Neutral Citation Number: [2024] EWCA Civ 1317

Case No: CA-2023-001545

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
HIS HONOUR JUDGE BEVER
CC-2023-MAN-000009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 November 2024

Before:
LORD JUSTICE LEWISON
LORD JUSTICE PHILLIPS
and
LORD JUSTICE SNOWDEN

- -

Between:

CHESHIRE ESTATE & LEGAL LIMITED	**Appellant/ Claimant**
- and –	
(1) THOMAS OLIVER BLANCHFIELD **(2) MARK MONTALDO** **(3) MTCC SOLUTIONS LIMITED**	**Respondents/ Defendants**

- -

Paul Chaisty KC (instructed by **FS Legal Solicitors LLP**) for **the Appellant/Claimant** ("CEL")
David E. Grant KC and Gus Baker (instructed by **RSW Law**) for **the First Respondent/Defendant** ("Mr Blanchfield") and **the Second Respondent/Defendant** ("Mr Montaldo")
The Third Respondent/Defendant ("MTCC") **was dissolved on 5 September 2023**

Hearing dates: 16 & 17 July 2024

- -

Approved Judgment

This judgment was handed down remotely at 2 pm on Tuesday 5 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

.....

Lord Justice Phillips:

1. This appeal raised the issue of whether directors of a company were in breach of their fiduciary and statutory duties by taking preparatory steps towards setting up a competing business prior to resigning their offices. By the time the appeal was heard, however, that issue had diminished in significance for the reasons explained below.

The essential facts

2. On 10 January 2023 Mr Blanchfield and Mr Montaldo ("the respondents") tendered their resignations as directors of CEL, a corporate firm of solicitors specialising in financial mis-selling and fraud claims. They also gave the required six months' notice of termination of consultancy agreements with CEL, pursuant to which they were each providing "legal services" for a minimum 40 hours per week (although Mr Blanchfield is not a lawyer and was the Finance Director of CEL).

3. On 12 January 2023 it was agreed that the respondents would be placed on gardening leave for three months, their consultancy agreements terminating on 13 April 2023.

4. Following their resignations, CEL discovered that, for several months prior to their resignations, the respondents (and in particular Mr Blanchfield) had been taking preparatory steps to set up a new law firm. These included registering the trading name "Complex Claims" on 15 August 2022, incorporating MTCC as the corporate vehicle for the firm (with both respondents as directors) on 22 August 2022, seeking professional indemnity insurance for the new company in August and September 2022, setting up a website for Complex Claims on 30 September 2022, opening a bank account for MTCC on 30 November 2022, applying to the Solicitors Regulation Authority ("the SRA") to register MTCC in October 2022 (the SRA issuing a "minded to approve" letter on 6 January 2023), opening a bank account for MTCC on 30 November 2022 and entering discussions with several litigation funders, including Deminor Litigation Funding ("Deminor"), a company with which the respondents had previously had negotiations on behalf of CEL.

The proceedings

5. On 1 February 2023 CEL commenced these proceedings, alleging that the respondents had acted in breach of their fiduciary duties as directors and were in breach of contract, further alleging that the respondents had conspired with MTCC to injure CEL by unlawful means. CEL sought injunctive relief (including a "springboard" injunction of 12 months' duration), an account of profits or equitable compensation and damages.

6. On 3 February 2023 CEL applied for interim injunctions. During the hearing of the application on 9 February before HH Judge Bever ("the Judge"), the parties reached agreement that there should be an expedited trial of all issues, save for the quantum of any loss or account, with interim injunctions in place in the meantime, together with an order for delivery up by the respondents of documents belonging to CEL in their possession.

7. The trial took place in April 2023 before the Judge, with written closing submissions delivered on 5 May 2023. In a reserved judgment handed down on 29 June 2023 the Judge held that (i) the respondents' preparatory steps had not "crossed the line", or

otherwise put them in a position of conflict, so as to amount to a breach of their fiduciary duties to CEL, (ii) the claim in conspiracy would in any event have failed as there was no intention to injure CEL; (iii) the respondents were not in breach of the restrictive covenants in the consultancy agreements; (iv) CEL was not in any event entitled to springboard relief, nor to an injunction in respect of confidential information. Accordingly, by order dated 31 July 2023, the Judge dismissed each element of CEL's claim and ordered that CEL pay the costs of the proceedings (save for a proportion of the costs of certain applications).

