

Neutral Citation Number: [2015] EWHC 1888 (Admin)

CO/5690/2014

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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 24 April 2015

B e f o r e:

MR JUSTICE KENNETH PARKER

Between:

THE QUEEN ON THE APPLICATION OF HOLMCROFT PROPERTIES LIMITED,
Claimant

v

KPMG LLP_

Defendant

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(Official Shorthand Writers to the Court)

MR R GORDON QC and Mr M BIRDLING (instructed by **MISCHON DE REYA**)
appeared on behalf of the **Claimant**

MR J HERBERG QC (instructed by **HERBERT SMITH FREEHILLS**) appeared on
behalf of the **Defendant**

MS M CARRS-FRISK QC and MR D BURGESS (instructed by the FCA) appeared for
the First Interested Party, the FCA

MR B JAFFEY (instructed by Linklaters) appeared on behalf of the Second Interested Party,
Barclays

JUDGE'S DECISION
(As approved by the Court)

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1. MR JUSTICE KENNETH PARKER: I thank all counsel and those that have assisted them behind in presenting this interesting case, and I also compliment them on the efficiency with which they have conducted their advocacy.
2. I have decided that I should allow this claim to go forward. I shall only make a few observations because it is not conventional to give a judgment at this stage, and it is generally not very helpful to do so. I have to remind myself that I am at the stage where I am considering whether this claim is properly arguable.
3. I certainly take into account very seriously the point made by Mr Herberg, on behalf of KPMG, the defendant, that this court should not allow a claim to proceed (particularly when it has had the benefit of the expert advocacy which I have had the benefit of today) unless the court is satisfied that the claim is properly arguable. Otherwise, the court would simply be allowing its resources to be used unmeritoriously and that has consequences for many, including other litigants.
4. However, I should, out of respect for the arguments that have been advanced, just make a few observations about the various points that have been made. It seemed to me, as I indicated in argument earlier today, that there were perhaps four essential points that needed consideration.
5. The first was the fact that there was a redress agreement between the authority and the banks. The point was made forcefully by all the parties that that redress agreement was entered into voluntarily and the banks' obligations under it derive from what, on the face of it, is a contractual agreement.
6. In response to that, Mr Gordon QC contended that that was not the end of the story, that it was necessary in the present context to have regard to the factual and legal background against which that redress agreement was made. He submitted in relation to the factual matrix that what happened here was that the authority (instead of proceeding to use the statutory powers that otherwise would have been available under the legislation to ensure that there was an appropriate remedial scheme in the circumstances that had arisen) decided, in the exercise of its statutory discretion, to take another route. The route that it chose was to enter into agreements with the banks.
7. Therefore, looking also at the relevant documentation (to which Mr Gordon took me on a number of occasions) it would appear that the authority was securing that appropriate, fair and reasonable compensation should be payable to unsophisticated victims of miss-selling through the establishment of these particular arrangements.
8. That, in Mr Gordon's submission, gave those arrangements a sufficient public law dimension to make them amenable to judicial review and he relied, in particular, on the function of the Independent Reviewer which he argued was integral and essential to those arrangements. Again, I do not comment on the strength of the arguments but it does seem to me that the points made in response by Mr Gordon were reasonably arguable.

