Neutral Citation Number: [2021] EWCA Civ 977

Case No: B2/2021/0154

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT EXETER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2021

Before :

LORD JUSTICE BEAN
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

- -

Between :

KAREN SMITH	**Claimant/ Respondent**
- and -	
THE ROYAL BANK OF SCOTLAND PLC	**Defendant/ Appellant**

- -
- -

Robert Weir QC and Jonathan Butters (instructed by **The Claims Guys Legal Limited**) for the **Respondent/Claimant**
John Taylor QC (instructed by **Pinsent Masons**) for the **Appellant/Defendant**

Hearing date: 22 June 2021

- -

Approved Judgment

Lord Justice Bean :

1. The decision of the Supreme Court in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61; [2014] 1 WLR 422 has led to a large volume of claims against banks by customers who took out payment protection insurance (PPI). One of these claims was brought by the Respondent, Karen Smith. She had applied for a credit card with the Appellant, the Royal Bank of Scotland ("the Bank"), in January 2000. She also entered into a separate contract for PPI. Premiums for the PPI were charged to the credit card. If any debit balance on the credit card was not paid in full each month, interest became due on that amount.

2. The Bank received commission payments from the PPI insurer. The commission payable was more than 50% of the premiums. Neither the fact that commission was payable, nor the amount, was disclosed to Mrs Smith. Mrs Smith terminated the PPI contract in early 2006 but did not terminate the credit card agreement which continued until some time in 2015.

3. Mrs Smith brought a claim in the County Court at Bodmin for repayment of the PPI premiums and interest. It was allocated to the small claims track, without objection from the other party.

4. The trial took place before District Judge Stone. He decided that in the context of financial dealing which included the provision of a PPI policy there existed a relationship between Mrs Smith and the Bank that was unfair within the meaning of section 140A of the Consumer Credit Act 1974 (the Act). He made an award of £735.11, interest of £611.18 and small claims track costs assessed at £365 giving a total of £1711.29.

5. A first appeal by the Bank was heard by His Honour Judge Allan Gore QC in the County Court at Exeter and was dismissed in a reserved judgment given on 13 November 2020.

6. Claims seeking the repayment of sums on the basis that there had been an unfair relationship may involve relatively small amounts of money so far as the claimant is concerned. The volume of such claims may, however, be large, and the implications for the bank concerned may therefore be substantial.

7. The appellant Bank, consequently, sought permission to bring a second appeal against the order of the District Judge requiring it to repay premiums and interest. There were two substantive grounds of appeal. First, it was said that, on a proper interpretation of the provisions of section 140A-C of the Act and the transitional provisions, the respondent had no cause of action as the PPI contract had been terminated before the relevant statutory provisions came into force. Secondly, it was said that the judge below ought to have decided that the respondent's claim was time-barred under section 9 of the Limitation Act 1980 as the claim related to the repayment of sums paid over 13 years before the issue of the claim. There was also a third, procedural, ground of appeal which I need not mention.

8. Brief reasons were submitted on behalf of Mrs Smith as to why permission to appeal should be refused, in accordance with paragraph 19 of Practice Direction 52C. The submissions also contended that, if permission to appeal was granted on any grounds,

the grant should be subject to a condition pursuant to CPR 52.6(2)(b) that the appellant Bank:

> "shall in any event pay the respondent's reasonable costs of the proceedings before the Court of Appeal, to be limited by agreement to, or in default, by order of the court.[4]"

9. Footnote 4 stated (in a smaller font size than the main text) that "this is a prospective costs order seeking a condition on the grant of permission and can thus be distinguished from *Akhtar v Boland* [2014] EWCA Civ 943 where the Court of Appeal (expressing regret at the outcome) held that there could be no costs order in favour of the successful party in a case proceeding on the small claims track after determination of second appeal unless one of the exceptions set out in CPR 27.14(2) applied". It is unfortunate that the issue of whether the Court of Appeal has jurisdiction to attach conditions to the grant of permission relating to the payment of costs on an appeal from the small claims track was only referred to in the footnote, and then only obliquely.

10. The application for permission to appeal (PTA) was considered by Asplin LJ on the papers in the usual way. By a decision sealed on 9 March 2021 she granted permission on all three grounds of appeal subject to the condition that the Appellant bank was to pay Mrs Smith's reasonable costs of the appeal limited to the sum agreed between the parties, or, in default of agreement, determined by the court. She stated her reasons as follows:-

> "All of the grounds have a real prospect of success and raise important points of principle in relation to this type of case, of which there are many. There is no High Court or Court of Appeal authority in relation to the interpretation and effect of the relevant transitional provisions and the application of the Limitation Act 1980 in the circumstances.
>
> The condition is imposed because the Respondent is an individual with a small claim who is required to defend a second appeal which is of importance to the Applicant/Appellant, a large corporation, because of the number of similar claims and the extent of their total value.
>
> A formal application to impose a condition must be filed by 4pm on 31 March 2021."

11. Mrs Smith's solicitors filed a notice of application to impose the condition and to cap (in reality to fix) the costs at £136,656 inclusive of VAT. By a cross-application dated 8 April 2021 the Bank applied to set aside the condition as to costs on which Asplin LJ had granted PTA. The Bank contended that there was no jurisdiction to impose such a condition on an appeal in a case which was tried following allocation to the small claims track. Alternatively, they contended that the Mrs Smith's solicitors had mis-described the case in their statement placed before Asplin LJ and that in reality the protagonists in this appeal are the bank and the Mrs Smith's solicitors, who are acting in a large number of PPI claims on the basis of a commission of 40% of the sums awarded. The Bank appended to its application a *Guardian* newspaper article from 2019 reporting

that The Claims Guys stated that it has obtained more than £900 million in PPI pay-outs for clients since 2009.

12. We decided to deal with the Bank's jurisdiction point first. In considering whether to revoke or vary the grant of permission to appeal or the conditions on which permission to appeal has been given the full court does not sit on appeal from the single Lord or Lady Justice (LJ) who granted permission. We can only discharge or vary the order of Asplin LJ if there is a compelling reason to do so: CPR 52.18(2). But it cannot be disputed that if a condition imposed on the grant of PTA was one which the single LJ had no power to impose, that is a compelling reason for setting the condition aside.

13. CPR 27.14(2) provides that the court may not award costs in a case allocated to the small claims track, with some specified exceptions which are not in issue here. In *Akhtar v Boland* [2014] EWCA Civ 943 this court held (per Sir Stanley Burnton) that "the wording of CPR 27.14 is clear, and extends to the costs of an appeal, and I see no basis for construing that as inapplicable to an appeal to this court". In *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339, another significant case in the PPI litigation, the bank ("CSO") had lost in a small claims track trial and on appeal to a High Court judge. Lewison LJ granted PTA to this court and wrote in his reasons for giving PTA:

> "Ms Potter has asked for the grant of permission to be made conditional on CSO paying her reasonable costs of the appeal irrespective of the outcome. Similar orders have been made in other cases where the amount in issue was small and the appellant wished to clarify the law for its own benefit e.g. *Morris v Wrexham* [2001] EWHC 697 (Admin); *Ungi v Liverpool CC* [2004] EWCA Civ 1617. But this is a case to which CPR part 27.14(2) applies. That rule applies to a second appeal to this court, *Akhtar v Boland* [2014] EWCA Civ 943. Under that rule the court has no power to make an order for costs. I do not consider that where a rule expressly deals with the questions of costs it would be a proper use of the power to attach conditions to be used to sidestep the rule."

14. When the substantive appeal in *Canada Square v Potter* was heard in this court the refusal of Lewison LJ to impose the costs condition applied for was noted at paragraph 52 and there was no suggestion that he had been in error.

15. *Ahktar v Boland* is binding on us; so that, as Mr Weir accepts, neither party to this appeal could be ordered to pay the other party's costs. It is of course quite commonplace for this court to grant a party with large resources permission to appeal (whether a first appeal or a second appeal) on terms that it pays the opposing party's costs whatever the outcome, but appeals from cases heard on the small claims are an exception.

16. There are situations in which the court can impose a condition on a party's continuing participation in a case which could not be the subject of a direct order. Mr Weir referred us to *Edwards-Tubb v J D Wetherspoon plc* [2011] EWCA Civ 136; [2011] 1 WLR 1371, a personal injury case in which the claimant, having set in train the pre-action protocol procedure for nominating experts and been examined by his nominated expert, A, then issued proceedings accompanied by a report from a different, nominated expert,

B. It was held that, even though the report from expert A was the subject of privilege and could not be the subject of an order for its disclosure, the court could properly refuse permission for the claimant to reply on the report from B unless he waived privilege in, and disclosed to the defendants, the report from A. There are many other examples. An even more commonplace feature of personal injury litigation is that a court will not make a mandatory order requiring a claimant to attend a medical examination, but can say that if he declines to attend his claim will be stayed. But in neither of these cases is a court overriding an express provision in the Rules.

17. There is a distinction between a court imposing a condition which it would not ordinarily make the subject of a direct order (such as an order that party A should pay party B's costs on appeal whatever the outcome in a case where CPR 27.14 is not engaged), and a court imposing a condition which it could never make the subject of a direct order because statute or a rule of court expressly prohibits it. I agree with the decision of Lewison LJ in *Canada Square v Potter* that where a rule expressly prohibits orders for costs it is not a proper use of the general power to attach conditions so as to sidestep the rule.

18. Mr Weir sought an alternative way of upholding the judge's order, which is to ask us to re-allocate the case to the fast track or multi track. The county court's discretion to reallocate to a different track under CPR 26.10 was described by Dyson LJ in *Maguire v Molin* [2003] 1 WLR 644 at [26] as apparently unfettered, and no doubt that is true; but it is far too late for us to reallocate the case now. No application was made in the county court, as it could have been, for the case to proceed on the fast track or multi-track. Appeals in this court do not proceed on the small claims track, fast track or multitrack: these are county court concepts. We cannot rewrite the history of the case.

19. These are my reasons for the decision, which we announced after hearing oral argument on the point, that the costs condition was one which Asplin LJ had no power to impose and must accordingly be set aside. This made it unnecessary for us to hear argument on whether, had the power existed, there was any other compelling reason for varying or revoking the condition as to costs.

Lord Justice Lewis:

20. I agree.

Lady Justice Elisabeth Laing:

21. I also agree.

ORDER

IT IS ORDERED that:

The costs condition imposed by Lady Justice Asplin when granting permission to appeal be set aside with (for the avoidance of doubt) no order as to the costs of this application.

Dated 30 June 2021