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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 3039 (Admin)



No. CO/991/2021

Royal Courts of Justice

Tuesday, 2 November 2021

Before:

MRS JUSTICE LANG

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
PETER KENNEDY & Ors

Applicants

- and -

FINANCIAL SERVICES
COMPENSATION SCHEME LIMITED

Respondent

MR J. HALL (instructed by Moore Barlow LLP) appeared on behalf of the Applicants.

MR A. GREEN QC and MR T. LAU (instructed by Dentons LLP) appeared on behalf of the Respondent.

J U D G M E N T

MRS JUSTICE LANG:

1 This is an renewed application for permission to apply for judicial review of the defendant's decision ("the decision"), communicated in a letter dated 29 January 2021, to decline the claimant's claim for compensation in respect of insurance policies ("the policies") issued by Enterprise Insurance Company Plc ("Enterprise") which has gone into liquidation.

2 Permission was refused on the papers by Sir Ross Cranston, sitting as a High Court judge, on 6 September 2021.

3 I refer to the facts as set out in the pleadings and the witness statements.

4 The defendant's decision was made pursuant to its statutory obligations under the Financial Services and Markets Act 2000 ("FSMA 2000"), the Prudential Regulation Authority Rulebook ("the PRA Rulebook") and the Policyholder Protection Rules ("the PPR") within the PRA Rulebook.

5 The decision was made by the defendant following a review of its initial refusal of the claims. In summary, the claims were rejected for the following reasons:

(a) the Icebreaker partnerships, in respect of which the insurance policies formed an integral part, were found to be failed tax avoidance schemes and are accordingly void for being contrary to public policy;

(b) the claimants were not eligible to claim compensation under the PPR because they, and their insurance policies, formed part of the arrangements which constituted a collective investment scheme ("a CIS"). A CIS, including its arrangements, are excluded under PPR 7.2(3).

(c) Further or alternatively, the claimants were not eligible to claim compensation under the PPR because they entered into the insurance policies as partners of the Icebreaker partnerships. Under PPR 7.2(14), an eligible claimant does not include a person who is or was a partner in a partnership in respect of a contract of insurance entered into by or for the benefit of that partnership.

Grounds of challenge

6 The claimants have renewed their application in respect of grounds 1 to 5. The claimants no longer pursue ground 6, as they accept that the defendant had the material documents from the five files when it made its decision. Furthermore, having now seen the files, the claimants do not consider that the documents would have made a material difference to the Defendant's decision.

7 The claimant's complained that Sir Ross Cranston did not pay sufficient regard to the test for granting permission when he refused permission in their case. I have no doubt that Sir Ross, who was Head of the Administrative Court for many years, was well aware of the correct test and had it well in mind. The test is whether the claimant can establish an arguable ground for judicial review which has a realistic prospect of success.

Ground 1(a) and (b)

8 The claimants submitted that, in determining that the policies were void as being contrary to public policy, and that therefore there was no liability on the defendant to provide compensation, the defendant acted irrationally and/or unreasonably. Furthermore, the

defendant acted in a way that was procedurally unfair and in breach of Article 6 ECHR by not giving the claimants adequate notice of this point.

- 9 In my judgment, ground 1 does not come close to establishing an arguable case of irrationality. The Icebreaker schemes have been considered in detail by the specialist tax tribunals. The Upper Tribunal in *Acornwood LLP v HMRC* [2014] UKFTT 416 (TC) found that the schemes were a tax avoidance scheme. It is not possible for the claimants to re-open or go behind this finding, and they do not seek to do so. They argue, however, that the insurance policies themselves were not, per se, unlawful as contrary to public policy and the defendant erred in finding that the policies were an integral or critical part of the Icebreaker schemes, particularly as investors were not required to take out the policies and the policies were not offered at all in the earlier Icebreaker schemes.
- 10 I consider that these submissions are unarguable. The defendant was entitled to take the view that contracts which seek to avoid tax legislation can engage the illegality doctrine (see the defendant's summary grounds of resistance at para.4.1 and 4.2).
- 11 As to the scope of the scheme, the policies were in place to provide an incentive to investors to join. The policies provided protection at low premiums for the personal capital contribution component of the investment, which was the only part of the investment that was at risk. All these claimants took out these policies. It was open to the defendant in the exercise of its specialist judgment to conclude that the policies were constituent components of an investment scheme deliberately designed to facilitate tax avoidance. In effect, the claimants were seeking to recoup from the defendant the value of their failed investments in a tax avoidance scheme.
- 12 Furthermore, in my view it is unarguable that there was procedural unfairness. The claimants are sophisticated investors who were legally represented. They were aware of the tribunal decisions on the Icebreaker schemes. The public policy issue was clear.

Ground 2

- 13 The claimants submitted that the defendant acted irrationally and/or unlawfully by taking into account and/or giving undue weight to the potential size of the levy it might have to raise if the claimant were accepted. It also acted in a way that was procedurally unfair and in breach of Article 6 ECHR by not giving the claimant adequate notice of this point.
- 14 The defendant stated in the decision letter at para.1.8 that:

“The total amount sought... is appropriately £30 million. FSCS is funded through levies raised on financial services and this would be a substantial figure for FSCS levy payers to bear.”

That estimated figure of £30 million was subsequently reduced to appropriately £11 million.

- 15 In my judgment, this was a legitimate consideration to take into account when considering the public policy aspects of compensating sophisticated investors from losses incurred in an unsuccessful attempt at tax avoidance. The weight to give to this consideration was a matter for the decision-maker. It was not treated as a separate reason for refusing the claims.
- 16 As I have already found, there was no procedural unfairness here. The public policy issue was clear.

Ground 3

17 The claimant submitted that in taking into account and/or giving undue weight to the perceived purpose or motive of avoiding tax the defendant acted irrationally and/or unfairly and with procedural unfairness in breach of Article 6 ECHR.

18 In my judgment, this was a legitimate consideration for the defendant and it was entitled to give it such weight as it thought fit when considering the public policy issue. The claimants were well aware of this issue throughout. I repeat my findings under ground 1.

Ground 4

19 The claimants submitted that in determining that they were not eligible to claim compensation under the PPR because the policies form part of the arrangements of a collective investment scheme, the defendant acted irrationally and/or unfairly and with procedural unfairness in breach of Article 6 ECHR.

20 I agree with the defendant's analysis in its summary grounds of resistance in para.14.1 to 14.4. The defendant was entitled to find that the relevant definitions were engaged on the facts as they found them. In my view, there is no arguable error of law in the defendant's analysis and conclusion. Furthermore, there is no arguable case of procedural unfairness. The claimants and their advisors ought to have been aware the criteria for eligibility to compensation under the PPR would be under consideration.

Ground 5

21 The claimants submitted that the defendant acted irrationally in determining that the claimants were not eligible to claim compensation because they were partners in the Icebreaker LLP within the meaning of PPR r.7.2(14).

22 The defendant determined in its decision at para.4.3 to 4.4.3:

“4.3 Further, and in any event, under PPR 7.2(14) a person who is, or was, a partner in a partnership in respect of a contract of insurance entered into by, or for the benefit of, that partnership is not an eligible claimant.

4.4 FSCS notes what you say in your letter dated 16 October 2020, about the Policies being intended to benefit individual investors, rather than the Icebreaker LLP as a whole. However:

4.4.1 Your clients entered into the Policies in their capacity as partners of the Icebreaker LLP and would not have done so but for their investment in such.

4.4.2 The availability of the Policies, and the protection of your clients' capital contribution that such Policies were intended to achieve, was designed to make the scheme more attractive to potential investors, thereby increasing the funds ultimately available for investment. In this way, the Policies were entered into for the benefit of the Icebreaker LLP.

4.4.3 Accordingly, FSCS does not consider that the Policies can be divorced from the partnership structure to which they were connected. It would be artificial to interpret the wording of PPR 7.2(14) as not applying in the present case.”

- 23 The claimant submitted that an LLP is not a partnership, as a matter of law, and that the purpose of PPR r.7.2(14) was to exclude the possibility of both a partnership and its constituent partners making claims in tandem on the same policy.
- 24 I accept the defendant's submission that there is nothing in the terms of the PPR that excludes this LLP from the definition of "partnership". The term "partnership" is not exhaustively defined in the PPR, presumably because it was not intended to limit the concept of partnership to any one form. Furthermore, the definition of "partnership" in s.417 SMAA 2000 is drafted in wide, inclusive language.
- 25 The defendant agreed that PPR r.7.2(14) is intended to exclude the partnership and its constituent parts. That means that the LLP and its members/partners are excluded from claiming under the PPR. The exclusion could be easily circumvented if the LLPs members/partners could claim collectively on behalf of the LLP but the LLP could not.
- 26 The claimants submitted that the policies were not entered into "for the benefit of" the partnership, as opposed to the individual claimants, and, thus PPR r.7.2(14) was not engaged. I agree with the defendant's submission that this argument puts form over substance. While it is accepted that each policy was entered into by an individual claimant, it is artificial and wrong to suggest this was entirely separate from their investment in the Icebreaker scheme. They would not have taken out the policies if they had not invested in the scheme. The whole purpose of the policies was to provide significant protection for the personal capital contribution that each investor would make into the scheme. Although entry into the policies was not a pre-requisite for investing in the Icebreaker schemes, in practice it is likely they were a significant influencing factor in any investment, given that they would protect the personal capital contribution of investors. Accordingly, entry into the policies was for the benefit of the partnership because it attracted investors/members into the scheme, without which it could not function.
- 27 In my view, the defendant was entitled to apply the PPR in the way that it did based upon its findings of fact. Therefore, the claimant has not established an arguable error of law.
- 28 In conclusion, for the reasons I have given, grounds 1 to 5 are unarguable and therefore permission is refused.
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CERTIFICATE

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This transcript has been approved by the Judge.