Settlements & Claims for Contribution - Percy v Merriman White and David Mayall (2021) EWHC 22 (Ch)

Caytons
Changing Perceptions

Introduction

The High Court has recently handed down its judgment in **Percy v Merriman White and David Mayall (2021) EWHC 22 (Ch)** in which it dealt with the basis upon which a party can bring a contribution claim under the Civil Liability Contribution Act 1978 in respect of a settlement that has been reached between a Claimant and a Defendant and raised a number of interesting points in relation to the apportionment of liability between solicitors and barristers.

We have therefore set out a short update on the decision.

Contribution & Apportionment of Liability

As professionals, solicitors and barristers owe any given client a duty of care to exercise reasonable skill, care, and diligence in the performance of their professional services. Often where a Claimant has suffered loss due to the joint negligence of two people, the Claimant will seek to recover all of its loss from one of the individuals so responsible as they are jointly liable for 100% of the damage. That will leave the paying Defendant to make a claim for contribution from the other wrongdoer.

Under the **Civil Liability (Contribution) Act 1978** (the "**Act**") where two parties are "*liable*" to another in respect of the "*same damage*", each can seek a contribution from the other. The question is what happens as regards a claim for contribution when there has been a settlement of the claim against one wrongdoer? Section 1(4) of the Act makes express provisions in relation to this:

"A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established." **(emphasis added).**

The Facts

The facts of the underlying claim concern advice given by Merriman White (the "**Solicitors**") and Mr Mayall (the "**Barrister**") in relation to a derivative claim by their client, Mr Percy (the **"Claimant**"), against Mr Trevor. It can be briefly summarised as follows.

In January 2007, the Claimant and a business partner, Mr Trevor, agreed to enter into a joint venture agreement. The corporate structure concerning the joint venture involved a company, which was wholly owned by the Claimant and another company wholly owned by Mr Trevor.

By 2010, the Claimant suspected that Mr Trevor had misappropriated assets of the joint venture. The Claimant subsequently sought advice from the Solicitors on the matter. The Solicitors' view was that the Claimant had a claim for unfair prejudice.

On 30 June 2010, the Solicitors provided instructions to the Barrister to advise in conference on how best to proceed to protect the Claimant's interests.

On 15 September 2010, the Barrister advised in conference about evidence in support of the derivative claim.

On 21 December 2010, a mediation took place. The Barrister did not attend but was asked to assist in the preparation. Late in the day, Mr Trevor made an offer of £500,000 inclusive of costs. The offer was rejected. The day after, the Solicitors sent counsel a full mediation bundle and copy note from the mediation. Counsel did advise that a settlement figure between £400,000 and £750,000 excluding costs would be worth considering. However, the matter did not resolve.

In order for the Claimant to pursue his claim against Mr Trevor he required the court's permission. The Solicitors evidence was that based on the Barrister's advice it was "*understood that obtaining permission to continue was a formality*". The Barrister accepted that he gave "*clear and robust*" advice essentially to the effect permission to bring the claim should be obtained. However, the Barrister said he highlighted the risk that a court may not grant permission, but instead say that the joint venture company should be wound up.

By judgment delivered on 30 June 2011, the Court denied the Claimant permission to pursue a derivative action as it did not meet the threshold test and instead said the joint venture company should be wound up. This was somewhat of a shock given the view of the Solicitors and the Barrister.

The Claimant then brought a claim in professional negligence against the Solicitors and the Barrister.

By 18 May 2017, the Claimant had agreed a 'drop hands' settlement with the Barrister. This is where the claim is dismissed on the basis that each side be responsible for their own costs.

By 7 January 2019, the Claimant's claim against the Solicitors had been settled.

On 8 September 2017, the Solicitors issued an application seeking permission to file a notice of contribution against the Barrister. That application was granted.

The Claim for a Contribution in respect of the Settlement

In this case, the Solicitors had sought a contribution from the Barrister in respect of the settlement that they had reached with the Claimant. The settlement sum was not referred to in the judgment probably because it was confidential.

The Barrister argued that he was not liable for a contribution because:

a. The Solicitors would not have been **actually** liable to the Claimant because they had a complete defence to the Claimant's claim under the 'no reflective loss' principle. This principle stems from the rule in **Foss v**

Harbottle (1843) 2 Hare 461 and sets out that a shareholder of a company cannot bring a claim for losses that was suffered by the company itself.

b. The Barrister also argued that even if the Solicitors were liable to the Claimant that he would not be liable to the Claimant in respect of "*the same damage*", as that which underlay the Solicitors liability to the Claimant. This was because the Barrister had advised that the court could order that the company should be wound up rather than giving the Claimant permission to bring his claim against Mr Trevor (which was the risk that eventualised).

The High Court confirmed that in a claim under the Act for a contribution towards a settlement, if there was an underlying "*bona fide settlement*", the Solicitors did not need to prove that they would have **actually** been liable to the Claimant. Rather, all that needed to be proven by the Solicitors was that they would have "*been liable to [the Claimant] assuming the factual basis of the claim against him could be established*". The judge explained the Solicitors only needed to demonstrate that the *"factual basis would have disclosed a reasonable cause of action against [them] to make [them] liable to [the Claimant] in respect of the damage*". Accordingly, the Barrister was unable to defend the claim by the Solicitors for a contribution on the basis they would not have been **actually** liable to the Claimant. Specifically, in this case the Barrister was not able defeat the claim by the Solicitors for a contribution on the basis that they would have been able to raise an actual defence to the claim by the Claimant based on reflective loss as a collateral defence.

Assessment of Contribution

The Judge held that the responsibility for the loss fell more on the shoulders of the Solicitors than the Barrister. In deciding apportionment of liability, the Judge considered the following points:

- The Solicitors' letter of engagement held themselves out to be experts in commercial law.
- The fee earner being less experienced than the Barrister did not affect apportionment of liability.
- Prior to the instruction of the Barrister, an offer had been made to settle the dispute and this required proper analysis by the Solicitors.
- The responsibility for the failure to accept the offer made at mediation rests with the Solicitors as the offer was rejected without reference to the Barrister.
- Some of the responsibility lies with the Barrister for failing to advise that the offer should be revisited when the Barrister was subsequently aware of the offer.
- That the Solicitors were not entitled to take the Barrister's advice to press on with the proceedings at face value, but that the responsibility for taking the case to a hearing lies predominantly with the Barrister.

Ultimately, taking into account the factors mentioned, the Judge held that the Solicitors are entitled to a contribution of 40% of the settlement sum.

Conclusion

The 1978 Act is not entirely straightforward and judicial guidance on the Act is therefore welcome. Some important points to take away from this judgment include the reminder that, subject to the facts of any given case, there can be limited avenues of defence when it comes to contribution claims where there has been a settlement between a Claimant and one Defendant.

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