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Case No: HC-2016-001362

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Rolls Building
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Fetter Lane
London, EC4A 1NL

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Before:

DEPUTY MASTER BOWLES

Between:

VINCENT JAMES WALSH (1)

MICHAEL ELSOM (2)

JASON MICHAEL EDINBURGH (3)

- and -

GREYSTONE FINANCIAL SERVICES
LIMITED

Claimants

Defendant

MR T. BESWETHERICK appeared on behalf of the **First Claimant**
MR A. HUNTER Q.C. and MR G. MOLYNEUX appeared on behalf of the **Second**
Claimant

The **Third Claimant** was **Unrepresented**

MR M. HARDWICK Q.C. appeared on behalf of the **Defendant**

APPROVED JUDGMENT

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MASTER BOWLES :

1. By three applications, all made on 1st November 2018, the defendant, Greystone Financial Services, which I will call Greystone, applies that the three actions to which the applications relate be heard together. I heard lengthy factual and legal argument on these applications on Wednesday of last week and I am grateful to all counsel.
2. This judgment, prepared in short order, relates to these applications. In very bare summary, each of the three claimants, Mr Walsh, Mr Elsom and Mr Edinburgh, sue Greystone primarily for negligence and deceit in advising and dealing with the claimants in respect of their investments, for tax saving purposes, in an LLP, Aquarius Film Company. One of the claimants, Mr Walsh, had earlier invested in other film schemes, Zodiac 1 and Zodiac 2, in respect of which he makes similar allegations against Greystone. I shall refer to the consequence of that investment later in this judgment.
3. Again in bare summary, the core negligence and deceit alleged by each claimant against the defendant arose, it is said, firstly, in the advice said to have been given as to the requirement for tax saving eligibility and secondly and perhaps more materially, in respect of the advice given and representations said to have been made by, or by an employee of, Greystone, a Mr Williams-Denton (for whose conduct Greystone is said to be vicariously liable) in respect of a large scale revenue enquiry into the claimants' participation in the Aquarius investment.
4. What is said by the claimants, in different terms, but upon broadly the same lines, is that they were advised by Greystone that the requirement of what I will call the ten-hour rule (whereby a participant in the Aquarius scheme, or a similar investment, had to be actively involved in the investment to the extent of 10 hours per week) could be met by watching videos and films and reading around the subject of films and their making. That advice, as I understand it, is flatly contradicted by a revenue note, or notice, explaining the true level of participation required for tax saving eligibility arising under a film scheme of the nature of the Aquarius scheme.
5. What is further said by the claimants, again in broadly similar terms, is that in respect of the lengthy revenue enquiry put in place by the Revenue in respect of the claimants' investments in the Aquarius scheme and the tax saving consequences which they claimed to arise out of their investments, is that they were told that there was nothing to worry about, that the enquiry was just a formality and was simply routine. In point of fact, the enquiry was anything but routine and anything but a formality. In the result all three claimants were arrested for conspiracy to defraud the Revenue, along with Mr Williams-Denton, a Mr Potter, from Aquarius, and several others. The claimants and each of them stood two lengthy trials before their eventual acquittal. Mr Williams-Denton and Mr Potter were convicted and sentenced respectively to six years' and eight years' imprisonment.
6. A key and indeed fundamental part of the prosecution was that false, I think, electronic diaries had been submitted by Mr Williams-Denton on behalf of each

claimant to support the contention that they and each of them had complied with the 10 hour rule. It is common ground that false diaries were submitted and at the trial of each of these claims, it is likely that the main factual question for determination on liability will be as to whether the claimants and each of them were aware of the contents of the false diaries, or whether, as they severally contend and in reliance, they say, upon the assurance made to them, they took little notice of the correspondence relating to the diaries and of Greystone's dealing with the correspondence and the diaries. They were not, they say, until it was too late, aware of what was being said and done on their behalf.

