ON THE CASE

TRUST ME, I'M A DOLPHIN

McHale v Dunlop [2024] EWHC 1174 (KB)

By Joseph Steadman

Joseph Steadman is a barrister at Wilberforce Chambers

One of the advantages of transferring pension savings to a small self-administered scheme ("**SSAS**") or a self-invested personal pension ("**SIPP**") is the member's ability to choose from a wider range of potential investments. But that advantage also comes with a concomitant risk—with a wider range of potential investments comes an increased likelihood that the investments will prove unsuccessful, or – worse still – turn out to have been a scam.

It is that risk which seems to have eventuated for pension savers who invested in an overseas investment scheme known as the Dolphin Trust. Amongst them was the Claimant in *McHale v Dunlop* [2024] EWHC 1174 (KB) ("**Mr McHale**").

In 2016, with the assistance of the Defendant ("**Mr Dunlop**"), Mr McHale had set up a SSAS, transferred the majority of his pension savings into it, and then invested the sum of £150,000 in loan notes with a fixed rate of 10% per annum issued by the Dolphin Trust. Then, in 2018, Mr McHale went on to invest a further £170,000 in such loan notes.

Part of the deal with Mr Dunlop was that Mr McHale would be paid a share of the commission, which was referred to in evidence as "double bubble", which Mr Dunlop

received from Dolphin Trust. Whether this amounted to unlawful pension liberation (noting that Mr McHale was 49 years old in 2016) was not discussed in the judgment.

Unfortunately, in 2020, the Dolphin Trust – which by then was known as the German Property Group – entered preliminary bankruptcy proceedings in Germany. That led to Mr McHale, in 2022, bringing two claims against Mr Dunlop, namely:

- a claim for damages for professional negligence, on the footing that Mr Dunlop had assumed the duties of reasonable care and skill which were to be expected of a financial advisor; and

- a claim for an account of the alleged "half-secret" commission (amounting to 20% of the investment) which had been received by Mr Dunlop in respect of the relevant investments into the Dolphin Trust, on the footing that Mr Dunlop owed fiduciary duties to Mr McHale.

A striking feature of the case is that its scope was narrowly constrained by the pleadings (a late application to amend was dismissed, and certain of the pleaded claims were not pursued at trial). The judgment indicates that these and other causes of action – against Mr Dunlop and others – might otherwise have been pursued.

Based upon the pleaded case, however, the outcome was perhaps a Pyrrhic victory for Mr McHale. The claim in professional negligence – financially the more valuable part of his claim – was dismissed in full, while the claim for breach of fiduciary duty succeeded.

The claim in professional negligence

The judge found that Mr Dunlop had not assumed a duty of care to provide financial advice to Mr McHale in respect of his investment in Dolphin Trust.

In doing so, the judge – as a result of the way the claimant's claims had been pleaded – gave no detailed consideration to the regulatory framework, but rather approached the question by reference to the general principles to be applied in respect of establishing whether a duty of care to prevent economic loss arises.

The foundation of such a duty of care, in the absence of any contract or retainer, was the concept of assumption of responsibility. The question was whether Mr Dunlop should – based upon an objective assessment of the facts, rather than upon either party's subjective state of mind – be taken to have assumed responsibility to Mr McHale in respect of the provision of financial advice.[1]

The judge found that Mr Dunlop had not acted as a financial advisor and so had not assumed a duty of care in that regard. Rather:

- Mr McHale had decided that he would invest in the Dolphin Trust prior to meeting with Mr Dunlop, not least in order to receive a share of the "double bubble" commission, and this decision was based on conversations with a third party, Mr Lockington (who the judge found had provided some form of financial advice, but who – for reasons which are not apparent from the judgment – was not a defendant to the claim); and

- Mr Dunlop had not presented himself as a financial advisor, and his role had instead been to provide information to Mr McHale in relation to the Dolphin Trust and to facilitate Mr McHale's transfer of funds to a SSAS and his subsequent investment in the Dolphin Trust, rather than to advise upon the suitability of the Dolphin Trust or whether Mr McHale should invest in it.

[1] See the recent Court of Appeal decision in *Spire Property Development LLP v Withers LLP* [2022] EWCA Civ 970.

Mr Dunlop's duties of care were circumscribed by the role he had undertaken. The key distinction drawn by the judge was that Mr McHale had not come to Mr Dunlop looking for advice on the relative merits of acquiring loan notes in Dolphin Trust as against other investment opportunities; rather, he had wanted Mr Dunlop to execute his own investment decisions.

This illustrates the fact-sensitive nature of the duty of care inquiry. The existence, and – often more importantly – the scope of such a duty of care will depend upon what the defendant said and did, and how that ought reasonably to have been understood by the claimant.

The claim for breach of fiduciary duty

However, the judge found that Mr Dunlop had come under fiduciary duties to account honestly to Mr McHale in respect of the commission.

Having found that Mr Dunlop had agreed to share the commission with Mr McHale (and also with Mr Lockington), the judge set out two alternative ways of analysing the case. The first was in accordance with the law relating to "half-secret" commissions, in that Mr Dunlop failed to provide full disclosure of the totality of the commissions payable on the opportunity to invest in the Dolphin Trust. The second was by reference to the "enhanced" investment opportunity which Mr Dunlop had purported to offer to Mr McHale, namely an equal share of the commission.

Taking the second analysis first, the judge found that in taking the additional step of offering to share the commission with Mr McHale, Mr Dunlop had changed the nature and content of the investment opportunity present to Mr McHale. In consequence, Mr Dunlop had taken on a role as agent in respect of the commission, in respect of which he was fixed with fiduciary duties.

The judge considered that the same conclusion followed on the basis of the law relating to "half-secret" commissions. Mr Dunlop had kept the true quantum of his commission secret from Mr McHale in circumstances in which he came under a fiduciary duty to declare the true quantum of that commission.

As a general principle, where an investor was presented with an investment opportunity which the introducer had enhanced by promising to pay one third of his own commission to the investor, then the introducer came under a fiduciary duty to provide an honest and truthful account of the total commission payable.

The judge found that Mr Dunlop had set out to "*make full use of Mr McHale's lack of information, to Mr McHale's disadvantage*" and therefore – on either analysis – breached the fiduciary duties he owed to Mr McHale by "*adopting and implementing a strategy deliberately to misinform Mr McHale of the true commission payable to him and by then failing to account properly to Mr McHale in respect of the commission payable to him*".

In particular, Mr Dunlop and Mr Lockington had together represented to Mr McHale that the total commission in respect of the 2016 loan notes was £9,000 (in truth, it was at least £22,500) and that the total commission was being split equally between the three of them (in truth, Mr Dunlop and Mr Lockington were receiving much more than Mr McHale).

It followed that the entire commission was unauthorised, and Mr Dunlop would be required to pay to Mr McHale the total commission received by him from Dolphin Trust, with interest.

As with the duty of care inquiry, this illustrates that the question whether a fiduciary duty arises will often (at least outside archetypal cases) depend upon a detailed consideration of the facts. The key question is whether – and if so, perhaps more importantly, to what extent

– the defendant has undertaken to act for or on behalf of the claimant in circumstances which gave rise to a relationship of trust and confidence.

Conclusion

This case is an interesting illustration of the sorts of claims which may be brought when an unsuccessful investment is made through a SSAS or SIPP. In particular, it illustrates the limits of those claims—just because a person was, in a broad sense, *involved* in an unsuccessful investment, it does not follow that they are legally *responsible* for the consequences of its failure. Rather, the scope of the defendant's duties will – as ever –depend upon a detailed consideration of the facts.

Published June 2024

This article was published on **www.pensionsbarrister.com**. Views expressed above are those of the author and are not necessarily those of Pensions Barrister. The article is provided for general information only and is made available subject to the Terms and Conditions found on **www.pensionsbarrister.com** (which contain amongst other things a disclaimer and further limitations on liability). Nothing in the article constitutes legal or financial advice nor may it be relied on as such advice.