Neutral Citation Number: [2014] EWCA Civ 560

Case No: B2/2013/1738

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MANCHESTER COUNTY COURT
HIS HONOUR JUDGE PLATTS
1IQ28336

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 7th May 2014

Before :

LORD JUSTICE JACKSON
LORD JUSTICE BRIGGS
and
LORD JUSTICE CHRISTOPHER CLARKE

- -

Between :

KATHLEEN PATRICIA WEBSTER AND OTHERS	**Claimants/ Respondents**
- and -	
MARK LIDDINGTON AND OTHERS	**Defendants/ Appellants**

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr John Whitting QC and Mr Andrew Kinnier (instructed by **Nabarro LLP and Clyde & Co**) for the **Appellants**
Mr Nicholas Braslavsky QC and Mr Andrew Grantham (instructed by **TJL Solicitors LLP**) for the **Respondents**

Hearing date: Wednesday 9th April 2014

Judgment
As Approved by the Court

Lord Justice Jackson:

1. This judgment is in seven parts, namely:

Part 1. Introduction

2. The principal issue in this appeal is whether clinicians are responsible for statements in manufacturers' brochures for cosmetic treatment, which they give to prospective patients without any disclaimer. The second issue is whether certain statements in those brochures constitute misrepresentations, if they fail to disclose the presence of small traces of bovine material in the substance to be administered.

3. The claimants in the present action and respondents in the appeal are persons who underwent treatment to rejuvenate their skin. The defendants in the action and appellants in this court are the clinicians who administered that treatment.

4. The company that devised and marketed the treatment which is the subject of this litigation is Isolagen Europe Ltd ("IEL"). IEL ceased trading in November 2006 and subsequently went into administration.

5. Two technical terms require explanation. The first is "fibroblast". A "fibroblast" is a cell type which produces the extracellular matrix and which is important during wound healing. In effect, fibroblasts maintain the connective strength of tissues.

6. The second technical term is foetal calf serum ("FCS"). FCS is a mixture of bovine proteins known to stimulate the survival and growth of human cells during in vitro culture.

7. After these introductory remarks, I must now turn to the facts.

Part 2. The facts

8. IEL (a company now in administration) operated in the UK between 2003 and 2006. IEL marketed a product called Isolagen. This product, it was said, rejuvenated human skin and restored a youthful appearance to those upon whom the years were advancing. The Isolagen process was autologous. That means it principally used the patient's own cells, rather than material taken from animals or other sources.

9. IEL did not itself administer the Isolagen treatment. Instead it had an arrangement with a large number of clinics and doctors around the country, whereby they carried out the treatment. The procedure was as follows:

   i) The clinician would remove a small skin sample from behind the patient's ear under local anaesthetic. The clinician sent this to IEL's laboratory in a sterile container.

   ii) IEL's technicians cultivated fibroblasts from the skin, using a proprietary Isolagen process. As part of the process the fibroblasts were cultured in FCS.

   iii) Once the Isolagen fibroblasts had been developed they were, so far as possible, washed clean of FCS. They were then placed in a suitable medium to create injectate. IEL sent the injectate back to the clinician.

   iv) The clinician injected the injectate into the patient in a series of three fortnightly sessions.

10. It is clear from the expert evidence (and was conceded by the defendants in their opening note at the trial) that stage (iii) of the process may not remove all of the FCS. Small traces of FCS could remain in the injectate.

11. A large number of patients underwent Isolagen treatment at a variety of clinics between 2003 and 2006. This treatment was significantly more expensive than other rejuvenation processes on the market, such as Botox or Bovine Collagen.

12. IEL produced brochures explaining the Isolagen process. Four of these brochures have been put in evidence. They have been referred to as "document 1", "document 2", "document 3" and "document 4". I shall follow that convention. Collectively I shall refer to documents 1 to 4 as "the IEL brochures".

