Revisiting Settlements & Contribution Claims - Percy v Merriman White and David Mayall (2022) EWCA Civ 493.

Caytons
Changing Perceptions

Introduction

In the recent judgment of ***Percy v Merriman White and David Mayall*** **(2022) EWCA Civ 493** the Court of Appeal addressed the impact of settlement agreements upon contribution claims. The Court reversed the decision of the High Court in ***Percy v Merriman White and David Mayall*** **(2021) EWHC 22 (Ch)** and clarified the contribution defendant's scope to defend against contribution proceedings.

We have set out a short update on the decision.

Contribution Proceedings:

The Civil Liability (Contribution) Act 1978 (the "**Contribution Act**") provides a right of action, often referred to as a contribution claim, where one party who is liable for damage may claim a contribution from other parties who are liable "*in respect of the same damage*"[1].

The crux of this case concerned circumstances in which one of the defendants had reached a settlement with the claimant and subsequently sought a contribution from another party. Section 1(4) of the Contribution Act makes provision for such a scenario and sets out that:

"*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 appeal focused upon whether, in such circumstances wherein one party had reached a "*bona fide settlement*", it was open to the party facing the contribution claim to mount a defence, or whether they were bound by the factual basis assumed by the bona fide settlement.

[1] Section 1(1) Civil Liability (Contribution) Act 1978

The Facts

The professional negligence action and subsequent contribution claim arose from an underlying Companies Act dispute.

Mr Percy had retained Merriman White (the "**Solicitors**") who in turn had instructed Mr Mayall (the "**Barrister**") to act in relation to the alleged misappropriation of company money by his joint venture partner, Mr Trevor. The joint venture company was equally owned by Mr Percy and Mr Trevor, through their own respective companies. The Solicitors had instructed the Barrister, who advised Mr Percy to seek permission to bring a derivative claim.

A mediation took place between Mr Percy and Mr Trevor, in or around December 2010, though the Barrister was not instructed to attend. At this mediation Mr Trevor made an offer of settlement of £500,000 inclusive of costs, though this was rejected by Mr Percy, who made a counteroffer of £750,000 plus costs, which in turn was rejected.

A conference between the Barrister, the Solicitors, and Mr Percy took place in early January, where the Barrister advised that one of the remedies that the Court had available was to opt for the winding up of the joint venture company. If this risk eventualised then Mr Percy would not be able to bring his derivative claim against Mr Trevor.

There seemed to be agreement at the conference that a reasonable settlement figure would be between £400,000 to £750,000 plus costs. However, a Part 36 offer was made to Mr Trevor, though this was for the much higher figure of £950,000 plus costs.

The application for permission to proceed with the derivative claim was dismissed on 30 June 2011 by the Deputy Judge, who was persuaded by Mr Trevor's argument for the joint venture company to be wound up. The Deputy Judge considered that the claims failed to meet the threshold test and that winding up would better resolve the dispute. The Barrister and the Solicitors both seemed to be surprised by the decision.

Following the Deputy Judge's decision, Mr Percy instructed alternative solicitors and negotiated a settlement with Mr Trevor for the greatly reduced sum of £65,000 in full and final settlement.

The Claim

Mr Percy subsequently brought a claim against both the Solicitors and the Barrister alleging, in summary, that he had been provided with negligent advice and without such he would have achieved a better settlement or result against Mr Trevor. However, by May 2017, Mr Percy had by consent order dismissed his claim against the Barrister, seemingly for concerns regarding causation.

Mr Percy's claim against the Solicitors later settled for £250,000 and following this the Solicitors made a claim for contribution against the Barrister.

The High Court's Decision

The Barrister had argued that he should not be liable to make a contribution because he had advised that the court could order the company to be wound up rather than giving Mr Percy permission to bring his derivative claim (which was the risk that eventualised) and that he had not caused Mr Percy's loss.

The questions of whether the Barrister was negligent and whether he had caused Mr Percy's loss seems to have been dealt with by the High Court as an afterthought of the judgment and they refused to consider a challenge to the decision of the Deputy Judge in the derivative proceedings.

In support of this approach, the High Court placed reliance in reaching their decision upon the Court of Appeal case ***WH Newson Holding Limited v IMI Plc & Delta Limited [2016] EWCA Civ 773*** ("***Newson***"). Particular weight was placed upon paragraph 59 of the judgment, wherein Sir Colin Rimer stated:

"*... **D1 must still prove at least something in order to succeed against D2**. That is that 'he would have been liable [to C] assuming that that the factual basis of the claim against him could be established.' **In my judgment the sense of that is that all that D1 needs to show is that such factual basis would have disclosed a reasonable cause of action against D1 such as to make him liable in law to C in respect of the damage. If he can do that, he will be entitled to succeed against D2**. There **may of course remain issues as to quantum**, as to which section 1(4) makes no assumptions." (emphasis added).*

It is ***critical*** to note that in *Newson* the contribution defendant had essentially ***already*** been found liable to the underlying Claimant. So, unlike in this case, it was not the position where the contribution defendant (i.e. the Barrister) could legitimately protest his innocence.

However, based on the above approach, the High Court concluded at paragraph 81:

"*...for the reasons given, and based on the permitted assumed facts, the breach of a duty of care pleaded in the Negligence Claim resulting in loss and damage gives rise to **a reasonable cause of action** between Mr Percy and [the Solicitors]. **It follows without more**, that [the Solicitors are] entitled to a contribution from [the Barrister]: see Newson paragraphs 59-61." (emphasis added)*"[2]

The High Court found in the favour of the Solicitors and held that the Barrister was liable for a contribution of 40% of the settlement.

The Court of Appeal's Decision

Newson and Section 1(4) of the Contribution Act

The Court of Appeal unanimously reversed the decision of the High Court.

The Court of Appeal held that the effect of Section 1(4) of the Contribution Act where settlement is agreed in circumstances as the present case is that "***D1 does not have to establish that he was or is liable to the claimant*** *provided that he would have been liable if the factual basis of the claim against him could be established."* (emphasis added) [paragraph 82].

However, the Court disagreed that *Newson* supported an extension of this principle to the party from whom a contribution was being sought i.e. the Barrister in this case. They held that the judgment within *Newson* was highly consequential on the facts and could not be removed from its context, where the liability of the contribution defendant had essentially been determined (unlike in this case).

Furthermore, as an aside, Lord Justice Lewison discussed in his concurring opinion that if it was correct that the Solicitors did not have to establish liability on the part of the Barrister that would effectively deprive the Barrister of his right to a fair trial under Article 6 of the European Convention on Human Rights (to which the UK remains a signatory).

Lord Justice Lewison summarised the principle succinctly, stating that "*Section 1 (4) relieves the contribution claimant from having to establish his own **liability, but it does not absolve him from establishing the liability of anyone else from whom he seeks contribution.***" (emphasis added) [paragraph 116].

In other words, to succeed in their claim for contribution the Solicitors had to have proven that the Barrister was negligent and had caused Mr Percy's loss.

[2] Percy v Merriman White and David Mayall (2021) EWHC 22 (Ch)

Breach of Duty of Care and Causation

The Court of Appeal considered that the High Court had insufficiently examined the alleged negligence of the Barrister. Sir Julian Flaux C found that the Barrister's advice concerning proceeding with the derivative action had not been negligent and was "*within the range of advice which could be given by a reasonably competent barrister*" (paragraph 95). He considered that the High Court's refusal to permit the Barrister to challenge the decision by the Deputy Judge to defend against his own alleged negligence was "*startling*" (paragraph 90). In these circumstances, where neither party to the contribution claim was a party to the underlying derivative proceedings it would be "*very rare*" for such a challenge to be an abuse of process (paragraph 93).

The Court's Decision on Causation

As regards causation, a key issue was whether Mr Percy would have proceeded in another manner, if at all, had the Barrister advised "*that there was a low risk of not getting permission to proceed with the derivative claim*" (paragraph 99). This was not addressed by the Solicitors. There was a "*fatal lacuna*" in the evidence, and it could have only been answered by Mr Percy (paragraph 107). It was held that the burden of proof fell upon the Solicitors to call Mr Percy to give evidence, which they had failed to do (paragraph 105).

Ultimately, the Court of Appeal granted the appeal, and the case was dismissed. It was decided that it would be "*unfair and oppressive*" on the Barrister to remit the case to the lower courts for retrial (paragraph 110).

Conclusion

The Court of Appeal's decision provides welcome guidance on the Contribution Act and highlights important considerations for practitioners and parties to disputes involving multiple defendants to have in mind when seeking settlement arrangements, wherein one party may consider a future contribution claim.

It will be important to consider the evidential requirements that may be necessary for a contribution claim when discussing settlement, and as outlined by Sir Julian Flaux C at paragraph 105 of the judgment, in some circumstances it may be necessary to secure guarantees that the claimant would provide evidence in future contribution proceedings.

This decision is further important to highlight, as touched upon by Lord Justice Lewison in his concurring opinion at paragraph 120 of the judgment, that a defendant of a contribution claim will not be deprived of their right to a fair trial under Article 6 of the European Convention on Human Rights. They will, rightfully so, be permitted to defend against any allegations of their own negligence. To propose otherwise would be to be suggest that a defendant of a contribution claim should be bound by a settlement agreement reached without their involvement, which would undoubtedly have manifestly unjust results.

Mark Loraine
Trainee Solicitor
E: loraine@caytonslaw.com

Sam Moore
Partner
E: moore@caytonslaw.com