7. In this regard, it is central to Greystone's case that the claimants and each of them were fully aware and participant in the making of the false diaries and were not, therefore, reliant, in their conduct as to the diaries, upon any assurances made. That same dishonesty, or dishonest conduct, it is said by Greystone further brings into play the maxim and the defence of *ex turpi causa non oritur actio*.
8. Although I have stated the issues, or some of them starkly, the factual matrix within which these issues arise is complex and lengthy; the HMRC enquiry itself continued over four years. The monies involved in each claim are substantial. Two of the claimants, Mr Walsh and Mr Edinburgh, were market traders working for RBS and earning very substantial incomes. The third claimant, Mr Elsom, was a fellow trader, well known to Mr Walsh and Mr Edinburgh. Each claimant has lost his employment and each claim that the loss of employment flows from the conduct of Greystone. Similarly, each claims that the very substantial legal costs incurred over the two criminal trials, as well as tax liabilities and penalties arising from the claimants' participation in the Aquarius scheme, are likewise losses that flow from the conduct of Greystone or of Mr Williams-Denton, for whose conduct Greystone is vicariously responsible. The cumulative value of the claims, as pleaded, exceeds £20 million.
9. These issues of causation are, in themselves, hotly disputed by Greystone which says, specifically in the cases of Mr Walsh and Mr Edinburgh, that their dismissal by RBS flowed not from Greystone's conduct, but from the view formed by RBS that two of its senior traders were carrying on their own business within their employment by RBS.
10. The three claims are in a markedly different state of preparation. Mr Walsh's claim was issued in 2016 and, following a case management conference before me in November 2017, it is to be listed for a 15 day trial in March 2019. Disclosure has taken place and witness statements are about to be exchanged.
11. Mr Elsom's case was issued in December 2017. Pleadings have closed and, barring these applications, the CMC in that claim would have taken place in November of this year and given rise to trial directions. There is an issue as to the length of any Elsom trial; his counsel, Mr Hunter's contention being that it would last six days and be heard, potentially, in January 2020. Mr Hardwick, for Greystone, says, given the estimated length of the Walsh trial, that that estimate is unrealistic and the expectation would be for a 12 day trial which, on

current indications from the Chancery listing office, would be ready for trial and/or could be heard at a trial from March 2020.

12. Mr Edinburgh's case is still less advanced in preparation. The claim was issued in February 2018, well after, therefore, directions were given in the Walsh claim. Service took place in June, but, in the absence of compliance with the pre-action protocol, the claim was stayed until the end of September. Greystone's defence was filed and served in early to mid-October, very shortly afterwards, the applications with which I am concerned were issued.
13. There was considerable debate before me as to whether given, in particular, the proximity of the Walsh trial, these applications have been made too late and should have been made earlier; or example, when Mr Elsom's claim became live in December 2017, or the early part of 2018, and whether, for that reason alone, these applications should be dismissed.
14. Although the good faith of Greystone's advisors was expressly not put in issue (following some clarification by Mr Walsh's counsel in the course of argument), it is said by the claimants that a significant ingredient in Greystone's thinking in respect of these applications is that a trial of all three claims together and the consequent impact of the evidence of each claimant upon the evidence of the others would, or could, be of tactical advantage for Greystone.
15. I am not persuaded that the somewhat sprawling way in which these claims have been brought forward, or any delay, if that is the right word, by Greystone in making these applications is central to this case, certainly as regards Mr Elsom and Mr Edinburgh. I think Mr Walsh stands in a different case. In his case, it is necessarily conceded that, if Greystone succeeds in persuading me to order a single trial, the result will be the adjournment of Mr Walsh's trial. The trial will be adjourned, if it is adjourned, in circumstances where the parties have been pursuing my directions and where there is, within the ambit of Mr Walsh's claim taken in isolation, no reason why the claim should not proceed.
16. Although, as I indicated, the putative trial windows which might arise, were there to be a single trial of all three claims, are not written in stone and could, at my direction, potentially give rise to the trial in the Michaelmas term of 2019, it is Mr Walsh's case that even that delay will cause him what might be very great prejudice. I will return to this a little later.
17. The essence of Mr Hardwick's submissions in support of joinder and which he submits justify the adjournment of an otherwise effective trial, is that in circumstances where all three cases arise, as they do, out of the same factual matrix, where broadly similar factual allegations and issues arise, where common issues of law are likely to arise and where, as he submits, the overall effect of one trial, in place of the three trials, will be to give rise to substantial savings in court time, the convenient and, he would say, the obvious course and one which affords the best use of court resources, is to have all matters determined at one trial.
18. There is plain force in those submissions. They do, however, give rise to serious and material disadvantages for each of the three claimants, each of whom has

spent very large sums upon their successful defences in criminal proceedings and have spent and will have to spend, in any event, very substantial sums in putting forward their current claims. By way of example, Mr Hunter for Mr Elsom told me that his client has already spent some £380,000 in respect of his current claim.

19. The main and obvious disadvantage of the proposed procedure, from the perspective of each of the three claimant,s is that the one trial contemplated by Greystone will inevitably be a longer trial and significantly more expensive for each of the three claimants than if each claimant was allowed his own separate trial. While the expense to Greystone would be reduced; one longer trial being cheaper for Greystone than the aggregate cost of three trials, which, taken together, would be of longer overall duration; the expense to each of the privately paying claimants will, or would, be, as I see, it significantly increased. Mr Hardwick's response to that, by way, as I saw it, of a metaphorical shrug of the shoulders, was that this extra cost was just one of those things.
20. His further response, to the effect that the problem could be alleviated by carefully considered trial arrangements, such that the co-claimants need not be fully in attendance throughout the trial, did not, in my view and as I think he ultimately conceded, fully stand up.
21. At the heart of his substantive, as opposed to procedural, reasoning, as to why one trial was appropriate, was the contention that a judge at one trial would have the benefit, when evaluating each of the claimants' evidence, of considering and having regard to the interaction of that evidence with that of the other claimants. The corollary of that approach and of that putative advantage for the trial judge would necessarily be that the claimants who were not giving their evidence would have at least to observe (and perhaps challenge) the evidence of their co-claimants in order, in due course, to advance their own informed submissions as to the overall material. It would not be realistic, or, from any co-claimant's perspective, safe, where the judge was going to make an overall determination, to be absent from any part of the relevant evidential process.
22. The question, then, is whether the plain disadvantage to each claimant by being joined in the single and, for each of them, very much more expensive trial, is outweighed by the other advantages said to arise from a single trial.
23. As to that, the point was well made by each of counsel for Mr Elsom and Mr Walsh (Mr Edinburgh being on this occasion unrepresented and leaving the determination of the joinder to the court) that the particular allegations made by each of the claimants and the particular defences raised against each of the three claims are free-standing and particular to each individual claimant; that is to say it is nowhere pleaded, in respect of what I will call the key knowledge issue, or any other issue, that the claimants were acting in concert, or in conspiracy, or that the knowledge that any of the claimants might have had in respect of the false diaries was knowledge emanating from or imparted by another claimant.
24. The relevance of this, as I see it, is that, as pleaded, Greystone's answers to each claim, whether as to knowledge, or otherwise, do not stand or fall together. To each claim, a different set of particulars, as to the relevant claimant's

knowledge, is given and, to each claim, a different answer is given to the particular allegations made. There is no significant pleaded interaction. Accordingly, there is no doubt that each trial could properly proceed separately. That this is the case is demonstrated by Greystone's own conduct. Until Mr Edinburgh's claim became live, Greystone had not envisaged a joint trial of the subsisting two claims. Mr Hardwick submitted that Mr Edinburgh's case is a game changer. I cannot agree.

25. In regard to the evaluation of each of the individual cases, Mr Hardwick will not be prevented, at trial, from cross-examining any particular claimant as to his relationship with the other claimants and as to his knowledge of what was being said or done by another claimant, nor as to what was said at mutually attended meetings, nor as to whether documents, pertaining perhaps to another claimant, had been shared. The trial judge will, one trial or three, still be able to make his evaluation in the broader context of the overall matrix. One is then left with the undoubted fact that one, albeit long trial, will be shorter than the aggregate of three separate trials. The advantage there, however, will be to the defendant and arguably the court (in terms of use of resources), but not to each claimant, each of whom will be substantially disadvantaged. I can see no good reason why the court should swing the balance of advantage in favour of a professional and insured defendant as against individual self-funding claimants. In so far as the resources of the court are concerned, I consider that the benefit to each claimant of a shorter trial at less of a cost is a price that the court can and should be prepared to pay. Much of the overriding objective is directed at saving cost and ensuring a level playing field. Separate trials are, in my view, consistent with that objective. It follows that, even without the special features which attach to Mr Walsh's claim, I do not think that this is case for a single trial.
26. The special features of Mr Walsh's case render the position as regards his case still more clear cut.
27. That case is well on the road to an early trial and, for the reasons already given, the supposed advantages of a single trial are insufficient to warrant the adjournment of that trial.
28. This is the more the case when, arising out of the Zodiac 1 and 2 schemes, touched upon earlier, Mr Walsh is presently confronted with an immediate tax demand for around £750,000, coupled with a threat of bankruptcy. Mr Hardwick says 'oh well, Mr Walsh has a house with equity and overseas property' and surely can come to an accommodation with the Revenue, such that Mr Walsh's ability to pay the demand is not contingent upon his trial against Greystone and his success at that trial, and such, in any event, that the putative delay in that trial could not, or would not, in the event, be fatal to his interest.
29. It is possible, of course, that an accommodation could, or can, be reached, such that the Revenue might stay its hand until the hearing of a delayed single trial. There can be no guarantee, however, and I agree with Mr Beswetherick that Mr Walsh should not be put to that risk for what is, essentially, the benefit of Greystone.

30. While I think that Mr Walsh's claim in these proceedings would not vest in the trustee in bankruptcy and could be continued post-bankruptcy, the reality of Mr Walsh's position post-bankruptcy, or with a battle to be fought with the Revenue in respect of bankruptcy, is that it would undoubtedly have a destabilising effect upon his ability to pursue his claim against Greystone.
31. In the result, I am not going to direct a single trial.
32. It remains, I think, to consider what steps can sensibly be taken towards the more efficient management of these matters.
33. One matter that could, or might, be achieved is to secure common findings of law. This case raises issues of *ex turpi causa* and vicarious responsibility, in particular, where, in respect of both, the law is in a developing phase. I can see great advantage in those issues, arising equally in each of the three claims, being resolved together.
34. I can see no reason why I should not direct that, at the PTR in Mr Walsh's case, all parties should attend with a view to defining the common legal issues and with a view to the court ordering those issues of law to be resolved, by way of preliminary issues, to be heard alongside Mr Walsh's trial.
35. Nor can I see any reason why I should not direct that all three cases be managed, hereafter by the same Master and tried by the same judge. The former will enable a continued degree of overview. The latter is more important because it seems to me:
 - i) that it will be manifestly more expeditious if the judge who has heard the first trial, and who has absorbed the shared background, hears the latter two cases, ideally successively; and
 - ii) that, if the judge who has resolved the common legal issues hears all three cases, then there is unlikely to be any significant problem of application when his, or her, legal rulings are applied to the particular facts of each of the three cases.
36. I add, finally, that, while I am conscious that the effect of this order will be that Greystone has to prepare for three trials, not one, that concern is significantly alleviated by the very common ground that founds the current applications. It seems to me that the disclosure in one action will be similar, if not identical, to the disclosure in the others and, correspondingly, that the material in the witness statements of the two witnesses to be put forward by Greystone in each of the three cases, are likely to have many common features, such that the preparation of the second and third trials can lean heavily upon the preparation of the first.
37. In the result, however, and subject to my directions as to the further management of the three claims, these applications are dismissed.

See separate transcript for proceedings after judgment