EMPLOYMENT TRIBUNALS

Claimant: **Mr D Rollo**

Respondent: **Marstons Trading Ltd**

Heard at: **By video CVP hearing** **On: 19 June 2024**

Before: **Employment Judge S Moore**

Representation:
Claimant: In person
Respondent: Mr T Coghlin, Kings Counsel

JUDGMENT having been sent to the parties on 24 June 2024 and reasons having been requested by the claimant and respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

1. The above hearing was listed following an application by the claimant dated 19 February 2024 to set aside a COT3 agreement reached on 13 June 2023 on the basis the claimant alleged fraudulent misrepresentation by the respondent's legal representatives. The application was refused and reasons provided orally.

   Grounds of the application

2. The claimant's grounds were set out as follows:

"I believe that the following instances of misrepresentation occurred during the negotiation and execution of the COT3 agreement:

1. *The Disclosure Schedule agreement Judge Brace used to determine documents weren't relevant for disclosure was either incorrect or purposely falsified by the respondents as it doesn't adhere to the framework established for such a document under article 28 of GDPR.*

2. *That the use of Data Processor term in the context of the 24th November 2022 email by the respondents was used either in error or purposely to mislead the court, whether intentional or not the respondents cannot state whether or not it negatively effected proceedings for definite.*
3. *Failure as Data Controller to assign the correct Data Processor which at all times should have been Flooid."*

3. The application led to this hearing being listed. The bundle contained a number of without prejudice documents so the Claimant was specifically on notice that without prejudice correspondence was included in the bundle, and if he did not realise that until the hearing he reasonably should have done so especially given that he was seeking to set aside the COT3.

4. The Tribunal confirmed in an order dated 21 March 2024 that the above grounds were the three acts of fraudulent misrepresentation to be determined at this preliminary hearing.

5. I had before me a bundle of documents of 900 pages which included witness statements for the respondent from Ms O'Gorman and the claimant and a small supplementary bundle. The claimant also sought to rely on Chat GPT statements. I return to this below.

Findings of fact

6. The Claimant's claim was presented on 15 July 2022. During the course of those proceedings he made an application for specific disclosure on 19 March 2023. This application considered by Judge Brace at a Preliminary Hearing on 3 May 2023 and Judge Brace refused the Claimant's application for specific disclosure on two grounds. The written record of that Case Management Hearing records that the reasons were as follows:

"I was not persuaded that such documents were relevant or necessary for a fair disposal of the proceedings and in any event accepted Mr Benton's submissions that the time it would take to retrieve the documents and to provide all the documents the claimant sought, namely one IT technician working constantly for 4 weeks, I did not consider it proportionate or in turn, in accordance with the overriding objective for the respondent to disclose such documents, whether collectively or individually."

7. Following Judge Brace's order, the claimant applied twice to vary the order both of which were refused. It is relevant to set out what the claimant said about the disclosure schedule in subsequent correspondence. The claimant believed the content of the schedule to be false as can be seen from his written correspondence at that time.

8. The claimant has made the following statements about the schedule in correspondence with the Tribunal:

   The schedule was "*nothing but a fluff piece designed to give ambiguous misleading grounds to refuse evidence" and "purposely misleading and unethical" and;*
   "A wonderful work of fiction" and;
   "the information you passed to court is incorrect / a lie / flim flam" and;
   "The information the respondents supplied the tribunal with is wildly inaccurate"

9. I heard evidence during these proceedings from the Claimant and from Ms O'Gorman who is an Employee Relations Partner of the Respondent. Ms O'Gorman was the individual who provided instructions to the Respondents solicitors, Howells Percival. There were two individual solicitors representing the respondent in the original Tribunal involving the Claimant. Ms O'Gorman's evidence was not challenged by the claimant.

10. Ms O'Gorman explained to the Tribunal, and I accepted her evidence in full, that upon the request for the specific disclosure by the Claimant she embarked on some enquiries in order to obtain information to form the view, and also to give instructions to the legal team, about that request. The Claimant had requested something called "Beanstore reports" relating to his individual pass codes amongst other things and this is the name of the Respondent's electronic point of sale system which records sales transactions throughout the pub estate and certain other data.

