Neutral Citation Number: [2023] EWCA Civ 724

Case No: CA-2023-000200

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Deputy High Court Judge Simon Gleeson
[2022] EWHC 3091 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2023

Before:

LADY JUSTICE ASPLIN
LADY JUSTICE SIMLER
and
LADY JUSTICE FALK

- -

Between:

(1) AMANDA CLAIRE MARIAN FEILDING or CHARTERIS, COUNTESS OF WEMYSS AND MARCH **(2) VILMA RAMSAY** **(as trustees of the Wemyss Heirlooms Trust)**	**Claimants/ Appellants**
- and –	
SIMON C. DICKINSON LIMITED	**Defendant/ Respondent**

- -
- -

David Cavender KC (instructed by **Pallas Partners LLP**) for the **Appellants**
Henry Legge KC (instructed by **Howard Kennedy LLP**) for the **Respondent**

Hearing date: 21 June 2023

- -

Permission to appeal: reasons for decision

Lady Justice Falk:

Introduction

1. The Appellants, trustees of the Wemyss Heirlooms Trust (the "Trustees"), sought permission to appeal against a decision of Simon Gleeson, sitting as a Deputy High Court Judge (the "Judgment"). The Judgment dismissed the Trustees' claim against the Defendant for breach of duty in respect of a sale of a painting entitled "Le Bénédicité" (the "Painting").

2. The fundamental issue between the parties relates to the extent to which the Painting should have been attributed to Jean-Baptiste-Siméon Chardin. In outline, the Defendant sold the Painting to a dealer for £1.15m as "Chardin and Studio". The Trustees say that there was at least a chance that the Painting could have been sold for considerably more on the basis of a full attribution to Chardin. They rely on the fact that the Painting was subsequently sold by the dealer for what was apparently a much higher price. The Painting had been sent to the Defendant for cleaning and assessment for a possible sale, and the Trustees maintain that there should have been a further discussion about attribution and possible next steps before a sale was made.

3. Permission to appeal was refused by the judge. I considered the Trustees' application to this court on the papers and adjourned it to an oral hearing, outlining some specific points that I considered should be addressed. We heard the application on 21 June 2023. The Trustees were represented by Mr Cavender KC, who had not appeared below. The Defendant (and proposed Respondent) appeared by Mr Legge KC, who had appeared at the trial. Mr Legge also provided additional written submissions. We are grateful for Counsel's assistance.

4. We informed the parties at the hearing that we had decided to refuse permission to appeal, with reasons to follow. These are our reasons.

Grounds of appeal

5. The grounds of appeal are somewhat lengthy but their essence can be summarised as follows:

   Ground 1 – duty in contract: The judge had failed to determine the terms of the contract, and should have concluded that the Defendant had a contractual duty to report back and advise/warn the Trustees before concluding the sale that it did.

   Grounds 2-6 – duties to warn etc: The judge was wrong to hold that the Defendant's duties to the Trustees were limited to the tortious duties discussed in *Thomson v Christie Manson & Woods Ltd* [2005] PNLR 38, given the very different factual situation. In any event, given his previously published views on the Painting there was a duty either to approach the leading expert on Chardin, M. Pierre Rosenberg, following cleaning to seek to confirm the attribution, or at least to advise the Trustees about the potential benefits of doing so. There was a duty to advise that there was a real possibility that the Painting could be worth considerably more than the proposed sale price, that the Painting was not being sold as a "Chardin" but as "Chardin and Studio", that it was being sold to a dealer

rather than on a retail basis and that the price was a "best guess" or was "fudged". The judge had also erred in relying on the subjective views of Mr Dickinson, whereas he should have applied an objective test.

Ground 7 – loss of chance: The judge was wrong not to apply "loss of chance" principles in assessing loss, in accordance with *Allied Maples Group v Simmons & Simmons* [1995] 1 WLR 1602 and *Perry v Raleys* [2020] AC 352.

Ground 1– duty in contract

6. We refused permission on this ground on the basis that it was a new point on appeal which it would not be appropriate to allow the Trustees to pursue. It had not been pleaded and was not the case that the Defendant had prepared to defend.

7. The Painting had originally been sent to the Defendant for cleaning and assessment with a view to a possible sale, but there was no dispute that the sale that took place was in fact authorised. The particulars of claim did not suggest otherwise. The claim made was that the Defendant had breached its duty to act with reasonable care and skill and to obtain the best price reasonably obtainable. The claim was one of negligence. The pleaded particulars of negligence included, as one aspect, a failure to warn the Trustees, but there was no suggestion that there was a contractual term that required the Defendant to revert to the Trustees prior to sale.

8. It is apparent from the Judgment at [107] that Mr Onslow KC, who appeared for the Trustees below, did argue that there was an obligation to report back prior to sale given the basis on which the Painting had been consigned to the Defendant. However, there is no indication that the case was presented on the basis that the contractual terms required this independently of the duty to exercise reasonable care. This is reinforced by the fact that the Trustees' written closing submissions deal with the point only in that context.

9. We accept Mr Legge's submission that, if the case had been put at trial on the basis of a contractual term, the Defendant's case would have been presented differently. It would have been necessary to look at the (significant) prior course of dealings between the parties in relation to sales of other paintings arranged by the Defendant to determine the terms of the mandate. This would have affected the evidence led by the Defendant and the cross-examination of the Trustees' witnesses. Instead, the trial did not focus on the terms of the mandate and the judge had simply referred to them as "lost in time".

