SHOULD COURTS GIVE DISHONEST CLAIMANTS THE BENEFIT OF THE DOUBT? A NOTE ON THE PRESUMPTION OF HONESTY IN LOSS OF CHANCE CLAIMS

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Introduction

In the recent judgment of ***Brearley & Ors v. Higgs & Co (a firm) [2021] EWHC 2635 (Ch)***, the High Court addressed the presumption of honesty in professional negligence claims against solicitors. Specifically, in this case, the Court had to determine whether a presumption of honesty on the part of a Claimant should survive if the court considered that the Claimant would not have actually acted honestly following competent advice by the solicitors. The judgment involved consideration of the Supreme Court's decision in ***Perry v Raleys Solicitors [2020] AC 352***, on the issue of presumption of honesty.

To that end, we have prepared a note on the decision.

THE FACTS

The Claimants relevant to this note are:

JRB Automotive Ltd (JRBA): a company run by Mr Brearley and others.

James Brearley: an individual who formerly led a division of the car dealership group, Pendragon. He left Pendragon in August 2015.

The Key Summary Background is:

Whilst Mr Brearley worked at Pendragon, there was an opportunity for that company to develop a Jaguar Land Rover dealership in Wolverhampton ("the Wolverhampton Opportunity"). Ultimately, Pendragon did not proceed in doing so, which they said was a result of Mr Brearley's dissuasion.

Mr Brearley's contract of employment with Pendragon included restrictive covenants. These essentially meant he could not pursue the Wolverhampton Opportunity personally, unless Pendragon agreed to them being relaxed.

Despite the presence of these restrictive covenants, Mr Brearley sought to actively pursue the Wolverhampton Opportunity for himself / JRBA by meeting with investors, amongst other things.

After several months of Mr Brearley having pursued the Wolverhampton Opportunity in breach of the restrictive covenants, he obtained what transpired to be some negligent advice from Higgs & Co in relation to the restrictive covenants.

Pendragon sought to persuade Mr Brearley not to purse the Wolverhampton Opportunity. As an example of that, in September 2015, Pendragon sent Mr Brearley a 'cease and desist' letter which threatened that unless Mr Brearley stopped pursuing the Wolverhampton Opportunity, Pendragon would take action against him.

However, Mr Brearley was not deterred and he continued to pursue the Wolverhampton Opportunity. Ultimately, Pendragon sought an injunction and damages from Mr Brearley and JRBA, and in March 2016, a settlement was arrived at with Mr Brearley / JRBA agreeing not to pursue the Wolverhampton Opportunity.

THE CLAIM

Mr Brearley had sought advice from Higgs & Co about pursuing the Wolverhampton Opportunity. It was established that he was given negligent advice. For the purpose of this note it is not necessary to go into detail as to why the advice was negligent. In broad terms, it was alleged that, but for Higgs & Co's negligent advice such as in relation to the restrictive covenants, he would have successfully pursed the Wolverhampton Opportunity and made substantial profits.

THE COURT'S DECISION

Breach of Duty

The court found that Higgs & Co, in breach of duty, had not given to Mr Brearley adequate advice in respect of the effect of the restrictive covenants in his contract of employment.

Causation

Perry v Raleys was a Supreme Court case which concerned a claim for damages based on a loss of an opportunity to claim for a services award under a government scheme for miners suffering from vibration white finger. One of the key causation debates before the Supreme Court was if the Claimant (Mr Perry) would have to prove that he ***would*** have brought an honest claim on the balance of probabilities, **or** instead, whether the Court would have ***presumed*** that he would have done so. In this case, Lord Briggs concluded in favour of the former and drew an analogous comparison: at [26]:

"If nuisance value claims fall outside the category of lost claims for which damages may be claimed in negligence against professional advisors, then so, a fortiori, must dishonest claims."

The Parties' Stances on Causation

The Defendant's position in relation to causation was that Mr Brearley ***would*** have to prove that he would have acted honestly in seeking a relaxation of the restrictive covenants which prevented him / JRBA pursuing the Wolverhampton opportunity before consideration was given to whether Pendragon would have consented. This was based on the Supreme Court's decision in ***Perry & Raleys***.

The Claimant's position in relation to causation was that causation needed to be assessed by reference to the likelihood of Pendragon consenting to a relaxation of the restrictive covenants based on an ***assumption*** that Mr Brearley would have been honest and given full disclosure. If this was correct, then the court's actual view of whether Mr Brearley would have been honest would not be relevant to the issue of whether the Defendants had a liability.

The Court's Decision on Causation

Mrs Justice Falk agreed with the Defendant's submissions as to what the correct test to apply was as a matter of causation. She said:

"It cannot be right that honesty must continue to be presumed in favour of a claimant whom the court is satisfied after the rigours of a full trial would, in fact, have behaved dishonestly. That would certainly not be fair. It would allow a dishonest claimant to escape from what the court is satisfied would in fact have been dishonest behaviour. That would not properly reflect the effect of the Supreme Court's decision that the claimant must demonstrate what he would have done, and it would be wrong as a matter of principle and justice since it is a matter that can fairly be tried."

Applying that test to the facts of the case, the Judge considered that Mr Brearley would have been *"reluctant to take or follow additional advice"* as she observed that Mr Brearley had his sights set on pursuing the Wolverhampton Opportunity for several months before any approach was made to Higgs & Co. As well as this, plans were being discussed with investors involving the project when he was still under contractual restrictions under his employment contract with Pendragon. Mrs Falk's view was that Mr Brearley must have been aware of these restrictions and he was *"not wholly ignorant"* of these terms of his own contract as a prudent individual.

Ultimately, the judge concluded:

"I am unable to conclude on the balance of probabilities that Mr Brearley would, in fact, have been prepared to approach Pendragon and make an honest and full disclosure."

Therefore, the presumption of honesty was rebutted, and the claim was dismissed because Mr Brearley could not established he would have acted honestly in pursuing the Wolverhampton Opportunity.

CONCLUSION

This case reinforces Lord Briggs' analysis in ***Perry v Raleys*** that in solicitors' negligence cases, whilst a court will fairly start with a presumption of honesty on the part of a Claimant, a court will not continue with that presumption if it is satisfied the Claimant would have acted dishonestly. We think this is a very sensible decision and consistent with Lord Briggs' statement that:

"The court simply has no business rewarding dishonest claimants".

Further Information

This note should not be treated as specific advice in relation to a specific matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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