Defendant argued that (i) as a matter of interpretation, there was simply no distinction between the prohibition of the assignment of claims arising "*under*", "*out of*" or "*in relation to*" the retainer; (ii) "*very clear*

language" would be needed to create different regimes for a client's contractual and tortious claims, especially, as here, where all the claims concern concurrent and identical rights, acts, omissions and losses, and no such language is present; and (iii) the interpretation advanced by the Claimant – that the parties had intended that clients could assign tortious claims – was entirely uncommercial and undesirable.

26. On the 'uncommercial/undesirable' issue, the Defendant argued that it would be irrational for it to agree that its clients could assign tortious rights during the retainer. If that were possible, the Defendant could find itself under tortious obligations to safeguard the economic interests of a mystery assignee without consent, regardless of money-laundering issues, conflicts or other issues (meaning it could owe obligations to a party it would not have chosen to do business with); and would still be subject to its (unassignable) contractual obligations towards its original client. Further, there might be a risk of 'double jeopardy': the original client could sue under the (unassignable) contractual rights; whilst the assignee could sue in tort, in respect of acts and omissions in the course of the same retainer.

27. In defending the application on this point, the Claimant argued that (i) *Henderson v Merrett Syndicates* [1995] 2 AC 145 at 190 makes clear that solicitors owe their clients a duty of care in tort quite apart from their contractual obligations; (ii) this is the reason why a claim on the same facts in tort can survive a limitation bar when a claim in contract fails; (iii) the doctrines of maintenance and champerty, as considered in *Trendtex Trading Corp v Credit Suisse* [1982] A.C. 679, would operate to prevent a purported assignee without a "*genuine commercial interest*" from taking and enforcing the assignor's tortious cause of action; (iv) the principle of *res judicata* would protect the Defendant from any risk of multiple claims arising out of the same facts; and (v) the person who drafted clause 15.11 may well have excluded reference to tortious claims for fear that such a wide clause could be void on public policy grounds as it would, for example, prevent an insolvency practitioner from assigning a cause of action (noting that their power to do so prevails over the doctrines of maintenance and champerty: *Stein v Blake* [1996] AC 243).

28. Further, the Claimant argued that the *Lenesta* decision was expressly confined to assignments that purport to create a new *contractual* relationship between parties, rather than considering the impact of non-assignment clauses on tortious claims (see page 107F). The Claimant also highlighted that in *Lenesta*, the party opposing the assignment clause had not been able to point to any objectionable public policy consequence of the clause (see page 107B-C) whereas here, there was such a consequence in the form of the adverse implications of the Defendant's construction of the clause in an insolvency context.

29. Having initially characterised this issue as "*a pure point of law, but a simple one*", the Claimant finally submitted that the complexity of these arguments and the need to have regard to the "*matrix of fact*" when construing the retainer (see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at pages 912-913, per Lord Hoffmann) meant that this issue was unsuitable for summary determination.

30. In further responsive submissions on the maintenance/champerty issues, the Defendant highlighted that the Deed of Assignment records that the Claimant was a "*person with a genuine interest in the success or otherwise of the claim*". It was therefore apparently specifically designed to circumvent an argument that it was void due to maintenance/champerty principles, from which the Claimant tried to draw support. The

Defendant argued that the Claimant "*cannot have it both ways*". In addition, the Defendant argued that even if a claim ultimately failed because the assignment was void (and/or, presumably, because the claim was considered an abuse of process), the Defendant would still potentially have incurred irrecoverable costs and adverse publicity. In any event the abuse of process doctrine would not necessarily protect the Defendant from claims being brought by different parties arising out of the same retainer.

31. The Defendant argued that the Claimant's reliance on comparisons with the insolvency regime were misplaced: a bankrupt's assets including causes of action vest immediately and automatically upon bankruptcy by statute (the Insolvency Act 1986, s.306) without any transfer or assignment.

32. Finally the Defendant emphasised that although it was a right to sue in tort that was in issue in this case, clause 15.11 applies to all the rights and benefits under the contract and had to be interpreted with reference to this wider scope.

Analysis and decision

33. I consider that this point is suitable for summary determination: it is, as the Claimant initially accepted, a short point of law and/or construction of the retainer, all the evidence necessary for the proper determination of the question is available now and the parties have had an adequate opportunity to address the issue in argument.

