Evans v Hughes Fowler Carruthers Ltd

Evans v Hughes Fowler Carruthers Ltd [2025] EWHC 481 (Ch)

Summary

Solicitors sued their sometime client for about £91,000. The client responded with a counterclaim for about £500,000. The solicitors applied for summary dismissal of the counterclaim. They succeeded before the Circuit Judge but then lost on the appeal to the High Court Judge. Nicholas Davidson KC and Clare Parkhouse note three points which come out of the case:

- When lawyers are acting for or against a Judge, they would be wise to consider at the earliest possible opportunity taking steps to avoid other cases of theirs coming before that Judge.
- Although it is relatively exceptional for a lawyer to be under a duty to a client to tell the client that the solicitor may have behaved negligently, the duty can (not, will) arise where the solicitor either knows, *or ought to know*, that there is a significant risk that their earlier advice was negligent.
- Although the engagement by a client of a lawyer may have distinct phases, the Court is likely to regard as reasonably arguable a client's claim to equitable set-off in respect of damage said to have happened in one phase against a claim for fees of another phase.

Facts and allegations

In 2011 Ms Evans instructed HFC and Mr Charles Howard QC in - obviously "big money" - divorce proceedings which were proceeding before Mostyn J. Those lawyers were at the same time instructed by Lady Mostyn in her divorce proceedings against Mostyn J.

The question whether this might be difficult was raised by Mostyn J. at a procedural hearing in February 2011. He gave Ms Evans a brief adjournment to take advice. After being advised by HFC, she did not make an objection to her case proceeding before Mostyn J.

HFC had other clients in family proceedings before Mostyn J. In July 2011, a special arrangement, approved by the President of the Family Division, was established, under which HFC were to inform all clients with cases pending before Mostyn J. that they also acted for Lady Mostyn; if the client objected to this, their case would be transferred to another judge without further question.

It is Ms Evans' case that she was not properly advised about these matters by HFC and, specifically, was not told about the special arrangement and the opportunity for transfer to another Judge without further question; and that if she had been advised correctly her case would have been removed from Mostyn J.

As it was, Ms Evans' case proceeded to trial before Mostyn J., and his draft judgment was circulated in April 2012. It is alleged that before the judgment was handed down Mostyn J. sent emails to Lady Mostyn containing disparaging comments about HFC and leading counsel, which emails could have founded an allegation of judicial bias. The upshot was that (1) after an April 2012 meeting with HFC, Ms Evans engaged fresh solicitors and counsel to challenge the judgment of Mostyn J. (2) the President set aside that judgment (3) substantial costs were wasted by what had happened, but (4) Ms Evans resumed instructing HFC on a revised retainer which contained a "special term" – which referred, among other things, to the fact that the costs of the trial before Mostyn J. had been wasted.

The case proceeded to retrial, before Moylan J., with judgment handed down in May 2013. After judgment, HFC remained instructed for Ms Evans until final resolution of consequential matters in 2018. Ms Evans paid approximately £400,000 worth of invoices between May 2013 and March 2018; between March and December 2018 there was a final phase in which Ms Evans instructed HFC to make applications to vary the financial orders made by Moylan J.

Ms Evans challenged HFC's claim for the further fees arising from these applications in that final phase.

The claim, and the allegations made in the counterclaim

As noted, HFC issued their claim for approximately £91,000. Ms Evans counterclaimed approximately £500,000.

Ms Evans alleges that:

1. HFC failed to provide adequate information and advice as to the risks of her case continuing before Mostyn J. in 2011-2, a continuation which she says was an accident waiting to happen. She says that when Mostyn J. flagged the issue in February 2011 she was advised not to object lest she be seen as difficult. Further, she says HFC never informed her of the "special

arrangement" and that if they had she would have exercised her right for her case to be transferred to a different judge, avoiding the need for two trials.

2. Thereafter, HFC failed to advise Ms Evans of their own potentially negligent conduct and that she might have a claim against them for damages reflecting the costs which had been wasted. Ms Evans argued that HFC's duty so to advise persisted until 2018 when any action against HFC in respect of 2011-2 negligence would have become time-barred. Time for this second claim would not have expired until 2024.

3. She is entitled to equitable set-off of her counterclaim against the claim.

Issues and decisions

HFC applied for summary judgment on the counterclaim. The application succeeded on all grounds at first instance, with HHJ Evans-Gordon holding that:

1. The allegations relating to provision of information and advice in 2011 and 2012 were time-barred because Ms Evans had the requisite knowledge under s.14A Limitation Act 1980 by May/June 2012.

2. HFC was not subject to a duty to advise Ms Evans of a possible claim against them, because (a) it was extremely unlikely that a competent lawyer in HFC's position would have had actual or constructive knowledge of the alleged negligence (b) in any event, HFC discharged the alleged duty because Ms Evans was advised in the April 2012 meeting that she needed to find alternative representation to challenge the judgment of Mostyn J.

3. Equitable set-off would not in any event be available to Ms Evans because the work on seeking to vary the financial orders of Moylan J. and the original proceedings before Mostyn J. were "separate transactions" such that there was not sufficiently close connection between the claim for unpaid fees from 2018 and the counterclaim for negligence in 2011-2012. Further, it would not be manifestly unfair to dismiss the counterclaim because of the revised retainer in 2012 which essentially "drew a line" under the Mostyn J. issue.

