3 HARE COURT

The City Lawyer

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December 2013

Welcome to the latest edition of the City Lawyer - the business law update from 3 Hare Court.

This month we discuss:-

- can silence equal consent to a director's breach of fiduciary duty? The Court of Appeal has said 'yes';
- whether there is a claim for malicious prosecution of a civil claim in England, following a Privy Council decision which permits it in the Cayman Islands;
- bad news from the Court of Appeal on relief from sanctions.

THIS MONTH'S CONTRIBUTOR

Thomas Roe

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Seminars and Workshops

3 Hare Court in Practice – Can silence equal consent to a director's breach of fiduciary duty?

***Sharma v Sharma and others* [2013] EWCA Civ 1287**

Thomas Roe and **Alexander Halban** acted in this case, in which the Court of Appeal answered 'yes' to this question. In doing so, it arguably adopted a new, less stringent test on acquiescence to directors' breaches of fiduciary duty.

The respondent was a dentist and the former wife of the first appellant. The other appellants were the first appellant's mother and brother. The respondent had two dental practices in her own name and found an opportunity to purchase a third. At a family meeting in July 2007, it was agreed that the family would set up a company to acquire this and other practices as a joint venture. The parties each took 25 percent of the shares in the company. The respondent became its sole director.

The appellants claimed that the respondent had breached her fiduciary duties, in particular by acting in conflict of interest contrary to s. 175 of the Companies Act 2006, by acquiring five further practices for her own benefit, not for the benefit of the company. The respondent said that at the July 2007 meeting, she had told the appellants that she intended to acquire practices for her own benefit as well as for the company and the second appellant agreed to this, while the first and third appellants

3 Hare Court members regularly provide seminars and workshops to individual firms or groups of practitioners. If you have a request for a seminar or lecture, or would like further information then please do not hesitate to contact our marketing manager, Carolyn Harris.

Conferences

We are often invited to speak at conferences in the UK and abroad. If you have a query concerning a conference then please get in touch with our marketing manager, Carolyn Harris.

Clerks

We have an experienced and approachable clerking team who will be happy to assist with recommendations, fees, our service protocol or general enquiries. Please contact the clerks on 0207 415 7800. Alternatively please contact our Senior Clerk, James Donovan

About us

The general editors of this bulletin are Helen Pugh, Asela Wijeyaratne and Alexander Halban. Please feel free to email them any comments, ideas or questions you might have about the City Lawyer.

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remained silent. The trial judge accepted the respondent's evidence and found that the shareholders had consented to the respondent's conduct and she was not in breach of duty. The appellants appealed.

The Court of Appeal reviewed the principles on fully informed consent by all the shareholders to breaches of duty by a director. It was accepted that if shareholders acquiesce in the director's conduct with full knowledge of the material facts that can constitute consent. Jackson LJ held that consent cannot be inferred from silence unless (i) the shareholders know that their consent is required or (ii) it would be unconscionable for them to remain silent at the time and then object afterwards. He found that the first and third appellants should have voice any objections at the time and that consent could be inferred from their silence. He also found that the conversation in July 2007 was sufficient to give the appellants full knowledge of the respondent's proposed conduct. The Court dismissed the appeal.

This decision has arguably imported a new test of unconscionability not found in previous cases. It may make it easier for directors to escape liability for breach of duty, by relying on matters which they allegedly told shareholders years previously, even if the shareholders did not positively consent to them. It arguably removes the burden from directors to seek shareholders' approval to conflicts of interest and instead places it on shareholders to raise objections immediately. The appellants have applied to the Supreme Court for permission to appeal.

Malicious prosecution of a civil claim

***Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, [2013] 3 WLR 927**

Most of us from time to time successfully defend a claim which should not have been brought. Victory will usually be sufficient vindication. But what if the client's business has been ruined, or its good name traduced in the media? A ruling that the claimant's allegations were baseless may not be enough.

