

English Court of Appeal Orders Retrial Because of Judicial Failings

16 October 2019

In a rare decision the English Court of Appeal has ordered a retrial of a claim by Simetra Global Assets Limited and Richcroft Investments Limited (“**Simetra**”) against Ikon Finance Limited (including other Ikon Group entities and its senior management) (“**Ikon**”) that had been tried and ruled upon by the English Commercial Court.¹ In the proceedings, Simetra brought claims against Ikon for dishonest assistance in the operation of a Ponzi scheme. Simetra alleged that it had lost around USD 290 million in the Ponzi scheme operated by another defendant and claimed that amount in damages from Ikon.

Following a three week trial in early 2018, the Commercial Court found in favour of the defendants, finding that there had been no dishonesty on Ikon’s part. Simetra appealed on the basis that the trial judge failed to give reasons for his judgment and ignored critical evidence. The Court of Appeal agreed, and while it did not substitute its own findings in place of the trial judge’s findings, it ruled that the trial judge’s reasoning was “*inadequate*”.² The Court of Appeal criticized the trial judge for failing to: (i) identify all the issues in dispute; (ii) make findings in relation to all issues; (iii) consider and address key evidence; and (iv) test the witnesses’ oral testimony against contemporaneous documents. The case will now be reheard by a different Commercial Court judge. This decision has had an immediate impact – a Commercial Court judge has recently referred to it in a complex shipping insurance case to explain the reasons for his decision and, in particular, why he has accepted some evidence but rejected other evidence as unreliable.³

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

LONDON

Sunil Gadhia
+44 207 614 2260
sgadhia@cgsh.com

James Brady
+44 207 614 2364
jbrady@cgsh.com

Marina Zarubin
+44 207 614 2286
mzarubin@cgsh.com

2 London Wall Place
London, EC2Y 5AU
England
T.: +44 207 614 2200
F.: +44 207 600 1698

¹ *Simetra Global Assets Limited, Richcroft Investments Limited v Ikon Finance Limited, Ikon Group Limited, Ikon Atlantic Limited, Ftechnics Inc, Gstar FX Inc, George Daskaleas, Diwakar Jagannath, Ersan Acun, Engin Yikilmazoglu, Simetra Management Limited, Richcroft Management Limited, Ikon Europe Limited*, [2019] EWCA Civ 1413 (“**Judgment**”)

² Judgment, paragraph 9

³ See judgment of Teare J in *Suez Fortune Investments Ltd et ors. v Talbot Underwriting Ltd et ors* [2019] EWHC 2599 (Comm), paragraph 25
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Background

In 2013, Simetra invested in FX trading with companies operated by one of the defendants, Mr George Daskaleas. Ikon owns the platform on which trading supposedly took place. In 2014, as part of an audit requested by Simetra, Ikon provided written confirmations, signed by its senior managers, in relation to the balances in Simetra's trading accounts. However, it transpired that the confirmations were provided in relation to so-called "demo" accounts containing notional money. The balances on Simetra's actual trading accounts were far below what Ikon had confirmed.

Simetra claims Ikon provided these confirmations dishonestly, and conspired with Mr Daskaleas to defraud Simetra. Ikon does not dispute a fraudulent scheme was operated by Mr Daskaleas, however, it says that it was not complicit and did not act dishonestly. It argued that Simetra was fully aware that: (i) its confirmations related to balances in demo accounts only; and (ii) Simetra's actual profits were far lower. Ikon also argued that Simetra did not rely on its confirmations.

Claim for Dishonest Assistance

Liability for dishonest assistance is a secondary liability. This means that a defendant is liable only when:

- i. a primary party owes a fiduciary duty to the claimant;
- ii. the fiduciary breaches that duty (the breach need not be dishonest);
- iii. the defendant assists in the breach; and
- iv. the defendant's assistance is dishonest.⁴

The trial judge focused exclusively on the question of Ikon's dishonesty, and considered whether there had been reliance by Simetra on Ikon's confirmations. He concluded that Simetra knew the profits were inflated and therefore there had been no reliance. He also

concluded that Ikon did not act dishonestly on the basis that Simetra was aware that the balances confirmed related to demo accounts only.

