Case No: QA-2020-000076; QA-2020-000069
Neutral Citation Number: [2020] EWHC 3743 (QB

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 6 November 2020

BEFORE:

MR JUSTICE CALVER

BETWEEN:

SPIE LTD

Respondent

- and -

PAUL GARSIDE

Appellant

MR CAVENDER, QC (instructed by JMW Solicitors LLP) appeared on behalf of the Appellant
MR MARTIN, QC (instructed by Mayer Brown International LLP) appeared on behalf of the Respondent

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JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

1. MR JUSTICE CALVER: By order made on 18 May 2020, Tipples J refused the third party to this action, Paul Garside, permission to appeal against the judgment and order of HHJ Hand QC made on 31 January 2020 on three separate grounds. By further order also made on 18 May 2020, Tipples J also refused the third party permission to appeal against the order that HHJ Hand QC made as to the costs of the action on 31 January 2020. Before me today the third party has renewed his application for permission to appeal against both judgments of HHJ Hand QC. He has been represented by Mr Cavender QC. I also allowed the defendant and respondent to the application, SPIE Ltd, to make some brief submissions in reply by Mr Martin QC.

2. By this action the defendant sought to recover from the third party either the sum of £50,000, which the defendant paid to the claimant under the terms of a compromise agreement, or such proportion of it as the court shall think fit. The basis of the defendant's claim against the third party was that in breach of his contract of employment with Garside and in breach of fiduciary duties owed by him to Garside as a director of that company, he had varied the claimant's bonus entitlement. The defendant accepted that some changes to the bonus scheme were discussed at various times, but his case was that radical changes to the existing bonus provisions applying to the claimant, Mr Coyne and Ms Schofield, the bonus employees, were not discussed or were not adequately discussed. Those changes were that the claimant was to have a bonus for the accounting year ending 31 July 2012 based not on the bonus provisions in his contract but on the provisions for calculating bonus to be found in the existing contract of employment of Mr Parker. Similarly, Mr Coyne and Ms Schofield were to have bonuses for that year based on the provisions for calculating bonus to be found in the claimant's existing contract. The effect of those changes was that the claimant's bonus was increased from some £49,000-odd to £186,000-odd and those of Mr Coyne and Ms Schofield from £37,000-odd to £49,000-odd.

3. The defendant's case was that there had been no explicit discussion about the changes made to the contracts of employment of the claimant, Mr Coyne and Ms Schofield, in the documents which the third party had attached to various emails to Mr Young or SPIE. Those changes have not been drawn attention to, were otherwise not obvious, and it was said were effectively smuggled in via documents which the third party calculated would not be studied in detail by those who received them. This was said to be a breach of fiduciary duty but also part of a broader strategy towards ensuring that Garside met the targets necessary for the third party to achieve the maximum additional earnout remuneration over the next two years.

4. In his judgment, HHJ Hand set out in detail his essential factual findings. He found in particular at paragraphs 47 to 50 of his judgment that Mr Young believed that the SPIE group was not going to be liable for any costs incurred in getting the bonus-earning employees to give up their existing terms and conditions and enter into new SPIE standard term contracts. Those costs would be borne by the third party himself. However, in paragraph 48 the judge found that whether Mr Young changed his position in relation to the compensation for Mr Parker for signing up to the new terms and conditions and, in particular the new bonus, or whether it was always his fallback position that the SPIE group might have to bear some of the cost was not easy to fathom.

5. The judge went on to consider on the evidence which he heard whether the change to the claimant's bonus arrangements was specifically drawn to the attention of Mr Young of the defendant, and that is paragraph 68 of his judgment. In particular, the judge in referring to the one-page side letter which dealt with the bonus, the side letter to the share purchase agreement, he said this:

> "In the hard copy which is at page 885, this rubric appears between two black heavy lines. There was a good deal of argument as to whether these lines were more obvious on one computer screen than on another or whether different versions of the Word software might affect the appearance. In his oral evidence, Mr Young said he had not noticed these lines at the time he had opened the attachment. Neither had anybody else who read the drafts."

