Neutral Citation Number: [2020] EWHC 1344 (Admin)

Case No: CO/629/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 May 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

R (on the application of
(1) WYLLIE FINANCIAL SERVICES LIMITED
(2) A SCOTTISH NEWS LIMITED

Claimants

v

FINANCIAL SERVICES COMPENSATION SCHEME

Defendant

- -

JOHN WYLLIE on behalf of the claimants
RICHARD POWER instructed by Dentons UK and Middle East LLP for the Defendant

Hearing date: 6 May 2020
Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HON. MR JUSTICE FORDHAM
Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

1. This was a Skype video conference hearing, which proceeded just as it would have done in open court. It and its start time were listed in the cause list with contact details available to anyone who wished permission to participate. I was addressed in exactly the same way as if we were sitting in the court room. I am satisfied of the following: that this constituted a hearing in open court, that the open justice principle has been secured, that no party has been prejudiced, and that in so far as there has been any restriction on a right or interest it is justified as necessary and proportionate.

2. This is a renewed application for permission for judicial review. The claimants issued their claim for judicial review on 18 February 2020. Mr Wyllie speaks on their behalf. He put before the court a number of key documents: they include the grounds for judicial review; a reply to the summary grounds of resistance; and the grounds of renewal. I had all the materials that have been filed with the court, but what was particularly helpful was that he put together at the court's request a set of core materials. He has addressed me at length at today's oral hearing. It was originally listed as a ½ an hour hearing, but it became obvious that it would be appropriate to allow further time so that he was able to say everything they wished to say and show me everything he wished to show me, for the purposes of what is permission hearing.

3. The judicial review claim seeks a quashing order in respect of the final decision made by the defendant on 17 January 2020 refusing a compensation claim. The claim for judicial review also seeks an award of "damages". In principle, "damages" could be ordered by the judicial review court, in one set of narrow circumstances, although it would not strictly be accurate to describe them as "damages". If the court were persuaded at a substantive hearing that the defendant had acted in public law terms unlawfully, that is to say unlawfully unreasonably or unfairly, in reaching a decision to refuse a compensation claim and if the court were persuaded that the only lawful and reasonable decision that the defendant could have arrived at was to allow the claim, then in principle there could be a mandatory order in those circumstances requiring that the compensation be paid. The more usual order in judicial review would be to quash a decision and remit the case for reconsideration, if the court is satisfied that there is some public law error in approach.

4. Also included within the claims made in this judicial review case was a claim for interim relief payment of £250,000. There is also an application for a protected costs order. As to a protected costs order, I have no jurisdiction to make such an order unless permission is granted: section 88(3) of the Criminal Justice and Courts Act 2015. But in any event, even if I had or have jurisdiction, I would want to consider first the viability of the claim. There are obvious problems in this case in any event as to whether there is a 'private interest'. As to any question of interim relief – and the ambition of an interim relief order for a payment is obvious – again I would want to start with viability of the claim.

5. I noted from the papers that, alongside the application for this hearing to be by way of Skype, there was an application that to named entities be allowed to disseminate the recording of this hearing. As my clerk explained at the start of this hearing, it has been recorded by the court but it is a criminal offence for any other person to take a recording of this hearing or to disseminate a recording of this hearing. If it becomes

relevant for any party to make an application relating to the recording of this hearing that will be dealt with at the appropriate time.

6. The grounds for judicial review are summarised at paragraph 63 of that document and comprise illegality, irrationality, procedural unfairness and breach of the public sector equality duty. I have considered all of those grounds, and everything that was said in writing about them, in dealing with the question whether there is an arguable claim, that being the key issue for me to address that today. No procedural bar is been raised by the defendant: for example alternative remedy or delay in bringing the claim. The question is squarely whether this case is properly arguable.

7. Mr Justice Garnham on the papers refused permission, concluding that the case is not properly arguable. He was persuaded on the basis of the summary grounds that none of the grounds for judicial review raise an arguable claim. He also ordered the costs of the acknowledgement of service (AOS) though he assessed those down, in circumstances where submissions had been made in the reply document about the proportionality of them: the costs claim was over £14,000 and he assessed costs of the AOS at £6000. I am satisfied that the appropriate course for me to take is to form my own view of whether there is an arguable case. I am not reviewing Mr Justice Garnham's decision though it is obviously always helpful to start from the position of the previous consideration and what is said about that decision by the parties.

8. The critical decision letter in this case, as the grounds for judicial review rightly recognise, is the letter dated 17 January 2020. By that letter, the defendant explained that it was not satisfied that the claimants were owed a civil liability by ART Finance Group Ltd (who everybody has been describing as "the firm"). The letter also explained that it in any event the defendant was not satisfied that the firm had caused losses to the claimants.