11. It should be borne in mind that at that time the Claimant was making his claim his claim was that he had made protected disclosures and it was not immediately apparent why that Beanstore information data would be relevant to the issues in his claim.

12. Ms O'Gorman spoke to the respondent's Business Information and Data Team to ascertain what reports were available. It was established or confirmed to Ms O'Gorman by that team that reports within Beanstore were retained for 13 months after which they would be published into XML format. This format apparently could not be easily accessed and in order to obtain access there would need to be a build of specific processes to retrieve the data and then put the data back into the original form. She also took similar advice from the same team regarding the request for the

back office transaction data which she was also informed would be converted to the XML format after 13 months.

13. Ms O'Gorman having made those enquiries provided instructions to the legal team to complete the disclosure schedule that would be before Judge Brace at the hearing in May 2023. She spoke again with the Business Information Data Team at that point to confirm the accuracy of what was in this disclosure schedule, she then provided instructions to her legal team and the population of the schedule was accurate.

14. Following Judge Brace's refusal of the application for specific disclosure the Respondent was ordered to provide a witness statement confirming other documents were not in their possession and Ms O'Gorman duly did so on 31 May 2023. I also noted that the Claimant had twice applied to vary Judge Brace's decision at that time and on both occasions that was refused and that the Claimant was aware of the ability and his right to appeal to the Employment Appeal Tribunal but did not do so in respect of the decision by Judge Brace.

15. The claimant had also made a number of DSAR requests and subsequent complaints to the ICO. In response to one of the requests dated 24 November 2022, the respondent's solicitors referred to the respondent in error as a data processor and not a data controller. This mistake was acknowledged by the solicitors and in any event the respondent has responded to the claimant's DSARs as a data controller.

16. The Claimant accepted under cross examination that he knew that the respondent was the Data Controller not the Data Processor and also that he believed Flooid[1] to be the data processor. I asked the Claimant to explain this to me during his evidence, in particular why, given that he knew this was an error, how it induced him to enter into the COT3 agreement.

17. The claimant told me that this incorrect statement led the ICO into closing down the investigation and he had had to make efforts to get a new investigation opened which took a long time by which time information he needed had been archived.

18. On 13 June 2023 the parties reached agreement by a COT3 settlement and the Claimant withdrew his claim the same day. Following that, between 18 October 2024 and 8 November 2024 the Claimant made a series of applications and wrote to the Tribunal on several occasions seeking to effectively set aside the COT3. The claimant had referred to there being a "re-evaluation" but it was established after enquiries were

[1] Flooid provide the software for the respondent's till operations

made that the claimant sought to set aside the COT3 on the basis of fraudulent misrepresentation.

The Law

19. I was referred to Chapter 10 of Chitty on Contracts which sets out the following requirements that must be satisfied for a party to have a remedy for misrepresentation that may give rise to a right to rescind a contract.

(i) A must have entered the contract after statement of fact or law has been made on which it was reasonable to believe A was intended to rely;
(ii) the statement must have been at least substantially untrue;
(iii) a statement of opinion or of intention will not amount to a misrepresentation unless the person making it does not in fact hold that opinion or intention, though a statement of opinion may carry the implication that the person making it has reasonable grounds for believing what is stated is true;
(iv) a statement that on the face of it is one of fact or law may in the context be reasonably understood as only an opinion; the question is whether A is reasonably entitled to rely on it;
(v) a statement may be implicit, or be inferred from conduct, or be a "misleading half-truth";
(vi) if the statement was true at the time it was made but becomes untrue before the contract is agreed, there will normally be a misrepresentation if B does not correct the statement;
(vii) the statement must have been made by, or where it originated from a third person, adopted by B, or B must have had actual or constructive notice of it;
(viii) the statement must have induced A to enter the contract. It need not have been the sole cause of A entering the contract but in most cases A must show that it would not have entered the contract, or would not have
entered it on the same terms, "but for" the misrepresentation. However, if A is merely seeking to rescind on the ground of fraud it seems to be sufficient that the fraudulent statement was "present to A's mind", even if A
might have entered the contract anyway;
(ix) it is possible that the misrepresentation must be material, in the sense that it would influence a reasonable person; but it seems that B cannot argue that the misrepresentation was immaterial if B should have known that A would be influenced by it;
(x) it is not necessary that A believed that the statement was true if it entered the contract because at the time it was unable to prove that it was untrue;
(xi) it is no defence that A could have discovered the truth. The Law Reform (Contributory Negligence) Act 1945 may apply to a claim for damages

