

JERSEY / JUDGMENT

Smith -v- SWM Limited [2018]

JRC 065 (23 March 2018)

[2018] JRC 065

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

judgment

the commissioner: 1. The defendant appeals from two case management decisions of the Master concerning the number of experts who may be called to give evidence at the trial of these proceedings. The first appeal was a few days out of time but, given the close connection between the two decisions, I exercised my discretion to extend the time for appeal against the earlier decision so as to allow it to proceed. 2. Following the hearing, I allowed the appeals to the extent that I made an order limiting the number of experts to a greater extent than had the Master, but not to the extent contended for by the defendant. I now give the reasons for my decision.

Background

3. At all material times the defendant was a firm of investment advisers registered as such with the Jersey Financial Services Commission ("the Commission"). The plaintiff was one of its clients. She has brought proceedings against the defendant alleging that the defendant failed to exercise reasonable skill and care in advising her to enter into a particular investment product known as the PATF2 ("the Fund") thus causing the plaintiff loss. The Fund was an Isle of Man vehicle and was designated for 'experienced investors' only. The claim is strongly denied. 4. Since a date in 2014, the Commission has been investigating the conduct of the defendant in advising clients to invest in the Fund (and one or two similar products). Pursuant to its power under Article 32 of the Financial Services (Jersey) Law 1998 the Commission required the defendant to commission a report from Grant Thornton into the suitability of the advice which it had given to clients in respect of the Fund. The Grant Thornton report was not favourable to the defendant and there was litigation between the defendant and the Commission as a result - see *SWM Limited v Jersey Financial Services Commission*

[2016] (1) JLR 65 and [2016] *SWM Limited v Jersey Financial Services Commission* JRC 094. The defendant rejects the findings of the Grant Thornton Report. 5. In view of the defendant's dissatisfaction with the Grant Thornton Report, the Commission in due course required the defendant to instruct another firm Duff and Phelps Limited and this was produced in September, 2016. It too made certain criticisms of the defendant. 6. The plaintiff instituted

these proceedings by way of Order of Justice in October, 2016. In broad outline, she alleges that the Fund was a high risk product suitable only for experienced investors and that she was advised to place a substantial proportion of her savings in such product without being alerted to the risk attached to the product and when she was not an experienced investor. It appears that there will be issues at trial as to what level of risk there was in investing in the Fund, whether the plaintiff was an experienced investor, what she was told and whether it was appropriate that she should invest the amount which she did in the Fund. She lost money as a result of the investment as it had declined in value upon redemption. Her total claim is in the region of £36,000 plus interest. It is therefore, in the scheme of things, not a particularly substantial claim. 7. On 17 th February, 2017, the Master rejected the claim of the defendant that it did not have to disclose the Grant Thornton report on the ground of litigation privilege. 8. On 21 st June, 2017, the Master gave directions including that, on the issue of liability, each party should be allowed to retain one expert in the field of investment advice. The defendant duly instructed Mr Trevor Gray and he has produced a report dated 25 th August, 2017. 9. On 4 th August, 2017, the plaintiff issued an application for summary judgement. That application was the subject of a judgment by the Master on 11 th October, 2017, Smith-v-SWM Limited

[2017] JRC 167 . It appears from that judgment that, during the hearing, Advocate Sharp made it clear that the plaintiff had elected not to obtain any expert evidence of her own on liability as permitted by the Master's order of 21 st June but had instead decided to rely upon the Grant Thornton report and the Duff and Phelps report. This led Advocate Blakeley to object to the admissibility of those two reports. The first part of the Master's judgment was concerned with this topic and, for the reasons set out in the judgment, he held that they were admissible. No challenge is brought against that part of his decision. He further held that those two reports were not covered by his order as to the number of experts on 21 st June because Grant Thornton and Duff and Phelps were not experts retained or called by the plaintiff; the reports were prepared for regulatory purposes at the direction of the Commission. 10. The Master then went on to dismiss the plaintiff's application for summary judgment. He concluded his judgment by saying that, when it was handed down, he would wish to be addressed by the parties on whether any party wished to adduce any further expert evidence and, if so, whether they should be permitted to do so. 11. His decision on this last topic is recorded in the Act of 11 th October, and his reasons are explained in his judgment of 23 rd October, Smith-v-SWM

[2017] JRC 175. In essence he accepted that the defendant should be allowed to call evidence to challenge the conclusions reached in the Grant Thornton and Duff and Phelps reports. The upshot was that, on 11 th October ,as well as allowing a witness to be called on behalf of each of Grant Thornton and Duff and Phelps to speak to their reports, the Master allowed the plaintiff to adduce evidence from Mr Richard Cropper, an expert who had produced a report dated 4 th October, 2017, and he allowed the defendant to call Mr Gary Godel in response to the Grant Thornton report and the Duff and Phelps report. At that stage he deferred a decision on whether the defendant should also be able to call Mr Grahame