9. The second point that was raised related to the meaning, scope and application of Section 166. It was argued that this power is used extensively in many contexts and it is inconceivable that it was contemplated that the exercise of the power would, in all those contexts, be amenable to judicial review.
10. Mr Gordon frankly accepted that Section 166 (standing alone) would not have been sufficient to get him home, and also he conceded that in not all contexts where the power under section 166 had been exercised would the exercise then be amenable to judicial review.
11. However, he again focused on the factual and legal matrix here and invited the court in his argument to consider the specific function that the Independent Reviewer was called upon to perform in this particular case; namely, confirming the appropriateness, fairness and reasonableness of the offers of compensation. He argued that, again, that function was integral to the authority's broader regulatory role in important respects. Again, I at this stage, am not confident that I should be dismissing that argument as not properly arguable.
12. Thirdly, considerable attention was drawn to the specific role of KPMG under these arrangements. It was stressed that KPMG's essential function was that of a reporter. It did not enjoy the indicia of any quasi-judicial function, nor could it be suggested that it would be subject, for example, to any rules of procedural fairness or rationality in its decision making that would otherwise adhere to a public body.
13. It was contended that it would simply be inconsistent for this court to impose procedural and substantive duties on the independent reporter, given the nature of the documents to which I was referred.
14. In response, it seems to me that in essence Mr Gordon was contending that this argument begged the question of what, if indeed the independent reporter were exercising public functions, on the basis of the other arguments that he had been presenting, specifically its duties would then be.
15. He would be contending that if he brought the Independent Reviewer within the scope of Public Law, the court would then need to scrutinise carefully what the obligations in terms of procedural fairness and substantive decision making should be imposed on a person in that position.
16. The fourth essential point, it seemed to me, that was put forward was that in this case there were plainly alternative remedies that would give appropriate and adequate relief to the claimant.
17. Mr Ben Jaffey, in his very helpful, concise and vigorous submissions submitted that this application was simply a means of correcting what have might have been an error or a mis-judgment by the claimant in not bringing legal proceedings open to it. The wider point was made by him and by others that indeed that if there were mis-selling there would be a ready contractual remedy for anyone in the claimant's position.

18. Mr Gordon, again, advanced the argument that the whole rationale of this particular set of arrangements was so that persons who might be financially unsophisticated to a considerable degree would have a fair, efficient and effective means of achieving redress for putative miss-selling without the expense, worry and general burden of bringing proceedings in the ordinary course. Again, I am not at this stage able to dismiss that response to this particular point as not reasonably arguable.
19. Reference was also made to the Ombudsman. Mr Gordon said that there were limitations to the jurisdiction of the Ombudsman, and in any event recourse to the Ombudsman did not, in his submission, really meet the nub of the case that was directed at the specific role (and in this case, the performance) of the Independent Reviewer.
20. Mr Ben Jaffey in his submissions submitted further that in so far as the the claim sought to challenge the substance in terms of procedure and quality of decision making it did not bear scrutiny and the claim should not be allowed to continue.
21. It seemed to me that Mr Jaffey was making forceful points, but again, it did appear to me that the claimant had brought forward sufficient grounds for arguing that the quality of the decision making in terms of its fairness and in terms of the outcome did not meet public law standards.
22. Again, I make no comment on the strength of the opposing contentions because that is not my role today. Those, it seems to me, are the four strands. There is, however, a fifth element that I believe that I should mention.
23. It is plain from everything that has been heard today that this matter is one of very considerable general public interest. I am not allowing the claim to proceed solely because of that factor, but it does seem to me a factor that the court should take into account in the balancing exercise to determine whether it is proper to allow a claim to continue to the substantive stage in this court. I have taken it into account and it seems to be a point that supports the claimant in wishing to maintain this claim.
24. So, very briefly, for those reasons, which I know do not in terms pay sufficient respect to the depth and quality of the argument that has been presented to me, I do grant permission in this case.
25. MR GORDON: From our point of view, no other points are added.
26. MR JUSTICE KENNETH PARKER: No, what about directions, are you then going to agree directions that will be put to me in writing?
27. MR GORDON: We can certainly attempt to do that, but I rather imagine that the normal directions 'kick in', in other words, the normal time limits.
28. MR JUSTICE KENNETH PARKER: Yes, but you may want to reflect whether there are any special directions that you would wish to make. Does the question of expedition, for example, arise?

29. MR GORDON: I do not think it does as well. I will check that from our perspective. There is a second point, I suppose, and I have only just thought of it. I have only just thought of it because your Lordship had a Point Five. It is the Point 5 that -- I just wondered whether your Lordship considered the case suitable for a Divisional Court?
30. MR JUSTICE KENNETH PARKER: I do not think I will impose that requirement because I am concerned not to impede the listing and I believe that although it is important, it is no more important than many claims that are decided by a single judge in this court. There should be direction that it is not heard by a Deputy High Court Judge.
31. MR GORDON: Yes, I will just check on expedition. We are not specifically seeking expedition, my Lord.
32. MR JUSTICE KENNETH PARKER: Perhaps you would just reflect on it and confirm what the directions are.
33. MR GORDON: Certainly, yes.
34. MR JUSTICE KENNETH PARKER: Thank you all very much, again.