6. In the light of the evidence, the judge then considered the parties' submissions. Paragraphs 99 to 108 contain the submissions of Mr Vickers for the third party, and in particular at paragraph 102 Mr Vickers submitted that the judge should not accept Mr Young's evidence as reliable. In paragraphs 109 to 114 the Judge recorded the submissions of Mr Martin for the defendant and Mr Martin submitted in particular (at paragraph 111) that there was an obvious breach of fiduciary duty by the third party, and (in paragraph 112) Mr Martin argued that he did not have to put any conspiracy to the claimant given that the additional claim had been raised against the third party.

7. At paragraph 115 of his judgment the judge reminded himself that it was not his duty to decide each and every point raised in the course of the hearing but only those which he thought were necessary for him to reach judgment on the case generally or in relation to significant individual issues, and as a result some of the points raised in the course of oral evidence and some of the submissions might not be reflected completely or at all in the text of his judgment. He then reminded himself at paragraph 118 of the relevant case law concerning the no-conflict rule, and he found on the facts at paragraph 119 that he had no hesitation in concluding that the third party owed a fiduciary duty to the defendant. He meant by that Garside. He said "the defendant" but that is an obvious slip. He noted that the real issue between the parties was whether on the facts the enhanced bonus scheme had been disclosed to the defendant, and the critical issue was whether it was discussed in a telephone conversation on 31 August 2012.

8. He then found as a fact in paragraphs 123 to 124 that Mr Young would have wanted to know about the enhanced bonus scheme, and had he been told of it, he would not have done nothing about it. In other words, he found that he was not told of it. Ms Schofield's evidence supported that finding of fact, as the judge records in paragraph 125 of his judgment. He went on at paragraph 126 to consider the third party's alternative case that there was a disclosure to the defendant by sending to the defendant the agreement and the side letter itself, and he rejected that case on the facts as the changes to the bonus arrangements were not, he considered, sufficiently signposted. He then went on to deal with the issue of causation. He applied the correct legal test to that in paragraph 131 of his judgment, and he went on to apportion those losses in paragraph 132. He said in paragraph 134 this was not an exact science but he had to make a sensible apportionment on the facts. It was broad brush exercise, he said, and

he concluded that a proper apportionment was that two thirds of the compromise sum related to the bonus claim and one third to the unfair dismissal claim.

9. Finally, in his second judgment, his judgment on costs, the judge awarded the defendant its costs on the standard basis, rejecting a claim for indemnity costs on the basis that the third party had lied about the telephone conversation. He rejected that submission, and he found that the defendant having succeeded on its breach of fiduciary duty claim, it should have all of its costs on the standard basis.

10. Before turning to the grounds of appeal, it is necessary to make some general remarks as to the ambit of this court's power to interfere with judgments such as those under challenge. First, so far as the judgment on liability is concerned, appellate courts have been repeatedly warned by recent cases at the highest level not to interfere with findings of fact by trial judges unless compelled to do so. This applies not only to findings of primary fact but also to the evaluation of those facts and to the inferences to be drawn from them; see *Fage UK Ltd & anor v Chobani UK Ltd & anor* [2014] EWCA Civ 5. The reasons for this approach are many, and they include the expertise of a trial judge being in determining what facts are relevant to the legal issues to be decided and what those facts are if they are disputed. Secondly, the trial is not a dress rehearsal, as was said by Lewison LJ in *Fage UK Ltd & anor v Chobani UK Ltd & anor;* it is the first and last night of the show. Thirdly, duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court. Fourthly, in making his decisions, the trial judge will have regard to the whole of the evidence before him, whereas an appellate court will only be island hopping. Fifth, the atmosphere of the courtroom cannot in any event be recreated by reference to documents. Lastly, even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

11. It is also important to have in mind the role of a judgment given after a trial. The primary function of a first-instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and if need be the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no need for a judge to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view and not to spell out every matter as if summing up to a jury, and I note that is the approach that HHJ Hand said he was adopting in this case. Secondly, the court will not, absent special circumstances, entertain new arguments which should have been but were not pleaded by the appellant. Thirdly, the court will only give permission to appeal on any particular ground if the appellant can show that the ground of appeal has a real prospect of success or there is some other compelling reason for the appeal to be heard. Fourth, insofar as the appeal against the judge's costs judgment is concerned, it will be a rare case where this court will interfere with such a decision. It may only do so where the judge has exceeded the generous ambit afforded to him within which reasonable disagreement is possible.

12. Coming to the two judgments, on the issue of liability the third party raises three grounds of appeal, and I take them in turn. I should say at once that the slight oddity about this application is that the trial judge has himself already given permission to

appeal in respect of certain matters which it is said were not pleaded, and they are recorded in grounds 1(b) and 2 of the grounds of appeal. I shall come back to the relevance of that fact shortly. Taking the grounds in turn, firstly ground 1(a). Ground 1(a) is that there was no conflict of interest and therefore no breach of fiduciary duty in the appellant discussing and forwarding a draft contract to the defendant, because, it is said, of two reasons: (1) it was only at the stage that the defendant was determining whether to enter into any contract that any potential conflict of interest would arise or crystallise; and (2) the judge's finding that the appellant might benefit financially, it is said, is not challenged, but so too might the defendant benefit financially from the senior employees entering into new contracts. Indeed, that was the whole object of the exercise. It is said the interests of the appellant and the defendant were aligned.

13. I refuse permission to appeal on this ground, and I fully agree with the analysis of Tipples J, with which I concur. The judge set out the correct legal test for the no-conflict rule in paragraphs 118 to 119 of his judgment. He found in paragraph 119 that the third party owed a fiduciary duty to Garside, and it is no answer to this finding that the judge's reasoning is only contained in paragraphs 118, 119 and 126. His reasoning does appear in sufficient detail to show the parties the principles on which he has acted. The judge found as a fact in paragraphs 43 and 47 of his judgment that the third party was in an obvious position of conflict as between his duty to Garside as director with his personal interest in that he was responsible for any costs incurred in getting the bonus-earning employees to give up their existing terms and conditions and enter into a new SPIE bonus contract. Indeed that is confirmed by ground 1(a)(ii) of the third party's grounds of appeal, where it is said that the judge's finding in paragraph 126 of his judgment that the appellant might benefit financially from this transaction is not challenged.

14. I also find that the reasons for denying that there was a breach of fiduciary duty must be pleaded, and in the case of this point, the pleading point does matter. The third party has failed to plead the reasons here why there was no breach of statutory duty and no conflict. In paragraphs 3 and 5 of the reamended defence to the additional claim, the third party admits that he owed a duty of good faith and fidelity to Garside and thereafter to the defendant, but the third party has not alleged that any potential conflict of interest could only arise or crystallise when the defendant was determining whether to enter into the contract (ground 1(a)(i)). In my judgment there was clearly at least the potential for conflict.

15. So far as ground 1(b) is concerned, the judge, as I have said, has already given permission for that. So far as 1(c) is concerned, the informed consent by execution of the draft contract and the enhanced bonus provision, I refuse permission to appeal on this ground also. It seems to me that in 1(c)(i), in seeking to advance this submission, the third party is seeking to question the judge's factual findings. In particular, 1(c)(i) refers to the discussion of forwarding, subject to approval of the defendant, of the draft contract, and inevitably it will focus upon the exchanges prior to the forwarding of the draft contract as being relevant to this ground. The judge dealt with this submission at paragraph 126 of the judgment, and he applied the facts as found by him and he held that failing to present the documents without obvious comment or signposting meant that the third party had failed to fulfil his fiduciary duty, and, having so found, the argument that the defendant gave fully-informed consent is unsustainable. In the light

of the judge's factual findings, he was plainly correct to find that no informed consent was given, and in my judgment this is an impermissible attempt by the third party to reargue the facts before this court. Moreover, the case that the third party wishes to advance in this respect is not pleaded, and that is a further reason to refuse permission.

