Neutral Citation Number: [2021] EWHC 55 (Ch)

Case No: CH-2020-000134

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
CHANCERY APPEALS
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
ORDER OF HHJ DIGHT CBE DATED 10 MARCH 2020
COUNTY COURT CASE NO: F10CL656

7 Rolls Building
Fetter Lane
London EC 4A 1NL

Date: 15/01/2021

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

David Anthony Hinkel — **Appellant**

- and -

Simmons & Simmons LLP — **Respondents**

- -
- -

The Appellant appeared in person
James Sharpe (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Respondents** (written submissions only)

Hearing dates: 12 January 2021
- -

Approved Judgment

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii.

.....

Mr Justice Adam Johnson:

Introduction

1. The intended Appellant, Mr Hinkel, seeks permission to appeal the Order of HHJ Dight dated 10 March 2020, by which Judge Dight entered summary judgment for the Defendants/Respondents, Simmons & Simmons, and in so doing dismissed Mr Hinkel's fraud claim against them. Mr Hinkel is a litigant in person.

2. I refused permission to appeal on paper, by means of my Order dated 1 December 2020, but Mr Hinkel renewed his application at an oral hearing before me on 12 January 2021. I had the benefit of full written submissions from Mr Hinkel before the hearing, and gave him permission to file certain further materials following the hearing, after it became clear that he required some limited additional time to deal with one of the matters I raised with him. In those circumstances, and in light also of the seriousness of the allegations made by Mr Hinkel and the importance of the case to the parties, I determined to give my ruling on the permission application in writing rather than orally.

Background

3. Mr Hinkel's claim concerns a failed attempt by him to purchase a property in England, owned by the Republic of Iran. The background is recited in the Judgment of HHJ Dight. In brief, Mr Hinkel approached a Mr Hooton of Simmons & Simmons in June 2015, saying he had information that Mr Hooton was newly instructed by the Republic of Iran. In response, Mr Hooton said he was not instructed at that time but had been in touch with an individual called Dr Azizi. On 23 July 2015, Mr Hooton had still not been instructed but said he was waiting sign-off on an engagement letter. After a long period of delay, Mr Hooton finally wrote to Mr Hinkel on 28 January 2016 to say: "*My clients have now instructed me to take this matter forward.*"

4. Attempts to move the transaction forward then continued until May 2016, when they came to an end and the transaction was aborted. Email exchanges between the parties' solicitors – Mr Hinkel had his own firm of solicitors instructed at the time – show that there were ongoing discussions over the price. Several emails from Mr Hinkel's solicitor, Mr Needham, are consistent with the idea that Mr Hinkel himself was engaged in discussions with someone on the seller's side over price. In the event, however, no agreement was reached and the sale did not go ahead.

5. In the meantime, of course, Mr Hinkel incurred legal costs. He also incurred costs associated with establishing an SPV which was intended to be used to acquire the property. He also says there are lost profits. He seeks to recover all of this from Simmons & Simmons on the basis that they were parties to a fraud.

6. The alleged fraud arises because Mr Hinkel says that Dr Azizi, who Mr Hooton was in contact with, was not in fact a representative of the Republic of Iran but instead an impostor. Mr Hinkel says he has conducted inquiries and Dr Azizi is not known to the Republic of Iran.

7. The Judge in his Judgment referred to this and to other evidence, and accepted that possibly one might draw the inference that Dr Azizi *was* an impostor and that Simmons

& Simmons therefore were not properly instructed. But he still entered judgment for the Defendants.

8. That was essentially for two reasons. The first was that he held the pleading of fraud was not properly put: see para. 41, where the Judge said there was no proper assertion that Simmons & Simmons actually knew that the representation they had made, to the effect that they had instructions from the Republic of Iran, was untrue. Nor was there any proper assertion that they were reckless as to its truth.

9. The Judge's second point went further than simply looking at the pleadings. He also looked at the evidence, including the course of the negotiations over price, and concluded there was no evidence which was properly consistent with an assertion of dishonesty: see at paragraphs 48-49.

