



Neutral Citation Number: [2021] EWCA Civ 1399

Case No: A4/2021/1106

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Jacobs
[2021] EWHC 1119 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/09/2021

Before:

LORD JUSTICE MALES

Between:

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| (1) GLOBAL DISPLAY SOLUTIONS LIMITED | <u>Respondents/</u> |
| (2) GDS TECHNOLOGY LIMITED | <u>Claimants</u> |
| (3) GLOBAL DISPLAY SOLUTIONS SPA | |
| (4) GLOBAL DISPLAY SOLUTIONS (SUZHOU) CO LIMITED | |
| - and - | |
| (1) NCR FINANCIAL SOLUTIONS GROUP LIMITED | <u>Appellants/</u> |
| (2) NCR SOLUTIONS LIMITED | <u>Defendants</u> |
| (3) NCR CORPORATION | |

Orlando Gledhill QC (instructed by **Ashurst LLP**) for the **Appellants**
Stuart Ritchie QC and David Lascelles (instructed by **Stevens & Bolton LLP**) for the **Respondents**

Written submissions only

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Friday 24th September 2021.

Lord Justice Males:

1. On 29th April 2021 Mr Justice Jacobs gave a judgment determining a series of preliminary issues in this case. One of those issues was whether all of the respondent claimants' claims in this action (which included claims for breach of contract and deceit) were precluded by a Letter Agreement dated 22nd February 2013. In a thorough and detailed judgment the judge held that the Agreement did not preclude all of the pleaded claims and that the extent to which it does, on its true construction, preclude those claims is to be determined hereafter. He held also that the appellant defendants knowingly made false representations as to their estimated future requirements for products supplied by the claimants and were thereby in breach of the contract between the parties. However, the judge made no decision whether the claimants had relied on any of the representations, whether the defendants were aware or intended that they would do so, or whether the claimants had suffered any loss or damage. Those matters were outside the scope of the preliminary issues and were reserved for later determination. Although some ingredients of a claim in tort for deceit have been established, therefore, it has yet to be determined whether that cause of action is complete.
2. Another of the issues with which the judge dealt concerned the claimants' claim for exemplary damages. This claim was advanced by reference to the second category of case identified by Lord Devlin in *Rookes v Barnard* [1964] AC 1129, i.e. where the defendant's conduct (here, in giving false forecasts) had been calculated by him to make a profit which might well exceed the compensation payable to the claimant.
3. As the judge indicated at [541], the claimants had submitted that consideration of this issue should be deferred until liability had been established. The defendants, on the other hand, opposed this course, submitting that the issue was within the scope of the order for preliminary issues and that it should be determined. The judge recognised that one advantage of deferring the issue would be that he would be able to assess the appropriateness of awarding exemplary damages, and in particular the amount thereof, in the context of any award of compensatory damages. He noted that in *Rookes v Barnard* Lord Devlin had said that juries should be directed that if, but only if, the sum which they have in mind to award as compensation is inadequate to punish the wrongdoer for his outrageous conduct, then a larger sum can be awarded to mark their disapproval of such conduct. That assessment (although no longer carried out by juries) would not be possible until the amount of any compensatory damages had been decided.
4. Despite this, the judge acceded to the defendants' submission that the issue of exemplary damages should be determined. He held in his judgment that this was a suitable case for exemplary damages and that the defendant was liable to pay exemplary damages of £125,000 in addition to any compensatory damages that might be awarded thereafter.
5. However, at a further hearing after delivery of the judgment, the judge recorded that it was common ground that exemplary damages could not be awarded for breach of contract and that it would not be right to award exemplary damages for tort, whether deceit or unlawful means conspiracy, until all of the ingredients of those torts had been determined. Because there remained issues as to reliance, causation and damage, it was not yet possible to say whether any tort had been committed. Accordingly the judge recalled that part of his judgment so that there would be no order for immediate payment

of exemplary damages. Instead he ordered that “The defendants are in principle liable to pay the claimants exemplary damages assessed in the sum of £125,000”.

6. There was then an application by the defendants for permission to appeal to this court. There were two proposed grounds of appeal.
7. The first ground was a challenge to the judge’s construction of the Letter Agreement. I refused permission to appeal on this ground in an order dated 18th August 2021, giving the following reasons:

“1. For the reasons very fully given by the judge, the Letter Agreement is concerned with claims relating to purchase orders placed by the applicant. It does not purport to release claims in fraud based on the absence of a genuine belief in the applicant's forecasts. These are distinct claims. In addition to the principles which the judge set out, it is also relevant that very clear language is needed to release a claim in fraud.”

8. The second ground was that the judge had been wrong to hold that the claimants were in principle liable to pay exemplary damages. Among other things, the defendants submitted (with considerable *chutzpah* in the circumstances) that the judge had been wrong to make this decision without first considering the amount to be awarded by way of compensation and whether that would be adequate in the circumstances; and that the outcome of the second trial might well influence the court’s view of the appropriateness of an award of exemplary damages in other ways, so that the judge had erred in principle by making an award at this stage.
9. The stance adopted by the claimants in response was commendably restrained. They pointed out that they had sought deferral of this issue at the trial and that the defendants had opposed this course; they explained that there had been extremely limited written and oral submissions on the issue before the judge, who had therefore received little assistance from the parties; and they expressed concern that an appeal on this issue should not delay or disrupt the final determination of their claims. They concluded:

“9. ... If the Court were to refuse permission to appeal on the construction ground, as GDS submits, but were minded to grant permission to appeal on the exemplary damages ground (which GDS resists but on which it makes no submissions), GDS undertakes for pragmatic reasons not to contest any appeal on that ground and to consent to the judge’s order in connection with this ground being set aside.”

10. That approach struck me as not only pragmatic, but likely to be correct in principle in circumstances where the defendants’ liability in tort as well as the amount of any compensatory damages remains to be determined – although in the absence of full argument on the point, this was only a provisional view. Accordingly I invited the parties to submit a consent order allowing the appeal on this issue:

“3. ... it seems to me that it was premature to make any decision whether the respondent is entitled to exemplary damages. If it turns out (as the applicant contends) that the respondent has

suffered no such loss or damage, a necessary element of a claim in deceit will not have been established and the respondent will not be entitled to any damages, compensatory or otherwise (save perhaps nominal damages for breach of contract). Moreover, as the judge himself recognised, until it is known whether the respondent is entitled to compensatory damages and, if so, in what amount, it is impossible to say whether the award of compensatory damages will be sufficient to punish the applicant for its outrageous conduct. No doubt the respondent will be contending for substantial damages by way of compensation before the question of exemplary damages is even reached.

4. In these circumstances it seems to me that the respondent was right to submit that this issue should be deferred, and unfortunate that the applicant insisted that the judge should deal with it.

5. Although the judge confined his order to saying that the respondent is 'in principle' entitled to exemplary damages, that seems to me to leave considerable uncertainty as to what this entitlement depends on.

6. The sensible way forward seems to be as proposed in paragraph 9 of the respondent's submissions. If the parties are able to agree a consent order accordingly, I will deal with this on paper. If not, the application for permission to appeal will have to be dealt with at an oral hearing."

11. I had expected that the parties would agree a consent order allowing the appeal and setting aside the judge's order for exemplary damages in principle, but making clear that the claim for exemplary damages would need to be considered afresh, if it arises, in the light of whatever may be decided as to the amount of any compensatory damages. In the event, however, the draft consent order submitted by the parties went further, not only setting aside the judge's order but dismissing the claim for exemplary damages. The parties have confirmed that this is indeed their intention.
12. Accordingly I make an order allowing the appeal in these terms. I am satisfied that it is appropriate to do so pursuant to CPR PD 52A, para 6.4. In doing so, however, I express no view as to whether this would be a suitable case for exemplary damages if the claimants are able to establish liability in tort. For the reasons I have briefly explained, it seems to me that it would be premature to reach any decision about that. As it is, in the light of the parties' agreement, this issue will not arise.