Case No: CHY09812

IN THE CENTRAL LONDON COUNTY COURT

26 - 29 Park Crescent
London W1B 1HT

Thursday, 6 May 2010

BEFORE:

HIS HONOUR JUDGE COWELL

BETWEEN:

ANDREW JOHN WALKER

Claimant/Respondent

- and -

CO-OPERATIVE INSURANCE SOCIETY

Defendant/Appellant

MR WALKER appeared in person

DR JESS appeared on behalf of the Defendant

Approved Judgment

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1. JUDGE COWELL: This is an application by the defendant, Co-operative Insurance Society Limited, to strike out two claims: one issued on 18 August 2009 and the other issued on 20 November 2009, both by the claimant, Mr Walker. I shall in fact refer to those two claims as the second claim and the third claim. I do that because on 4 April 2006 he issued a claim against the defendant, which was tried in the fast track by District Judge Lightman on 31 January 2008, the district judge having spent very much more than that one day in preparatory reading of the papers; he dismissed the claimant's action against the defendant. That judgment the claimant appealed, and on 24 February 2009 His Honour Judge Knight upheld the judgment of District Judge Lightman.

2. The claimant then sought permission to appeal from the Court of Appeal. That was turned down on paper on 10 September 2009 by Buxton LJ. He was entitled to an oral hearing. There was an oral hearing before Toulson LJ on 19 November 2009 and I shall have occasion to refer to that judgment. It will be evident from the order of events I have mentioned that the second claim was issued before any determination by the Court of Appeal.

3. Toulson LJ refused permission to appeal. The third claim was made the day following the judgment of Toulson LJ on 19 November 2009. The second claim is in very large measure exactly the same as the third claim. There are some additional introductory paragraphs – (B), (C) and (D) in the third claim - but they are little more than comment. There is the addition of a list of other kinds of policies beyond the two kinds of policies which the claimant has, or has had, with the defendant's society. Those policies were either with profits endowment contracts of insurance (and there is a list of them at page 4 of the bundle) or they were personal pension policies (and there were four, which are listed at page 5 of the bundle). In the third claim there are some additional paragraphs in case reference has to be made to them, and they are at pages 158 to 162, and they are numbered 24(i) to 27. The rest of the third pleading is in the same form.

4. I, like Lightman DJ, had a very great deal of reading to do yesterday. One of the reasons why it is necessary to do so much reading is that the particulars of claim in the third action are voluminous. They cover 33 pages in the second claim without the schedules, so there is a vast amount to read. What I shall endeavour to do in due course is to summarise (because I think it is just possible) what it is the claimant is saying.

5. Nevertheless, the defendants by their counsel, Dr Jess, have put in a lengthy defence, necessarily lengthy because of the length of the particulars of claim. There is a useful summary in paragraph 1 of the defence and the defendants reserve their position to strike out in paragraphs 2 and 3 for the reasons there set out, but nevertheless I have gone through the entire defence and I have noted against the particulars of claim what is admitted, in some cases subject to certain qualifications, and there are a number of things which are in fact admitted as matters of fact. I will come back to that in due course.

6. The defendant company directors determine from time to time what bonus payments are to be added to policies, both of the endowment kind with profits, and to the pension policies with profits, and I have already explained that the claimant has some of each

kind. This being a comparatively new field of law to me, I have been greatly assisted in understanding what is involved in the payment of bonuses by a passage in the speech of Lord Steyn in the leading case of Equitable Life Insurance Society v Hyman, [2002] 1 A.C. 408, and the passage is at page 453C-F. I appreciate that he was speaking in terms of the bonus system run by that society, but the feature which must surely apply in all life insurance societies is that the directors have a wide discretion to declare bonuses during the currency of a policy; they are known as reversionary bonuses which are ordinarily irrevocable and vest a legal entitlement in the policy holder; and then there are final bonuses known as terminal bonuses which vest on the policy's maturity.

7. I am not saying the system is in every respect the same as the system in that case, but it must be the case that the directors have a wide discretion. The only point to observe in relation to the Equitable Life case is that it was decided upon the true construction of Article 65 of the constitution of that life insurance company that there was a limitation on the discretion, that limitation being that the directors could not ignore the rights of, and they had to pay the guarantees they had given to, certain policy holders, and could not ignore the guarantees and benefit other policy holders with what ought properly to have been paid pursuant to the guarantees. I bear that in mind, that being the background law. Indeed, the case of Hyman is referred to in the argument of the claimant, which I will come to in due course.

8. The other matter of law which I have been led to in the course of the particulars of claim of the claimant comes from the case of Paragon Finance plc v Nash. That was about whether a mortgagee was entitled to increase the interest rate on a loan and what, if any, limits there were on the power to do so. I shall assume without deciding that the defendant's directors in this case owe the duties as are set out in Paragon, that is, that their discretion should not be exercised dishonestly, for an improper purpose, capriciously, or arbitrarily; and those words come from paragraph 32 of the judgment on page 700 of Paragon Finance [2002] 1 WLR 685. One can, I think, add that they must not exercise the discretion unreasonably in the sense of conduct or a decision to which no reasonable person having the relevant discretion could have subscribed, and I take that from page 702 in paragraph 39, which also appears to be the test (see paragraph 42 at the top of page 703).

9. Subject to a qualification, which I am going to come to in due course, the first case brought by the claimant I am going to summarise in this way: his first case was based on the premise, which he could in no way prove, that commission in excess of 1 per cent was paid out of the premiums, or the fund created by the premiums. The defendant's evidence, which was given by their chief actuary, Dr Bunch, was to the effect that there was a rule stating no more commission than 1 per cent per annum could come out of the particular fund allocated to the particular policy holders.

10. The defendant's evidence by Dr Bunch was that commission in excess of the 1 per cent per annum (which in later years after it was first imposed became 1.5 per cent) came from what was called the working capital of the defendant, that being a wholly different fund separate from the fund created by the premiums that had been paid, that working fund being the company's money which the directors could do with as they determined, in their discretion, and I am assuming that is a question which is only limited in the sense mentioned in the Paragon case.

11. Lightman DJ dismissed the claim on the basis that the defendant's evidence was perfectly clear and the claimant simply had not a shred of evidence to contradict it. His decision was upheld, as I have indicated, by Knight HHJ and permission to take the matter further was refused, first by Buxton LJ and then Toulson LJ.

12. With that in mind I come to the second claim and what I say about the second claim and how it is divided up applies equally to the third claim. Without I hope confusing anybody I want to make it clear that the second and third claims have three different aspects to them. The first aspect (and it takes up more than 20 pages of the particulars of claim) is along these lines: that things like the payment of commission and other expenses, if they do not come out of the funds reserved for the policy holders of the kind that the claimant is, nevertheless do come from out of working capital and therefore do diminish the entire fund of working capital and so reduce the amount distributable by way of bonus, whether reversionary or terminal. The question that arises is even if it does reduce what is available, what is unlawful about that in the sense of what breach of contract is involved, what breach of any other duty such as the duty that rests on the directors on the footing of the Paragon Finance test? That is the first part of the first claim.

13. The second aspect of the second and third claims is that because the directors are paying the guaranteed annuity rates to those policy holders who have policies providing them with such guarantees, and because those payments after a while tend to become higher than the market rate annuities, those payments come from funds intended for, or created by, the premiums paid for other policies, for example, the endowment with profit policies the claimant holds. Thus it is said by the claimant that that is contrary to the principle in Hyman. That incidentally seems to me to be a very ironic point to make for it is as though the policy holders other than the guaranteed policy holders in Hyman itself could lawfully have complained as a result of the actual decision in Hyman, but this second aspect of the second and third claims can only succeed if the guaranteed annuity rates are in fact paid out of other funds. The defendant says they are not, they were paid out of working capital, and the funds for both the ordinary with profit policies and the guaranteed annuity rates policies are ring fenced and separate.

14. Dr Bunch's evidence is exactly to that effect. In Hyman the decision was that the guaranteed annuity rates have as a matter of contract to be paid, and no doubt some funds had to be used which otherwise might have benefited others, but there is nothing in Hyman to suggest that others could properly complain or, indeed, which group of others could properly complain. The essential point made in the defence on this second aspect of the claims is crucially put in paragraph 53 of the defence bundle at page 82, which reads as follows:

> "53. As already pleaded above this claim is misconceived because returns on Endowment policies have been completely unaffected by the Defendant making up any shortfall on investment returns for GAR Policies from its LTBF Working Capital. There can therefore be no breach of any alleged implied term(s) or reasonable expectation of the Claimant. …."

15. The third aspect of the second and third claims is that the defendant company has from time to time stated that it imposes certain restrictions on the amounts it will lend on the

security of its policies. My initial reaction when I read that part of the particulars of claim was that it was simply not evident that that gave the claimant any cause of action, for one asks oneself what duty or obligation to lend can be said to rest upon the defendant? The highest the documentation goes is to be found in documents such as the one in the supplemental bundle numbered 25, this bundle being the bundle attached to an application of the claimant dated 30 April 2010, and indeed there is another reference at page 22 of the same bundle, which is to the effect that the society makes it clear it "will be prepared to" lend; those are the words.

16. One of the extraordinary features of this case is that since the particulars of claim were drafted and served an offer has been made to make a loan of £13,160 secured on one identified endowment policy, the remainder of which have in fact been surrendered, so it is the only one available. That offer has not yet been responded to. It is said that the rate of interest is unlawful, but no explanation has been given as to why the rate of interest is unlawful. In short, this third aspect of the claim not only discloses no cause of action, but in my judgment no possible loss can follow.