34. Clause 15.11 on its face precluded assignment of the right to sue in contract. In my view the Claimant does not have a real prospect of showing that it did not also preclude assignment of the right to sue in tort. I consider that the Defendant is right to argue that the broad scope of clause 15.11 must be borne in mind when interpreting it. Application of the *Fiona Trust* principle dictates that *"rights…under…the agreement*" in clause 15.11 includes tortious rights. I accept the Defendant's arguments as to why permitting the tortious rights to be assigned would be uncommercial and undesirable. On that basis, per *Fiona Trust*, it is to be assumed that the parties would not have intended such consequences without clear language to that effect, and there is none. The fact that those tortious rights can exist in some cases absent a contract is irrelevant, because here there was a contract, and because the issue here is the extent to which those acknowledged tortious rights could be assigned. I do not consider that the Claimant's arguments as to the limits of *Lenesta* assist.

35. I therefore conclude that the Claimant has no real prospect of showing that Mr Baxendale-Walker validly assigned his rights to sue the Defendant in contract or tort such as to give it 'standing' to bring the claims.

36. On that basis the Claimant has no real prospect of succeeding in any element of the claim. There is no other compelling reason why the case or issue should be disposed of at a trial. Accordingly the Defendant is entitled to summary judgment on the whole claim under CPR 24.2.

The 'no duty' ground

The parties' submissions

37. The Defendant argued the Claimant had no real prospect of demonstrating that the Defendant was obliged to proffer advice to Mr Baxendale-Walker to avail himself of any specific refinancing opportunities or to seek refinancing in general.

38. This was because (i) there is no such thing as a general retainer imposing a duty to consider all aspects of the client's interests whenever the solicitor is consulted; rather the extent of a solicitor's duties depends upon the terms and limits of that retainer (*Midland Bank Trust Co. Ltd v Hett, Stubbs & Kemp* [1979] Ch 384 and *Regent Leisuretime Ltd v Skerrett* [2006] EWCA Civ 1184 [34]); (ii) advice about refinancing was not covered expressly by the retainer in this case and there is no suggestion that Mr Baxendale-Walker specifically asked for such advice; and (iii) the retainer did not extend to an obligation to volunteer commercial advice because this was not something "*reasonably incidental*" to the work that the Defendant was carrying out, to quote one of the principles governing the solicitor's duty of skill and care summarised by Jackson LJ in *Minkin v Landsberg* [2016] 1 W.L.R. 1489 at [38].

39. In *Minkin*, it was held that in determining what advice is "*reasonably incidental*", it is necessary to have regard to all the circumstances of the case, including the character and experience of the client. The Defendant referred to one of the client examples given in *Minkin* that "*an experienced businessman*" who "*[would] not wish to pay for being told that which he/she already knows*". The Defendant argued that Mr Baxendale-Walker fell within this example: he was an experienced entrepreneur and businessman who had established a solicitors' firm and other businesses where he had practised as a wealth management and specialist tax advisor; he had been described by his own counsel in the County Court trial as a "*sophisticated borrower*"; he had authored textbooks on trusts; and there is evidence that he was an experienced and frequent litigator. Significantly, it was the Claimant's pleaded case that Mr Baxendale-Walker had "*sought out possible refinancing opportunities for the Burleigh Loan*" and so had already done precisely what he now alleged the Defendant should have advised him to think about doing.

40. Finally, the Defendant argued that no legal duty obliged Mr Baxendale-Walker to seek to refinance, because he was not claiming damages against APL and APL could not, and did not, allege failure to mitigate in its defence to his claim.

41. The Claimant's position was that it did have a real prospect of showing at trial that the Defendant owed Mr Baxendale-Walker the duty in question. This was because (i) potential re-financing was a matter relating to the loan, and therefore within the scope of the retainer, not least because of the inclusion of the words "*in particular*" in the engagement letter; (ii) in any event a solicitor's duty of care in tort can go beyond the scope of an express contractual retainer (see, for example, *Ball v Druces and Attlee (No 2)* [2003] EWHC 1402 (QB)); (iii) for Mr Baxendale-Walker to have continued to incur avoidable interest at 33.6% per year would quite likely negatively impact the remedy the court awarded him in the County Court proceedings, not least because the court has a considerable discretion as to remedy in unfair credit proceedings, so that the Defendant should have advised Mr Baxendale-Walker as to financing; and (iv) generally, the proper approach to investigating the scope of a duty of care is highly fact-sensitive, and so best determined at trial (see the observations of Lord Roskill, among others, in the leading authority of *Caparo v Dickman* [1990] 2 AC 605).