13. Some clinics produced their own brochures describing the process, based on information provided by IEL. One such clinic was Harley Medical Centre Ltd ("HMC"). Another was Wirral Aesthetic Cosmetic Clinic ("WACC"). I shall refer collectively to the IEL brochures, the HMC brochure and the WACC brochure as "the brochures".

14. The brochures all used language to suggest that the injectate which a patient received contained only that patient's cells and no extraneous material. By way of example, document 1 stated that the rejuvenation therapy would: "utilise only your own living cells."

Document 2 said that the injectate was:

> "a solution using only your own cells."

Document 3 used the same phrase. Document 4 said:

> "The patient's immune system recognises the injection of cells as the patient's own and does not reabsorb them or reject them as it does with other foreign materials such as Botox, collagen or hyaluronic acid."

The HMC brochure contained a similar sentence to that quoted from document 4. The WACC brochure said:

> "Unlike other collagen development companies Isolagen uses only the patient's unique live cells to produce the patient's own collagen."

15. A number of the patients who received Isolagen treatment subsequently discovered that the injectate may have contained traces of FCS. They took the view that the brochures were misleading in this respect. In order to recover appropriate compensation they commenced the present proceedings.

Part 3. The present proceedings

16. During 2011 and 2012 a group of 70 people who had received Isolagen treatment issued claims in the Manchester County Court against the various clinics or clinicians involved. They did not join IEL as a defendant, since that company was in administration.

17. In each of those cases the claimant alleged that the particular brochure which she or he received contained misrepresentations. The brochure stated that only the claimant's own cells would be injected, when in fact the injectate was liable to contain some FCS. The claimants did not allege that they had suffered any physical injuries in consequence of the treatment. They formulated their claims for damages in a variety of ways. Mr Nicholas Braslavsky QC, counsel for the claimants, realistically accepts that in practice the claimants' claims may be limited to recovering the costs of their treatment. Those costs were in the region of £3,500 to £4,000 per patient.

18. On 22nd February 2012 a case management conference was held before His Honour Judge Stewart QC. By then the number of the claimants had reduced to 53. The judge ordered the trial of the following three preliminary issues:

    i) Do the sentences identified in the schedule served by the claimants' solicitors on 20th January 2012, as a matter of law, constitute representations?

    ii) If so, were those representations of fact or opinion?

    iii) If those were of representations as a matter of law, and were of fact, were they accurate?

19. The schedule referred to in issue (i) set out the passages in each of the brochures upon which the claimants relied as constituting misrepresentations. In relation to the claims based upon the HMC brochure there was no doubt that the defendant, HMC, was the author of the passages relied upon. In relation to the claims based upon documents 1 to 4, there was a serious question as to whether the statements in the IEL brochures constituted representations for which the defendant clinicians were responsible. Although not separately identified, that question fell within preliminary issue (i).

20. Only one of the surviving 53 claims was based upon the WACC brochure. That was a claim by Ms June Attwell against two of the doctors at WACC who had treated her. The same question arose in her case, namely whether those two doctors were responsible for the statements in the WACC brochure.

21. Because this was and is a low value claim, very properly considerations of proportionality loomed large in the minds of the lawyers involved and the judge. In those circumstances it was decided that the preliminary issues would be tried without any factual evidence. Instead it was agreed as a fact that the defendants had in all cases given to the claimants the brochures relied upon. The only witnesses who were asked to attend court at the preliminary issues trial were the two experts, namely Professor Ronald Barnes for the claimants and Professor Philip Stevens for the defendants.

22. The trial of the three preliminary issues took place before His Honour Judge Platts at the Manchester Civil Justice Centre on 19th to 21st February 2013. The two experts produced helpful joint statements outlining the relevant science and identifying certain matters upon which they were not agreed. They were duly cross-examined on the matters where their opinions differed. Since they were both eminent experts in the field of cell biology, as one would expect there was much common ground between them.

