IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 866 (Admin)

No. CO/2899/2020

Royal Courts of Justice

Thursday, 11 March 2021

Before:

MR JUSTICE HOLGATE

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
SIDHPURA — Claimant

- and -

POST OFFICE LIMITED — Defendant

THE SECRETARY OF STATE FOR
BUSINESS, ENERGY AND INDUSTRIAL STRATEGY
Interested Party

MR P. COPPEL QC and MR P. MARSHALL appeared on behalf of the Claimant.

MISS M. CARSS-FRISK QC and MR D CASHMAN appeared on behalf of the Defendant.

The Interested Party did not appear and was not represented

J U D G M E N T

(Transcript prepared from Microsoft TEAMs recording)

MR JUSTICE HOLGATE:

Introduction

1 This is an application for permission to apply for judicial review in relation to the defendant's Historical Shortfall Group Scheme ("the Scheme"). The claimant is a former sub-postmaster, whose contract with the defendant was terminated by the latter in 2018 after it had purported to identify a shortfall of £57,000 on its Horizon system for the account relating to his branch. He was interviewed under caution. Although he vehemently denied the shortfall, he paid the sum under protest to avoid civil litigation and, indeed, the risk of prosecution and stigma arising from the allegation.

2 This is an *ex tempore* judgment which I am giving following the oral submissions this morning. I apologise for any infelicities in the delivery of this judgment. I will endeavour to deal with the additional, new submissions which were made on behalf of the claimant this morning.

3 It is well known that defects in the Horizon system resulted in great numbers of sub-postmasters being wrongly accused of false accounting, resulting in misconceived civil claims brought by the defendant and the terrible personal tragedies suffered by many, including bankruptcy and even criminal convictions. When the truth began to unfold, claims were brought against the defendant for breach of contract and various torts by about 550 sub-postmasters. These were the subject of a group litigation order in March 2017, which resulted in heavily contested hearings before Fraser J and two substantial judgments, [2019] EWHC 606 QB and [2019] EWHC 3408 QB, delivered respectively on 15 March 2019 and 16 December 2019.

The Historic Shortfall Group Scheme

4 On 10 December 2019, a confidential settlement deed was entered into to settle the group litigation. Clause 9.4 obliged the defendant to establish the Historic Shortfall Group to deal with issues relating to Horizon shortfalls between 2000 and 2019. The object was to bring finality to any outstanding issues and to determine, whether in the light of the two judgments of Fraser J, shortfalls said to relate to other postmasters falling outside the group litigation should be paid or repaid. Schedule 6 required the Group to set up a Historic Shortfall Group Scheme. The Scheme was to allow three months for sub-postmasters who had been in a contractual relationship with the defendant to apply to join, setting out any outstanding issues with supporting evidence. In short, schedule 6 provided for ADR. The Historic Shortfall Group was to investigate and evaluate each claim, arrange for meetings with each claimant to endeavour to resolve the dispute, to enter into mediation and ultimately, if those prior steps had been unsuccessful, the matter would be dealt with in the County Court or, where the sum in dispute exceeds £10,000, by arbitration. Schedule 6 did not provide additionally for the intervention of any independent advisory panel.

5 Pursuant to that deed, on 1 May 2020 the defendant established the Scheme, defined in two documents, the Terms of Reference and Eligibility Criteria, supplemented by a third document entitled "Questions and Answers". The Scheme builds upon Schedule 6 of the deed.

6 Turning to the Terms of Reference, para.3 states that any application to join the Scheme had to be made by 14 August 2020. Thereafter, applicants are not eligible to join unless the defendant agrees to that. Paragraph 5 states that applicants are required to agree to the Terms

of Reference. Those who do not agree to those terms are not eligible to participate. Paragraph 6 provides that once an application had been made, either party could write to the other to request relevant information and that they were to cooperate with each other in providing information which is reasonably requested and proportionate.

7 Paragraph 7 states:-

> "Eligible applications made under the scheme will be individually investigated and the outcomes assessed by an independent advisory panel. Following assessment of the claim, the Post Office will write to the applicant, setting out the outcome of his or her application."

I interpose to note that it was not promised in that paragraph that an "outcome letter" would simply set out the assessment made by the panel.

