IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS
OF ENGLAND & WALES
CHANCERY APPEALS (ChD)

CH-2019-000084

[2019] EWHC 2828 (Ch)

The Rolls Building
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Fetter Lane
London, EC4A 1NL

Monday, 7 October 2019

Before:

MS KELYN BACON QC

(Sitting as a Judge of the Chancery Division)

B E T W E E N :

COMPETITION & MARKETS AUTHORITY — Applicant

- and -

(1) CARE UK HEALTH & SOCIAL CARE HOLDINGS LTD
(2) CARE UK COMMUNITY PARTNERSHIPS LTD — Respondents

MS S. FORD QC and MS SMITH (instructed by CMA in-house solicitors) appeared on behalf of the Applicant.

MR G. FACENNA QC and MS D MACKERSIE (instructed by CMS Cameron McKenna Nabarro Olswang LLP) appeared on behalf of the Respondents.

J U D G M E N T

MS KELYN BACON QC:

1 This is an appeal by the Competition and Markets Authority ("the CMA") from the order of Deputy Master Henderson dated 11 March 2019, directing that the CMA's claim against the respondents, Care UK Health and Social Care Holdings Limited, and Care UK Community Partnerships Limited, should proceed under CPR Part 7 rather than CPR Part 8, and making consequential directions for the exchange of pleadings and costs.

2 Permission to appeal that order was given by Snowden J on 3 May 2019 on the grounds not only that there was a real prospect of success, but also that it was important that the form in which the case should proceed was correctly determined at the outset, given that these are likely to be substantial proceedings with important consequences for the parties.

3 The CMA's appeal is based on a point of principle. In the submission of the CMA, represented by Ms Ford QC and Ms Smith, the determinative factor that caused the Deputy Master to direct that the claim should proceed under CPR Part 7 was the conclusion that the CMA's claim included allegations of deceit and conniving in deceit, which in pre-CPR days were the sort of allegations that were not appropriate for the originating summons procedure. That, the CMA says, is an error of law because the relevant allegations in this case are based on the statutory language of the Consumer Protection from Unfair Trading Regulations 2008 ("CPUTRs"), which in turn is based on an EU Directive. The concept of deceit in that context does not originate from or equate to the domestic law tort of deceit, and there is no requirement of dishonesty.

4 The CMA therefore submits that the decision of the Deputy Master was premised on a manifest error of law. Moreover, the CMA says, if that decision is correct it would have serious consequences for the CMA's consumer enforcement role, because it would mean that the CMA would always have to proceed under Part 7 in this type of claim, which would significantly increase the time and cost of obtaining enforcement orders for the protection of consumers.

5 Mr Facenna QC and Ms Mackersie, representing the respondents, submit that the order should be upheld on the basis that the Deputy Master's order did not establish any point of principle in this regard, but was merely a fact-specific case management decision based on a number of different factors. Alternatively, if the CMA's characterisation of the Deputy Master's reasoning is accepted as accurate, Mr Facenna submits that the decision should be upheld for the different reasons that the Part 8 procedure is not suitable for the proper resolution of this claim, in particular because it is likely to involve a substantial dispute of fact.

Background to the CMA's claim

6 It is necessary to start by setting out, briefly, the nature of the claim advanced by the CMA in these proceedings.

7 The CMA's claim in its original Part 8 form was issued on 7 February 2019. It was brought as the culmination of an investigation that had started in December 2016 when the CMA launched a market study into the UK care homes market. As part of that study, the CMA sent an information request to the respondents and other large care home providers, which

included a request for the information that was given to consumers before entering into a contract, as well as information relating to fees charged to residents.

8 Following the respondents' response to that request, the CMA decided to open a consumer protection case in June 2017, specifically relating to the administration fee charged by the respondents to residents on admission to certain of their care homes in England. The CMA then initiated a consultation with the respondents pursuant to Part 8 of the Enterprise Act 2002. In July 2018 the CMA sent the respondents a letter as part of that consultation, alleging breaches of consumer law and seeking undertakings from them.

9 The respondents removed their administration fee with effect from 1 August 2018. The parties were, however, unable to agree on a resolution of the CMA's investigation and in February 2019 the CMA filed its Part 8 claim. The claim form was accompanied by Details of Claim running to 12 pages, and seven witness statements on behalf of the CMA. The main witness statement was a 77 page statement from Ms Jennifer Dinmore, a Project Director in the Competition, Consumer and Markets Group of the CMA. There were also shorter witness statements from Dr Gavin Knott, a Director in the Remedies, Business and Financial Analysis team at the CMA, and Mr Paul Hughes, Assistant Director of Investigations at the CMA. The remaining witness statements were statements from four individuals whose relatives had gone into the respondents' care homes. All four had complained to the CMA about their experiences with the respondents. The witness statements were accompanied by voluminous exhibits, running to thousands of pages in total.