23. The judge reserved his judgment, which he handed down on 26th February 2013. He found in favour of the claimants on all three preliminary issues. I would summarise the judge's conclusions as follows:

    i) The defendants are responsible for the statements contained in the brochures which they handed over.

    ii) The defendants intended the claimants to rely upon those statements and the claimants did reasonably rely upon them.

    iii) The brochures all asserted that only the patient's own cells would be injected into the patient. Those assertions were incorrect because the injectate was contaminated, or potentially contaminated, with FCS.

    iv) All of the identified sentences in the six brochures constituted misrepresentations except for one of the sentences in document 4 and two of the sentences in the WACC brochure.

24. Unfortunately HMC went into liquidation in early 2013. Accordingly the judge ordered that the 25 claims against HMC be stayed.

25. A further 8 cases settled in the aftermath of Judge Platts' judgment. After that only 20 out of the original 70 cases remained live. The judge gave directions for disclosure and exchange of witness statements in those 20 cases, so that they could proceed to trial.

26. The defendants in the surviving 20 cases were aggrieved by the judge's decisions on the preliminary issues. Accordingly they appeal to the Court of Appeal.

Part 4. The appeal to the Court of Appeal

27. By an appellant's notice filed on 26th June 2013 the defendants in the surviving 20 cases ("the appellants") appealed against the judge's decision on three grounds. I would summarise those grounds as follows:

    i) The judge erred in holding that the defendants were responsible for the accuracy of the contents of the brochures.

    ii) The judge erred in holding that FCS was bonded with or internalised in the patient's cells.

    iii) The identified sentences in the brochures were not misrepresentations because they were substantially or materially accurate.

28. Because the claims against HMC have been stayed, we are now only concerned with five brochures. These are the IEL brochures and the WACC brochure.

29. The second ground of appeal, although no doubt of interest to the scientific community, is of no relevance for present purposes. Although the judge concluded that it was "highly likely" that some of the FCS became internalised into the fibroblast cells, that finding played no part in his decision on the preliminary issues. It was common ground that traces of FCS were, or may be, present in the injectate. Whether or not parts of those traces became internalised does not affect the outcome of the preliminary issues.

30. In those circumstances neither counsel lingered for long on the second ground of appeal. Accordingly, beyond observing that the expert evidence appears to support the judge's decision, I shall not venture into the technicalities of internalisation. Suffice it to say that ground (ii) is academic and cannot be a basis for allowing the appeal.

31. The real issues for this court concern grounds (i) and (iii). I must deal first with ground (i), which raises the question whether the appellants are responsible for the contents of the brochures.

Part 5. Are the appellant clinicians responsible for the contents of the brochures?

32. I shall deal first with the IEL brochures, i.e. documents 1 to 4. Nineteen of the twenty remaining claimants are relying upon these brochures.

33. The judge held that the defendants accepted responsibility for the contents of the brochures which they handed over. He set out his reasoning as follows in paragraph 34 of the judgment:

> "On this issue I have no hesitation in accepting the claimants' argument. As the claimants submitted there is a clear imbalance between the expertise and knowledge of the patient on the one hand and the clinic or clinician on the other. The patient relies on the professional, not only to carry out the procedure, but for basic advice about it. In my judgment it was wholly reasonable for a patient to assume that the clinician who was offering the Isolagen procedure knew what it involved. The defendants were all seeking to benefit from Isolagen's literature and were distributing it in order to assist the patient to decide whether or not to pay to have it done. In distributing it for that purpose in my judgment the defendants must be responsible for its content."

34. Mr John Whitting QC for the appellants submitted that the judge made factual findings in paragraph 34 which went beyond the single agreed fact. I do not agree. It is common ground on the pleadings that the appellants are clinicians who administered Isolagen treatment to the claimants. It is an agreed fact that the appellants handed over the brochures to the claimants in every case before embarking upon treatment. All of the judge's factual comments and statements in paragraph 34 were inferences, which the judge was entitled to draw.