10. Mr Hinkel now seeks permission to appeal. The substance of his challenge is as to the Judge's second point. In order to obtain permission, he needs to satisfy the Court that his appeal has a real prospect of success. Mr Hinkel says there is evidence of fraud. In making his argument, he seeks to rely on a number of new documents, including in particular a copy of a draft engagement letter from Simmons & Simmons dated 18 December 2015, which identifies Dr Azizi as their intended client contact.

11. I should say that the story of Mr Hinkel's complaints against Simmons & Simmons is a long one, and includes a complaint made by him to the Solicitors Disciplinary Tribunal about a number of matters, including allegations of inadequate record keeping and due diligence. These complaints were rejected by the Tribunal in a Decision dated 6 June 2019, but only after inquiries had been made of Simmons & Simmons by the Solicitors Regulation Authority, who provided reports to the Tribunal in their letters dated 2 May and 16 May 2019. I will come back to some aspects of this correspondence below.

12. In his written and oral submissions, Mr Hinkel has developed a number of points, but it seemed to me there were two main ones.

13. His first main point is expressed as follows in his written Submissions at para. 5: "*HHJ Dight was correctly of the opinion that the Respondents were never engaged by the Islamic Republic of Iran as acting solicitors for a property which the Embassy states was never for sale but wrongly proposed without any evidence instead that the respondents acted as agents on a retainer*." In saying this, Mr Hinkel seems to be saying that the Judge wrongly concluded that Simmons & Simmons *did* have authority to act for the Republic of Iran, albeit as agents rather than as solicitors instructed on a conveyancing transaction. In order to counter this point, Mr Hinkel relies on a number of documents, including a draft sale contract in respect of the property, provided by Simmons & Simmons to Mr Hinkel's solicitors in May 2016. He also points to the draft engagement letter. He says that these documents show clearly that Simmons & Simmons held themselves out as solicitors instructed by the Republic of Iran on the intended sale.

14. Mr Hinkel's second main point, and indeed the critical one, relates to the states of mind of the relevant individuals at Simmons & Simmons with whom he and his solicitors were in contact. He says that they *did* know that they were acting without authority, and the evidence is the letter of engagement: see his written submissions at para. 7. The

point is developed at para. 9, where the point made is that the Iranian address given on the draft engagement letter is not in fact an address associated with the Republic of Iran, and that it must follow that Mr Hooton and his associate Miss Rose "*did not comply with their firm's own regulations and standards of KYC*", the latter point referring to the requirement that a solicitor should "*know your client*". The address given in the draft is: "*Shahid Langari and Sanaye Street Crossing, Noubonyad Square, PO Box 16765-1479, Iran*." Mr Hinkel says his researches have shown that this was not an address of the Government of Iran but instead of the Executive Editor of the "*Iran Wood, Paper and Furniture Magazine*".

15. In developing his case on the fraud issue more generally, Mr Hinkel referred in submissions to a document published by the Solicitors Regulation Authority called, "*Acting with Honesty*." He also referred to certain of the decisions mentioned in that document, and in particular to the decision of the Supreme Court in Ivey v. Genting Casinos (UK Ltd) t/a Crockfords [2017] UKSC 67, in which the Court articulated a two-stage test for determining dishonesty: stage 1 involves inquiring into the defendant's subjective knowledge and belief at the time; and stage 2 involves asking, whatever subjective view the defendant may have had about whether he was acting honestly or not, whether his conduct would be regarded as dishonest by the standards of ordinary decent people. Mr Hinkel said that in this case, measured by the yardstick of what the ordinary, decent person would regard as acceptable, the Respondents had clearly been dishonest, and had fallen short of what was properly to be expected of them.

Draft Engagement Letter

16. Before moving on, I should deal with one important preliminary point, which is that the draft engagement letter referred to was not available during the hearing before HHJ Dight. Mr Hinkel has explained that it became available to him only afterwards, as a result of its disclosure in some related criminal proceedings. Although not supported by evidence, I am content for present purposes to accept that explanation, and to permit Mr Hinkel to rely on the draft engagement letter for the purposes of this application.

17. I turn then to the substance of Mr Hinkel's arguments.

Agency Arrangement

18. It seems to me, with respect, that Mr Hinkel's first point rests on a misapprehension. It appears to have its origin in an exchange the Judge had with counsel for Simmons & Simmons, shown at pp. 19-20 of the transcript for the hearing. But that was a discussion about how the Claimant's own case was put, rather than a conclusion expressed by the Judge. One can see that clearly from what the Judge said at p. 20, lines 20-23: "*As I read this, it looks more as if it is being suggested that your client was being put in the position, or was in the position, through holding a signed mandate, not of being a solicitor advising Iran, but as agent acting on behalf of Iran.*"

19. I do not think it follows from this that the Judge concluded that there *was* a mandate to act as agent and that Simmons & Simmons were therefore authorised, but on some basis which did not involve them acting as conveyancing solicitors.

20. On the contrary, the judgment to my mind proceeds on quite the opposite basis. Taking the relevant points in turn, the Judge's analysis seems to me to break down into three parts, as follows.

21. First, when Mr Hooton said in his email of 28 January 2016 that his clients had instructed him to take the matter forward, that was a representation that he, and Simmons & Simmons, were instructed by the Republic of Iran as solicitors in connection with the proposed transaction. The Judge clearly proceeded on that basis, because he said so expressly at para. [20] of his Judgment. Referring to some late evidence filed on behalf of Simmons & Simmons, which he agreed to admit, the Judge said: "*It does not seem to me to take matters much further. It confirms the position of the defendant, that they were instructed, and held themselves out as instructed to act on behalf of the Government of Iran, in respect of this transaction*."

22. Second, as I have already mentioned, the Judge accepted that the inference might be drawn, based on the evidence he had seen, that Simmons & Simmons were *not* in fact properly instructed by the Republic, because Dr Azizi was an impostor: see his Judgment at para. 47. In saying this, and although he recorded his view that there was strong evidence pointing in the opposite direction, I understand the Judge to be saying it was at least arguable that Simmons & Simmons were not properly instructed.

23. Third, however, again as I have already mentioned, the Judge concluded that the further, critical part of an allegation of fraud was not made out – i.e., knowledge that a false statement was being made, or recklessness as to the truth or otherwise of the statement.

24. I should say that it was this agency point which I invited Mr Hinkel to clarify after the hearing, i.e. I asked him to identify where, either in the judgment or in the transcript of the hearing before HHJ Dight, the Judge had expressed the *conclusion* that Simmons & Simmons were acting under some general agency arrangement. In his letter to the Court after the hearing, Mr Hinkel was not able to identify any such conclusion, but referred only to certain passages in the transcript including the quotation set out above at [18]. But that was obviously not a conclusion.

25. I will come back in a moment to the question of knowledge or recklessness, but for the moment, addressing Mr Hinkel's first point, it seems to me Mr Hinkel is wrong in assuming that the Judge proceeded on the footing that Simmons & Simmons had some form of agency mandate, and that in some way that fed into his overall conclusion that there was no fraud. Instead, the Judge agreed that Simmons & Simmons held themselves out as acting as conveyancing solicitors; he accepted that arguably they were not properly instructed; but said there was no evidence that they knew that or were reckless about it. In those circumstances, I reject Mr Hinkel's first main point. I also think that this addresses the argument made at some length by Mr Hinkel, as to the significance of the draft sale contract which Simmons & Simmons later provided. This was relied on by Mr Hinkel as showing that Simmons & Simmons held themselves out as solicitors instructed on the transaction. He is right about that, but it carries him no further forward because the point was accepted by the Judge and clearly formed part of his reasoning.

Fraud: Knowledge or Recklessness

26. Mr Hinkel's second main point is that the Judge was wrong on the question of knowledge or recklessness. He says that the relevant individuals at Simmons & Simmons did know that Dr Azizi was an impostor, or were reckless as to that fact.