20. Chapter 5 of Spencer Bowen on Actionable Misrepresentation deals with the inducement element. Inducement is a question of fact and the burden of proof is on the claimant. There are two aspects of inducement. Inducement is established by proof that the representation was made with the object and had the result of causing the claimant to alter his position.

21. I was referred to the following authorities:

Cooper and Another v Tamms QBD 1987;
Zurich Insurance Co plc v Hayward [2016] UKSC 48;
Portland Stone Firms Ltd and others v Barclays Bank PLC and others [2018] EWHC 2341 (QBD) which sets out a summary of the approach to be taken by the courts to proving fraud in civil litigation:

"*A sufficient summary for present purposes is provided by Fiona Trust & Holding Corp v Privalov [2010] EWHC 3199 (Comm) at [1438]-[1439] per Andrew Smith J:*

It is well established that "cogent evidence is required to justify a finding of fraud or other discreditable conduct": per Moore Bick LJ in Jafari-Fini v Skillglass Ltd., [2007] EWCA Civ 261 at para.73. This principle reflects the court's conventional perception that it is generally not likely that people will engage in such conduct: "where a claimant seeks to prove a case of dishonesty, its inherent improbability means that, even on the civil burden of proof, the evidence needed to prove it must be all the stronger", per Rix LJ in Markel v Higgins, [2009] EWCA 790 at para 50. The question remains one of the balance of probability, although typically, as Ungoed-Thomas J put it in In re Dellow's Will Trusts, [1964] 1 WLR 415,455 (cited by Lord Nicholls in In re H, [1996] AC 563 at p.586H), "The more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it"…

…Thus in the Jafari-Fini case at para 49, Carnwath LJ recognised an obvious qualification to the application of the principle, and said, "Unless it is dealing with known fraudsters, the court should start from a strong presumption that the innocent explanation is more likely to be correct.""

22. Facts must be clearly pleaded (paragraph 29) and the partiuclars of claim must include a concise statement if the facts on which the claimant relies (paragraph 30).

Conclusions - Ground 1

23. This related to the disclosure schedule that had been prepared for the Preliminary Hearing before Judge Brace that I have referenced above and

made findings about how that disclosure schedule came to be both populated and provided to the Respondents legal team on instructions.

24. I have understood the claimant's case to be that the statement of fact was what the respondent said about the disclosure sought, in particular how long the documents would take to obtain and organise and that was untrue (see findings of fact about this disclosure schedule at paragraphs 8, 13 and 14 above). The problem is that is not what the application said. Ground 1 said *"the disclosure schedule was incorrect or purposely falsified as it doesn't adhere to the framework established for such a document…"* The words *"as it doesn't adhere"* clearly denotes the reason it is said to be untrue is because it does not comply with article 28 of GDPR, not because what was said about how long it would take to organise the data was untrue. I agree with Mr Coghlin that it would not be correct in law to be generous about the grounds of the application and the facts must be clearly pleaded. (**Portland Stone Firms Ltd and others v Barclays Bank PLC and others).**

25. Even if the claimant's case is taken on the basis he has sought to advance it at the hearing, in my judgment this was bound to fail in any event as the claimant has not shown that the statement was untrue. The claimant sought to rely on a conversation with ChatGPT as expert evidence that the respondent's explanation regarding the difficulty and time involved in extracting the data was false. He had been informed by REJ Davies on 11 June 2024 that he did not have permission to adduce AI generated documents. In accordance with **Serco Ltd v Wells 2016 ICR 768, EAT** I did not consider there were grounds to interfere with this order as there had not been a material change of circumstances, a material omission or misstatement, or some other substantial reason that was rare or out of the ordinary. I would add that even if there had been, a record of a ChatGPT discussion would not in my judgment be evidence that could sensibly be described as expert evidence nor could it be deemed reliable.