35. The crucial question in this appeal is whether the legal conclusion at which the judge arrived in the final sentence of paragraph 34 is correct.

36. The basic legal position is easy to state, but not always easy to apply. When a person passes on information supplied by another, the question whether he is adopting that information as his own or making some representation about it is a question of interpretation depending upon the facts. See generally *Chitty on Contracts*, 31st edition at paragraph 6-011 and *Misrepresentation, Mistake and Non-Disclosure* by John Cartwright, 3rd edition at paragraph 3-19.

37. In order to tease out the principles more fully, it is helpful to review two recent authorities.

38. In *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm); [2007] 1 Lloyd's Rep 264, Autodis was considering the acquisition of Finelist. Autodis engaged Arthur Andersen to review Finelist and report. Autodis engaged GS to act as its adviser in connection with the transaction. GS agreed to provide finance for the transaction. GS invited a number of banks including IFE to participate. GS sent a Syndicate Information Memorandum ("SIM") to IFE. A notice in the SIM made it clear that GS had not independently verified the information in the SIM. The SIM presented a positive view of Finelist and summarised information drawn from its audited accounts and the Arthur Andersen report. Toulson J rejected the contention that GS impliedly represented any of the following matters:

    1) It was not aware of any facts which showed that the statements about Finelist's financial performance made in the SIM were or might be incorrect in any material way; and/or

2) It was not made aware of any facts which showed that the facts stated in the Arthur Andersen reports were or might be incorrect in any material way, and/or which showed that the opinions expressed in those reports were not or might not be reasonable; and/or

3) So far as it was aware, Arthur Andersen considered that the facts stated in those reports were correct and that the opinions stated in them were reasonable.

39. Toulson J formulated the test as follows at paragraph 50:

> "In determining whether there has been an express representation, and to what effect, the court has to consider what a reasonable person would have understood from the words used in the context in which they were used. In determining what, if any, implied representation has been made, the court has to perform a similar task, except that it has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context."

40. The Court of Appeal dismissed IFE's appeal: see *IFE Fund SA v Goldman Sachs International* [2007] EWCA Civ 811; [2007] 2 Lloyd's Rep 449.

41. I agree with and adopt the test formulated by Toulson J at paragraph 50 of the first instance decision in *IFE*.

42. The second relevant decision is *FoodCo UK LLP (trading as Muffin Break) v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch). Neither counsel relied upon this authority in their submissions. In view of its importance the court invited counsel to deal with *FoodCo* in written submissions following the hearing. They duly did so and I take those submissions into account.

43. In *FoodCo* the claimants agreed to take leases of various retail and catering units at a facility called "Stop 24", close to junction 11 of the M20 motorway. They were dismayed to discover that the numbers of travellers who left the motorway to visit their units were far fewer than predicted. They made claims for misrepresentation against Henry Boot, the developer ("HB").

44. Lewison J dismissed these claims. One of the issues was the extent of HB's responsibility for statements in brochures and in a report which HB had passed on to the claimants. Lewison J held that by passing on the brochures HB implicitly represented "that it believed the express representations made in the brochure and did so on reasonable grounds". Lewison J did not accept that there was a further implied representation to the effect that HB possessed no information that might reasonably be supposed to call into question the accuracy of the brochures. See paragraph 227.

45. At paragraph 228 Lewison J rejected the submission that an independent report which HB passed on to the claimants constituted representations made by HB. At paragraph 229 he found implied representations as follows:

> "By supplying the report to interested persons I consider that Henry Boot implicitly represented that this was a report on which they themselves were relying; and that they believed that it was a competent and independent report that had been prepared by an expert. I accept also that Henry Boot implicitly represented that it honestly believed the predictions or estimates contained in the report as predictions or estimates."

46. Let me now stand back from the authorities. When a person (X) passes information produced by another (Y) someone with whom X is hoping to contract (Z), a range of possibilities exist. In particular:

i) X may warrant to Z that the information is correct. X may thereby assume contractual liability to Z for the accuracy of the information. That liability may exist under the main contract or a collateral contract.

ii) X may adopt the information as his own, thereby taking on such responsibility as he would have if he were the maker of the statement.

iii) X may represent that he believes, on reasonable grounds, the information supplied by Y to be correct. That involves a lesser degree of responsibility than scenario (ii).

iv) X may simply pass on the information to Z as material coming from Y, about which X has no knowledge or belief. X then has no responsibility for the accuracy of the information beyond the ordinary duties of honesty and good faith.

47. Those four scenarios are not a complete statement of the range of possibilities. There are other intermediate positions. The test for determining which scenario applies is an objective one, as stated by Toulson J in *IFE*. The extent of X's responsibility for Y's information is that which a reasonable person in Z's position would (a) understand from X's words or (b) infer from X's conduct and all the circumstances.

48. In *IFE* there was an express disclaimer by GS, with the result that the judge held that GS had made no relevant representation. In *FoodCo* on the other hand there was no disclaimer. HB passed on the brochures and the expert report without any adverse comment. An obvious inference from HB's conduct and all the circumstances was that HB believed the information to be correct and had reasonable grounds for so believing.

49. In both *IFE* and *FoodCo* all the parties involved were commercial entities with access to independent professional advice. That was a material fact which the courts took into account.

50. Let me now return to the present case. As Mr Whitting rightly points out, none of the appellants gave any warranty to the claimants. The clinicians did not guarantee that every statement in each brochure was correct. Therefore by reference to the summary set out in paragraph 46 above this case does not fall within scenario (i).

51. In analysing the facts of this case, a number of features stand out as important. The claimants were consumers and the appellants were qualified clinicians. There was a stark imbalance of knowledge between the parties. The appellants were offering to sell both a product and service to the claimants. In each case the relationship between the parties was that of clinician and patient, as well as vendor and purchaser. None of the claimants was ill or in need of Isolagen treatment for medical or therapeutic purposes. Isolgaen treatment was purely elective. The appellants did not stipulate any disclaimer or express any reservations about the accuracy of the information which they were handing over.

52. In my view a reasonable person standing in the shoes of any of the claimants would conclude that the clinician was adopting the contents of the brochure which he handed over. This was a written description of (a) the treatment which the clinician was offering to carry out and (b) the substance which the clinician was offering to inject into the patient. Accordingly by reference to paragraph 46 above, this case falls into scenario (ii).

53. If the clinician wished scenarios (iii) or (iv) to apply, he would need to issue a disclaimer. For example, he might say: "This is what the manufacturer says. They are a reputable company. Although I have no direct knowledge of these matters and cannot confirm the details, I believe that the brochure is accurate." That would bring the case within scenario (iii). If, for understandable commercial reasons, the clinician is unwilling to make any disclaimer along those lines, then in the circumstances of this case scenario (ii) applies. Accordingly the clinician is adopting the content of the brochure.

54. In the case of June Attwell, the defendants did not hand over a manufacturer's brochure. Instead they handed over a brochure, which had been prepared by WACC and was based upon IEL's literature. It is not clear to me whether the two defendants were partners in or employees of WACC. Either way the analysis is the same. They were the clinicians proposing to treat Ms Attwell. They gave to her WACC's brochure as describing the treatment which they would carry out and the substance which they would inject. They did not make any disclaimer. Indeed it would have been very surprising if they had disclaimed responsibility for the WACC brochure. In those circumstances they adopted the contents.

55. Let me now draw the threads together. In this case there was no disclaimer by any of the twenty appellants. Having regard to the appellants' conduct in handing over the brochures and all the circumstances, the appellants adopted the contents of the brochures. I agree with the judge's conclusion in the last sentence of paragraph 34 of his judgment.

56. My answer to the question posed in Part 5 of this judgment is yes. I therefore reject the appellants' first ground of appeal. I must now move on to the third ground of appeal, which concerns whether the identified sentences were misrepresentations.

Part 6. Were the identified sentences in the brochures misrepresentations?

57. The effect of the expert evidence is that FCS only forms a very small part of the injectate used in the Isolagen process. It amounts to between 0 and 0.02%.

58. Mr Whitting submits that this is such a small trace that the various statements in the brochures were substantially true. For all material purposes the injectate did comprise only the patient's own cells.

59. Mr Whitting relies principally upon *Avon Insurance Plc v Swire Fraser Ltd* [2000] EWHC 230 (Comm). The claimants in that case were stop loss insurers, who claimed that they had entered into binding authorities as a result of misrepresentations made to them by brokers. Rix J dismissed their claims. In a graphic passage at paragraph 15 he discussed what was meant by the truth or falsity of representations:

> "What, however, is the test of truth or falsity, and how difficult is it to rebut the inference of inducement? Is a representation true if in substance it is true, even if to some extent, let us assume some real and more than trivial extent, it is false? Moreover, where the transaction is complex and the representations are manifold, much may depend on how they are categorised. If the representations are chopped into small slices, and the microscope is turned up to investigate each slice, it may be easier to establish the inaccuracy of a representation than if the matter is looked at more broadly. On the other hand it may be that the smaller the slice, even on the assumption of materiality, the weaker is the inference of inducement. So these questions are interlinked."

60. Rix J then referred to the provisions of section 20 of the Marine Insurance Act 1906, which is recognised to apply generally to insurance contracts. He concluded at paragraph 17:

> "Thus a representation may be true without being entirely correct, provided it is substantially correct and the difference between what is represented and what is actually correct would not have been likely to induce a reasonable person in the position of the claimants to enter into the contracts."

61. Mr Whitting also placed reliance on *De Beers Abrasive Products Ltd v International General Electric Co of New York Ltd* [1975] 1 WLR 972. In my view, however, that is a very different case and of no assistance in relation to the present appeal.

62. Mr Braslavsky for the claimants accepts that only small traces of FCS were present in the injectate. He relies upon the evidence of Professor Barnes, which the judge accepted, in order to establish that those traces were significant.

63. The effect of Professor Barnes' evidence was that between 3% and 10% of the population has a propensity to suffer an allergic reaction to bovine products. Such persons might have a mild or even a severe reaction to a small trace of FCS. Professor Stevens, the defence expert, came some way towards accepting those propositions in cross-examination: see the transcript of day two at pages 34-36.

64. Against the background of the expert evidence, it seems to me that the judge was entitled to find that the small traces of FCS in the injectate were a material matter. Statements to the effect that the injectate contained "only" the patient's own cells and nothing else were incorrect in a material respect. If patients were told the true position concerning FCS, this may well have affected their decision to go ahead. For some people the idea of having extraneous material injected into one's face is off-putting. I could not say that such an attitude is unreasonable. The present case, therefore, is substantially different from *Avon*.

65. In the result, my answer to the question posed in Part 6 of this judgment is yes. I would dismiss the third ground of appeal.

Part 7. Executive summary and conclusion

66. The twenty remaining claimants in this action allege that erroneous statements about Isolagen treatment in brochures given to them by clinicians constituted misrepresentations for which the clinicians were responsible.

67. On a trial of preliminary issues the judge found in favour of the claimants. The defendants now appeal on two grounds, namely (i) they are not responsible for statements in the brochures and (ii) those statements were substantially accurate.

68. In my view the first ground of appeal fails because each clinician adopted the contents of the brochure by handing it to the patient whom he was offering to treat without making any disclaimer. The other ground of appeal fails because the error was significant. Contrary to assertions in the brochures a very small quantity of bovine material was liable to be present in the injectate. That could possibly cause an allergic reaction in some individuals.

69. If my Lords agree, this appeal will be dismissed.

Lord Justice Briggs:

70. I agree.

Lord Justice Christopher Clarke:

71. I also agree.

72.