8 Paragraph 8 provides that if a person is dissatisfied with the outcome, then the ADR procedure would ensue and, in the event of a claim not being resolved, it is agreed that the claim will be determined by the County Court, unless the amount involved exceeds £10,000, in which case it is to be referred to arbitration.

9 The Eligibility Criteria document again states under para.4 that an applicant has to agree to be bound by the terms of reference of the Scheme. Paragraph 5 excludes matters involving or relating to any criminal convictions, on the basis that only the Criminal Division of the Court of Appeal can consider past convictions. Paragraph 6 excludes from participation in the Scheme a person who had been part of the group litigation against the defendant that was settled in December 2019.

10 The Questions and Answers document supplements the first two documents to which I have referred. In relation to information to be provided in support of an application, the document states that an applicant should provided relevant supporting material that would enable the application to be properly considered. That would include any relevant accounting or financial information. Doing this enables the application to be assessed and considered more efficiently.

11 On page 2 of the Q and A document the defendant addresses the question whether a participant may leave the scheme. The answer given is that they can do so by withdrawing their application at any time before receiving an outcome letter.

12 Page 3 of the document deals with the subject of independence. It states that eligible applications would be reviewed and assessed by an "independent *advisory* panel" (emphasis added). The document adds that there would also be a dispute resolution process that would include independent mediation.

13 Page 5 of the document, under the heading "Scope of the Scheme", explains that the Scheme would address firstly, shortfalls and secondly, losses linked to a shortfall which a sub-postmaster had been required to repay. Thirdly, in relation to the issue of whether consequential losses could be recovered, such as distress, ill-health and financial loss, the document states that eligible claims would be assessed by reference to recognised legal principles. As a matter of common sense, it is to be inferred that the document is referring to established principles of English law referable to claims of this nature, or such claims as any individual may wish to raise. Once again, there is an exhortation to participants to provide as much information and evidence as they can about any shortfall-related losses.

14 Finally, on page 6 of the document, under the heading "Assessment of claims", firstly the document repeats that claims would be assessed in accordance with "recognised legal principles", including those established by the group litigation. It is common ground that that refers to the substantive judgments of Fraser J. Secondly, the defendant's solicitors, Herbert Smith Freehills, would be responsible for assessing the eligibility of applications. Thirdly, each eligible application would be assessed by an independent advisory panel, following which the defendant would write to the applicant, setting out the outcome proposed.

15 The court has been told that by 26 February 2021 the defendant had received 2,478 claims. The court has also been told that a substantial number of outcome letters have already been issued, but solely in relation to the issue of eligibility.

16 Because the claimant and the defendant had already been in correspondence about the Scheme, the defendant wrote to him on 4 May to inform him about its launch and also the end date. Nearly a month later, on 2 June, the claimant raised a number of queries which were answered by the defendant on 5 June. It was confirmed that if he were to join the Scheme he could withdraw at any point prior to receiving an outcome letter, but if dissatisfied with that letter, mediation would follow, leading ultimately, in the event of the dispute remaining unresolved, to arbitration. That was because of the potential size of his claim.

17 On 9 July, the claimant was reminded of the closing date for applications. On 16 July, he sent some further questions to the defendant, to which they responded on 27 July. For example, he asked why there was no more detail in the documentation on the criteria for assessing eligibility and compensation. The defendant responded that the judgments of Fraser J already provided considerable guidance on the principles to be applied and the intention was for guidelines to be agreed with the independent panel before being shared with "postmasters who have applied to the Scheme". So, it was made clear at that stage that there would be a further development of the principles to which I have referred.

18 On 27 July 2020, the claimant replied to the defendant saying "Thank you for that information - very helpful." Then he raised the possibility of discussing his issues with the defendant on a "one-to-one personal basis" without incurring costs, rather than joining the Scheme. On 28 July, the Post Office responded that their preference was for the claim to be independently assessed and resolved through the Scheme that they had established. On 30 July, the claimant replied that it was not in his interests for him to join the Scheme at that stage and he needed to seek advice.

The claim for judicial review

19 On 11 August 2020, the claimant's solicitors sent a pre-application protocol letter to the defendant. At para.15 they set out in summary form the proposed grounds of challenge: first, inadequate time had been allowed for sub-postmasters to consider whether or not to join the Scheme; second, inadequate information had been given to them in order to decide whether or not to join the Scheme; and, third, the required surrender of rights by sub-postmasters when joining the Scheme, including the right to have their claim determined in open court, was improper. Those three issues became grounds 1, 2 and 3 of the statement of facts and grounds.

20 In para.16, the solicitor said that this decision concerned an extra-contractual scheme put forward by a public body and, as such, was amenable to judicial review. Paragraphs 19 and 20 of the letter elaborated ground 1 in a way which was subsequently repeated in the statement of facts and grounds. Paragraph 34 elaborated the complaint under ground 3, by setting out the civil rights which individual sub-postmasters were expected to cede on joining the Scheme. Paragraph 41 set out the action which the defendant was expected to take. It was

invited to withdraw the Scheme lock, stock and barrel. In the alternative, it was said that the deadline for applications to join the Scheme should be extended by a period of six months to 12 February 2021, that being the earliest realistic date on which the Court of Appeal could be expected to rule upon criminal cases referred to it by the Criminal Cases Review Commission.

21 Somewhat optimistically, the solicitors asked for a response by 4.00 p.m. the following day. Not surprisingly, on the following day, the defendant's solicitors stated that they had not been allowed sufficient time within which to give a response to the pre-action protocol letter, it being well-understood that a claimant should normally allow 14 days for such a response. The point was also taken at that stage that the claim had not been brought in time.

22 On 18 August, the claim form was issued and sent to the defendant. It raised substantially the same points as had been foreshadowed in the pre-action protocol letter. The claim asks that the current scheme be quashed and also for a declaration that it is unlawful. Alternatively, it seeks an injunction to prevent the administrators of the Scheme from refusing to accept applications to join it made by 12 February 2021. In para.15 of the statement of facts and grounds, it is said that the claimant and other persons in the same position would be forced to litigate their claims against the Post Office if they did not sign up to the Scheme. That, indeed, reflects the civil rights which it is said under ground 3 are improperly removed by the Scheme.

23 As foreshadowed in the previous communications between the claimant and the defendant, the defendant subsequently issued Terms of Reference for the Independent Advisory Panel and "Consequential Loss Principles and Guidance" documents. This took place by about 30 September 2020.

24 The defendant has filed an acknowledgement of service with summary grounds of defence. The claimant has filed a brief reply. The interested party, the Secretary of State for Business, Energy and Industrial Strategy, has filed an acknowledgement of service but said that he would not file submissions at this stage.

25 On 26 November 2020, Eady J adjourned the application for permission to be dealt with at an oral hearing.

26 I have had the benefit of detailed skeleton arguments, supplemented by substantial oral submissions from counsel. The main issues are whether the claim is arguable and, it if is, whether permission should be refused because the application is out of time under CPR 54.5.

Amenability to judicial review

27 The first issue is whether it is arguable that the defendant is amenable to judicial review in respect of the subject matter of the claim. Paragraph 14 of the claimant's skeleton stated that it is not in dispute that the Scheme has been voluntarily created by the defendant. It was accepted that the defendant was not under any statutory obligation, or contractual obligation owed to the claimant, to create the Scheme or, indeed, any compensation scheme. Rather, the scheme has been created by the defendant under its common law powers as a legal entity to give such money as it likes to whom it likes and on such terms as it likes. It is then submitted that in doing this as a public body it must do so fairly, relying upon submissions which follow at paras. 37 to 38. Those paragraphs simply deal with situations in which the courts have held that certain *ex gratia* compensation schemes are amenable to judicial review. At para.40 of the skeleton, under what is labelled Question 3, the claimant states that judicial review is only available against a body or person "exercising public functions that involves a public element", citing the well-known cases of *R. v. Panel on Takeovers and Mergers ex parte*

Datafin plc [1987] Q.B. 815; *R (Beer) v Hampshire Farmers' Market Limited* [2004] 1 WLR 233 and *R (Holmcroft Properties Limited) v KPMG LLP* [2020] Bus LR 203.

