Case No: CC/2008/PTA/0047

Neutral Citation Number: [2008] EWHC 3392 (QB)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 20 November 2008

BEFORE:

MR JUSTICE ARNOLD

BETWEEN:

ANDREW JOHN WALKER

Applicant/Claimant

- and -

CO-OPERATIVE INSURANCE SOCIETY LTD

Respondent/Defendant

MR C DAVEY appeared on behalf of the Claimant

DR JESS (instructed by Co-Operative Insurance (CIS)) appeared on behalf of the Defendant

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Approved Judgment

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1. MR JUSTICE ARNOLD: This is an application by the appellant claimant for permission to appeal against the order of Mr Recorder Roger QC of 25 January 2008 by which he dismissed an application by the claimant for what in the application notice was characterised as further information under CPR Part 18 but, in fact, turned out to be an application for specific disclosure under CPR rule 31.12 of 14 categories of documents.

2. The claimant's claim, as formulated in his second Amended Particulars of Claim, is a claim that the defendant, with whom the claimant has a number of with-profits endowment policies and personal pension policies, acted unlawfully in two respects. First, that it unlawfully subsidised its stakeholder pensions to his detriment as a with-profits policy holder. Secondly, that it unlawfully determined to grant annual bonuses to different categories of policies, namely personal pension policies and endowment policies. The basis for these allegations is that the defendant is said to have been in breach in one or more of seven implied terms in the contracts in question that are pleaded in paragraph 5 of the Amended Particulars of Claim.

3. The claim has a somewhat unfortunate history that is reviewed in the judgment of Lightman DJ dated 31 January 2008. As Lightman DJ points out in his judgment, the claimant seeks damages limited to £5,000. Moreover, it was the claimant's proposal that the matter be heard under the Small Claims procedure. In the event, it was allocated to the fast track for a one-day hearing on liability only. The hearing on liability was fixed for 31 January 2008. The claimant's application notice was issued on 13 December 2008 and subsequently amended. As I have said, it eventually came before Mr Recorder Roger QC on 25 January 2008, that is to say, six days before the hearing of the fast track trial on liability. The application, as eventually presented to the Recorder, sought specific disclosure of 14 categories of documents. Those categories of documents were extensive and wide-ranging.

4. The defendant served a witness statement of Prudence Katie Hopley, a solicitor engaged by the defendant to act on its behalf in this matter, in which she went through the categories of documents item by item explaining the defendant's position in respect of each category. In summary, what she said was that in a few cases the documents had been disclosed; in many cases the information contained in the documents was irrelevant; and in other cases the categories of documents were too wide and disclosure would be disproportionate.

5. Amongst the categories of documents that were sought was the 11th category, namely documents showing what the £7 million stakeholder pension start-up costs were spent on. Ms Hopley explained where the figure of £7 million came from, namely the defendant's accounting records, and she said disclosing the accounting records would be disproportionate.

6. The learned Recorder in his judgment recorded the fact that in the course of the hearing before him a number of the categories were withdrawn, in particular, numbers 1, 5, 8, 9 and 10. The remainder, however, were persisted with.

7. The learned Recorder's reasons for dismissing the application were, in short, that he was entirely unpersuaded that the categories of documents of which disclosure was sought were relevant to the claimant's claim. Moreover, it is clear that he took the

view that the width of the categories was excessive, and he stated that his clear view was that the application was properly characterised as a fishing expedition.

8. Six days later the matter was heard by Lightman DJ and he dismissed the claim. It is unnecessary to go through his reasons, but I note in particular that the district judge was concerned at the volume of documents that were put before him. I understand they amounted to some four lever arch files, not including the core bundle, for a claim valued at no more than £5,000 and which was originally suggested to be appropriate to be heard under the small claims procedure. He was also concerned about the claimant's motivation for bringing the claim and the circumstances behind the bringing of the claim. He was also concerned about the fact that, if the claimant had valid concerns, they were matters for the FSA; but the claimant accepts that, as the FSA has found, there has been no breach of any FSA rules or guidance. His conclusion at the end of his judgment was that the claim was "hopeless".

9. In the meantime, on 28 January, the claimant had appealed against Recorder Rogers' order. In section 7 of his appellant's notice, he asked for the following order:

> "That the Defendant be ordered to provide to the Claimant copies of CIS Stakeholder Pension Fund accounts from 2000 to date in lieu of the information requested in the draft order attached Application Notice dated 13 December 2007."

10. As that immediately reveals, the application that is sought to be made on the appeal is different to the application that was presented to the Recorder. Whereas the application to the Recorder was for 14 categories of documents, some of which were not in the end asked for but others of which were persisted in, what is now sought is specific disclosure of a different category of documents. The justification for that, as it is presented on behalf of the claimant, is that in the run-up to and at the hearing before the learned Recorder, he had inquired about the accounts for the CIS stakeholder pension funds and had been assured that no such documents existed. On the strength of that assurance the claimant did not make any application to the Recorder, whether by formal amendment to his application notice or otherwise. The claimant says that shortly after the hearing he discovered evidence to suggest that those assurances which he had been given were incorrect, and thus it is that this application is sought to be made on appeal.

11. Before dealing with the application itself, I should also record that the claimant has also appealed against the order of Lightman DJ dismissing his appeal; that he has received permission to appeal for that application from HHJ Marshall QC; and that I understand that the hearing of the appeal has now been fixed for February next year.

