Browne Jacobson

Claims against solicitors and the 'no-negligence world'

23 February 2023

Mackenzie v (1) Rosenblatt Solicitors (a firm) (2) Rosenblatt Ltd [2022] EWHC 331 (Ch)

The facts

Bob Mackenzie ("Claimant") was the executive chairman and CEO of the AA; he was suspended from his role after an "unsavoury incident" involving him and another AA executive at a company away-day. He tried to resign from the AA due to ill-health, but his resignation was rejected and in August 2017 he was dismissed for gross misconduct. As a "bad leaver" his share entitlement was at risk and the AA looked to recover his sizeable bonuses. Events in 2017 were the catalyst for a protracted dispute between the Claimant and the AA resulting in an adverse finding against the Claimant in the Court of Appeal (July 2022) with remaining matters seemingly being concluded between the parties in late 2022.

Wheeling back to 2017 the Claimant had instructed Rosenblatt solicitors to consider possible claims against the AA and its officers personally (together the "defendants"). A claim form was issued in March 2018 against the defendants as to various claims including for unlawful means conspiracy which the defendants robustly resisted. The Claimant abandoned the conspiracy claim in November 2018 shortly after ending his retainer with Rosenblatt but before the hearing of the defendant's application to strike it out.

The Claimant pursued a claim against Rosenblatt that there was no proper evidential foundation on which to plead the conspiracy claim and that even if there was Rosenblatt was in breach of duty in failing to tell the Claimant that the claim was weak. He claimed as damages the various costs incurred (his own costs and liability for the defendant's costs).

The decision

The claim proceeded to trial and, in a judgment handed down at the end of last week, was dismissed. There was sufficient evidence to pursue the conspiracy claim and Rosenblatt had not advised it was a "good" claim in the sense that it was likely to succeed at trial. The claim's main purpose was tactical - to hit the AA "*hard and fast*"; advancing an arguable claim to put the defendants "*on the back foot*" and reach a negotiated favourable financial settlement. Rosenblatt had correctly advised it would not be known until disclosure whether there was strong evidence to support the conspiracy claim.

That said the judge considered Rosenblatt was in breach of duty in failing to advise before June 2018 that the conspiracy claim was weak and so was at risk of an application to strike out. The difficulty for the Claimant was when it came to looking at the counter-factual or as the judge put it - he had to prove "…in relation to each or any breach, on a balance of probability, that he would have acted differently in a no-negligence world, and if so, how."

He alleged, properly advised, he would not have issued the claim form against the officer defendants and would have limited his claim against the corporate defendants to claims in wrongful dismissal and disability discrimination. Analysing the evidence, including crucially the Claimant's belief there had been a conspiracy to oust him and his wish for vindication, the court concluded, on balance of probability, in a no—negligence world, that a conspiracy claim would still have been issued and served on the defendants. Breach of duty, to the limited extent found, did not cause the Claimant the loss claimed resulting in the dismissal of the claim.

What do we take from the judgment?

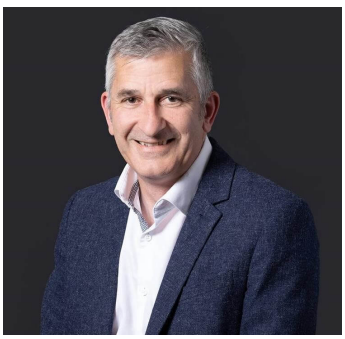
There is careful analysis in the judgment of how a claim in unlawful means conspiracy should be pursued but more than that the judgment shows the importance of careful marshalling of the evidence particularly as to the advice given as to prospects of success in potential and ultimately robustly resisted litigation.

And it's crucial that such evidence is presented to the court in accordance with the relevant procedural rules (Practice Direction 57AC) – the judge was heavily critical of the Claimant's witness statements as being over-lawyered ("*the careful work of the legal team*") and not reflecting the witnesses own voice – crucially they did not use the witnesses "*own words*". This is particularly of concern where there was a disconnect between the level of recall of Claimant's own witness evidence when in the witness box in comparison to what was said in the statements.

This is another illustration of what must be proved where the basis of the claim is that the claimant has lost the opportunity to conduct themselves in a certain way. It is not enough to establish a breach of duty – the judge must be persuaded what would have happened in a "*no-negligence world*". In that endeavour the Claimant wholly failed – the available evidence did not support his counter-factual of what he would have done in the litigation properly advised even in circumstances where the hurdle to be overcome for that is no higher than on balance of probabilities – that was fatal to his claim.

Browne Jacobson acted for Rosenblatt Solicitors (a firm) and Rosenblatt Ltd in the successful resistance of the Claimant's claim.

Key contacts



Jason Nash

Partner

jason.nash@brownejacobson.com

+44 (0)330 045 2181

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