Goodyer but on 26 th October he agreed to that. 12. The upshot therefore is that a total of six experts will give evidence at trial, namely a witness from each of Grant Thornton and Duff and Phelps, Mr Cropper as expert for the plaintiff and Mr Gray, Mr Godel and Mr Goodyer as experts for the defendant. This is in addition to any experts who might be called on Isle of Man law. This appeal 13. The defendant appeals from the decisions of 11 th and 26 th October. Advocate Blakeley submits that the matter has got out of all proportion to the amount at stake and the Master's decisions do not give proper weight to the Overriding Objective set out in Rule 1/6 of the Royal Court Rules 2004 . He submitted that the Court should revert to the position envisaged by the Master in his order of st June, namely that each side should be entitled to call evidence from one expert. This would mean that Mr Cropper would be called on behalf of the plaintiff and Mr Gray on behalf of the defendant. No other evidence, including the Grant Thornton and Duff and Phelps reports, should be admitted. 14. Advocate Sharp submitted that the appeal constituted yet another attempt by the defendant to exclude the Grant Thornton report and the Duff and Phelps report, which were critical of the defendant in relation to how it had advised clients generally in relation to the Fund. Furthermore, given that two of the factual witnesses to be called by the defendant were qualified Independent Financial Advisers (IFA), the result would be that the defendant would be calling three IFAs to give evidence whereas the plaintiff would only be calling one, Mr Cropper. That would lead to the unsatisfactory situation envisaged by the English Court of Appeal in *ES v Chesterfield and North Derbyshire Royal Hospital NHS Trust*

[2003] EWCA Civ 1284 . Discussion 15. The test for an appeal from the Master in relation to procedural matters is well established. The Court will exercise its own discretion whilst giving due weight to the Master's decision. 16. In my judgment, the position which has been arrived at as a result of the Master's orders is out of all proportion to what is at stake. In a claim worth some £36,000 plus interest, the Court will hear from no less than six expert witnesses on the issue of liability. I accept that the case may be of wider significance for the defendant (in that if the plaintiff is successful, others may be tempted to institute action in relation to losses suffered by reason of investment in the Fund) but I still consider that the calling of six experts is completely disproportionate and does not give proper weight to the Overriding Objective, as required by paragraph 5 of Practice Direction 17/09. 17. I have had the advantage of reading the reports and I see no reason why the plaintiff should not rely on Mr Cropper and the defendant on Mr Gray. Both individuals are extremely well qualified and their reports deal with all relevant matters or can be easily supplemented if the party calling them considers there are any gaps. I see absolutely no need for the defendant to be allowed to call Mr Goodyer or Mr Godel as well as Mr Gray. 18. The question then arises as to whether the Court should allow a witness to be called from Grant Thornton and Duff and Phelps in order to speak to their respective reports. 19. In my judgment, the proportionate response is that one of them should be allowed at the choice of the plaintiff. I do not consider that it is necessary or proportionate for them both to be called. The Duff and Phelps report is essentially concerned with

commenting on the Grant Thornton report, although it does consider an additional nine clients of the defendant. I think it would be disproportionate for a witness from both Grant Thornton and Duff and Phelps to give evidence. 20. I would summarise my reasons for concluding that a witness from one or other of these firms should be permitted to give evidence as follows. I refer hereafter only to Grant Thornton because Advocate Sharp indicated that, if only allowed to call one of them, he would probably choose Grant Thornton. However, what I say applies equally to Duff and Phelps. 21. First, as the Master said, Grant Thornton was not instructed as an expert by either party. Although formally instructed by the defendant, it was done at the direction of the Commission and was prepared for regulatory purposes, not for the purposes of the present proceedings. It was to enable the Commission to see if there was a problem. 22. In that sense, the position is not wholly dissimilar from that in *Rogers v Hoyle*