17. I suppose this might be as convenient a moment as any to point out that when the first action was before Lightman DJ, and despite the vast amount of reading he had to do, it was in the fast track, and it was in the fast track because the claim was quantified in the region of £5,000, so it is a very important factor in this case that the amount of loss, if the claimant is right, is in the region of £5,000. Litigation of this kind, involving the perusal of more than 30 pages of a pleading and a number of court appearances, is causing the defendant to expend a wholly disproportionate amount of money bearing in mind the likely size of the loss. I will come back in a moment to what I call the qualification to the first three claims made in the claims numbered two and three.

18. I have already dealt with the third aspect of the second and third claims and it seems to me to be the easiest to deal with because the claim is the most preposterous of all. There is simply no duty upon the defendant to lend at all and, as I have indicated, nothing unlawful in the rate of interest has been identified, and no loss, it seems to me, can possibly have been suffered by the claimant, so that clearly has to be struck out. When seeking to strike out ordinarily the party striking out puts in some cogent evidence demonstrating that there is no reasonable prospect of the claim (in this case) succeeding, but of course the evidence has already been given in the earlier proceeding.

19. In relation to the second aspect of the claim, that is, have the funds devoted to the endowment policies and the pension policies with profits been used to pay the other policy holders who have a guaranteed annuity rate in their favour? The evidence is completely against the claimant and so is the decision of all the judges who have dealt with the first claim. There is the evidence; it is irrefutable and it seems to me that to raise that issue again by two further actions is vexatious, particularly as there is not a shred of evidence to put in countering the evidence of Dr Bunch on this point. It is an abuse of process, it is disproportionate in terms of the amounts at stake, and unfair in terms of costs to the defendant.

20. What is the qualification I have mentioned more than once? It stems from a passage in the judgment of Toulson LJ and, indeed, it is that passage the claimant has strongly relied upon. It appeared to Toulson LJ that the complaint the claimant was making was

somewhat wider than the point that was actually dealt with by Lightman DJ. As Toulson LJ puts it at the end of paragraph 6 of his judgment:

> "Rather, his complaint was that the relevant costs were taken from funds which ought to have been preserved for with-profits endowment policy holders including himself."

21. In order to deal with that particular point Toulson L.J. says a great deal in the succeeding paragraphs, noting in particular that the evidence of Dr Bunch was fully accepted by Lightman DJ. He also notes the wide discretion the directors of the insurance company have at the beginning of paragraph 15 of his judgment; no doubt an echo of what Lord Steyn said in the passage I have already referred to. Ultimately, Toulson LJ accepts the evidence of Dr Bunch in paragraph 33 of Dr Bunch's statement. He sets that out in paragraph 17 of his judgment and concludes that the with profits policy holders are not prejudiced.

22. Then in paragraph 18 (and this is the particular point relied upon by the claimant) he says:

> "It is right to note that, in the witness statement of Mr Walker to which I have already referred, he said that there was a line between a subsidy underpinned by reasonable commercial risk and a subsidy that is so loss-making that it could only be described as unlawful. He accepted that for the court to make an informed decision about where the line was, he must be able to see more detailed accounts than he had. There was an unsuccessful application by Mr Walker for further disclosure by CIS of various classes of financial document."

23. Because this aspect of the matter was not entirely considered by Lightman DJ, what is the position now? It seems to me this line that is referred to, on one side of which a subsidy that is so loss making it could only be described as unlawful, is what the claimant is seeking to rely upon. In effect, it seems to me, he wishes to show that the actions by the directors in their dealings with the working capital is contrary to the duty which I have assumed lies upon them, the duty explained in the Paragon case. Attention in the argument before me dwelt upon what the claimant referred to on many occasions as a calamity, or a possible calamity, that might affect the defendant company, or as Dr Jess put it a possible future scenario.

24. Concentration rested upon page 17 in the bundle, paragraph 20. It is a passage in a with profits guide, which is admitted, and explained on page 78 in the defence at paragraph 45. The passage in the guide reads:

> "Losses from certain risks, such as the cost of paying guaranteed annuity rates and any that arise from our operating subsidiary companies, are currently covered by the working capital of the fund. Such risks do not usually affect what you get back. ["you" are the life insurance policy holders.] If the working capital is not enough to meet some or all of these losses, we may have to reduce bonuses and cash-in-values. Similarly, if the level of working capital is more than we require, we may share out additional profits."

25. That seems to me a perfectly sensible warning. The crucial word is "may" and it seems to me the true construction of the document is, when it says "we may have to reduce

bonuses", that that is not a reference to failing to pay the bonuses which have already been declared; it does mean that in future years bonuses are going to be less than those declared in previous years.

26. What the defendant says of that particular paragraph 20 of the particulars of claim, having admitted that that is what the guide says, is that it is only a possible scenario. A reduction in bonuses or cash in value has not occurred to date as a result of working capital being insufficient. A potential policy holder is openly made aware of the possibility in the guide so that he or she can decide whether or not to buy a policy with the stated possible risk. This is a calamity that has not happened and, accordingly, the claimant cannot show he suffered any loss.

27. As Dr Jess points out the claim is backed up in paragraph 20(o) on page 26 of the particulars of claim by what is a wholly unsubstantiated allegation. The allegation (and this is why so much careful attention one has to pay to such a long document as the particulars of claim as it is very easy to overlook some very significant things) at the very end of paragraph 20(o) is "Wasting Long Term Business Fund working capital breeches this term". The "term" referred to is Article 21 of the EU Directive 2002/83/EC, which directive is all about avoiding insolvency.

28. Dr Jess argues, and I entirely accept it, that there is not a shred of evidence of any kind of wasting. What happens is that working capital is simply used, and so far working capital has not been in deficit or, in other words, not enough to meet some or all of the losses, as the guide puts it. Also at page 26 there is an allegation that effectively Article 19 of the directive is breached and it is said: "Investing Long Term Business Fund working capital sourced from life insurance and diamond premiums [etc]…"

29. Dr Jess finds that it is simply not sourced from such premiums, and one only has to look at the evidence of Dr Bunch to see that. The argument based upon calamity, or disaster, about what may happen in the future has in no way caused the claimant to suffer any loss. Essentially, it seems to me, what the claimant is seeking to do (and he used the word "recklessness" on the part of the directors) is to build a case to the effect that the directors are in breach of the Paragon duty, and the breach consists of paying commissions and the like for future business. The fact that that sort of thing is paid for does not, without more, amount to recklessness and this is simply a case of assertions being made upon the basis that the mere assertion is to be treated as wholly true.

30. In short, it seems to me that I have to balance what in my judgment is a merely fanciful chance of showing in some way that the directors have acted in breach of the Paragon duty in the way they have dealt with the working capital. It is fanciful because it involves establishing that Dr Bunch is entirely wrong and also that his successor, who is the actuary of the defendant, who signed as true the defence and so put his reputation upon the truth of that defence. The claimant has to show that all the defendant's evidence is wrong; and also there is the element of vexation, abuse of process, and disproportionality which I have already referred to. In short, it is those latter features, which mean, overwhelmingly in my judgment, that the entire actions should be struck out.

31. There are two further applications. One was made last week on 30 April and the other was made a matter of days ago on 5 May, both by the claimant. The application of 30 April has very helpfully been paginated and I have already referred to the

documents which say that the defendant is "prepared to" lend. It so happens that a policy matured (it is referred to on page 3 of the application bundle). According to a letter all that was paid was £1,004.44 and I understand that was the amount which was paid to the claimant and the rest (which was a figure in excess of £10,000) was money that had been loaned to the claimant by the defendant. The total was approximately the original sum invested of £12,000.

32. The suggestion is that the claimant needs to know the precise amount. For some reason that has not been given to him, and he wants to know what bonuses have been declared, but that is not a very fruitful exercise because it in no way of itself establishes breach on the part of the directors with the Paragon duty.

33. The other matter that this application deals with is that in a letter of 13 October 2009, as an excuse for not lending the claimant any money, the defendant by some employee referred to recent legislation which precluded a loan being made. Since there was no duty to make any loan in the first place, to be told what legislation the person had in mind does not seem to matter a bit. Indeed, it is not part of the defence to this part of the claim that any legislation is relied upon, and it is sought to amend the third aspect of the second and third claims because of the offer that has been made.

34. The claimant explained to me, when it was suggested by Dr Jess that on his own account he said that he could obtain a lower rate of interest from Tesco and so clearly had not suffered any loss, that if he applied to Tesco for a loan they would ask if he had any County Court judgments against him, and because he has he would have to tell Tesco, so he has not taken that any further, but it seems to me none of that has anything whatsoever to do with the absence of cause of action which vitiates the third aspect of the second and third claims.

35. Then, finally, there is the application of 5 May and that, again, seeks to bring into the pleadings the question of the loans and what minimum loan value the defendant would seek to impose. As I indicated, that all goes to the third aspect of the second and third claims which discloses no cause of action at all. In short, the first two aspects of the second and third actions are clearly refuted by clear evidence and the claimant has no evidence in response and nowhere near sufficient to suggest a breach of the Paragaon duty. The third aspect of the second and third claims discloses no cause of action. The order I must make is to strike out the second and third claims and to dismiss the applications of 30 April and 5 May.