42. As to the *Minkin* issue of the character and experience of Mr Baxendale-Walker, the Claimant submitted that there was substantial reason to believe that he was not a sophisticated businessman who needed no advice: he had been struck off as a solicitor and potentially also as a barrister, a civil restraint order had been made against him and the fact that he had entered into a loan on punitive interest terms, and had not refinanced on vastly preferable terms, itself generated reason to doubt his judgment.

Analysis and decision

43. In my view the arguments on this issue are sufficiently finely balanced that this issue would not be suitable for summary determination.

44. While there is some force in the Defendant's *Minkin* arguments about the character and experience of Mr Baxendale-Walker, I am not satisfied that the Claimant has no reasonable prospect of making out its case that refinancing was "*reasonably incidental*" to the retainer given the potential link between refinancing and the County Court proceedings. In my view this issue is one that would have needed proper exploration at trial, when all the factual evidence was available.

45. I would not therefore have granted the Defendant summary judgment on this ground. However as I do consider that summary judgment is appropriate on the 'no assignment' point, my decision on this issue is academic.

The 'no terms' ground

The parties' submissions

46. The Defendant's overarching position on this ground was that Mr Baxendale-Walker had not informed the firm of the alleged Aeriance or APL terms and therefore the Defendant could not have been under any duty to advise him about them (albeit that in light of the 'no duty' issue the Defendant was not obliged to advise Mr Baxendale-Walker to accept such terms in any event).

47. More specifically the Defendant argued that (i) it was not even the Claimant's pleaded case nor was it said in evidence that Mr Baxendale-Walker had provided the terms to the Defendant, such that the Claimant had failed to comply with the essential pleading duties at CPR 16 PD 8.2(5); (ii) accordingly there was no need for an impermissible 'mini-trial' on this issue; (iii) the Defendant's files contain neither set of terms; (iv) the argument that the Defendant would have known of those terms "*with a reasonably diligent review of the relevant papers*" does not assist as the Claimant was still unable to assert which "*relevant papers*" contained the terms; (v) he fact that the APL terms were included in the County Court trial bundle is irrelevant because the Defendant had been dis-instructed over a year before the trial; and (vi) Mr Sachs's evidence that he was "*certain*" that he had not seen document purporting to be the Aeriance Terms. Overall, the Defendant's position was that there was no basis to anticipate that the evidential position on this issue will have improved by trial, so it was suitable for summary disposal.

48. The Claimant's submissions were that (i) it had met the pleading duties by asserting at paragraph 30.1 of the Particulars of Claim that the Defendant "*knew*" about the terms or "*would have discovered [them] with a reasonably diligent review of the papers*"; (ii)

obtaining copies of the two sets of terms had not been easy because of Mr Baxendale-Walker's bankruptcy and his trustees in bankruptcy taking possession of his lawyers' papers; (iii) the Claimant had nevertheless obtained a copy of the Aeriance terms and proof, from the County Court transcript, of the existence of the APL terms; and (iv) more evidence of the Defendant's knowledge of the terms was likely to emerge through the *inter partes* and third party disclosure regimes which would include a search of the Defendant's email system. Overall, the Claimant submitted that this was an archetypal dispute of fact unsuitable for summary determination.

Analysis and decision

49. I prefer the Claimant's submissions on this issue.

50. I consider that this issue remains fact-sensitive, and could not properly be determined at this stage, primarily because it is quite likely that further relevant evidence directly bearing on the issue of the Defendant's knowledge of the terms would emerge before trial.

51. I would not therefore have granted the Defendant summary judgment on this ground. However, again, given my judgment on the 'no assignment' point, my decision on this issue is academic.

Conclusion

52. For the reasons set out herein the Defendant is entitled to summary judgment on the whole claim under CPR 24.2.