16. I should add that Mr Cavender suggested that the reason that this point is not pleaded, and indeed the point under ground 1(a) to which I have already referred, is because the third party responded in its statement of case to the defendant's pleaded case on conspiracy in paragraph 18 of the amended defence and counterclaim and additional claim. Whilst that may be true in part, it is nonetheless undoubtedly the case that the defendant pleaded its breach of fiduciary duty case clearly in paragraphs 17(e) and 21 to 28, and in particular in paragraphs 26, 27 and 28 the defendant pleaded the point that the change that had been made to the bonus payment had not been noticed by Mr Young or SPIE UK, and the third party on 5 September 2012 asked for permission to sign the agreement on behalf of Garside and it was granted, and the agreements were therefore executed under a mistake. So, in my judgment the point was raised sufficiently by the defendant for the third party to plead back to it, and if they wished to advance this case they should and could have done so but failed to do so.

17. So far as paragraph 2 of the grounds is concerned under ground 1, permission has already been granted by the trial judge to advance all of these points on informed consent, and that is the way in which paragraph 2 is put, as one can see, because it reads:

> "The judge erred in law by holding in paragraph 126 that there was a further duty of disclosure on the third party to ensure that attention was drawn to the variation of contract in respect of the bonus provisions which was breached. The judge should have held that the defendant gave its informed consent by authorising the signing of the contract and that there was no further duty of disclosure because …."

18. And then there is a series of subparagraphs which refer to various exchanges between the parties as giving rise, it is said, to that informed consent, and they include the suggestion that the defendant had ample time to review the draft contract and the bonus schedule, which was only one page, and one sees that from subparagraph (f).

19. That brings me to paragraph 3 of ground 1, for which the third party does seek permission. That is an allegation that even if there were a duty of disclosure, the judge was wrong to hold the placing of the altered wording dealing with the issue of bonus between bold tramlines was insufficient in the circumstances set out above to satisfy such a duty. Presumably, this is an allegation of informed consent and a challenge to paragraph 126 of the judgment. If so, it seems to me that having allowed the third party permission to appeal on all of the matters in paragraph 2 of ground 1, the third party should also be given permission to appeal on this point, which is part of same overall issue now before the Court of Appeal, and it would be wrong to prevent the Court of Appeal from considering it. In other words, there is some other compelling reason for the appeal to be heard on this ground as well regardless of the fact that it has not been clearly pleaded, not least because the judge nonetheless dealt with it in

paragraph 126 of his judgment. However, my order should make it clear that permission to appeal on this point in paragraph 3 of ground 1 is permission to advance this point as amounting to informed consent only.

20. That brings me next to ground 2 of the Notice of Appeal, which concerns the causation issue. It is said that the judge erred in law by holding that the breach of fiduciary duty caused the loss claimed; that the defendant would have entered into the contract anyway, had the change in the bonus provision been signposted; in other words, that Mr Young was indifferent to the fact or the size of the enhanced bonus. The third party accepts that the judge identified the correct test of causation, which indeed he did in paragraph 131 of his judgment. I consider that this ground of appeal is an impermissible attempt to reargue the factual findings of the judge at paragraphs 123 to 124 of his judgment. At one stage I was tempted to agree with Mr Cavender that there were inconsistent factual findings of the judge on this point by reason of paragraphs 47 to 50 and paragraphs 123 to 124 of his judgment. However, upon reflection I think this is to subject the judge's assessment of the evidence to too fine an analysis. It is clear overall in my judgment that the judge did find that Mr Young, had he been told of the change to the bonus arrangement, would not have said and done nothing about it, and I consider it clear from paragraphs 131 to 132 of the judgment that the judge found that it would have caused Mr Young to act differently, and the defendant would not have suffered the loss which it suffered. As Tipples J says in paragraph 14(c) of her order, the real issue between the parties was how the sums paid under that agreement should be apportioned in that the claimant's potential claim for unfair dismissal has also been compromised. In the circumstances, I refuse permission to appeal on ground 2.

21. Lastly, ground 3. It is said that the judge erred in law by holding that the amount of £50,000 paid to the claimant by the defendant under the compromise agreement was paid as to two thirds in respect of the claimant's claim for a bonus and one third for his unfair dismissal claim. I do not consider there was any error of law here. Mr Martin explained that the judge had asked the parties to form a view of the value of the unfair dismissal claim. The defendant's case was that no value should be attributed to the unfair dismissal claim and that £50,000 had been paid only in respect of this claim. I accept that the judge had to do the best he could on the evidence before him and that there was sufficient evidence before him to conclude that nonetheless one third of the value should be attributed to the unfair dismissal claim and there was no error of law; see paragraphs 132 to 139 of the judge's judgment.