27. The Judge, having heard from the parties on the evidence, was very clear in his conclusion. He referred to the evidence of Mr Hinkel's own inquiries, including the discussion he had with the Iranian embassy in London (see the Judgment at [45]). But he concluded there was no evidence "*from which the court could properly infer that the defendant did not believe in the truth of the representation that they acted on behalf of the Iranian government.*" In other words, he drew a distinction between the issue of whether Simmons & Simmons were actually instructed, and the separate matter, assuming they were not, of whether they knew they were not, or did not care to the point of being reckless about it. He said there was no evidence on this latter point, which it was for Mr Hinkel to prove, and said the nettle had to be grasped straightaway: " *… it is not the sort of case where one can wait until trial to see what happens*."

28. Mr Hinkel was critical of these findings by the Judge, although if I may respectfully say so, it seems to me that in making his submissions Mr Hinkel tended rather to mix together the second and third of the elements in the Judge's analysis (above at [22]-[23]), i.e. he tended to confuse the fact that there was evidence that Dr Azizi was possibly not a representative of the Iranian Government with the separate question whether Simmons & Simmons knew that to be the case but pressed ahead anyway. Evidence supporting the former conclusion is not determinative of the latter, although of course it may be relevant, depending on the circumstances.

29. Looking at the Judgment itself, however, it seems to me that the Judge approached his analysis in exactly the right way. He carefully evaluated the evidence before him with a view to assessing whether it properly disclosed an arguable case of knowledge or recklessness amounting to fraud. It seems to me that the conclusion he reached was one which was plainly available to him on the evidence before the Court. This included evidence of the course of the negotiations over price and the termination of the efforts to bring about the transaction. Certainly the transaction had some unusual features, given the nature of the counterparty (a foreign State subject to international sanctions), but I think the Judge was justified in reaching the conclusion that there was nothing to show that the mental element of the test was satisfied – i.e., that Simmons & Simmons knew that Dr Azizi was an impostor but decided to carry on anyway, or alternatively were reckless as to Dr Azizi's status to the point of not caring whether they were telling the truth or not. It is relevant that Mr Hinkel seems to have conducted his own direct discussions with the Iranian side on the question of price, and does not seem to have been concerned at the time.

30. That deals with the Judgment, but the question then is, looking at the draft engagement letter, does that make a difference, or arguably make a difference, to the view taken by the Judge?

31. In my view, although I have very carefully considered Mr Hinkel's arguments, the answer to that question is no. I say that for the following reasons.

32. To begin with, there is nothing in the point Mr Hinkel made a number of times, that the draft contract of sale was circulated by Simmons & Simmons before the date of the draft engagement letter. The draft engagement letter is dated 18 December 2015, and the draft contract 6 May 2016, some months later – i.e. the reverse of the chronology Mr Hinkel said was material.

33. Another point Mr Hinkel makes, which was summarised in a letter sent to the Court after the present hearing, is as follows:

> *"That the Defendant was deceitful is proved by the date of this engagement letter which is many months after the Defendant claimed to have written it, knew that it had been signed or was in the post as the Defendant knew in the Defendant's mind that it had not yet been written. That was deceit."*

34. With respect, I think this is also a rather confused submission. The engagement letter which has been produced is a draft, which is not signed by Dr Azizi. As to whether Mr Hinkel was ever told there was a final, signed version of the engagement letter, the Judge said at [42] of his judgment that there was "*no good evidence*" of that ever being said to him. I have seen nothing which calls into question that conclusion, and on the contrary, the chronology tells a different story. As noted above, what Mr Hooton said on 23 July 2015 was that he was still awaiting sign-off on the engagement letter. In other words, what he said at that stage was that he was without instructions. He did not claim to have instructions until 28 January 2016. Both facts are consistent with the idea that there is an unsigned, draft engagement letter dated 18 December 2015, at a point when Mr Hooton did not claim to have instructions and was apparently still waiting for confirmation to proceed.

35. In those circumstances, it seems to me the real significance to be attached to the engagement letter arises out of the address given for Dr Azizi, the alleged government representative. During the course of the hearing, I understood this to be Mr Hinkel's main point about it. His allegation, simply put, is that the address was a clear signal that Dr Azizi was not a representative of the Republic, and even if they did not know that, Mr Hooton and Simmons & Simmons more generally were obviously reckless in failing to check.

36. I do not accept that submission. The problem with it is that it requires an inference of dishonesty to be drawn, but in circumstances where other, entirely plausible explanations are available which are inconsistent with any dishonest intent. As to this, HHJ Dight referred in the course of his Judgment to the following passage in the speech of Lord Hobhouse in Three Rivers DC v. The Governor and Company of the Bank of England (No. 3) [2001] UKHL 16, [2003] AC 1, at para. [161], where in giving guidance on the proper application of the summary judgment test, Lord Hobhouse said:

> *"The burden of proof remains the civil burden - the balance of probabilities - but the assessment of the evidence has to take account of the seriousness of the allegations, and if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence."*

37. One alternative explanation here is that there was a degree of carelessness in the dealings with Dr Azizi, but carelessness falling short of the sort of recklessness, amounting to dishonesty, necessary to sustain an allegation of fraud. I do not say that there was such carelessness of course. I could not reach that conclusion on the present application. I say only that a degree of carelessness in running the appropriate checks is another plausible explanation of the present facts, but one which is inconsistent with the idea that Simmons & Simmons perpetrated a fraud on Mr Hinkel. To put it another way, another explanation of what happened, even if one starts from the proposition that Dr Azizi *was* an impostor, is that Simmons & Simmons were *also* deceived by him, albeit that they were careless in allowing that to happen.

38. Yet a further possible explanation (or it might in fact be a gloss on the first) is that although a certain degree of due diligence was conducted into Dr Azizi, it was not finally conclusive. One might perhaps expect as much in dealings with a client based in a jurisdiction such Iran, where chains of authority are no doubt difficult pin down. This interpretation is borne out by one of the letters sent by the SRA to the Solicitors Disciplinary Tribunal, namely the letter dated 16 May 2019, in which the SRA reported as follows:

> *"In terms of due diligence checks, Simmons & Simmons have explained to the SRA that the Government of Iran was an existing client of the firm albeit that their representative [I take that to be a reference to Dr Azizi] was a new contact. Simmons & Simmons made it clear to the client (and to Mr Hinkel's lawyers) that they would need to visit the Iranian Embassy in London to verify the identity of the new contact and that any documents which needed to be executed would need to be executed at the Embassy. However, the purchase fell through and there was never any need to have the documents agreed and executed, so this became irrelevant."*

39. What is being said here, as I understand it, is that Simmons & Simmons had encountered some difficulty in verifying Dr Azizi's identity (that is consistent in the delay occasioned in trying to do so), but made it clear that that would have to happen before any transaction was eventually concluded.

40. I put this passage to Mr Hinkel during the course of the hearing before me, and I understood him to contest it on the basis that it was inaccurate and misleading. I do not think I can discount it, however. It records a statement made by a firm of solicitors to its Regulator, in the course of inquiring into a complaint. It seems to me I should take it at face value unless there is a good reason not to, and here I see no such good reason. In any event, it is not necessary for me to make any finding in relation to it for the purposes of the present application. I rely on it only as an articulation of what seems to me an entirely plausible, alternative interpretation of the events Mr Hinkel complains about, but an alternative explanation which is consistent with Simmons & Simmons behaving honestly.

41. Relatedly, and indeed as part of the same overall evaluation, I think it is relevant to bear in mind the implausibility of not one, but two or more, persons from a well-known firm of solicitors being involved in a fraudulent scheme. Mr Hinkel says I should not put legal professionals in a different category to anyone else, and I agree with that. No

special treatment is deserved. But what I do say is that, as a matter of common sense, and as a matter of evaluating the evidence overall, it is relevant to bear in mind the inherent improbability of a firm of solicitors taking such a huge risk with its reputation, for the sake of one client or even one transaction. That is all the more so in this case where the mechanics of the alleged fraud are unclear to me, i.e., it is unclear precisely how Simmons & Simmons, or Mr Hooton, or the other individuals said to have been involved, would have made money out of it. The transaction did not go ahead; no money changed hands; and indeed Mr Hinkel's case in his written submissions at para. 13 is that Mr Hooton dishonestly drove up the asking price in order to cause the transaction to aborted.

42. Overall, my view is that there are a number of ways of looking at the present facts which are consistent with Simmons & Simmons (or rather, their representatives) having an entirely honest motive. I would go further in fact, and say that the alternative interpretations I have identified are inherently much more likely or more plausible than the theory that Simmons & Simmons were involved in a fraud. The fraud allegation appears to me to be quite unrealistic. I therefore think HHJ Dight was correct to reach the conclusion he did, and I do not consider that the engagement letter, even if taken into account, gives rise to any serious prospect of showing on appeal that that conclusion was wrong.

Miscellaneous points

43. I should deal briefly with certain other points made by Mr Hinkel in his submissions. One was that Judge Dight had been wrong to question whether Mr Hinkel was in fact the true owner of the SPV he says he incorporated, following a request from Simmons & Simmons, to be his acquisition vehicle. Relatedly, Mr Hinkel sought permission to rely on a further new document to deal with this point. This was an email dated 15 December 2016 identifying Mr Hinkel as the owner of the SPV, Harrington Developments Limited.

44. As to this particular issue, it seems to me that the fact that the Judge may have raised a question issue about ownership of the SPV was not material in any way to his decision. At paragraph [16] of the Judgment, the Judge acknowledged that Mr Hinkel asserted he was the beneficial owner of the SPV, and as I read it, the rest of the Judgment proceeded on the assumption that he was. In any event, I am prepared to make that assumption for the purposes of this judgment, and in those circumstances it is unnecessary for me to decide whether Mr Hinkel should be entitled to rely on this further document. Even making that assumption in his favour, however, in my judgment, Mr Hinkel does not have a real prospect of succeeding on the more material points going to the fraud case, summarised above.

45. Mr Hinkel also seeks to rely on a further new document, namely an email from Mr Hinkel himself dated 31 January 2013, addressed to Mr Hooton, at a time when Mr Hooton was apparently at Ashurst, solicitors. I refuse permission to rely on that document. It was plainly available to Mr Hinkel prior to the hearing before Judge Dight. Perhaps more significantly, it seems to me to have no real relevance to the present inquiry. The fact that Mr Hinkel may have written to Mr Hooton in January 2013 when he was at another firm of solicitors tells one nothing about Mr Hooton's state of mind two years later when he was in contact with Mr Hinkel while working at Simmons & Simmons.

Conclusion and Final Points

46. It follows that my overall conclusion is that I should refuse permission to appeal.

47. That being so, I should deal with two applications made on paper by Simmons & Simmons. First, they asked me to dismiss Mr Hinkel's permission application on the basis that it was totally without merit. Second, they asked for an Order for their costs of the appeal (although they did not appear at the oral hearing, they made short submissions in writing).

48. As to the first point, although I have rejected it, I do not consider Mr Hinkel's application to have been totally without merit. The background is complex, and I think Mr Hinkel raised a legitimate question about the significance of the address shown on the draft engagement letter, even if, as matters have turned out, my answer to that question does not ultimately help him.

49. As to the second point (costs), the Court did not invite written submissions from the Respondents, and I see no reason to depart from the usual approach that a Respondent is not entitled to its costs at the permission to appeal stage. Accordingly, I will make no Order as to costs of the appeal.

50. I am sure the overall result will come as a disappointment to Mr Hinkel, not least because in the hearing before me, his sense of frustration at the failure of the intended transaction was still apparent, albeit that the relevant events were now almost five years ago. It seems to me, however, that the possibility of matters not turning out as he would have wished was inherent in his seeking to conclude such an important but inherently risky transaction. The way matters have developed is unfortunate, but it is not appropriate I think for him to seek to vent his frustration by making allegations of dishonesty against Simmons & Simmons. I hope he may now be able to turn over a new leaf and move forward with other, more profitable ventures.