26. The only other evidence led by the claimant that the respondent's explanation regarding the difficulty and time involved in extracting the data was false was his evidence that simple maths say what the respondent had claimed was impossible.

27. On the basis of the evidence before me I concluded that both the population of the disclosure schedule and the instructions were honestly and in good faith reasonably ascertained and furthermore that the Respondents legal team acted entirely properly on the reasonable instructions of their clients when providing that disclosure schedule.

28. There is no requirement in the Tribunal Rules of Procedure for disclosure schedules or the disclosure exercise or the lists used to convey

information under the disclosure exercise to comply with Article 28 of GDPR or be in any particular format. The duty is to disclose documents that are relevant and necessary for the fair disposal of proceedings. I was unable to understand what the alleged breach of article 28 was or how this rendered the disclosure schedule untrue.

29. I further find that the statement about and in the disposure schedule cannot have induced the Claimant to have entered into the COT3. The Claimant unequivocally and repeatedly proclaimed on a number of occasions that he did not believe the schedule to be true. Whilst he does not need to show he believed the representation it must have been materially operative. The claimant therefore he cannot show that the schedule induced him to enter into the COT3 agreement.

30. For these reasons I dismiss the first point relied upon by the Claimant.

Conclusions – Ground 2

31. Turning now to the second alleged act of fraudulent misrepresentation. There was a statement made by the respondent's solicitors in an email dated 24 November 2022 that referred to the respondent as a data processor. It was accepted this was untrue (albeit untrue by reason of error than any deliberate or intentional untruth). I have had some difficulty in understanding the claimant's case here.

32. There was no evidence of fraud and it was plainly a mistake. The claimant knew the respondent was the data controller. I was unable to understand how that inaccurate description would have induced him to enter into a COT3 many months later. The claimant seems to be saying that as he could not obtain the documents he wanted he had to enter into the settlement agreement. However the reason the claimant could not obtain the documents he wanted was because Judge Brace made a judicial decision in her order to refuse the application for specific disclosure. It is worth noting that this was not made solely on the grounds of how difficult it would be to organise the data. Judge Brace also decided the documents were not relevant or necessary for a fair disposal of the proceedings.

Conclusions – Ground 3

33. There was no statement here at all. At best the claimant advances that there was an omission by the respondent to assign the correct data processor which should have been Flooid. The claim falls at the first hurdle. There is no information about who made that statement, when, and to whom. The Claimant also told the Tribunal that it was in fact his misunderstanding as to who the correct Data Processor was and that the

respondent's legal representative should have informed him he was incorrect. This appeared to be the basis of the alleged fraudulent misrepresentation.

34. The Claimant invited me to consider a particular reference in the text of ***Chitty*** at 10-022 which deals with non disclosure. This states that the general rule is that mere non-disclosure does not constitute misrepresentation, for there is, in general, no duty on the parties to a contract to disclose material facts to each other, however dishonest such non-disclosure may be in particular circumstances. The exceptions are set out as follows:

    "But there are exceptions to the general rule that there is no duty to disclose. First, there are many statutory exceptions. Secondly, there are exceptions at common law where in particular types of contract there has been held to be a duty of disclosure (often categorised as contracts uberrimae fidei). These include cases where there is a fiduciary relationship between the parties and where the relationship between the parties is one of trust and confidence. There may also be a duty to disclose where failure to disclose some fact distorts a positive representation. It is also possible for a person to be guilty of misrepresentation by conduct. Cases of fiduciary relationships and relationships of trust and confidence are dealt with later. Misrepresentation by conduct and cases in which a failure to disclose a fact distorts a positive misrepresentation are dealt with in the following paragraphs.

35. The claimant and respondent were not in a fiduciary relationship or one of trust and confidence. None of the outlined exceptions apply in this case. I do not accept that a person can rely on their own statement which was not corrected by the respondent to assert fraudulent misrepresentation. Further I have no understanding as to how the claimant's misunderstanding as to who the data processor was would have induced him to enter the COT3 agreement.

For these reasons the claimant's application was dismissed.

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Employment Judge S Moore
Dated: 1 August 2024

REASONS SENT TO THE PARTIES ON 2 August 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche