

The Supreme Court of the United Kingdom

Undergraduate Moot: Tort / Duty of Care

Mr Winfield (Respondent) v Jolowicz Law LLP (Appellant)

Background

1. Mrs Clerk was the founder, Chief Executive Officer and sole shareholder of Clerk Publishing Limited, one of the leading publishing companies in the United Kingdom. The share capital of Clerk Publishing Limited consists of 20,000 shares. The shares carry the right to dividends and other distributions.
2. Mrs Clerk left a will dated 1 January 2019. In her will Mrs Clerk left equal shares in Clerk Publishing Limited to Ms Lindsell and Mr Winfield. Mrs Clerk died on 1 January 2020 and Ms Lindsell and Mr Winfield inherited 10,000 shares each.
3. Ms Lindsell has spent her entire career working in publishing. She joined Clerk Publishing Limited in 2005 and has served as Chief Financial Officer for the past 10 years. Mr Winfield is a successful entrepreneur. He has no prior experience in the world of publishing. He trained as a solicitor, qualifying in 2007. However, he has not practised as a solicitor since 2011.
4. At the time of inheritance, Article 20 of Clerk Publishing Limited's Articles of Association provided that:

“... Notwithstanding any other provision of these articles, the Directors shall, in any financial year in which profits are available for dividend, recommend to the Company a dividend of not less than 50% of such profits. If the Directors make such a recommendation, the Company in a general meeting shall ratify and approve such dividends accordingly.”
5. Ms Lindsell wanted to rapidly grow Clerk Publishing Limited by branching into the audiobook market. She therefore wanted to invest all the profits back into the company over the proceeding five years. Accordingly, Ms Lindsell wanted to reduce the required dividend recommendation in Article 20 to zero. Mr Winfield agreed that growth and reinvestment was a good strategy and that they should change the Articles, but wanted the Articles to require some set dividends. Ms Lindsell and Mr Winfield failed to agree a position and were in a deadlock. A dispute arose between them about amending the Articles in relation to dividends. Ms Lindsell and Mr Winfield also disputed various other issues including what to change the company name to, the appointment of directors and the decision-making powers of the directors.

6. A series of negotiations took place between Ms Lindsell and Mr Winfield. Ms Lindsell was represented by Jolowicz Law LLP, a ‘full-service’ international law firm. Mr Winfield was not legally represented.

7. Ms Lindsell and Mr Winfield reached a compromise. A Memorandum of Understanding was drawn up reflecting the agreed changes to the Articles of Association of Clerk Publishing Limited. Among other things, the Memorandum of Understanding stated:

“The Articles of Association of Clerk Publishing Limited are to be amended, in particular by including a new Article 20, which shall provide for a maximum dividend from profits lower than the current Article 20 provision.

[...]

The remaining profits are to be reinvested in the Company.”

8. It was left to Jolowicz Law LLP to prepare the compromise documentation relating to the changes to the Articles of Association. Drafts of the Articles went back and forth between Jolowicz Law LLP and Mr Winfield.

9. At 13:00 on 1 May 2021, Mr Winfield sent around updated Articles with a new Article 20 for Clerk Publishing Limited. The proposed new Article 20 included the following provision:

“... Notwithstanding any other provision of these articles, the Directors shall, in any financial year in which profits are available for dividend, recommend to the Company a dividend of not less than 20% of such profits. If the Directors make such a recommendation, the Company in general meeting shall ratify and approve such dividends accordingly.

[...]

Any remaining accumulated and undistributed profits are to be reinvested in the Company.”

10. Jolowicz Law LLP noted a problem with the reference to the directors’ recommendation of a dividend of “not *less* than 20% of such profits”. Drafted in this way, Article 20 would impose a minimum dividend. It should have said “not *more* than 20% of such profits”, imposing a maximum dividend as agreed in the Memorandum of Understanding. Jolowicz Law LLP corrected this. They also added the words “of that year” to Article 20, so the provision now read:

“... Notwithstanding any other provision of these articles, the Directors shall, in any financial year in which profits of that year are available for dividend,

recommend to the Company a dividend of not more than 20% of such profits. If the Directors make such a recommendation, the Company in general meeting shall ratify and approve such dividends accordingly.

[...]

Any remaining accumulated and undistributed profits are to be reinvested in the Company.”

11. The effect of the additional words “of that year” was to limit the dividend to not more than 20% of profits generated in a particular year, thereby excluding from the dividend the profits earned in previous years that were saved in Clerk Publishing Limited’s investment account. This greatly reduced the amount of the profits from which the maximum of 20% was calculated and so diminished the value of the dividend that would flow from Clerk Publishing Limited to Ms Lindsell and Mr Winfield, and in turn allowed all saved profits from previous years to be reinvested into Clerk Publishing Limited.
12. Jolowicz Law LLP sent the updated Articles back to Mr Winfield at 22:00 on 1 May 2021. The next morning at 10:00 there was a meeting at which Ms Lindsell, Jolowicz Law LLP and Mr Winfield were present. At the meeting, among other things, Mr Winfield said that he had noticed the specific change from a minimum limit to a maximum limit and agreed that this correction generally reflected the terms of the Memorandum of Understanding. No mention of the additional words “of that year” was made by the parties.
13. Following the meeting, further work was done to finalise the documentation and the documents were signed on 17 May 2021. The version of Article 20 which was ultimately incorporated into the Articles of Association of Clerk Publishing Limited was the version that corrected the mistake in the proviso but which also included the words “of that year”.

Proceedings below

14. When the effect of the additional words “of that year” in the new Articles of Association became apparent, Mr Winfield brought a claim against Jolowicz Law LLP for breach of duty of care. Mr Winfield alleged that:
 - a. Jolowicz Law LLP owed him a duty of care;
 - b. Jolowicz Law LLP breached this duty by amending Clerk Publishing Limited’s Articles without its client Ms Lindsell’s instructions; and
 - c. Jolowicz Law LLP’s breach of the duty of care caused him to suffer loss and damage.
15. Jolowicz Law LLP contended that no such duty was owed to Mr Winfield and applied for summary judgment on that basis.

16. It was agreed between the parties that Mr Winfield did not notice the additional words “of that year”. It was unclear whether Jolowicz Law LLP acted on the instructions of Ms Lindsell or of their own volition when adding those words. Jolowicz Law LLP claimed that the additional words “of that year” added into the Articles of Association reflected the Memorandum of Understanding.
17. In the first-instance proceedings, the High Court accepted Jolowicz Law LLP’s submission that there was no duty of care owed to Mr Winfield and granted summary judgment on the basis that Mr Winfield’s claim therefore had no reasonable prospect of success.
18. The Court of Appeal allowed Mr Winfield’s appeal, setting aside the order for summary judgment. It held that the High Court erred in accepting the absence of the duty of care without a trial. Jolowicz Law LLP now appeals to the Supreme Court.

Issues in the appeal

1. Did Jolowicz Law LLP owe a duty of care to Mr Winfield not to act without its client Ms Lindsell’s instructions when drafting amended Articles of Association pursuant to a Memorandum of Understanding agreed between Mr Winfield and Ms Lindsell?
2. Is the above issue (about whether such a duty of care exists) appropriate for summary judgment?