9. It important in my judgment to contextualise this case, and the decision that has been made in this case. The defendant had to evaluate the claim against the particular context, circumstances and evidence. To some extent, for reasons I entirely understand, Mr Wyllie in his oral submissions has opened out what he says are the logical consequences of the defendant's findings. That opening out involved far-reaching submissions: about whether life policies of particular categories would logically or be illegal; whether the life of an employee could in principle be an insurable interest; whether an individual such as Mr Wyllie himself could have an insurable interest in relation to his own life; and whether a duty of care can be owned to a customer who is an introducer appointed representative. What the defendant has done in its decision letter is to reach, in my judgment, conclusions that are referable to the particular context. It is also important, in my judgment, that I consider the arguments in the context in which they arise.

10. The position is described in the decision letter as follows. Mr Wyllie is the sole shareholder and director of the claimants. The first claimant was an appointed representative of the firm. An arrangement was set up by which the first claimant was to refer applications for life insurance to the firm. The firm was to place the cover with insurers and the firm was to then pay a proportion of the commission generated to the first claimant. That shared commission was intended then to fund the second claimant. In the period between July 2017 to March 2018 the first claimant referred 484 life insurance policies said to relate to 44 of the claimants' employees. (I

interpose at that point that I have seen in the claimants' documents the description that what was in fact being referred, they say, were the individuals rather than the policies.) In the event, the insurers cancelled the insurance policies. The claimants' position is that some £160,000 of premiums were paid in conjunction with those insurance policies and have not been refunded. When a Mr McCallum, said to have been an employee of the first claimant died, that there was available to the first claimant no insurance payout: the claimants' position is that the payout under the policy should have been £7.25 million.

11. It is against that background and in those circumstances that the various compensation claims were advanced before the defendant by the claimants. There was a long and protracted process involving an evaluation, consideration and communication. A large volume of material was supplied and, the defendant says, was considered and evaluated.

12. Essentially, as was confirmed in the oral submissions today, so far as the losses claimed are concerned they really fall into three categories. The narrowest category would concern premiums that had been paid and were never retrieved. A second category is the £7.25 million not paid out in respect of the death of Mr McCallum. The third and broadest category is what was described today as an 'expectation' loss: that is to say it is the loss of all of the various commissions and income stream and indeed all the various insurance cover that would have been in place under these various policies.

13. I have described the circumstances as characterised in the decision letter. Nothing that I have read or heard causes me to conclude that they have been mischaracterised.

14. As the defendant points out by reference to the relevant rules and provisions, to be a "claim" that is compensated for by it, there must be a valid claim in respect of a civil liability owed to the claimants by the firm, it being accepted that the firm is in default. It is also the case that, in the discharge of its public functions, it is for the defendant to evaluate facts and circumstances and reach judgments and conclusions. It is necessary for the defendant to be satisfied before it can allow a claim. That satisfaction includes questions in relation to civil liability being owed; questions in relation to loss and damage being recoverable; and questions relating to causation of loss and damage.

15. Mr Wyllie submits – and he is undoubtedly right about this – that the defendant is required to act in accordance with public law standards of legality, and of course there is no dispute between the parties about that. Mr Wyllie submits that there has been catalogue of legal errors, and at one point he referred to eleven misdirections of law. He submits, in writing and orally, that the defendant has acted unlawfully and has reached legally unsustainable conclusions. The grounds also include within them the allegation of errors of fact, and unreasonable conclusions, including conclusions unsupported by evidence.

16. As I have already mentioned complaint is also made about process. So far as process is concerned no argument was developed orally in relation to those grounds, but I have read and considered the points that are made relating to fair process and the public sector equality duty. I see no arguable grounds relating to the process which the defendant adopted in this case or relating to any breach regarding any disability. What matters in this case ultimately is the substance, as Mr Wyllie indeed recognised

sensibly in the way in which he focused his oral submissions. Either there is, in the defendant's approach, some error of approach, misdirection or error of law, error as to an established and verifiable fact, or unreasonableness as to a conclusion, or there is not. The question for today is whether there is any of those species of public law wrongs, arguably on the papers before me.

17. In the end, in my judgment, as a result of the oral submissions and the exchanges with the court and between the parties, there is a logical framework that emerges as to the issues with which the defendant was concerned in this case.

18. The starting point and first stage relates to the 484 policies regarding the 44 individuals. I put to Mr Wyllie whether his position was that each and every one of those policies was valid and lawful, and that the defendant should have so concluded. He submitted that that is indeed his position. He says that the only lawful conclusion open to the defendant was that these were valid policies of insurance. He submits that the defendant went wrong when they reached the conclusion that there was, in the case of this group of insurance policies, a fatal pair of problems. The first problem, concluded the defendant, related to the absence of an "insurable interest". The second problem related to the breach of the "fair presentation" duty, in failing to bring to the attention of the insurance companies concerned the circumstances of these multiple insurance policies relating to the same individuals.

19. On this first issue, the defendant explained in its decision letter that it had concluded that there was no "insurable interest" in relation to the various individuals, including Mr McCallum. It reached that conclusion by reference to the facts and circumstances of this case, by reference to the evidence as to whether or not the individuals could be shown to have been 'key' employees and, perhaps more fundamentally, by reference to the absence of evidence, concluded the defendant, that the individuals had ever started work.

20. Mr Wyllie submits, on this first issue, that the defendant has arrived at a conclusion that is unlawful, involves a misdirection, or is unsustainable and unreasonable. He submits that there is no precondition that an employee needs to be a 'key' employee. He submits that on the evidence these individuals all had signed contracts, which he says it is sufficient for them to be employees. His central submission it is to rely on the "broad concept" of "legal or equitable relation" described by Lord Justice Waller in Feasey v Sun Life a decision of the Court of Appeal [2003] EWCA Civ 885 at paragraph 97. I had the advantage of the quotation from that paragraph in the grounds for judicial review but I have also been able to look at the authority itself.

21. On this first topic I accept the submissions of Mr Power on behalf of the defendant. In my judgment it clear from the decision letter that what the defendant has done is to reach a conclusion on the facts, evidence and circumstances of the present case. I accept that that involved an exercise of evaluative judgment for the defendant in this particular context. Indeed, I put to Mr Wyllie that in his reply document, replying to the summary grounds of defence, he characterised the presence or absence of "insurable interest" as "a matter of opinion". Judgment and appreciation is perhaps a better phrase than opinion, but what that document, in my judgment correctly and realistically, recognises is that there is an application of judgment in in relation to the question of "insurable interest". The same is true, in my judgment, on the question of whether there has been a breach of a duty of fair presentation.

22. In this case, I am quite satisfied – as was Mr Justice Garnham – that the conclusions arrived at by the defendant on this topic in the decision letter were on the face of it open to the defendant. I have not been persuaded by any of the submissions made by Mr Wyllie that there is any error of law misdirection or unreasonableness in that conclusion. That, in my judgment, is the important starting point for everything that then follows.

23. Mr Wyllie submits that even if all of that is correct, the claimants still have a compensatable claim that the defendant has unlawfully failed to recognise. At this, the second stage of the analysis, his argument ran as follows. He submitted that there was an actionable duty on the firm to act reasonably and with propriety in relation to its customer, that is to say the first claimant. He showed me a series of rules of the Financial Conduct Authority which deal with duties that are owed to customers who buy policies: duties to ensure they make informed decisions; duties applicable to "pure protection contracts"; duties to establish their demands; and to take reasonable care in relation to suitability; to ensure suitability; to advise appropriately; and not to impose unreasonable post-sale barriers. In essence, as I saw it, the submission was that these obligations – in content – were owed in the circumstances of the present case.

24. The consequence therefore would be this. Even if it is right that these were not valid policies, by reference to insurable interest or fair presentation, the obligation lay on the firm to advise, so that the claimants did not pursue such inappropriate policies of insurance.

25. Again, I accept the submission on behalf of the defendant that in the exercise of its evaluative judgment, on the facts and circumstances and against the evidence of this case, the defendant needed to decide whether it was satisfied that such a duty was in fact owed to the first claimant as referring 'appointed representative' of the firm. The defendant, exercising that evaluative judgment, explained in its decision letter that it does not consider that such an obligation did arise in the circumstances of this case. I have not been persuaded that there is any arguable misdirection or unlawfulness or unreasonableness in that evaluative conclusion. I agree with Mr Justice Garnham.

26. The logic continues to a third stage. That is because, if stage one is correct and the defendant reached a lawful decision as I have held beyond argument to be correct, even if the claimant had an arguable case in relation to stage two, the question is whether there is an arguable basis for impugning the alternative conclusion that the defendant reached in any event. That conclusion was that the defendant was not satisfied that any loss or damage arose in this case which had been caused to the claimants by any default on the part of the firm.

27. I have already said that loss and damage really breaks down into three categories. I have described them and I will deal with each of them in turn. The narrowest of the categories, in my judgment, takes the claimants nowhere. That is for this reason. If one focuses simply on the question of the premiums that had been paid and had not been recovered, and does not look more broadly at the 'expectations' (which is category three), the question is whether there is any loss or damage as to premiums unrecovered, when one takes account of commissions received. The defendant concluded that it was not satisfied that there was such a shortfall. Mr Wyllie, very fairly and candidly, has recognised that, leaving aside his broader categories and

leaving aside arguments as to why he said commission should be ignored, he accepts that the premiums that have unrecovered are a lower figure than the commissions that have been received. It is quite impossible, in my judgment, on this narrowest first category to see any arguable basis on which the defendant has acted unlawfully unreasonably or unfairly on the conclusion in relation to loss and damage.

