

IN THE COUNTY COURT AT CARDIFF

On appeal from the County Court at Cardiff
District Judge Coates
Claim No. G00SA419

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

2 June 2021

Before:

HIS HONOUR JUDGE KEYSER QC

Between:

(1) GARETH ELIAS
(2) PATRICIA ELIAS

Appellants

- and -

BLEMAIN FINANCE LIMITED

Respondent

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JAMIE JOHNSTON for the **Appellants**
GURPRIT MATTU for the **Respondent**

JUDGMENT

HIS HONOUR JUDGE KEYSER QC:

1. This is an appeal from the order made by District Judge Coates at an allocation hearing on 9 March 2021, when she allocated this claim to the small claims track. The appellants, who are the claimants, contend that the decision was wrong and that the case ought to have been allocated to the fast track or even the multi-track. The appeal is brought with permission granted by HHJ Jarman QC. I am grateful to Mr Johnston and Ms Mattu for their very focused submissions.
2. The claim was commenced in the County Court at Swansea in July 2020. The claimants are a married couple now gently entering their maturity. The defendant is a specialist lender; specifically, it lends to people with poor credit ratings.
3. The particulars of claim state the following case. In 2006 the claimants entered into a fixed-term loan agreement over 15 years for £25,000 secured by a charge over their home. The loan was, at least in part, to refinance existing borrowings. The loan was facilitated by a broker who is said to have been

acting as an agent and fiduciary of the claimants. It is alleged that without the claimants' knowledge or consent the defendant agreed to pay and did pay a commission of £1,250 to the broker upon completion of the loan. The payment of the secret commission (as it is alleged to be) is said to give rise to three remedies: payment of £1,250 either as equitable compensation or in unjust enrichment; an account of profits or benefits received by the defendant; and rescission of the loan agreement and the security. There is a distinct claim under section 140B of the Consumer Credit Act 1974 on the ground that the relationship between the parties was unfair. The relief sought in that regard is repayment of all moneys paid in excess of the principal sum, discharge from further obligations, discharge of the security and payment of the amount of the commission. The grounds on which the relationship is said to be unfair are pleaded at great length, but they include the agreement to pay the secret commission, the claimants' lack of experience in financial matters, their poor credit rating, the existence of significant additional fees and charges, the failure to explain the implications of a change in payment date (although, as is acknowledged even in the particulars of claim, that particular matter received redress in 2015), and various factors that are said to have made the decision to lend irresponsible.

4. The defence denies the claim in its entirety. It is a detailed and comprehensive defence and I do not need for present purposes to refer to it in detail. It denies that the broker was a fiduciary. It avers that the fact of commission was disclosed and does not admit that the claimants did not know the amount of the commission. It denies that there was an unfair relationship and it denies entitlement to any relief.
5. The directions questionnaires were filed in October 2020. Both of them showed that no expert evidence was required. (The claimants' draft directions include some relating to expert evidence, but that was presumably a mistake.) The claimants proposed standard disclosure by list; they said that they intended to rely only on their own evidence; they estimated the length of the trial as one day; and they proposed allocation to the fast track. The defendant gave a 3-hour time-estimate for the trial and proposed allocation to the small claims track. Both directions questionnaires were supported with lengthy and detailed submissions on allocation; this, I think, reflected the fact, also evident from the transcript of the hearing before the district judge, that the argument concerning allocation was not a one-off but was the latest instalment in an ongoing dispute that the same lawyers have aired in many cases.
6. An allocation hearing was listed to take place in Swansea on 11 December 2020. It came on in front of DDJ Evans, who is a very experienced retired district judge. He expressed a preliminary view that value and complexity were likely to make the case suitable for allocation at least to the fast track but that he thought this was a decision that ought to be made by one of the district judges authorised to sit in Business and Property Courts work, so he transferred the case to Cardiff for consideration by such a district judge. That was how the matter came before DJ Coates, who, along with her other responsibilities, is one of the Business and Property Courts district judges in Cardiff. As I have said, she allocated the case to the small claims track.

7. At this point, it is convenient to refer to the relevant provisions of the Civil Procedure Rules. Rule 26.6 contains the following provisions concerning the tracks to which cases will normally be allocated:

“(3) Subject to paragraph (1) [which is not relevant to the present case], the small claims track is the normal track for any claim which has a value of not more than £10,000.

(4) Subject to paragraph (5), the fast track is the normal track for any claim –

(a) for which the small claims track is not the normal track;
and

(b) which has a value – (i) for proceedings issued on or after 6th April 2009, of not more than £25,000 ...