The appeal

8. CEL appealed, challenging each of the findings above. However, at the hearing of the appeal Mr Chaisty KC, for CEL, confirmed that his client was no longer seeking springboard or any other injunctive relief due to the passage of time[1]. The purpose of the appeal was therefore to overturn the Judge's findings as to liability of the respondents for breach of fiduciary duty and breach of contract so that, he explained, CEL could seek damages for those wrongs at a second stage quantum trial.

9. The problem with that approach is that CEL has struggled to advance an arguable case that the preparatory steps taken by the respondents have caused CEL any damage. The Particulars of Claim identify two heads of loss. The first is in respect of fees paid to the respondents under their consultancy agreements between June 2022 and January 2023, when CEL was unaware of their alleged breaches of duty, asserting that such sums were paid under a mistake. But such a claim would be for restitution rather than for damages and is, in any event, unsustainable given that the sums paid were contractually due and paid (in arrears) for services rendered to the satisfaction of CEL. The second head is reputational damage or loss of business suffered by CEL as a consequence of the respondents' actions. But as the respondents' actions were not known to CEL, let alone the public, the argument is without merit.

10. Mr Chaisty accepted the above difficulties, but argued that (assuming CEL was successful in its appeal on liability) the matter should nevertheless be remitted for an assessment of damages and CEL should be given the opportunity to re-formulate its case as to its losses prior to that hearing. Mr Chaisty indicated that claims might be advanced for the cost of dealing with data transfers by Mr Blanchfield, an increase in CEL's insurance premium by some £60,000, or the fact that several "entities", attributable to or associated with the respondents, had entered the fraud-claim market. There was, however, no application to amend to plead these new heads of loss, no draft pleading and no evidence in support. In my judgment, even if CEL were to establish the respondents' liability on appeal, it would not be appropriate to remit the matter for an assessment of damages where no arguable case of damage has been advanced, formally or informally.

11. In the end, it was apparent that CEL's primary motivation for maintaining its appeal was in an attempt to reverse the Judge's order as to costs. The main question at the trial, however, was whether injunctions should be continued and extended. Merely

[1] This concession rendered moot the respondents' argument, raised by Respondent's Notice, as to whether CEL's claims to equitable relief should have failed on the further ground that CEL had been guilty of a "corrupt practice" and so did not come to court with clean hands. The Judge held that there was insufficient evidence to support such a finding.

establishing technical breaches of fiduciary duty or contract, with no arguable case as to loss, would not obviously, in itself, justify interfering with the order that CEL pay the costs of the trial: CEL would have to demonstrate that it would have obtained injunctive relief had it succeeded on liability. The difficulty in that regard is that the Judge held that, even in those circumstances, CEL would not have been entitled to the injunctions it sought, and in my judgment he was plainly right to do so for the reasons set out in the following section.

CEL's claim to injunctive relief

12. First, CEL claimed an injunction to enforce the restrictive covenant in clause 13.1 of the consultancy agreements, which provided that the respondents (each defined as "the Consultant") must not, for 12 months after termination:

> "..supply, or solicit any person with a view to supplying, services that are the same as, or similar to, and in competition with, the Services, to any client or customer of [CEL] with whom the Consultant had material dealings during the course of his consultancy with [CEL]".

13. The Judge accepted that the restriction was lawful and enforceable, but held at [398]-[399] that there was no evidence of the respondents soliciting clients or customers of CEL and no threats on their part to do so. Indeed, the one-off nature of the claims handled by CEL was such that repeat custom was not a feature of its business model and solicitation of existing clients with whom the respondents (primarily Mr Montaldo) had dealt was not a real concern. In those circumstances the Judge was undoubtedly right to decide that injunctive relief was not appropriate in respect of the clause.

14. Second, CEL claimed an injunction to restrain the respondents from using CEL's confidential information. However, the Judge made findings of fact at [465] that the respondents had surrendered, or no longer had any access to, any confidential documentation or information and that they would be unlikely to deploy any such information in future. Given that finding, the Judge was plainly entitled to refuse injunctive relief even if (which he rejected) CEL had identified any information that it was entitled to protect and had effectively protected.

15. Third, CEL sought to restrain the respondents from providing any services or products of a type provided by CEL, or promoting or raising funding for any such business, for a period of 12 months. This was claimed by way of springboard relief, designed to deprive a wrongdoer of the "head start" he has obtained by his unlawful acts: see *Roger Bullivant v Ellis* [1987] ICR 464 and *QBE v Dymoke* [2012 EWHC 80 (QB). The Judge held, however, that the duration of any advantage achieved by the respondents' conduct (even if, which he rejected, such conduct was unlawful) was very limited indeed, of the "ephemeral" and "short term" type that was identified in *Dymoke* as not justifying relief [508]. Mr Chaisty accepted in the course of his oral submissions to this Court that the claim to an injunction for 12 months had been unrealistic, but suggested that two or three months of restraint would have been justifiable. I see no basis to interfere with the Judge's assessment in this regard, nor with his further decision at [513] that he would have refused an injunction as a matter of discretion given that there was no allegation that the respondents had started to trade or that CEL had lost clients or that its workflows had been affected.

16. It follows that, even if CEL were to succeed in establishing technical breaches on the part of the respondents on appeal, it cannot establish that it would have been entitled to relief at the end of the trial.

17. Nevertheless, as the matter was argued fully before us, I will consider below the challenge to the Judge's finding that the respondents did not breach their fiduciary duties to CEL.

Did the respondents breach their fiduciary duty to CEL?

The legal principles

18. The authorities and the relevant legal principles were considered in detail by Etherton J in *Shepherds Investments Ltd v Walters* [2006] EWHC 836 (Ch), [2007] 2 BCLC 202.

19. In the light of the authorities, and in particular the judgment of Arden LJ in *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91 at [41]-[43] and the decision of Hart J in *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EWHC 466 (Ch), [2003] 2 BCLC 523, Etherton J stated at [105] that:

> "..it is plain that the necessary starting point of the analysis is that it is the fiduciary duty of a director to act in good faith in the best interests of the company (*Item Software* at para [41]), that is to say "to do his best to promote its interests and to act with complete good faith towards it", and not to place himself in a position in which his own interests conflict with those of the company (*British Midland Tool* at paragraph [81] and *CMS Dolphin Ltd v Simmonet* [2001] 2 BCLC 704 at paragraph [84])."

20. In *Item Software* a director of a company had secretly approached the main customer of the company whilst the company was renegotiating its contract with the customer, proposing to divert the contract to a company he had set up for his own benefit. The renegotiations failed and the customer terminated the contract. On the company's claim against the director for compensation, the director was held liable for breach of his duty in failing to disclose his own wrongdoing to the company. The Court of Appeal dismissed the director's appeal, holding that there was no basis on which the director could reasonably have come to the conclusion that it was not in the interest of the company to know of his breach of duty: he could not fulfil his duty of loyalty on the facts of that case except by telling the claimant of his setting up of his own company, and his plan to acquire the contract for himself.

21. In *Balston Ltd v Headline Filters Ltd* [1990] FSR 385 Falconer J had identified a countervailing public policy which would excuse a director, who was not yet engaging in competing activity, from disclosing to the company his intention to set up a competing business:

> "In my judgment an intention by a director of a company to set up business in competition with the company after his directorship has ceased is not to be regarded as a conflicting interest within the context of the principle, having regard to the rules of public policy as to restraint of trade, nor is the taking of preliminary steps to investigate or

> forward that intention so long as there is no actual competitive activity, such as, for instance, competitive tendering or actual trading, while he remains a director."

22. In *British Midland Tool*, however, Hart J held that a director must resign as soon as his intention to compete is irrevocable, or he would be obliged to make disclosure to the company, recognising that view was inconsistent with *Balston* (but consistent with the facts in that case):

> "89….A director's duty to act so as to promote the best interests of his company prima facie includes a duty to inform the company of any activity, actual or threatened, which damages those interests. The fact that the activity is contemplated by himself is, on the authority of *Balston's* case, a circumstance which may excuse him from the latter aspect of the duty. But where the activity involves both himself and others, there is nothing in the authorities which excuses him from it. This applies, in my judgment, whether or not the activity in itself would constitute a breach by anyone of any relevant duty owed to the company. It does not, furthermore, seem to me that the public policy of favouring competitive business activity should lead to a different conclusion. A director is free to resign his directorship at any time notwithstanding the damage that the resignation may itself cause the company: see per Lawrence Collins J in *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 at para 95. By resigning his directorship he will put an end to his fiduciary obligations to the company so far as concerns any future activity by himself (provided that it does not involve the exploitation of confidential information or business opportunities available to him by virtue of his directorship). A director who wishes to engage in a competing business and not to disclose his intentions to the company ought, in my judgment, to resign his office as soon as his intention has been irrevocably formed and he has launched himself in the actual undertaking of preparatory steps. Although this might seem inconsistent with the wide statement of principle in *Balson's* case, it is not inconsistent with the decision in that case on its particular facts: as already noted…the intention to compete does not appear to have been formed prior to the resignation as a director."

23. I read Hart J's analysis as meaning that the director's obligation to disclose preparatory activities arises (and only arises) when a director has formed an irrevocable intention to form a competing business, both where he is acting alone and also where he is acting with others. The only basis for distinguishing between disclosing the actions of others and a disclosing director's own actions and intentions was the reasoning in *Balston*, which Hart J effectively discounted.

24. That appears to be the effect of Etherton J's analysis in *Shepherds Investments*. After agreeing that it was difficult to see any legitimate basis for the "trumping" of a director's duties by "rules of policy as to restraint of trade", Etherton J stated at [108]:

> "What the cases show, and the parties before me agree, is that the precise point at which preparations for the establishment of a

> competing business by a director become unlawful will turn on the actual facts of any particular case. In each case, the touchstone for what, on the one hand, is permissible, and what, on the other hand, is impermissible unless consent is obtained from the company or employer after full disclosure, is what, in the case of a director, will be in breach of the fiduciary duties to which I have referred or, in the case of an employee, will be in breach of the obligation of fidelity. It is obvious, for example, that merely making a decision to set up a competing business at some point in the future and discussing such an idea with friends and family would not of themselves be in conflict with the best interests of the company and the employer. The consulting of lawyers and other professionals may, depending on all the circumstances, equally be consistent with a director's fiduciary duties and the employee's obligation of loyalty. At the other end of the spectrum, it is plain that soliciting customers of the company and the employer or the actual carrying on of trade by a competing business would be in breach of the duties of the director and the obligations of the employee. It is the wide range of activity and decision making between the two ends of the spectrum which will be fact sensitive in every case. In that context, Hart J may have been too prescriptive in saying, at paragraph [89] of his judgment, that the director must resign once he has irrevocably formed the intention to engage in the future in a competing business and, without disclosing his intentions to the company, takes any preparatory steps. On the facts of *British Midland Tool*, Hart J was plainly justified in concluding, in paragraph [90] of his judgment, that the preparatory steps had gone beyond what was consistent with the directors' fiduciary duty in circumstances where the directors were aware that a determined attempt was being made by a potential competitor to poach the company's workforce and they did nothing to discourage, and at worst actively promoted, the success of that process, whereas their duty to the company required them to take active steps to thwart the process."

25. Mr Chaisty referred to a dictum of HH Judge Hodge QC in *Berryland Books Ltd v BK Books Ltd* [2009] EWHC 1877 (Ch)[2] at [25], to the effect that, whilst still employed, it is unlawful for an employee to take steps necessary to establish a competing business so that it is 'up and running' or ready to go as soon as the employee leaves his employment. However, in my judgment that is too dogmatic a statement given the wide range of circumstances in which that situation might occur, whether in the context of a director or an employee. The preferable approach is that identified by Etherton J in *Shepherds Investments*, namely that whether preparatory actions, short of active competition, are consistent with a director's fiduciary duty to the company is highly fact sensitive in every case, and that even an irrevocable intention to compete does not necessarily mean that merely preparatory steps are unlawful.

[2] Two of the defendants found by HH Judge Hodge QC to have been party to an unlawful conspiracy to divert business were successful in reversing that decision on appeal (see [2010] EWCA Civ 1440), but there was no appeal against the dictum to which Mr Chaisty referred.

The Judge's reasons

26. In the present case, after hearing evidence over the course of five days, including from Mr Blanchfield and Montaldo, the Judge made the following findings:

    i) the respondents did not intend that MTCC would trade until the end of their contractual notice period notice, that is to say, July 2023 [285]-[286]. Any statements to third parties indicating an earlier date were probably made with a view to achieving progress;

    ii) the respondents did not form a settled or irrevocable intention to compete with CEL until mid to late December 2022 or early January 2023 [324], and that intention was not cemented until the "minded to approve" notification from the SRA on 6 January 2023 [327];

    iii) as at 10 January the respondents' plans were at a very early stage. They had no clients, no funding, no premises and no staff and had not made a clear decision what services to offer [352].

    iv) although the respondents had had dealings with Deminor on behalf of CEL in late December 2022, on the balance of probabilities Deminor no longer represented a business opportunity to CEL. CEL had entered into an exclusive arrangement with another funder which would have precluded it from engaging any further with Deminor [341]. On the other hand, there was no evidence that Deminor could not have worked with both CEL and the respondents (if CEL was in a position contractually to do so) [343].

27. The Judge recognised at [320] that, on the authorities, there is no hard and fast rule or guidance as to whether, and the extent to which, the taking of preparatory steps is permissible or constitutes a breach of duty. However, at [321] the Judge stated that it was evident that the steps taken by the respondents to prepare for their new business venture fall into the middle ground identified by Etherton J in *Shepherds Investments.*

28. At [322] the Judge identified that, within that middle ground, each case turns on its own particular facts. He stated at [323] that a key issue related to the respondents' intentions and frame of mind at the time the contentious steps were taken and, in particular, when they formed a settled intention to establish their new firm.

29. In view of his findings that the respondents did not form a settled intention to leave CEL until mid to late December or early January 2023, the Judge concluded at [335] that the majority of the actions taken by the respondents by way of preparatory steps did not cross the line and constitute a breach of their fiduciary duties. He pointed out at [336] that it was entirely possible that those steps could have been unsuccessful, in which event the respondents may well have remained at CEL and not sought to set up their own firm. He further held at [338] that the steps taken by the respondents would not have affected the respondents' ability to serve CEL faithfully, honestly and to the best of their abilities. They could have remained in post, even though they had taken those steps.

30. The Judge found the position regarding Deminor more finely balanced, but on the basis of the factual findings referred to above, he decided at [345] that a reasonable person,

looking at the facts of the case, would probably not conclude that there was a real possibility of conflict arising out of the respondents' dealings with that funder.

31. The Judge therefore concluded at [350] that he did not find that the respondents were in breach of their fiduciary or statutory duties by failing to report their tentative plans to CEL.

CEL's challenges to the Judge's decision

32. CEL submitted that the respondents' actions went well beyond legitimate conduct. They did not simply discuss possibilities, but acted to set themselves up so as to be ready to go as soon as possible, getting their "ducks in a row". It was not a matter of their intentions, because their actions were secretive and underhand and well past what was acceptable for directors of a company. Dealing with Deminor was a prime example of the conflict created because the respondents were defined as key workers in CEL's agreement with its funder and if they left, that funder could terminate its funding, leaving CEL in need of a new funder, and Deminor was itself a potential new funder.

33. CEL also challenged certain of the Judge's factual findings, in particular his finding as to the date the respondents formed an irrevocable intention to set up a competing business, submitting that the Judge failed to have sufficient regard to messages passing between the respondents, Mr Blanchfield's actions in emailing CEL material to himself and statements to the SRA and other third parties.

34. CEL further complained of the Judge's refusal to admit evidence of Mr Blanchfield's actions in downloading CEL documents to his One Drive, and also submitted that the Judge failed to give sufficient reasons for his decision.

Discussion

35. As the Judge correctly identified, he was engaged in a fact sensitive exercise, assessing whether the preparatory steps taken by the respondents placed them in breach of their duties to CEL. The Judge conducted a very thorough review of those facts on the basis of the extensive evidence before him and came to a conclusion that there was no breach of duty. That conclusion was plainly open to him: (i) the steps taken were entirely preparatory to trading which would not start until six months after the respondents resigned, (ii) the venture might not have proceeded until the SRA's response of 6 January 2023; (iii) the respondents tendered their resignation four days later; (iv) in the meantime the respondents were able to and did serve CEL faithfully. There is no recognised basis on which that conclusion could be overturned.

36. As for CEL's case that the respondents' dealings with Deminor gave rise to a conflict of interest, that was tenuous at best given that CEL had already entered a contract to deal exclusively with another funder. Any residual force in the point was ended, in my judgment, by the Judge's finding (set out at [26(iv)] above) that there was no evidence that Deminor could not have worked with both CEL and the respondents in the event that CEL's exclusive contract with its current funder was terminated. CEL did not challenge that finding.

37. Neither is there any basis on which to challenge any important aspect of the Judge's findings of fact. In particular, his finding as to when the respondents formed an

irrevocable intention to set up a competing business was based on an assessment of all the evidence (including the respondents' oral evidence), set out, considered and explained by him. It is not open to CEL to challenge that finding by emphasising certain of that material, ignoring the whole: see *Volpi v Volpi* [2022] EWCA Civ 464. It would be necessary for CEL to show that the finding was plainly wrong, and that it cannot do.

38. As for the One Drive, it was open to CEL to cross-examine Mr Blanchfield about that exercise. As it did not do so, I see no merit in the complaint that the Judge excluded its late admission in the exercise of his discretion.

39. The judgment in this case extended to 69 pages and 523 paragraphs. The Judge gave very detailed reasons for his decision and the suggestion to the contrary is ill-founded.

Conclusion

40. I would dismiss the appeal.

Lord Justice Snowden

41. I agree.

Lord Justice Lewison

42. I also agree.