Simetra appealed saying that the trial judge had failed to determine all issues in the case, ignored key evidence and provided no real explanation as to why he reached his conclusions.

The Appeal

First, Simetra claimed that the trial judge failed to set out and address the issues against the primary fiduciary Mr. Daskaleas on whose liability its case against Ikon is founded. The Court of Appeal agreed and said that the judge should have considered the evidence and made findings in relation to: (i) the duties Mr Daskaleas owed to Simetra; and (ii) whether they had been breached. The Court of Appeal said that this was a "*significant omission*" because a claim against Ikon could only succeed if the breaches by Mr Daskaleas were established.⁵

Second, Simetra claimed that the judge had failed to consider key contemporaneous documents which undermined the oral witness testimony of Ikon's witnesses. The Court of Appeal agreed, criticizing the trial judge for failing to take into account and consider the discrepancies between the defendants' witness testimony and contemporaneous documents, including instant messaging between the CEO of Ikon Group and the party operating the Ponzi scheme. The Court of Appeal emphasized that where documentary evidence appears contrary to witness testimony, the judge must explain the reasons why such evidence is to be discarded, which the trial judge did not do. The Court of Appeal noted that especially in cases of fraud, the parties' internal documents are of vital importance for a judge assessing the credibility of witnesses. The Court of Appeal said "[t]hose documents tend to be the documents where a witness's guard is down and their true thoughts are plain to see. [...] [t]hose documents are generally regarded as far more reliable than the oral evidence of witnesses".⁶ This is consistent with a

⁴ *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614, paragraph 28

⁵ Judgment, paragraph 138

⁶ Judgment, paragraph 48

number of well-known judgments in English fraud cases that have emphasised the importance of contemporaneous documents and the relatively lesser evidential value that should be given to witnesses' recollections (see, for example, *Gestmin v Credit Suisse*, where Leggatt J said that “*the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts*”).

Overall, the Court of Appeal in *Simetra v Ikon* said that there had been “*a wholesale failure to deal with the contemporary documents*”.⁷

Finally, *Simetra* said that the judge's assessment of and reliance on oral witness testimony was wrong and unfair.⁸ In particular, the Court of Appeal was invited to reverse the judge's finding that the *de facto* CEO of the defendants, Mr Jagannath, was not dishonest. The Court of Appeal, however, refused to reverse any findings, or make any conclusions as to the credibility of any of the witnesses (which is unsurprising given that the Court of Appeal did not have the benefit of hearing the witnesses and relied solely on transcripts of the trial). The Court of Appeal said that it “*should not tie the hands of the judge who will retry the case*”.⁹

In its decision, the Court of Appeal set out a number of requirements for a properly reasoned judgment, which are: (i) identify issues to be determined; (ii) assess evidence pertaining to each issue; and (iii) give reasons why evidence should be accepted or rejected.¹⁰

Implications

This is a rare instance of the Court of Appeal making significant criticisms of an experienced Commercial Court judge. It is notable that the Court of Appeal did not reverse any of the findings but ordered a retrial, which will have significant costs implications for the parties to the case, who will be required to re-litigate

all of the factual issues that were before the original trial judge.

This decision is also likely to lead Commercial Court judges to be particularly mindful of the need to give full reasons when giving their judgments, particularly in complex and fact-intensive cases, as has already been acknowledged in one instance. Parties to litigation and their counsel should note that a failure by a judge to follow the requirements for a properly reasoned judgment may be a ground to appeal an unsuccessful judgment, albeit only in an exceptional case.

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⁷ Judgment, paragraph 168

⁸ Judgment, paragraph 175

⁹ Judgment, paragraph 38

¹⁰ Judgment, paragraph 46