10 The CMA's claim as set out in its Details of Claim centred on the fact that between 1 February 2013 and 31 July 2018 the respondents charged residents of most of their care homes in England a non-refundable administration fee on commencement of a care home contract, which amounted to two weeks' residential fees, unless a lower amount was negotiated.

11 The CMA said that these administration fee terms were unfair terms within the meaning of regulation 5(1) of the Unfair Terms in Consumer Contracts Regulations ("UTCCR"), and unfair terms within s. 62(4) of the Consumer Rights Act 2015 ("CRA"). The essence of the CMA's objection in this regard was that the consumer was required to pay the administration fee at the commencement of the contract, whatever the duration of the contract might be, and before any service, or alternatively anything more than a disproportionately small service, was provided in return. The CMA also said, among other things, that unfairness resulted from the fact that the administration fee terms were not disclosed until the relevant consumers were to some degree emotionally committed to entering into the care home contracts, and that the consumers in question – either elderly people or their relatives – were at particular risk of accepting unfair contract terms. Accordingly, the CMA said that the respondents had engaged in Community infringements falling within s. 212(1)(a) of the Enterprise Act 2002 ("EA02"), and domestic infringements falling within s. 211 of the EA02.

12 The CMA also said that the respondents had engaged in unfair commercial practices that were misleading actions, misleading omissions and/or aggressive practices, contrary to the CPUTRs, essentially on the basis that insufficient information was given to consumers about the administration fee. This was said to deceive or be likely to deceive the average consumer in relation to the price or the manner in which the price was calculated, thereby causing or being likely to cause the average consumer to take a transactional decision (to visit a home,

or to take various further steps towards admission to the home) that they would not have taken otherwise.

13 Accordingly, the CMA sought a declaration that the administration fee terms used by the respondents were unfair within the relevant provisions of the UTCCR and CRA, and sought enforcement orders under the EA02 prohibiting the respondents from using unfair terms and requiring them to offer refunds to consumers who had paid administration fees under unfair terms and/or as a result of unfair commercial practices contrary to the CPUTRs.

Care UK's application to transfer the claim to Part 7

14 After the claim was filed the respondents invited the CMA to agree to convert the claim to a Part 7 claim. The CMA maintained its position that Part 8 was appropriate. Accordingly, on 21 and 25 February 2019 the respondents filed applications seeking an order that the claim should proceed as if commenced under Part 7 (with consequential directions), or in the alternative that there should be an extension of time for them to serve their written evidence in response to the claim.

15 The respondents' applications were supported by a witness statement from Mr Tom Dane, a partner at CMS Cameron McKenna Nabarro Olswang, solicitors to the respondents. Mr Dane maintained that the Part 8 procedure was inappropriate for this claim, on the basis that there were substantial disputes of fact on which the respondents would need to file evidence. He also said that the CMA's claim involved "numerous legal complexities", including important issues as to the CMA's interpretation and application of the relevant domestic and EU legislation, which would need to be decided in light of the particular factual circumstances of the case. In those circumstances he said that the exchange of formal pleadings would enable clear identification of the issues in dispute.

16 Those applications came before Deputy Master Henderson on 11 March 2019. In his judgment, the Deputy Master identified as the central question for his determination whether the proceedings were likely to involve a substantial dispute of fact. He then went through a number of different points that had been identified in the witness statement of Mr Dane, and in argument by Mr Facenna, as liable to involve substantial disputes of fact. While he outlined the responses by Ms Ford for the CMA to those points and in relation to some of the points added further comments of his own, he did not express a firm conclusion as to whether those matters indicated, individually or collectively, that the claim should continue as a Part 7 claim. Rather, he suggested at §31 of his judgment that on the basis of those points alone the decision was rather finely balanced:

> "Had things stood on that basis, I have to say that I would have found it a difficult decision as to whether to let this continue as a Part 8 claim with future directions perhaps as to lists of issues and allowing the Defendants to make requests for further information on particular points."

17 What tipped the balance, however, was a point that emerged in argument towards the end of the hearing, regarding the CMA's allegations of misleading conduct, which was said to deceive or be likely to deceive the average consumer. On that point, the Deputy Master said, at §35:

> "The allegations of conniving in deceiving people seem to me to be the sort of allegations which fall fairly and squarely within the category of cases which in pre-CPR days were held not to be appropriate to be dealt with or

> continued under the originating summons procedure, which is the old equivalent of Part 8. It seems to me that remains the case under Part 8. Where you are making a serious allegation against somebody that they connived in deceiving somebody, you really do need to give proper particulars by way of a statement of case. The allegations and their answers need to be clear. For that reason, it seems to me the balance is tipped away from this being a Part 8 claim and for it to become and to be continued as a Part 7 claim, and I propose so to order."

18 The Deputy Master accordingly ordered that the CMA should file particulars of claim under Part 7 which it duly did on 25 March 2019; and the respondents' defence was filed on 29 April 2019. At the same time, however, the CMA brought the present appeal.

The issues on the appeal

19 The CMA's appeal raises three issues:

> (1) Was the Deputy Master's consideration of what I will call the "deceit issue", at §35 of his judgment, the determinative factor in his conclusion that the proceedings should be continued as if commenced under Part 7?
>
> (2) Did the Deputy Master consider that the CMA's case amounted to an allegation of deceit or dishonesty, and thereby err in law?
>
> (3) Is there any other substantial dispute of fact such as to make the CMA's claim unsuitable for Part 8?

The basis of the Deputy Master's decision

20 Starting with the first issue, Mr Facenna's position was that the Deputy Master's decision did not turn on the deceit issue. Rather, he says, the Deputy Master's concern was that on the facts of the case there were serious allegations advanced, which had significant financial implications for the respondents. Mr Facenna also said that on a fair reading of the comments of the Deputy Master, he did in fact accept that there were substantial disputed issues of fact.

21 In my judgment, while it is fair to say that the Deputy Master did appear to consider that some factual evidence would be needed on some of the disputed issues, it is clear from the face of his judgment that the deceit issue was the determinative factor in his decision. But for that factor, the Deputy Master said that it would have been a difficult decision as to whether to let this continue as a Part 8 claim. The deceit issue was, however, the factor which in the express words of the judgment meant that "the balance is tipped away from this being a Part 8 claim". The Deputy Master's comments at §35 of his judgment about the seriousness of the allegations were explicitly directed to the allegations that the respondents had connived in deceiving consumers.

22 While the Deputy Master may well not have intended to set this up as a point of principle, the terms of his judgment do perhaps unwittingly have consequences for other cases where the CMA is relying on the same provisions of the CPUTRs.

The Deputy Master's analysis of the "deceit issue"

23 It is therefore necessary to consider whether the Deputy Master's approach to the deceit issue erred in law. As an initial observation in that regard, it should be noted that the Deputy Master's judgment does not itself state that the CMA's case amounts to, or is equivalent to, an allegation of the tort of deceit, or that the CMA was alleging dishonesty. Nevertheless it is apparent from the transcript of the hearing that the Deputy Master understood this to be essentially the nature of the allegation – see for example his question to Mr Facenna: "It is an allegation of fraud, is it not, 'connived and deceived'?", and his subsequent question to Ms Ford that "It does strike me reading that, it is tantamount to an allegation of deceit, is it not, of fraud and dishonesty?" The Deputy Master went on to explain that his concern was that the pre-CPR originating summons procedure:

> "was not appropriate where there was an allegation of fraud, because an allegation of fraud was a very serious thing and whoever the allegation was made against, needed to know exactly what the allegation was. Now, if this is tantamount to an allegation of fraud, it seems to me that it is something that needs to be set out".

24 That last exchange was then reflected in the terms of §35 of the Deputy Master's judgment, set out above.

25 The Deputy Master does, therefore, appear to have regarded the CMA's allegations in the present case as being, if not in terms allegations of fraud, at least akin to such allegations. That is why he considered that these were serious allegations which needed to be properly particularised by way of a statement of case under Part 7.

26 In this case, however, it is common ground that the CMA's pleaded case alleges neither fraud nor dishonesty. The language of "deceives or is likely to deceive" derives from Article 6 of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices, which provides in relevant part:

> "**Misleading actions**
>
> 1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:
> …
> (d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;"

27 That Article is implemented by Regulation 5 CPUTRs, which contains almost identical language:

> "**Misleading actions**
>
> (1) A commercial practice is a misleading action if it satisfies the conditions in either para. (2) or para. (3).
>
> (2) A commercial practice satisfies the conditions of this paragraph –

(a) if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and

(b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

…

(4) The matters referred to in paragraph (2)(a) are –

…

(g) the price or the manner in which the price is calculated."