Victims of criminal prosecutions for which there was no reasonable cause have long been able to claim damages for distress, loss of reputation and financial loss. They must show malice but this may be capable of being inferred from the lack of reasonable cause. However, the Privy Council has recently ruled in *Crawford*, that the tort of malicious prosecution applies to *civil* claims too.

The facts were simple. Insurers engaged a surveyor in respect of hurricane damage claims. On his advice, the insurers made big advance payments to builders. The insurers then happened to recruit a new vice-president who knew and disliked the surveyor. He convinced

himself that the surveyor and the builders had conspired to defraud the insurers. He said he intended to drive the surveyor out of business. He caused the insurers to sue for fraud (in Cayman) and loudly publicised the proceedings. The claim collapsed shortly before trial when the surveyor produced invoices justifying the advance payments. The insurers discontinued and the judge awarded indemnity costs. By now, however, the surveyor's business had suffered loss of about £1m (over and above his legal costs), and he had suffered great distress. He counterclaimed for malicious prosecution of the civil claim against him.

Such a claim had generally been thought a non-starter. The House of Lords ruled that maliciously taking disciplinary proceedings was not a tort, and went on to say that there was no case for 'the extension of the tort to civil proceedings' (***Gregory v Portsmouth City Council [*2000] 1 AC 419).**

In the Privy Council, however, Lord Wilson, Lady Hale and Lord Kerr decided that malicious prosecution has all along covered civil actions, and that in any event there was no good reason not to extend it to them. *Gregory* did not stand in the way because its ratio was merely that there was no tort of maliciously instituting *disciplinary* proceedings. Lords Sumption and Neuberger, dissenting, thought that *Gregory* had decided the point. In their view its ratio was that malicious prosecution only applied to criminal proceedings. In any event they saw no good reason to extend the tort.

What is now the law of England? Privy Council decisions are highly persuasive but cannot overrule a binding English decision. So it may depend on who was right about what *Gregory* decided. It may take a brave (or desperate) litigant to put it to the test, but there is clearly now an opportunity for a vindicated defendant to try to win back some of what has been lost.

Bad news from the Court of Appeal on relief from sanctions applications

***Andrew Mitchell MP v News Group Newspapers Limited* [2013] EWCA Civ 1537**

In the October edition of the *City Lawyer w*e covered the decision of Master McCloud in the so-called 'plebgate' case. Readers may recall that Mr Mitchell's solicitors had failed to file their costs budget seven days in advance of the CMC. As a result Master McCloud ruled that Mr Mitchell could only recover court fees but no other costs of his action. Further, the Master refused relief from sanctions under CPR r. 3.9. Mr Mitchell's appeal to the Court of Appeal has already been heard and dismissed.

Lord Dyson MR, giving judgment, noted that the new r. 3.9 now only drew specific attention to two factors: (1) the need for litigation to be conducted efficiently and at proportionate costs and (2) the need to enforce compliance with rules, practice directions and orders. These factors now carry greater weight than the other circumstances of the case.

Further, relief from sanctions will be granted less often than previously. The Court gave the following guidance:

- The Court will usually still grant relief if there has been an insignificant failure e.g. narrowly missing a deadline or where the failure is of form not substance.
- Where the default is not trivial, the defaulting party must give a good reason for it
- A good reason may include a case where a party or solicitor suffered from a debilitating illness or was involved in an accident, or where developments in the litigation render the period set for compliance unreasonable.
- A bad reason would include merely overlooking a deadline. Solicitors were warned not to take on too much work in the expectation that the Court would excuse them.

Master McCloud's decision struck many as an unjust and disproportionate response to a minor, everyday infraction. The Court of Appeal clearly disagrees. This case will no doubt give sleepless nights to many solicitors, save perhaps for those in professional indemnity departments who can look forward to an influx of cases. Welcome to the post-Jackson era!

Get in Touch

We hope you have enjoyed this issue of the City Lawyer. If you are dealing with a similar case or wish to discuss any area of commercial law, please **get in touch** to arrange a short informal discussion.

We wish you all a very merry Christmas and a Happy New Year!

The next edition of the City Lawyer is due in January 2014. Until then!

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