22. Turning lastly to the costs judgment, in considering permission, as I have said, I bear in mind that an appeal court should only overturn a judge's exercise of his discretion to award costs where the judge has exceeded the generous ambit within which reasonable disagreement is possible. The judge had to consider essentially two costs submissions in his judgment, which he sets out at paragraph 24. At 24 he said:

> "Mr Vickers [Mr Vickers was for the third party] submits that under that general proposition there should be a proportionate costs order on the basis that in essence this case can be divided up into issues, legal and factual, and both in terms of causes of action and factual issues, he has succeeded. Indeed, he makes so bold as to day that effectively all that the defendant has succeeded is a narrow

> issue of breach of fiduciary duty, and he does not shrink from suggesting that in reality it is the third party who has succeeded in this case and not the defendant."

23. The judge rejects what he calls that extreme part of his submission, which is the adverse costs order point, and Mr Cavender submits that in dealing with the proportionate costs order submission, the judge failed to take account of the fact that the trial had also concerned to a substantial degree the defendant's conspiracy claim and that the judge's decision to award the defendant all of his costs on a standard basis failed to give any weight or effect to the fact that he had abandoned that conspiracy case. He said that what would otherwise have been a three-day breach of fiduciary duty case worth £33,000 in fact took 13 days in respect of a £400,000 claim.

24. Mr Martin for the defendant disputes that. He explained that after its pleaded case had been drafted by the defendant, there was a settlement between the claimant and the defendant. That narrowed the scope of the litigation, as indeed is recorded in the liability judgment at paragraphs 3 and 127. So, that enables Mr Martin to make the submission that everybody knew from August 2016 when the compromise agreement was notified to the third party that this case was only a case about the settlement sum. But even in relation to that claim and the claim of breach of fiduciary duty, Mr. Martin explains that it was necessary to go over events from the years prior to and after the conclusion of the share purchase agreement. It is also fair to say that the judge had well in mind the submission that the costs of proving events before and after 2012 did not just relate to the breach of fiduciary duty case and so, it was said, should not be awarded to the defendant. That is apparent from paragraphs 27, 28 and 29 of his judgment where he records the submission of Mr Vickers to the effect that this case has involved an analysis of periods before 2011 or some part of 2011, an intensive scrutiny of some periods of 2012 and what might be described as a hard look at some parts of 2013, 214 and 2015.

25. Mr Vickers' submission was that by no means all of these matters related to breach of fiduciary duty. Some of them related to the issue of whether or not the claimant and the third party conspired by unlawful means in respect of the bonus matter, and the judge then referred to the fact that cases can be described as organic, they develop and grow, move backwards and forwards through history. The Judge's essential point here, and indeed it can be seen in his conclusion in paragraph 29 of his judgment, is that he does not accept Mr Vickers' submission that it was unnecessary to look at matters in 2013 and 2014, as well as concerning the dismissal of Mr Reader in 2015. I therefore accept the submission of Mr Martin that the judge took these matters into account, not in relation to the conspiracy claim but in relation to the breach of fiduciary duty case as well, and indeed the judge refused, as one sees from paragraph 30 of his judgment, to allow the conspiracy claim to be explored at trial, and yet he allowed the parties to explore matters going back to 2011 and forward to 2015.

26. So, whilst this argument is, I accept, finely balanced, I consider that the judge's ruling that the third party should pay the defendant's costs on the standard basis was one which fell within the generous ambit of the discretion afforded to him. He heard the evidence, and he would have a much better feel than this court for the need to adduce evidence on a wider scale than simply the immediate period prior to and immediately

after the execution of the share purchase agreement. In the circumstances, I do not consider that it is appropriate for this court to interfere with the exercise of that discretion, despite Mr Cavender's skilful and persuasive submissions to the contrary.

27. So, for all those reasons, that is my order that I make on these applications.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge