Neutral Citation Number: [2022] EWHC 3488 (Ch) Case No: BL-2022-MAN-000018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
MANCHESTER DISTRICT REGISTRY

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester, M60 9DJ

Date: Friday 21st October 2022
Start Time: **15.30** Finish Time: **15.59**

Before:

HIS HONOUR JUDGE HALLIWELL

- -

Between:

JOHN GLARE

Claimant

- and -

CLYDESDALE BANK

Defendant

- -
- -

JOHN VIRGO for the **Claimant**
IAN WILSON KC for the **Defendant**

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APPROVED JUDGMENT

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HIS HONOUR JUDGE HALLIWELL:

1. By these proceedings the claimant, Mr John Glare, seeks damages for misrepresentation based substantially on evidence given by the defendant's Chief Executive Officer, Mr David Thorburn, to the Treasury Select Committee and the disclosure of conditions in legal proceedings between the claimant and defendant in Scotland.

2. The claimant alleges that, in reliance upon the misrepresentations, he lost the opportunity to bring a successful claim for damages in relation to what is characterised, in the claim form, as "the application of an indicated break cost in respect of the Tailored Business Loan and…further consequential losses".

3. By its application notice dated 2nd February of this year the defendant seeks an order striking out the proceedings on the basis that they disclose no reasonable grounds for bringing a claim, or they amount to an abuse of process or are otherwise likely to obstruct the just disposal of the proceedings or that the claimant has no real prospect of success on the claim and there is no other compelling reason why the case should be disposed of at trial. The defendant also seeks summary judgment under Part 24 of the Civil Procedure Rules.

4. Before me Mr Ian Wilson KC has appeared on behalf of the defendant and Mr John Virgo of counsel has appeared on behalf of the claimant. They have each presented their respective cases with considerable skill.

5. The factual and procedural background is lengthy, although Mr Wilson has endeavoured to take me through what he sees as the more pertinent aspects. Without seeking to set out the background in comprehensive detail, I shall identify some of the more conspicuous features of the evidence.

6. On 14th February 2008 Mr Glare obtained a Tailored Loan Facility from the bank under which the sum of £3.95 million was advanced, secured by a charge over his property, business premises at Chantmarle Manor, Dorset. Mr Glare fell into arrears of repayment and, on 22nd September 2009, the loan was terminated with break costs calculated at £712,931. On 26th April 2010 receivers were appointed over the property and, on 4th February 2011, a Bankruptcy Order was made in respect of Mr Glare upon the application of a third party creditor. At that stage Mr Glare's estate would have vested in his trustee in bankruptcy under the provisions of section 306 of the Insolvency Act 1986. This would have included his property within the extended definition of section 283 of the Act, including causes of action not personal to the bankrupt.

7. However, on 7th January 2013, the trustees in bankruptcy, Jamie Taylor and Louise Donna Baxter, assigned to Mr Glare all his claims against Clydesdale Bank, as more fully set out in the schedule to the assignment, including "all claims or rights of action howsoever arising, whether known or unknown, which the assignor has, or may have, against the bank, including but not limited to claims for breach of trust and breach of fiduciary duty". This did not include subsequent claims, but it did encompass Mr Glare's claims against the bank as at the time he entered into bankruptcy. No point is taken about the interpretation of the assignment or, indeed, as to whether it was sufficiently wide to include the claims subsequently made based on rights that accrued to him after the bankruptcy.

8. In 2013 Chantmarle Manor was sold and at least part of the proceeds of sale were applied in part discharge of Mr Glare's indebtedness to the bank. However, there remained outstanding to the bank some £2,490,752. Having realised its security, the bank would have been entitled to submit a proof in respect of the outstanding balance of Mr Glare's indebtedness, proving rateably for the amount with the unsecured creditors. There is nothing to suggest it did so.

9. In February 2013, a month after the assignment, Mr Glare commenced proceedings against the bank in Scotland alleging that the loan had been miss-sold and that, had it not been for the bank's wrongdoing, he would have entered into a variable rate loan and thus not be required to pay the bank's break costs. In those proceedings Mr Glare contended that the bank was not entitled to charge the break costs and, in its Answer to Mr Glare's Condescension, the bank accepted that he should not have been sold the tailored business product. The bank conceded that it was liable to compensate Mr Glare himself for any loss or damage incurred as a result of the loan.

10. However, when the claim came before Lord Doherty, it was dismissed, on the basis that Mr Glare had not sustained such a loss. Judgment was given on 31st December 2015. During his submissions this morning for the bank, Mr Wilson took me to passages from Lord Doherty's judgment, including a passage at paragraph 40 of the judgment, in which he stated that the keystone of Mr Glare's case is that if it had not been offered the TBL he would have sought and obtained a variable rate loan of £3,950,000. However, Lord Doherty was not satisfied that Mr Glare would have done so. Ultimately, Mr

Glare was ordered to pay the bank's costs in the sum of £890,606.19 with interest at 8%. This judgment has not been successfully appealed. Permission to appeal was refused. No part of the costs award has ever been paid to the bank although it is apparent that the judgment, together with other judgments in relation to costs, have been registered.

11. On 20th December 2017, Mr Glare commenced proceedings in the Liverpool Circuit Commercial Court, in which he again contended that the loan had been miss-sold and that on a reference to the Financial Ombudsman Service the bank had presented terms and conditions applicable in Scotland not England. The bank applied for an order striking out the Liverpool proceedings, or alternatively for summary judgment, on the grounds that the proceedings were founded on matters that were *res judicata*. They also relied on issue estoppel and contended that the proceedings amounted to an abuse of process according to the principle in *Henderson v Henderson* and a collateral attack on the judgment in Scotland.

12. On 11th September 2019 the bank's application was heard by His Honour Judge Richard Pearce. He gave judgment for the bank and struck out the whole claim, save for a paragraph in the amended particulars of claim based on the proposition that "had the claim been unlikely to succeed, Mr Glare would have received advice to that effect from his English solicitors and counsel would not have pursued the claim at all". As I mentioned to Mr Wilson in argument this morning, it is difficult to see how this could have amounted to a freestanding claim but it was or has been contended that Mr Glare was thus entitled to the costs he had incurred in the sum of £1,235,613.

13. In any event, Mr Glare then sought permission to amend the claim, contending that, had it not been for the negligence of the bank in producing terms and conditions that were incorrect he would not have litigated. The bank then issued a cross application for an order striking out the claim in its entirety.

14. The two claims came before Judge Pearce on 6th May 2020. Judge Pearce refused Mr Glare's permission to amend and gave summary judgment for the defendant in respect of the remaining part of the claim.

15. Mr Glare commenced the present proceedings on 13th August 2021. He relies on evidence given by Mr David Thorburn, the Chief Executive of the Bank, to the Treasury Select Committee on 17th June 2014 about the bank's products, denoted as the Thorburn Portfolio Hedge Representations, and a statement that the Tailored Business Loans were not matched or hedged with mirror swaps attracting a mirror swap break cost, but rather that the National Australia Bank may incur an economic cost in the event of early termination of a Tailored Business Loan. It is pleaded in this way in paragraph 5 of the particulars of claim.

16. In paragraph 7 of the particulars of claim, Mr Glare relies on implied representations based on the fact that the bank's conditions were disclosed in the Scotland proceedings, including implied representations that the bank thus represented that the notified break costs charged to Mr Glare's loan account were a genuine cost and that the sum charged to his loan was a liability of Mr Glare calculated in accordance with the costs incurred by National Australia Bank on termination of his TBL.

17. In paragraph 8, Mr Glare contends that, in reliance on the alleged representations, he elected to proceed only with the miss-selling claim in the Scotland proceedings, did not further pursue the mirror swap break costs claim but accepted that the bank was entitled to charge his loan account with the notified break costs of £783,383.

18. It is then alleged that the representations were false and made deceitfully or negligently, although Mr Wilson takes the point that there are particulars in support of deceit as distinct from falsity and that Mr Glare has thus sustained the losses set out in paragraph 14. The basis for the loss is set out at length.

19. Mr Glare's counterfactual is based on the proposition that, had it not been for the bank's wrongdoing, he would have sold Chantmarle Manor and pursued the Scottish proceedings on a different basis.

20. On behalf of the bank Mr Wilson identifies two critical questions in the present proceedings. The first question is whether the bank was entitled to charge break costs. The second question is as to the position Mr Glare would have been in and the steps he would have taken had he not been charged the break costs or the bank not entitled to such costs. Mr Wilson submits that the second of those questions, or sets of questions, is specifically directed to the cause of action upon which Mr Glare relies. He says these questions have been determined in the proceedings in Scotland. Lord Doherty has determined that, had Mr Glare not contracted to obtain the Tailored Loan Facility, his financial position would not have been materially affected. In any event, following the determination of a court of competent jurisdiction, it is not open,

he submits, to Mr Wilson to re-open these questions in these proceedings. They have now been definitively determined and they are *res judicata*.

21. Mr Wilson also submits that, whilst the first question (that is the question of whether the bank was entitled to charge the break costs) has not been determined by the courts in Scotland, it is an abuse of process for Mr Glare to seek to re-litigate by virtue of the principle in *Henderson v Henderson*.

22. In my judgment, Mr Wilson's submissions on those points are well-founded for essentially the reasons he gives. Mr Glare is precluded from properly advancing a new and alternative case based on the counterfactual by the principle of *res judicata*.

23. Mr Virgo submits that the cause of action, as originally pleaded, was different from the cause of action on which Mr Glare now relies. He can at least point to superficial differences of presentation. However, in my judgment, the loss putatively encompassed by the cause of action in Scotland was sufficiently wide to comprehend the losses now claimed in these proceedings. In any event, it is an abuse of process to re-litigate any of the issues in relation to the counterfactual and the bank's right to charge break costs under the *Henderson v Henderson* principle. The point is not taken that the courts of Scotland are based on a foreign jurisdiction but, if it were to be taken, it would not assist Mr Glare. The costs judgments have been registered. It does not appear other judgments have been registered. However, the judgment of a court of competent jurisdiction is conclusive on any matter adjudicated upon and cannot simply be impeached for error. To the extent clarification of these

principles is sought, it can be found in Rule 51, at page 772, of Dicey, Morris & Collins in the Conflict of Laws, 16th edition.

24. Moreover, whilst Mr Glare is in breach of several costs orders in favour of the bank in the Scotland and Liverpool proceedings, he has not provided a proper explanation for his failure to make payment nor undertaken to pay those costs. Mr Wilson submits that this, in itself, warrants an order striking out the claim. Mr Virgo takes issue with him. He submits that Mr Glare's failure or omission to make payment merely furnishes the court with a discretion to strike out the proceedings. It does not follow that the case should be struck out as a matter of principle. He also submits there is no evidence the claimant is other than impecunious. He has been adjudged bankrupt in the past and there is nothing to indicate that, following the bankruptcy, Mr Glare has acquired new assets or, more generally, that his financial position has significantly improved. As it happens, no evidence has been filed on the point and no proper explanation has been given as to why the claimant has failed to make payment. I am satisfied that, on this basis alone, an order striking out the claim is warranted.

25. The Claim shall thus be struck out. For the sake of completeness, however, had I not struck out the proceedings under Rule 3.4, I would have been minded to grant the bank reverse summary judgments under the provisions of Rule 24. I have taken this into account when exercising my discretion to strike out the proceedings.

26. I have reached my conclusion on the basis that Judge Pearce has already determined that Mr Glare was not and is not entitled to advance a claim based

on the breach of a duty of care in relation to the disclosure of the bank's terms and conditions and Mr Glare is precluded by Article 9 of the Bill of Rights 1689 and Parliamentary privilege from advancing his case based on Mr Thorburn's evidence to the Parliamentary Select Committee. This is so even if it can somehow be shown that Mr Thorburn's evidence can be impugned.

27. Judge Pearce's determination and the reasons for it were summarised by Mr Wilson in his submissions before me. They are underpinned by the passage in his conclusion, at paragraph 27 of his main judgment at page 654, including a passage referring to an extract from Clerk & Lindsell which has been updated and is now contained in the latest work at paragraph 1351. For the avoidance of doubt, I am satisfied Mr Wilson is correct in his submissions about the effect of Judge Pearce's judgment of May 2020 and the application of the SAAMCO principle, itself now refined by the Supreme Court in *Manchester Building Society v Grant Thornton* [2021] UKSC 20.

28. Mr Wilson's submissions on Article 9 of the Bill of Rights and Parliamentary privilege were based, in particular, on the judgment of Stanley Burnton J in *Office of Government Commerce v Information Commissioner* [2010] QB 98, including his guidance in paragraphs 37 and 39 of the judgment and the observations of Browne-Wilkinson L in *Prebble v Television New Zealand* [1994] AC 321 and 337 to which I referred Mr Virgo when he made his submissions. It is true that this is a judgment of the Privy Council and is thus of persuasive authority only but obviously it is worthy of the greatest respect.

29. Mr Virgo submitted that Mr Wilson's point of Parliamentary privilege and immunity was taken for the first time only two days ago when his skeleton

argument was forwarded to Mr Virgo. In these circumstances, he submits that Mr Glare has not yet had the opportunity, to approach Parliament with a view to waiving privilege. However, Mr Virgo took a realistic view and did not invite me to adjourn. Had he done so, it is highly unlikely he would have obtained an adjournment on this basis. As Mr Wilson submits, I must take the law and the facts as they stand today. I am not minded to adjourn or stay the proceedings but I would be minded to allow an extended period, perhaps 28 days, for Mr Virgo, if he so wishes, to apply for permission to appeal and or file an appellant's notice.

30. It remains necessary for me to consider whether to record that the claim, as it currently stands, is totally without merit in the sense envisaged in Practice Direction 3C. I am satisfied that this is so essentially for the reasons I have given when striking out the claim. I am satisfied Mr Glare is seeking to re-litigate a case that has already been determined and struck out. If he is seeking to raise new issues that have not been fully determined, they ought to have been raised and disposed of in the Scotland or Liverpool proceedings. Moreover, in the hypothetical event that it would otherwise be open to him to litigate such issues, the new claim is doomed to failure, on the basis that he does not have a reasonable cause of action on the merits. Mr Glare has also failed to satisfy the orders that have been made against him in costs and provided no explanation for his failure to do so.

31. I shall thus record that the claim is totally without merit. However, this appears to be the first occasion on which the claim has been recorded as totally without merit. At this stage, it would thus be inappropriate for me to make a

civil restraint order of any kind. As it happens, Mr Wilson has not invited me to do so.

32. On this basis, the application is allowed.