28 There may be cases in which the honest belief of a trader forms part of the enquiry under Regulation 5: see for example *Office of Fair Trading v Officer's Club* [2005] EWHC 108 (Ch), applying the provisions of the Control of Misleading Advertisements Regulations 1988. The question of the trader's belief arose in that case because the OFT's case was that consumers would have drawn the inference that advertised discounts of the price of the products were genuine, when in fact the higher (non-discounted prices) were not at all genuine. Etherton J agreed in that context that it was a facet of a genuine price that the seller honestly believed that the price was an appropriate sale price for the goods: §158.

29 A misleading action under Regulation 5 does not, however, inherently require proof of dishonesty on the part of the trader, nor – *a fortiori* – is there any requirement that the conduct in question should amount to the tort of deceit. Rather, the reference to a practice that "deceives or is likely to deceive the average consumer" concerns the *deceptive nature* of that practice vis-à-vis that average consumer. Unlike the tort of deceit, which requires a false representation, the commercial practice may be deceptive within the meaning of Regulation 5 even if the information supplied is factually correct. Moreover, as LJ Leveson observed in *R v X Ltd* [2014] 1 WLR 591, §§13–14, the offence under Regulation 9 of engaging in an unfair commercial practice contrary to Regulation 5 is an offence of strict liability, subject to a defence of due diligence in Regulation 17.

30 I consider, therefore, that the CMA is right to say that the Deputy Master erred in law by equating the allegation of deceptive conduct under Regulation 5 with an allegation of fraud or deceit, or dishonesty, with the consequence that he considered that the allegation was by its nature something that required a particularly detailed pleading by way of a Part 7 claim.

Whether there is a substantial dispute of fact

31 That is, however, not the end of the matter, because Mr Facenna says that even if the Deputy Master erred on that particular point, the decision that the claim should continue as if commenced under Part 7 was nevertheless correct because the claim is likely to involve a substantial dispute of fact, and is therefore unsuitable for the Part 8 procedure. He relied in that regard on various specific points which he said showed that there was a substantial dispute of fact in the present case.

32 Before turning to those points, I should make some general comments on the approach to be taken to this question, in a case of this nature. Ms Ford submitted that collective and enforcement proceedings brought by the CMA are inherently more suited to Part 8 proceedings rather than Part 7 proceedings because of the role of the Court in such claims, which is not to engage in fact-finding as to what transpired in respect of particular

consumers, but rather to exercise judgment as to the likely impact of conduct in typical cases.

33 I do not think that it would be appropriate for me to express a view as to what a typical collective or enforcement claim by the CMA will entail. It seems to me that each case is likely to turn on its own facts. There may be some cases, such as *Office of Fair Trading v Purely Creative* [2011] EWHC 106 (Ch) cited to me by Ms Ford, where the factual disputes are limited and where the parties may accept that Part 8 is an appropriate procedure. Equally, however, as Ms Ford fairly accepted, in some cases Part 7 proceedings might be more appropriate. I do not, therefore, consider that any conclusions can be drawn for this case by looking at other CMA cases that turn on quite different alleged conduct.

34 Nor do I consider that the fact of extensive pre-action inquiries made by the CMA in the course of its market investigation and subsequent investigations, or the fact that the CMA relies predominantly on the respondents' own documents, should mean that there is not likely to be a serious dispute of fact. Mr Facenna is in my view right to say that the CMA cannot fairly take the line that the Court only needs to look at the evidence selected by the CMA. In other contexts such as Competition Act infringements the fact that a decision by the CMA is typically preceded by a lengthy administrative procedure does not undermine the relevance of what is often extensive factual evidence on appeal.

35 The question is, therefore, a case-specific one of what the disputed factual issues are in this case. Mr Facenna has identified five specific points.

36 The first is the range of services provided to consumers, and the extent to which those services justify the administration fee charged. Ms Ford's response was to say that the dispute is as to the characterisation of these services, i.e. whether these are in fact services provided to consumers in return for the administration fee. That may be the case for some aspects of the services said to be provided by the respondents, but for many of the services identified, such as training staff to meet the needs of a prospective resident, buying specialist equipment and settling the new resident into the home, the issue in dispute is not the characterisation of the service but the extent or value of that service. That is likely to require factual evidence and indeed is likely to be a key factual dispute in the case.