(5) The fast track is the normal track for the claims referred to in paragraph (4) only if the court considers that –

(a) the trial is likely to last for no longer than one day; and

(b) oral expert evidence at trial will be limited to – (i) one expert per party in relation to any expert field; and (ii) expert evidence in two expert fields.

(6) The multi-track is the normal track for any claim for which the small claims track or the fast track is not the normal track.”

8. Rule 26.7 provides as follows:

“(1) In considering whether to allocate a claim to the normal track for that claim under rule 26.6, the court will have regard to the matters mentioned in rule 26.8(1).

(2) The court will allocate a claim which has no financial value to the track which it considers most suitable having regard to the matters mentioned in rule 26.8(1).”

9. The matters relevant to allocation are set out in rule 26.8, which (so far as relevant for present purposes) provides as follows.

(1) When deciding the track for a claim, the matters to which the court shall have regard include –

(a) the financial value, if any, of the claim;

(b) the nature of the remedy sought;

- (c) the likely complexity of the facts, law or evidence;
- (d) the number of parties or likely parties;
- (e) the value of any counterclaim or other Part 20 claim and the complexity of any matters relating to it;
- (f) the amount of oral evidence which may be required;
- (g) the importance of the claim to persons who are not parties to the proceedings;
- (h) the views expressed by the parties; and
- (i) the circumstances of the parties.

(2) It is for the court to assess the financial value of a claim and in doing so it will disregard –

- (a) any amount not in dispute;
- (b) any claim for interest;
- (c) costs; and
- (d) any contributory negligence.”

10. Rule 26.5(3) is also relevant:

“Before deciding the track to which to allocate proceedings or deciding whether to give directions for an allocation hearing to be fixed, the court may order a party to provide further information about his case.”

11. There is also a Practice Direction to Part 26. Paragraph 7 deals with the principles of allocation. Paragraph 7.3 provides:

“(1) Rule 26.8(2) provides that it is for the court to assess the financial value of a claim.

(2) Where the court believes that the amount the claimant is seeking exceeds what he may reasonably be expected to recover, it may make an order under rule 26.5(3) directing the claimant to justify the amount.”

12. Paragraph 8.1 of the Practice Direction deals with allocation to the small claims track:

“(1) (a) The small claims track is intended to provide a proportionate procedure by which most straightforward claims with a financial value of not more than £10,000 can be

decided, without the need for substantial pre-hearing preparation and the formalities of a traditional trial, and without incurring large legal costs. (Rule 26.6 provides for a lower financial value in certain types of case.)

(b) The procedure laid down in Part 27 for the preparation of the case and the conduct of the hearing are designed to make it possible for a litigant to conduct his own case without legal representation if he wishes.

(c) Cases generally suitable for the small claims track will include consumer disputes, accident claims, disputes about the ownership of goods and most disputes between a landlord and tenant other than opposed claims under Part 56, disputed claims for possession under Part 55 and demotion claims whether in the alternative to possession claims or under Part 65.

(d) A case involving a disputed allegation of dishonesty will not usually be suitable for the small claims track.

(2) The court may allocate to the small claims track a claim, the value of which is above the limits mentioned in rule 26.6(2). The court will not normally allow more than one day for the hearing of such a claim.”

13. Finally, one must remember that the overriding objective is relevant to all case management decisions.
14. Returning to the present case, I have read transcripts both of the full hearing and of the judgment of the district judge. It is unnecessary to cite passages from the transcript of the hearing. In her judgment, the district judge set out the competing contentions of the parties and continued:

“3. The value of the case is not pleaded. The loan that the Court is concerned with I am told was in the region of £26,000. The Defendant says that the value of the case at its highest is likely to be in the region of £4,000 to £4,500. One of the issues in the case is whether the commission in the case was fully secret or not. The Claimants say that this is a fully secret commission case that therefore rescission is available as a remedy as of right and that for various reasons this was an unfair agreement and the Court will have to grapple with what it puts as being:

‘Complex issues to determine the appropriate remedy considering rescission and counter restitution.’

4. The Defendant says that rescission as a remedy is fanciful in this case, that the Court will have to look at all the circumstances, that the borrowing was actually used for consolidation of other loans and that in reality what the Court will be doing is looking at an

appropriate remedy probably of damages based on commission and charges most likely in the region of around £2,500. They say this is not a complex matter.

5. I have considered all of these arguments and in particular the question of proportionality. It has come to this Court's attention that there are a number of these claims waiting in the wings as it were and they are regularly being listed for allocation hearings. My view is that this is a matter that should now be allocated to the small claims track with a time estimate of three hours in accordance with wider practice that as I understand it is developing in response to claims of this nature. I do not agree that there is anything particularly complex about this matter in the way that Mr Smith has sought to argue that it is that would warrant allocation of the matter to the fast track.