12. The defendant resists the application for disclosure that is now made on three grounds. The first is the technical ground that the application that is now made is not the application that was dismissed by the Recorder and, given that this appeal is a review of the recorder's decision, it follows that there is no basis for making the order now sought.

13. In my view, the technical point is probably correct. But, nevertheless, if I was persuaded that evidence had emerged subsequent to the Recorder's hearing which

persuaded me that the documents of which disclosure is sought existed and were relevant, then I do not think I would refuse permission to appeal purely on this ground. The reason is that, whereas the correct course for the claimant to adopt in such circumstances would ordinarily be to make a fresh application, at the time he filed his appeal on 28 January the claimant was acting in person. Moreover, that was only three days before the hearing of application of the trial liability, and it might well have been difficult for him to ensure that a fresh application for disclosure was heard in the intervening period. In those somewhat unusual circumstances I might have allowed the claimant to pursue the application on appeal even though it was not made at first instance.

14. However, the defendant also resists the applicant on two substantive grounds. First, that the documents, even if they existed, are not relevant to the claimant's claim. Secondly, that, as the claimant was assured at the hearing on 23 January 2008, the documents do not exist.

15. Dealing with those two substantive points in reverse order, counsel for the claimant has taken me to four pieces of evidence which he submits support the inference that such documents do exist. First, he points to the Stakeholder Pension Scheme Regulations 2000. They define a with-profits fund as a fund maintained by an insurance company in respect of a particular part of its long-term business for which separate accounting records are maintained in respect of all income and expenditure relating to that part of its business. I add that it is clear from other evidence that the defendant's stakeholder pensions include with-profits stakeholder pensions.

16. Secondly, he points to a report by AKG Actuaries and Consultants Limited of October 2007, and in particular page 290, which sets out a with-profits realistic balance sheet for the CIS With-Profits Stakeholder Fund. This information as stated by AKG is derived from Returns to FSA Form 19. Counsel for the claimant submits that the existence of a balance sheet implies the existence of profit and loss accounts for the three years in question, namely, 2005, 2006, 2007, and further suggests the existence of similar documents for earlier years.

17. Thirdly, he has put before me a document, the nature and source of which are unclear, but appears to be some kind of return by the defendant to the FSA, and in particular page 188, where we find, in respect of the financial period ended 13 January 2007, the statement:

> "Form 4301, With-profits stakeholder. Expenses borne by the funds are limited by stakeholder pension regulations and are currently insufficient to meet the costs incurred. Those expenses which have been charged to the fund have been allocated as acquisition costs."

18. Finally, he has put before me a letter from the FSA to the defendant dated 15 November 2001, which contains the following paragraph on the second page:

> "Expense reserve: I agree that an expense reserve will be required calculated on the basis of a prudent estimate of the present value of future expenses less future recoveries via the 1 per cent per annum

> charge on the Stakeholder fund. This reserve should be held in the balance of the long term fund (ie outside the stakeholder fund) because that is where the expenses will be paid from."

19. On the basis of those four items of evidence counsel for the claimant submits that it is to be inferred that the accounts do exist. In response to that the defendant has put before me this morning a witness statement of Shaun Cooper, who is employed by the defendant as its with-profits actuary, in which he states at paragraph 3:

> "CIS does not keep separate stakeholder pension fund accounts and nor is it required to do so by the Stakeholder Pension Schemes Regulations 2000 (as amended). Stakeholder Pension business is part of the Long-Term Business Fund for which full accounting records are maintained (the assets belonging to Stakeholder with-profits policyholders are separately ring-fenced from the other assets in the fund which include the assets backing a mix of Ordinary and Industrial Branch savings and protection policies as well as the working capital of the fund). Accounting records are kept that demonstrate that the charges made to stakeholder pension policy holders remain within those permissible in the regulations."

20. In my judgment, that statement is a complete answer to the application sought to be made on this appeal. What it shows is that, as one would expect, the defendant does, indeed, maintain accounting records. None of the items of evidence relied upon by the claimant, however, demonstrates the existence of stakeholder pension fund accounts for the years in question as opposed to underlying accounting records. There being no hard evidence that the documents exist and affirmative evidence from the defendant's with-profits actuary that they do not, there is no basis for an order for specific disclosure.

21. I would add that no application has been made before me for disclosure of the underlying accounting records. That was, of course, part of the application that was originally before the Recorder. He dismissed that application and the claimant has not actually sought to appeal against that dismissal. Moreover, even if any application were to be made, my immediate reaction to it would be that disclosure of the underlying accounting records, even if relevant, would be plainly disproportionate to a claim valued at a mere £5,000.

22. In those circumstances it is unnecessary for me to deal with the other point made by the defendant in response to the application, but for completeness I will do so briefly. Counsel for the claimant summarised the claimant's case on relevance in paragraph 19 of his skeleton argument for this hearing as follows:

> "The relevance of the documents is that if the accounts show payments from the working capital into the stakeholder fund during the period 2001 to 2006 and during that time show no significant payments in the reverse direction this will be relevant to whether the Appellant can establish breaches of the terms / duties set out in paragraph 7 above. The amounts and frequency of payments and

> contra payments will be relevant to establishing whether there has been a breach."

23. I am not persuaded that demonstrates that the stakeholder pension fund annual accounts, if they existed, would actually be relevant to the claimant's first head of claim as formulated in his second Amended Particulars of Claim.

24. Finally, I would say this. Mr Davey, who was instructed at a late date by the claimant on the direct access basis, has said everything that could be said in support of his application for permission to appeal. In the result, however, it must be refused.