37 The second issue is whether sufficient information was provided before a relevant consumer was, in the CMA's words, "emotionally committed" to the care home. That, again, is likely to turn on evidence as to the extent to which, at the point at which the administration fee was explained to the relevant consumers, those consumers were sufficiently committed to the care home in question that they could no longer make rational and independent decisions.

38 The third issue is whether the administration fee was genuinely intended to cover pre-admission costs or whether it was simply intended to generate profit. That is related to the first issue, and like the first issue is likely to be the subject of significant evidence.

39 The fourth issue is the position of the "average consumer" who, the CMA says, was deceived or was likely to be deceived by the information provided, or not provided, by the respondents. Ms Ford is right to say that this is ultimately a question of judgment for the court, and that – as a general proposition – it is not likely to be useful to look at large quantities of evidence from different consumers. Precisely that point was made by Etherton J at §§146–147 of *OFT v Officer's Club*, in the context of advertisements by a high street retailer:

> "It is common ground that the touchstone, on this issue, is the view of the ordinary, reasonable consumer characteristic of the class to whom the advertisement is addressed. The Court must reach a conclusion on that view, irrespective of whether or not there is any actual evidence from consumers. Evidence from such consumers is, therefore, not necessary. …
>
> Indeed evidence from actual or potential consumers may be unhelpful: if the evidence is given by too few of them, their views will not be sufficiently representative of the entire range of such customers; if a large number, intended to cover the full range, gives evidence, the adverse effect on the cost and duration of the trial may be disproportionate to the value of their evidence."

40 In any case, however, the court will need to consider the factual matrix against which it will exercise its judgment as to the perceptions and reactions of the "average consumer". That judgment is unlikely to be reached in a complete factual void; on the contrary this is a fairly typical example of an issue of mixed fact and law. That is particularly the case where, as in the present case, the CMA's reference to the "average consumer" is not to the average consumer at large, but rather the particular group of consumers who are either elderly people who need to move into a residential care home, or their children or other relatives who have responsibility for them. The CMA relies in this regard (at least as part of its case) on Regulation 2(4) of the CPUTRs, which provides that:

> "In determining the effect of a commercial practice on the average consumer where the practice is directed to a particular group of consumers, a reference to the average consumer shall be read as referring to the average member of that group."

41 The CMA's case, as set out in both its Part 8 Details of Claim and its subsequent Part 7 Particulars of Claim, is that in that context the average consumer's "circumspection and capacity for rational decision-making was limited by reason of their circumstances", those circumstances being, among other things, that the average prospective resident required a move into residential care as soon as possible, and that their children or other relatives, having emotional bonds with and/or responsibility and concern for the elderly people upon whose behalf they were acting, were at particular risk of accepting unfair contract terms.

42 Mr Facenna says that these issues of fact are vigorously disputed by the respondents, who intend to adduce evidence to demonstrate that the average prospective residents and their families or carers are not prevented by reasons of urgency from carrying out a rational and independent assessment of potential care homes and the relevant contractual terms offered by those care homes. He also points out that the CMA itself has adduced evidence from four consumer witnesses. Although Ms Ford said at the hearing that the CMA did not intend to rely on that evidence for this purpose, it seems to me that there is some force in Mr Facenna's rhetorical question as to why that evidence has therefore been adduced, if it is considered to have no relevant probative value.

43 This issue is in my view a significant issue of fact, and indeed is likely to be a central issue in the claim. The respondents should be entitled to answer the CMA's claims by adducing appropriate evidence of their own, and to test the CMA's evidence in the normal way by cross-examination if that is considered necessary.

44 The fifth and final point is whether the average consumer was caused to enter into a transactional decision that they would not otherwise have taken. Again, Mr Facenna – rightly in my view – characterises this as a question of mixed fact and law. It cannot be addressed simply by legal submissions, but will depend on the evidence as to the basis on which consumers normally make their decisions. Again, as matters currently stand it seems clear that this will be an important area of factual dispute, and one on which the respondents should be entitled to adduce evidence and test the CMA's evidence in the normal way.

45 This is therefore not a case where the court "wait[s] with bated breath to see whether there is a substantial dispute of fact" (*Amey v Birmingham City Council* [2016] EWHC 2191 (TCC), §16). Rather it is one where the factual disputes have been identified on the pleadings and where those factual disputes are, in my view, substantial and indeed important issues in the case. I therefore uphold the order of the Deputy Master, albeit to some extent for different reasons to those that he gave.