6. Given the issues the proportionate way forward is the small claims track. The judges who sit in fast track trials and small claims track trials are the same judges, they will be familiar with the issues and they will be able to deal with those issues. It is not so complex that it would justify a different allocation."

15. When Judge Jarman QC gave permission for this appeal, he noted in his order: "Notwithstanding the high hurdle which the appellants face to challenge successfully an allocation of this nature, given the potential complexity and value of the claim there is a realistic prospect of success." That draws attention at the outset to the point, made by Ms Mattu, that this is ultimately a case management decision. It is therefore a decision with which this court ought only to interfere if it considers that the district judge made an error of law, or that she failed to take into account matters she ought to have taken into account or took into account matters she ought not to have taken into account, or if her decision was wrong in the sense that it was a decision that was outside the range of decisions reasonably open to her. If the decision is open to review on those grounds, this court is entitled to exercise the discretion afresh.
16. What is striking about the judgment is that, having referred briefly to the issue between the parties as to the value of the claim—which is, after all, the first matter in the list of factors in rule 26.8(1)—, the district judge did not say anything more about it. After she had summarised the parties' competing contentions, the rest of her judgment was directed to proportionality and complexity, with particular regard to what the district judge took to be a developing practice of the courts and to the fact that the same judges who dealt with fast track cases would also deal with cases in the small claims track. In my judgment, this left a hole in the reasoning in the judgment. The value of a claim is fundamental to the question of which is the normal track for allocation, although it is not necessarily determinative of the question of allocation in any particular case. Further, the question of what is proportionate necessarily involves consideration not only of complexity and trial-length but also of value.

17. As is made clear by rule 26.8(2) and PD 26, para 7.3, at the stage of allocation the assessment of the value of a claim is a matter for the court. Nevertheless, the starting point is to look at what is being claimed. If the court forms the preliminary view that the value placed on the claim by the claimant is unrealistic, in that it exceeds the amount that the claimant may reasonably expect to recover, it may (though it is not bound to) exercise its power under rule 26.5(3) by asking the claimant to justify the value it puts on the claim. If at the point of allocation the court is satisfied that the value placed on the claim by the claimant is unrealistic, it will proceed on the basis of its own assessment of the value of the claim. Nevertheless, an allocation hearing is not the same as a hearing for the summary determination of an issue, and where there is a live issue of quantum—such as, in the present case, might turn on the availability of rescission or on the nature of relief that might be granted under the Consumer Credit Act 1974—it will not generally be appropriate for a judge deciding on allocation to do so on the basis of an opinion that, on a contested issue of quantum, one side’s case is preferable to another’s.
18. At all events, in the present case the district judge did not purport to proceed on the basis of any assessment of the value of the claim. She did not express any view at all in that regard. As I have said, this constituted a significant lacuna in the judgment. The starting point ought to have been the value of the claim. The district judge’s failure to address that issue suffices to entitle this court to look at the matter afresh and exercise its own discretion on allocation.
19. The claim form stated: “The claimant estimates the total value of the claim to be up to £21,325.67.” Before the district judge and before me, explanations were given orally and in writing of how the value of the claim had been calculated; these rested primarily on the alleged availability of rescission and the detailed outworking of that relief if granted. Although the claim may or may not succeed and, if it does, the relief granted may or may not be that which the claimants seek, it seems to me that the value of the claim is for present purposes clearly to be taken as being in excess of £10,000 and probably in excess of £20,000. That is not to say that the claimants will probably recover that amount if they succeed on liability. The defendant has raised substantial arguments for the conclusion that any remedy will be of limited value. It is not difficult to see that, whether the matter be viewed in terms of equitable rescission or in terms of relief under the 1974 Act, the making of necessary adjustments so as to avoid giving the claimants a windfall may result in an outcome no more favourable to them than the defendant says. However, if the claimants’ case is accepted at trial, they may well obtain relief with a value such as they contend for. That is not a matter that can be determined at this stage. For the purpose of allocation, the value of the claim ought properly to be taken as the value advanced by the claimants.
20. The nature of the remedy sought has already been mentioned. It is not an entirely straightforward matter: this is a fact likely to have been in the mind of DDJ Evans, who will well have understood that, whatever the merits or demerits of the case, the actual remedy available in equity or under the 1974 Act is a potentially complex and nuanced issue.