10. In those circumstances, and applying the principles relating to new points on appeal recently summarised by Lewison LJ in *Hudson v Hathaway* [2022] EWCA Civ 1648 at [34]-[35], it would not be just to permit the Trustees to pursue Ground 1.

Grounds 2-6 – duties to warn etc.

11. Permission on these grounds was refused on the basis that there was no real prospect that the Trustees would succeed in reversing the judge's conclusion that the claim should be dismissed, and there was no other compelling reason for the

appeal to be heard. In particular, even if any legal error in the judge's approach could be detected, there was no real prospect of an appeal process leading to a conclusion that a further pre-sale discussion would have led to a different result. Any appeal would therefore be academic.

12. Mr Legge showed us that Mr Onslow had conceded at trial that the Trustees would have followed Mr Dickinson's advice. The Trustees also did not establish that Mr Dickinson's views were negligent. Mr Dickinson's opinion that the Painting was only partly by Chardin and so should not be fully attributed to him was not successfully challenged. In relation to whether Mr Rosenberg should be consulted the judge found at [103] that the decision not to do so was not negligent, because doing so would be a "spin of the roulette wheel" that could destroy, rather than enhance, the value of the Painting. The context for that finding included the acceptance by the judge of Mr Dickinson's evidence that when Mr Rosenberg had seen the Painting at Gosford House in 1992 he had commented that it was "wholly studio" (Judgment at [99]-[100]) and the judge's finding that Mr Dickinson, a "recognised expert", had concluded that the Painting was inferior to other versions of the work and that he had not been negligent in doing so ([117]-[118]). The judge also concluded that the sale price secured was not negligent for the Painting with less than a full attribution ([119]-[129]).

13. Therefore, in a counterfactual world where the Defendant did consult the Trustees prior to sale the advice would not have been negligent and the Trustees would have followed that advice. It follows that the Painting would still have been sold on the terms that it was.

14. In oral submissions Mr Cavender sought to challenge some of the judge's findings of fact. In particular, he sought to challenge the judge's findings at [103] and [106] about the downside risk of consulting Mr Rosenberg, and the final sentence of [106] which dealt with the likely reaction of Lord Wemyss. The relevant part of [106] reads as follows:

> "… However, the evidence of the Wemyss themselves was that they did not have any particularly sophisticated understanding of the art market, and that they employed Mr Dickinson precisely because he had that knowledge. His mandate from them was simply to obtain the best price reasonably obtainable for The Paintings given to him for that purpose. I formed the view that they would have been astonished and somewhat irritated to receive a communication from Mr Dickinson of the form "here are the facts – you decide". Lord Wemyss made the entirely sensible point that if Mr Dickinson had told him that there were steps which could have been taken which would improve the likely selling price of The Painting by several million pounds, he would of course have urged that those steps be taken. However, it seems to me to be equally clear that if Mr Dickinson had informed him that there was an accompanying risk that the £1m sale price would be significantly negatively affected, he would have explained to Mr Dickinson – possibly somewhat brusquely – that the making of judgement calls of this kind was exactly what Mr Dickinson was being paid to do."

15. It was far from clear from the grounds of appeal and skeleton argument that Mr Cavender would be seeking to make a full-frontal assault on any of the judge's findings of fact (and in particular the final sentence of [106]), so it was understandable that Mr Legge had not prepared to address that point. However, the limited parts of the evidence of Lord and Lady Wemyss that we were taken to by Mr Cavender were obviously no substitute for all the evidence seen and heard by the judge. There is no real prospect of the Trustees succeeding in demonstrating that either the judge's conclusion that it was not negligent to refrain from consulting Mr Rosenberg because of the risks involved, or his assessment in the final sentence of [106] of the likely reaction if the Defendant explained the risks, was a finding that the judge was not entitled to make on the evidence. In particular, the assessment at the end of [106] was obviously reached having heard all the evidence, and was certainly not inconsistent with the judge's conclusion that Lord and Lady Wemyss were honest witnesses.

16. The complaint that the judge relied on the subjective views of Mr Dickinson appears at first sight to have some substance, but on analysis it does not. The challenge is somewhat unfair because Mr Dickinson's actual state of mind was put in issue by the Trustees. In any event, however, when considering whether attribution has been negligent it is inevitable that the relevant expert's opinion must be identified, including the existence (or otherwise) of any real doubts that they hold: see for example *Thomson v Christie* at [157]. As Mr Legge explained, having determined that Mr Dickinson's actual opinion, reached after an appropriate process of assessment, was that the Painting was properly attributable to "Chardin and Studio", the remaining question was whether that opinion was one that it would be negligent for a reasonably competent specialist to hold. As to that, the challenge to Mr Dickinson's assessment was limited to reliance on certain published views about the Painting set out at [93] of the Judgment. The judge dealt with those convincingly and succinctly at [94], concluding that they were either of no assistance or were not dispassionate assessments.

Ground 7 – loss of chance

17. This does not arise given that permission has been refused on the question of breach of duty.

Lady Justice Simler:

18. I agree.

Lady Justice Asplin:

19. I also agree.