On appeal, Adam Johnson J. overturned HHJ Evans-Gordon's rulings on both the duty to advise of previous negligence and equitable set-off. The limitation issue was not subject to appeal.

Duty to advise of previous negligence

A solicitor "who… has acted negligently [does not come] under a continuing duty to take care to remind himself of the negligence of which, ex hypothesis, he is unaware"[1]. Cases in which a duty to tell a sometime client that the solicitor may have been negligent will be held to have existed will be relatively exceptional, but they do occur: see paragraphs 98 and 99 of the decision of Neuberger J. in *Gold v. Mincoff, Science & Gold*.[2]

In the context of an application for summary judgment, the question was "whether there was a real prospect of Ms Evans showing that HFC knew or ought to have known there was a significant risk that their earlier conduct was negligent". Paragraph 43 of the judgment, mentioning earlier judicial dicta which may have suggested some difference of opinion, is clear that "ought to have known" of the significant risk is enough to create a duty of this kind.

Adam Johnson J. concluded that HHJ Evans-Gordon had asked herself the correct question but had come to the wrong answer by "fragile" reasoning, and that the case was properly to be investigated at a trial. Ms Evans had a real prospect of showing both the existence of the duty and that any such duty was not adequately discharged, so summary disposal was not appropriate.

He also addressed the temporal parameters of such a duty, though he was careful to acknowledge that it was not technically within the scope of the appeal. He observed that it is arguable, and would be logical to argue, that if a solicitor's practice is under a duty to advise about a possible claim against it, that duty persists for such time as the client is able to do something about it. One of Neuberger J's key concerns when circumscribing the duty in *Gold v Mincoff, Science & Gold* to only relatively exceptional cases was that it could provide an artificial loophole to limitation. Adam Johnson J's reasoning perhaps provides grounding to extend the bounds of the duty, but if the striking circumstances of Ms Evans' case do not make it "relatively exceptional" then it is difficult to envisage what might.

[1] *Midland Bank Trust Co Ltd –v- Hett Stubbs and Kemp* [1979] Ch. 384 at 403C.

[2] [2001] Lloyd's Rep. P.N. 423; his views were endorsed by the Court of Appeal in *Ezekiel* v. *Lehrer* [2002] EWCA Civ 16 [2002] Lloyd's Rep. P.N. 260 (paragraphs 24 and 49).

Equitable set-off

As with the duty issue, Adam Johnson J. held that HHJ Evans-Gordon had asked the correct questions but had arrived at the wrong answer. He considered that the notions of "inseparable connection" and "manifest injustice" were themselves essentially covering the same ground, in that if there were an inseparable connection between claim and counterclaim it would be manifestly unjust to allow enforcement of one without taking account of the other.

He further concluded that HHJ Evans-Gordon's determination on equitable set-off could not stand in the light of his findings on the duty issue, because she had considered equitable set-off on the assumption that HFC owed no duty to advise of earlier negligence; he also considered it arguable that there is an inseparable connection between the claim and counterclaim because they "arise out of the same overall course of dealings between solicitor and client."

Comment

1. Although the judgment of Adam Johnson J. did not need to comment on the early part of the history, it is surely the case that it would have been wiser if the risks associated with the solicitors (and counsel) acting in the divorce of a Judge had been addressed as soon as they started to act. Regardless of whether anyone might think that there might be a real risk of appearance of bias, any risk of embarrassment or worse could have been removed by notifying the President of the Family Division of the fact that the lawyers were so acting and requesting that no case involving them be listed before the Judge concerned. (The Courts can be relied upon to be helpful. In a case in which one of the writers was involved, an allegation of negligence was made against the solicitor spouse of a High Court Judge. The parties agreed to notify the head of Division and steps were helpfully taken to ensure that the Judge hearing the case was one who did not know either the solicitor witness or the High Court Judge to whom the witness was married.) It is worth reflecting that this saga may have involved Ms Evans in £500,000 of unnecessary costs in her divorce proceedings, her former husband in possibly substantial costs in those proceedings, and, so far, the costs of two hearings in the present dispute, in which both parties were represented by leading counsel before Adam Johnson J.

2. There is now consistent authority at High Court level that the lawyer is at risk of liability for failure to tell the client that the lawyer may have been negligent if *either* the lawyer is aware of that fact *or* the lawyer ought to have been aware of that fact.

3. While equitable set-off is unlikely to be available where claim and counterclaim arise out of matters with distinct subjects, it is likely to be available where the two matters are related to a single subject.

4. Although the point did not arise in this case, one question about potential set-off is about timing: can X obtain an enforceable judgment against Y pending trial of Y's cross-claim against X? Coincidentally, in different circumstances, in *Matovu v. Porter*,[3] decided last week, the Court decided that in the particular case equitable set-off would not be available but pointed out that any potential injustice could be addressed by a stay of the claim.

As the client's case that the duty to warn her of allegedly previous negligence had arisen and been breached was adequately arguable, there was no summary judgment, and the litigation proceeds on the solicitors' claim and the client's counterclaim. The backdrop to this sort of case is, of course, limitation: expiry of limitation for a claim for the alleged previous negligence is the trigger for the claim based on omission to tell the client of it.

Nicholas Davidson KC

Clare Parkhouse

[3] [2025] 3 WLUK 18.