[2013] EWHC 1409 (QB) . In that case, the deceased was killed when a vintage bi-plane in which he was a passenger crashed. The claimants, who were the executors of the deceased's will, brought a claim in negligence against the pilot. The claimants wished to rely on a report produced by the Department of Transport's Air Accident Investigation Branch ("AAIB"), a body with statutory responsibility for the investigation of accidents involving aircraft. The defendant challenged the admissibility of or alternatively said that the Court should in its discretion exclude the report. Leggatt J held that the AAIB report was admissible and refused to exclude it, holding that it was a matter for the trial judge to make use of the report as he thought fit. An appeal against the decision of Leggatt J was dismissed. One of the matters relied upon was that the AAIB had an expertise in investigating air accidents, and its investigation was carried out close to the time of the accident and that it was independent of the parties. Indeed Leggatt J said this at paragraph 45:- "If any non lawyer was told that the law does not permit a court to have regard to the AAIB report when deciding how the accident was caused, I am sure that he or she would express astonishment at the suggestion. Unless the Court is prevented from doing so, it would be foolish and blinkered to ignore such a valuable resource." 23. As Advocate Blakeley submitted, there are of course material differences between the circumstances in *Rogers* and in this case. Thus, whilst Grant Thornton is qualified as an expert in this field, it is not in the special position as to expertise occupied by the AAIB. Secondly, the Grant Thornton report was prepared many years after the relevant investment in the Fund by the plaintiff whereas the AAIB report had been prepared comparatively shortly after the accident. Nevertheless, where a report is prepared by an independent entity for a purpose wholly unrelated to the litigation, it would seem unwise for the Court to deprive itself of such assistance as may be derived from such a report. 24. Secondly, I can see some force in the point made by Advocate Sharp at para 14 above. In the *ES* case, the claimant brought proceedings against the hospital trust alleging negligence by the medical staff at the time she was born. The allegations of negligence related essentially to the activities of an obstetric registrar (who had since become a distinguished consultant), and to another consultant obstetrician at the hospital. The judge said that there could only be one expert

in the field of obstetrics on each side. On appeal, the Court of Appeal held that, in the particular circumstances of the case, the claimant should be allowed to call a second expert in the field. It was of course a very different case. The claim for damages was valued at £1.5m and the issues were extremely complex. Nevertheless, the key element in the Court of Appeal's decision overturning the judge, was that there would not be an appearance of fairness if the judge's order stood. On behalf of the claimant, there would simply be one consultant obstetrician who would be giving expert evidence. On behalf of the defendant there would not only be the expert but also the two consultants who were involved. Although they would be witnesses of fact, it was inevitable that a witness of fact who happens to be a professional will give evidence of his actions based upon his or her professional experience and expertise. Thus there would in effect be three consultant obstetricians giving evidence as to the appropriate practice in the case on behalf of the defendant. In those circumstances, the Court of Appeal granted leave for an additional expert to be called by the claimant on the basis that this would assist the Court to do justice and to be seen to do justice between the parties. 25. This is of course a very different case. Nevertheless, in circumstances where there is in existence an independent report (the Grant Thornton report) it could be said not to give a fair reflection of the position if at trial the plaintiff is forced to rely on one expert as to the appropriate practice etc. whereas the defence will in effect have three, namely Mr Gray, and the two IFAs from the defendant who will inevitably, in the course of their evidence, be referring to professional practices and standards when explaining why they did what they did. 26. Thirdly, I cannot ignore that the defendant has sought previously to keep the Grant Thornton report out of the proceedings. I have little doubt that if the Grant Thornton Report had given the defendant a resounding vote of confidence in relation to its advice concerning the Fund, Advocate Blakeley would not be seeking to exclude it. Reverting to the first point made above, I see no reason why, where a report is prepared by an independent firm (Grant Thornton) for an unconnected purpose (so that its report may be regarded as being wholly independent), the Court should be deprived of such assistance as it chooses to derive from such a report. 27. In the circumstances, I allowed the appeals and ruled that the Master's order should be varied. The plaintiff should be entitled to call one expert, Mr Cropper and the defendant should be entitled to call one expert, Mr Gray, each of whom would speak to his report. The plaintiff should also be entitled to adduce evidence of the Grant Thornton report by calling an appropriate member of Grant Thornton. Admissibility of all of these reports would depend upon the relevant witness being available for cross-examination. Authorities Financial Services (Jersey) Law 1998. *SWM Limited v Jersey Financial Services Commission*

[2016] (1) JLR 65. *SWM Limited v Jersey Financial Services Commission*

[2016] JRC 094 . *Smith-v-SWM Limited*

[2017] JRC 167 . *Smith-v-SWM*

[2017] JRC 175. Royal Court Rules 2004. ES v Chesterfield and North Derbyshire Royal Hospital NHS Trust

[2003] EWCA Civ 1284 . Rogers v Hoyle

[2013] EWHC 1409 (QB) . Page Last Updated: 03 Apr 2018 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2018/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/smith-v-swm-limited-2018-jrc-065-23-march-2018>

Prepared on 26 October 2026 · Esheria