28. The second subcategory of loss and damage was the payout that the claimants say they missed out on in relation to the death of Mr McCallum. It is important to remember that the premise is that, as I have concluded, the defendant lawfully concluded that there was no valid policy by reference to insurable interest or fair presentation, so far as Mr McCallum is concerned. That was an evaluation in relation to the evidence that involve consideration of Mr McCallum, the conduct that he was said to have carried out and the evidence that supported it, as well as the question of whether his role could support an insurance policy of this size as being his insurable interest and value to the claimants. On that premise – that this was not a valid insurance policy – the question then arises as to what loss and damage would have followed, even if the defendant had had a duty to act and advise the claimant. In those circumstances one has to posit not this policy, but an alternative and lawful one. The defendant looked at this matter, viewed against the course that was open to the claimants in the one year between the cancellation of this policy and Mr McCallum's death. The defendant relied on the fact that they were not satisfied that steps had been taken to replace the policy. The argument by Mr Wyllie today, and in the papers, is that no alternative was effectively open to them in those circumstances. In my judgment, the defendant was reasonably and lawfully entitled to reach the conclusion that it was not satisfied that there was any loss and damage demonstrated by reference to an alternative policy to the one it had included concluded was invalid. I see no unlawfulness or unreasonableness in that conclusion but I emphasise that it only arises if the claimant has an arguable case on the second topic (which I have concluded it does not), or if it has an arguable case on the first topic the lawfulness of validity of the policy (which again I have rejected).

29. That leaves the third and broadest category of loss and damage relied on by the claimants. This was what I suggested was a category of 'expectation' loss. By that I mean the claimants have painted the picture of the income that would have been in place, and the insurance cover that would have been in place, had the policies been operative. The problem with that lies in the fact that the defendant has already lawfully concluded that these were not valid policies. Therefore, even if there were a duty to advise an act and assist the claimants in relation to taking appropriate steps, those steps could not logically possibly have involved the establishing of the set of 'expectations' as to income and cover on which reliance is placed. Ultimately, the defendant was not satisfied that there was any loss or damage in relation to income or cover that had been sustained, even if some duty had been breached. The defendant emphasised that no "insured act" had arisen in relation to any of these individuals or policies, except for the death of Mr McCallum with which I have already dealt.

30. Ultimately, in my judgment, the judicial review court in the exercise of its supervisory jurisdiction is bound to do two things in a case such as the present. Firstly, it is bound to respect that the defendant evaluate the material and exercise appropriate judgment to arrive at reasoned conclusions. Secondly, the court must listen with care and evaluate for itself whether it is persuaded by a claim in writing, or submissions made

orally, that there is some public law error of approach in the way in which the decision is approached or reasoned or the conclusions that are arrived at. That is what Mr Justice Garnham was required to do and what I am required to do.

31. The threshold for permission is a modest one, in the sense that the case only has to be arguable. But I cannot grant permission for judicial review unless I have been persuaded, by written or oral submission, that there is a properly arguable case with a realistic prospect of success involving a material public law error in the defendant's decision. I have not been so persuaded and for the reasons I have given this renewed application for permission for judicial review will be refused.

LATER

32. Mr Wyllie, by way of her consequential application, invites the court to set aside the costs order made by Mr Justice Garnham. In my judgment, there is no reason to set aside or vary that order. Mr Wyllie emphasises that the claimants are simply not in a position to pay any costs but that is not a reason to deny a costs order which is otherwise appropriate, still less a reason to reopen the costs discretion that the judge properly exercised on this point on the papers. Questions of enforcement of costs orders are a separate matter; I am dealing with whether in principle the defendant should be entitled to retain the costs order that they obtained. What was open to the claimants was to make any points in relation to proportionality and costs, but so far as that is concerned, the point was made in writing in the reply document, that the defendant's solicitors ought to have been able to deal with the acknowledgement of service without engaging counsel. In the event, Mr Justice Garnham on the papers scaled down the costs and decided the appropriate degree of recoverability. He did so, as it happens, to a level that was just below the solicitors' costs standing alone. I am quite satisfied that there is no basis for interfering with that assessment as to proportionality and incidence of costs of Mr Justice Garnham on the papers.

33. As I indicated to Mr Wyllie and the others participating in this hearing, it is my hope and intention to be able to circulate a written version of my ruling. It has proved particularly helpful that the voice-recognition software has picked up on my ex tempore ruling in this case because, towards the end of it, Mr Wyllie unfortunately dropped out of the video conference. As I said towards the start of my ruling, this hearing has been recorded and should it be necessary for anyone to apply to access the recording for any purpose that is a matter that can be dealt with. Finally, I simply thank Mr Wyllie, Mr Power and everyone else who has participated, for the preparation and presentation of the arguments, written and oral.