21. This in turn has relevance to the likely complexity of the case. It is unlikely that the facts or the evidence will be complex. But the outworking of the facts in terms of liability and remedy is unlikely to be straightforward. This is reflected in the terms of Judge Jarman's order, and I think that it was probably also in DDJ Evans' mind.
22. In this connection, I say a word about legal representation, which is a matter that has been raised in argument before me. It is obvious that the ambit of the small claims track is capable of including cases where legal representation might be appropriate or even necessary. Nothing that I say is intended to deny or contradict that. However, it is also clear from the passages that I have mentioned in the Rules and the Practice Direction that the basic idea is that the small claims track is designed for low-value claims that people might be expected, with a degree of assistance from the court and with simple case management directions, to conduct from beginning to end (including at trial) by themselves and without the need for legal representation. For the respondent, Ms Mattu submits that this consideration does not apply in the present case, because the claimants have entered into a CFA. In my judgment, that cannot be the correct approach. If it were, the fact that these particular claimants have a CFA would be a reason for an allocation that would not be thought appropriate where the claimant did not have legal representation; it would, moreover, treat the prior existence of legal representation as a justification for allocating to a track on which legal costs are not recoverable.
23. More generally, it seems to me that there is a real danger in cases of this sort that issues and arguments that can only be addressed and presented competently by lawyers, to whom perhaps the issue might indeed appear simple if they are experienced at the work, will end up being shunted into the small claims track where litigants in person are not going to be able to present the case. Personally, I should very much doubt whether litigants in person are likely to have competence in questions of secret commission or section 140B of the Consumer Credit Act 1974. I also do not think that it suffices in those circumstances to trust to the wisdom and experience of the district bench: first, not all those who hear cases in the small claims track will have expertise in, or even much experience of, such cases; second, although judges will seek to assist litigants in person they do not act as advocates and are not responsible for researching the law on all the cases that come before them in the small claims lists or for presenting those claims; third, before the matter even comes before a judge the claimant must have been able to identify and formulate the claim that he or she wishes to advance. In cases such as the present, the defendants will almost always have legal representation, even if only in-house. The risk of depriving claimants of the real opportunity of obtaining legal representation seems to me to be a wider reason why some caution is required before cases of this sort are allocated to the small claims track, at least where that is not the normal track for them under rule 26.6.
24. The next specified factor, concerning the number of parties, does not have any particular relevance one way or the other in the present case.
25. In this case, there is no counterclaim or Part 20 claim.

26. The amount of oral evidence that is likely to be received would not require allocation to the fast track. However, I should expect that, if the evidence were tested and considered properly, the hearing would last for more than three hours. One day ought to be allowed for the trial.
27. The claim has no importance for persons other than the parties.
28. The views expressed by the parties regarding allocation do not take the matter further, because there was no agreement. (Of course, even if there had been agreement, it would not have bound the court.)
29. There are no particular matters before me concerning the circumstances of the parties, beyond those that I have mentioned. However, I mention again the fact that allocation of claims of this sort to the small claims track is liable to impose greater burdens and difficulties on claimants acting in person than on institutional or corporate defendants. This may be justified and even inevitable where claims are simple and of low value. But where the claims are of higher value and have a degree of complexity, there is good reason to give proper weight to the value of the claims and not to disregard too readily their complexities.
30. The district judge placed some weight on what she referred to as the “wider practice” that she understood to be “developing in response to claims of this nature.” I do not think that a consideration of that sort is impermissible. However, it does not seem to me to be of much assistance in the present case. First, the mere fact of a practice cannot be sufficient to justify it. If it were, mistakes would become self-authorising by repetition. The rationale for the practice will be relevant, as will the success or otherwise of its operation. Second, apart from the district judge’s reference to her own understanding, the information before me does not establish the existence of any settled practice or, if there is one, what it is. Third, it is unclear what the district judge meant by “claims of this nature”. Claims concerning brokers’ commissions or unfair relationships will vary widely, both as to details and as to value. If a practice is to be relied on, it will at least be necessary to consider whether the justification for the practice in the generality of cases applies also to the specific features of the case under consideration.
31. In conclusion, in my judgment the district judge failed to analyse the case correctly or to have regard to the relevant factors. For this reason, I consider that I am entitled to substitute my own view regarding allocation. I also consider, though with greater hesitation, that the conclusion reached by the district judge was itself outside the scope of the proper exercise of her discretion, having regard to the value of the claim and the nature of the issues. In my judgment, the proper track for the claim is the fast track. I am satisfied that it would be disproportionate to allocate a case of this financial value with an expected length of trial of one day to the multi-track.