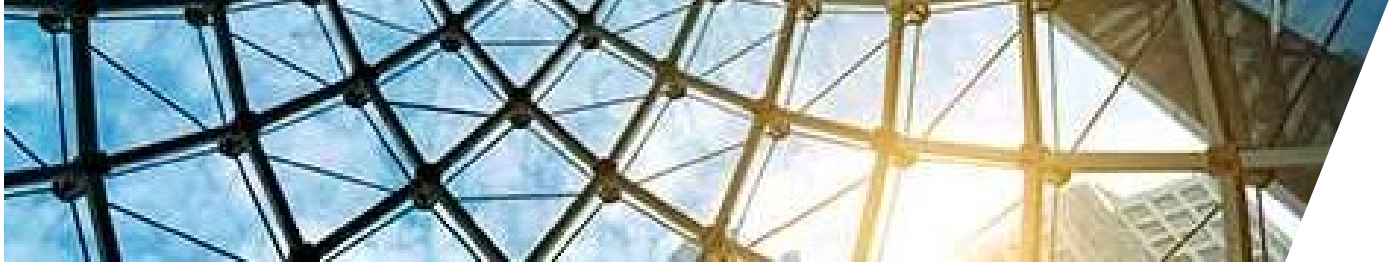

Mischconceived: a look at the failed £53m claim against Mishcon de Reya

Caytons
Changing Perceptions

Introduction

Aurium Real Estate v Mishcon de Reya [2022] EWHC 1253 (Ch) was billed by *The Lawyer* as one of the top 20 cases of 2022. A £53m professional negligence claim against a Silver Circle firm inevitably captured the attention of the profession, and perhaps encouraged schadenfreude in former opponents. The claim was comprehensively dismissed. The court's approach is of interest beyond the facts of the case. It contains an illuminating indication of how a court might work through the six tests set out in *Manchester Building Society v Grant Thornton LLP* [2021] UKSC 20.

We have, therefore, prepared the following note.

BACKGROUND

THE PROJECT

The claim arose from a property development project ('the Project'). Park Modern, as the Project was marketed, was on Bayswater Road overlooking Hyde Park. The GDV was about £500m. The Claimant, Aurium, was a Jersey company. It operated through a subsidiary, Bayswater Road (Holdings) Limited ('Holdings') and in turn through SPVs registered in the UK. Holdings entered into a Development Management Agreement with established developer, Fenton Whelan, to implement the Project. Its viability was dependent on the developer[1] acquiring vacant possession of the titles which were to make up the site, obtaining planning consent and securing sufficient funding. All three proved a headache.

FUNDING

In June 2014, the hedge fund, Cheyne Capital Management ('Cheyne'), agreed to advance £75m for a period of 18 months ('the Loan'). Aurium agreed to pay interest at 10%. The Loan was secured against Aurium's shares in, and loans which it made to, Holdings. Neither the amount nor the period of the Loan was enough. Cheyne agreed to extend the term several times. It advanced a further £5.8m. This was still insufficient. The two individuals behind Aurium injected a total of about £50m of their own money.

PLANNING

The developer was slow to apply for planning consent. Its application did not go in until November 2015. This was only about a month before the Loan was meant to be repaid. The Project proved

1 This neutral word is used throughout to refer, as the context permits, to any or all of Aurium, Holdings, their UK subsidiaries and/or Fenton Whelan

controversial. Petitions were raised against it. Campaigners objected that it involved tearing down attractive period buildings. The then Mayor of London was sympathetic. He proposed to order the planners to refuse consent. But eventually, on 18 July 2016, his successor agreed not to intervene after the developer promised to include significantly more affordable housing. Consent was granted on 2 March 2017.

ASSEMBLING THE SITE

By December 2014, the developer had acquired all of the freehold titles it needed to assemble the site. It then began negotiating with leaseholders. It offered inducements for early surrender. One of the leaseholders, Berkeley Credit & Guarantee Limited ('Berkeley') proved difficult. It ignored the developer's offers and took every opportunity to object to, or complain about, the Project. The timing of these interventions was such that Fenton Whelan became convinced, rightly in the Judge's view, that Berkeley had inside information. It demanded that the developer pay for historic repairs, and when it resisted, launched proceedings. It even approached Cheyne with an offer to buy the Loan. It was hard to disagree with Berkeley's argument that the plan to demolish the building it occupied was a breach of the covenant to "*keep the main structure of the Building and in particular the roof void and main structural walls thereof and all common parts in good and tenantable repair and condition*" ('the Covenant').

MISHCONS' INVOLVEMENT

The extent of Mishcons' involvement was substantially disputed. In February 2015, Fenton Whelan instructed Mishcons to prepare a vacant possession agreement for Berkeley. In the same month, they made an offer to Berkeley on behalf of the developer to pay £450,000 for the surrender of the lease. After this was ignored, they made an increased offer of £500,00 in May 2015. Berkeley was no more receptive.

Mishcons belatedly sent a client care letter to Aurium in July 2015 ('the 2015 Retainer'). It referred to *"instructions to act in relation to producing and negotiating vacant possession agreements with the occupational tenants of 2 Queensway and 125 Bayswater Road, 4 Queensway and 119-122 Bayswater Road".* They then carried out various other discrete pieces of work for Aurium, Holdings and several of the SPVs, for which they produced further client care letters. They billed a total of about £1m in fees.

THE 'BUILDING AROUND' SOLUTION

From about December 2015, Fenton Whelan began to contemplate an alternative approach of building around the property which Berkeley occupied. It used this as a threat in negotiations, but it had no effect on Berkeley.

THE ADVICE

On 5 January 2016, Fenton Whelan emailed Mishcons, noting:

> *"125 Bayswater is setting up for a fight. We would prefer to buy him out, but he has thus far refused to agree. Thus, our plan must be to build around him.*
>
> *On reading his letter, I am particularly concerned about the provision of the lease regarding the 'roof void' – the structural walls can be maintained as part of our build if required.*
>
> *I think we must now reply to him given to neglect to do so at this stage must weaken our case in any future court proceedings."*

After further exchanges and conversations, which were largely undocumented, Fenton Whelan emailed Mishcons on 19 January 2016, stating:

"We really need the advice on the 125 tenant's rights and how we can build around him. If we decide to alter our planning permission (it) *requires lead time and we do not want to miss our committee date. Please advise when we can expect to receive this analysis."*

Two days later, Mishcons provided written advice as to Berkeley's rights under the lease ('the Advice'). It contained the following passages:

"Any scheme you prepare must be designed so as to enable the tenant to continue to trade throughout the duration of the works. If the development prohibits trade then you could be faced with a claim for damages or an injunction.

Notwithstanding this there are a number of practical steps that you can take in order to insulate yourself from claims being made against you.

…

"(the Covenant) *needs to be considered in the light of plans you have for the Building. This covenant only requires you to keep the main structures in good repair. It does not necessarily prevent you from altering the structure however, the works you carry out must be done in such a way that does not leave the structural parts in a poor state of repair.*

THE AMENDED PLANNING APPLICATION

In April 2017, the developer applied to amend the existing planning consent. The revised scheme involved keeping intact Berkeley's shop premises but demolishing the rest of the building.

THE LOSS

By June 2017, Aurium was in negotiations to sell Holdings to a Chinese company ('the Buyer') for £158m. It had by then defaulted on the Loan. Cheyne agreed a series of extensions. At that point, Berkeley issued proceedings for a declaration that the build around scheme involved breaches of covenant. This spooked the Buyer. It walked away from negotiations. Counsel advised the developer that Berkeley's chances of success were about evens. Aurium then resumed talks with Berkeley. It tabled a substantially increased offer of £1m. Berkeley asked for £16m. It ultimately accepted £4.25m. Aurium then tried to revive negotiations with the Buyer. It failed. By October 2018, Cheyne had lost patience and called in its security. Aurium lost its investment.

THE CLAIM

Aurium blamed all this on Mishcons. It said that it had been reassured by the Advice that the build around scheme would not expose it to liability and that it proceeded in reliance on this.

THE JUDGMENT

The claim fell at the first hurdle. The Judge concluded that the Advice could not have been given under the 2015 Retainer. This was because it did not involve producing or negotiating vacant possession agreements. Instead, it concerned what might be done if vacant possession could not be achieved. He was unimpressed with Aurium's submissions that the introductory words "in relation to" considerably widened the scope of the retainer.

The Judge also rejected the alternative argument that the 2015 Retainer had been varied to extend to giving the Advice. This, he said, would have led to Mishcons *"being contractually obliged to provide advice of a fundamentally different subject matter*". It would have had to bill for the work at the discounted rate which it had agreed under the 2015 Retainer if vacant possession was not achieved. He said, with judicial understatement, that it was "not obvious" why this would have been agreed.

He found that that the Advice had been given under a separate retainer but that Mishcons had overlooked preparing a client care letter.

After a careful consideration of the course of dealings between the parties, the Judge concluded that the Advice had been given to Holdings, not Aurium. That was enough to dispose of the claim. But he went on *obiter* to address the other issues between the parties.

Turning to the 'scope of duty question', he rejected Aurium's submissions that Mishcons had been asked to advise on whether the proposed build around scheme would breach the terms of the Lease. He concluded that they had not been given any details of a specific build around scheme and were only asked to provide a high-level overview of Berkeley's rights and remedies, together with practical advice as to how works might be designed and executed to minimise the risk of claims.

He rejected Aurium's formulation of the risk that the Advice was meant to guard against. This was the risk that Aurium might lose its investment if it was unable to sell Holdings within the term of the Loan due to Berkeley's refusal to give up vacant possession. The Judge concluded that this was at odds with the high-level nature of the Advice. He found that the sale of Holdings was just one of a range of potential exit strategies which Aurium had in contemplation. The Advice could not possibly have been designed to protect them all. Finally, the Judge concluded, the risk contended for would depend on commercial factors which Mishcons were not asked to advise on. These included whether vacant possession could be negotiated, whether the unresolved issue of Berkeley's lease would be a deal-breaker for potential buyers of the company and Cheyne's willingness to extend the term of the Loan.

The Judge preferred Mishcons' submissions that the risk that the Advice was meant to guard against was that some of Berkeley's rights or obligations might be overlooked and that this might lead the developer to waste money on a defective scheme which needed to be changed and/or incur costs of enforcement action by Berkeley. It followed that the loss arising from Cheyne enforcing its security was outside the scope of Mishcons' duty. The 'duty nexus question' was, therefore, answered in their favour.

Moving on to the 'breach question,' the Judge rejected the suggestion that Mishcons had given a concluded view that a build around solution would not breach the Covenant. He found that the Advice was saying no more than that further consideration would need to be given to the Covenant when details of the proposed build around scheme were known. Mishcons were never asked to advise on a specific scheme.

Aurium's fallback argument was that it should have been obvious to an experienced property lawyer that any build around scheme would involve some degree of demolition and, therefore, that a duty to warn arose. The Judge disagreed. He concluded that, while it might have been obvious to a property developer, it would not have been obvious to a property lawyer. He might have added that, if it would be obvious to a property developer, it is hard to see why the duty would arise. Or, indeed, if it did how causation might be established.

On the 'factual causation question,' the Judge found that no director of Aurium ever read the Advice, so there was no direct reliance. Nevertheless, he indicated that he would be prepared to find reliance established indirectly on the basis that Aurium received advice from Fenton Whelan and knew, in turn, that it had received the Advice. But, he concluded, the Advice could not reasonably have been relied on as confirming that the build around scheme in contemplation was feasible.

He then turned to look at what would have happened in the 'no breach' scenario contended for. Aurium's case was that if it had known about the risks of the build around solution it would have adopted a more conciliatory approach to Berkeley and achieved a settlement sooner. The Judge accepted that it would have modified its approach but found that there was no real and substantial chance of any of Berkeley, KWG or Cheyne acting differently. The threshold for a loss of a chance claim was, therefore, not met.

A few points emerge from the judgment which merit further comment.

WITNESS EVIDENCE

What the Judge made of the witnesses in this case mirrors our own recent trial experience in *Various North Point Pall Mall Purchasers v 174 Law Solicitors v Key Manchester* [2022] EWHC 4 (Ch). In both cases, the Judges reminded themselves of the observations of Legatt J (as he then was) in *Gestmin v Credit* Suisse [2013] EWHC 3560 (Comm) about the fallibility of recollections, including recollections of historical belief. They accordingly attached limited weight to what the Claimants' witnesses said they recalled. In both cases, however, the Judges' overall assessment of the witnesses was significant.

In *Aurium*, the Judge found Mishcons' witnesses to be honest and reliable, whereas Aurium's witnesses were affected by "*litigation wishful thinking*". He concluded that, "*hav*[ing] *come to the view that* [Mishcons] *were to blame for the loss*…[they] have to an extent "back filled" their recollections so as to be consistent with that narrative". Defendants should be alert to this tendency, which can of course affect their own witnesses as well. The Judge in *174 Law* went further and found that the Claimants' evidence represented pre-prepared answers and not genuine recollection. He was complimentary about each of the Defendants' witnesses.

It is sometimes said that, where solicitors do not take attendance notes of conversations, the client's version of events is likely to be preferred. But as with many such propositions, this needs caveats and qualification. In particular, the client's account needs to be credible and its witnesses need to be found reliable and honest. The court's impression of the solicitor's evidence will also be relevant. In both Aurium and 174 Law, the Judges preferred the solicitors' version of events despite them not taking attendance notes of disputed conversations.

STANDARD OF CARE

It is sometimes suggested that prestigious professional practices are expected to meet some kind of enhanced standard of care. This appears to attach too much weight to a comment by Henderson J in *Hicks v Russell Jones & Walker* [2007] EWHC 2545 (Ch) that "*RJW are a well-known City firm and it would be absurd to judge them by the same standard as a small country firm".* The better analysis of the authorities is that a solicitor is to be judged by the standards of the ordinarily competent practitioner *specialising in the same field*. This was the standard applied here.

DUTY OWED TO WHOM?

It is critical, in cases involving complex corporate structures, to be clear about which entity was the client. The question might not be straightforward where, as one sometimes sees, controlling individuals treat their various companies as alter egos and switch hats at random. But the judgment illustrates the potential for this point to gift a defendant an easy win.

THE SCOPE OF DUTY

Despite the best efforts of claimant lawyers, the courts will not treat solicitors as *"general insurers for their clients' legal problems,"* as Laddie J put it in one case[2]. It always needs to be determined what the solicitor agreed to do. The starting point will be to construe the client care letter, where there is one.

The Judge's approach to the 2015 Retainer was surely correct. It cannot be right that what a solicitor has agreed in writing to do can be ignored so as to impose it with liability for something altogether different. Equally the courts ought to be slow to find that a retainer has been varied to extend to entirely different work without clear evidence.

In formulating the risk which they allege the defendant's duty was meant to guard against, claimants will, naturally enough, look at what went wrong and work back from there. This can produce results which are artificial and enjoy all the benefits of hindsight. So it was here. Aurium's formulation was

[2] *Credit Lyonnais v Russell* Jones *& Walker* [2002] EWHC 1310

unwieldy. It involved several stages of knock-on effect. Mishcons' formulation felt more intuitive and it is not surprising that the Judge preferred it.

An interesting facet of the Judge's reasoning was that the risk which Aurium contended for was dependent on commercial considerations. It remains to be seen what weight other courts will place on this factor, but the reality behind many professional liability claims is that the losses arose for commercial reasons.

RELIANCE

The notion of indirect reliance might seem questionable at first sight, but the same conclusion could be reached by applying established agency principles. It was not established on the facts, in any event.

LOSS OF A CHANCE

Where a claimant's case is that a third party would have acted differently in a counterfactual world, the third party will often not be available to give evidence either way. The court will apply a two-stage test. It first asks the threshold question: was there a real and substantial chance of the third party acting as the claimant contends? If the answer is no, the claim fails. If it is not, the court goes on to assess the percentage chance of the third party acting as the claimant would have it. The bar is low and claimants will often clear it without difficulty, but as this decision illustrates, it should not be assumed that they will in every case.

In concluding, it is fair to note that this was only a first instance decision. It might be appealed. The Court of Appeal might see the case differently. Other Judges might adopt a different approach. But it is encouraging nonetheless.

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