28 The claimant rightly cites the judgment in *Holmcroft* of Arden LJ (as she then was) at [40]:-

> "The authorities cited demonstrate, as the Divisional Court pointed out, that the fact that the decision emanates from contractual arrangements does not mean that public law principles are inapplicable. The question is whether the body is carrying out a public law function…"

I also note the decisions in *R v Insurance Ombudsman Bureau ex parte Aegon Life Assurance Limited* [1995] LRLR 101 and *R v Jockey Club ex parte Aga Khan* [1993] 1 WLR 909. They allow for the possibility that the functions of a body, albeit not derived from legislation or the exercise of governmental power, might nonetheless be amenable to judicial review if sufficiently woven into the fabric of public regulation or a system of governmental control.

29 Mr Coppel QC for the claimant submits that the Post Office has long been regarded as an emanation of the state and that that status has not changed as a result of incorporation. He points out that the company is wholly owned by the state and that there are a number of statutory provisions governing its constitution. It receives public funding and it must make an annual report to the Secretary of State. But he accepts that merely because an entity is, or may assumed to be, a public authority does not address the critical question in this case, namely, whether it is arguable that the function discharged by the defendant is itself a public law function, or influenced by public law, and therefore amenable to judicial review.

30 At para.48 of his skeleton Mr Coppel QC says that this claim for judicial review is not concerned with enforcing private law rights. Instead, it is concerned with the nature of an *ex gratia* compensation scheme created by the defendant exercising a common law power. At that point in his argument, he relied upon a number of authorities which undoubtedly show that in some circumstances an *ex gratia* compensation scheme is amenable to judicial review. But I do not accept that they support the approach which Mr Coppel seeks to take. This is simply because those cases, and there is now no dispute about this, are all examples where it is plain that both the decision-maker was discharging a public or governmental function and, moreover, the source of the power was either legislation or the royal prerogative. As I have said, even if the court were to accept, for the sake of argument, that the Post Office is, at least for some purposes, a public authority, that would not, in itself, be sufficient to render the Scheme amenable to judicial review. For example, there can be no doubt that a local authority is a public body amenable to judicial review of its functions. But disputes involving a local authority which only relate to private law issues are not amenable to judicial review, for example, claims based on negligence, contract or property law, not unless a public law element has been injected into the dispute. For example, decisions on letting contracts which are the subject of the procurement code, a statutory regime, are amenable to judicial review.

31 It is therefore necessary to consider the nature and purpose of the dispute resolution or compensation scheme which has been established in this case and, in particular, whether it is for the resolution of private law issues. The relevance of this point is illustrated by the decision of the Court of Appeal in *Holmcroft*. There, a bank had agreed with its regulator to review and provide fair compensation to any of its customers who had been mis-sold interest rate hedging products. The bank undertook to appoint a firm of accountants as a "skilled person" to provide an assessment in each case of whether the compensation to be offered was fair and reasonable. In addition, the regulator exercised a statutory power to require the accountants to make a report to it on the operation of the scheme. The Court of Appeal accepted that the banks in question had been obliged by the regulator to grant redress and to

engage a "skilled person" to assess the compensation offered and therefore fell within the statutory scheme of regulation (see [39]). But the court went on to hold, in summary, that that did not alter the nature of the scheme, which was essentially for addressing private law rights. The compensation was to be negotiated on private law principles and if agreed would be enforceable through the courts, not, for example, by the regulator. The requirements which the regulator had imposed merely overlaid or sat alongside a private law dispute, but they did not change the character of that dispute, which was fundamentally a private law matter. Accordingly, a decision by the independent reviewer was not amenable to judicial review. Mr Coppel QC went on to accept that the scheme in that case was not amenable to judicial review.

32 The Divisional Court reached similar conclusions in the *Aegon* case, to which I have referred. That related to a voluntary scheme for resolving complaints by customers of insurers. I accept the submission of Miss Carss-Frisk QC, who appeared on behalf of the defendant, that the reasoning in *Holmcroft* applies *a fortiori* here. The Post Office has voluntarily created a scheme for addressing private law rights.

33 It appeared to me when I was reading the papers in this case that it was not legally obliged to do so and that that was indeed the position adopted by the claimant in his skeleton. On that basis, if, hypothetically, it is assumed that the claim proceeds and were to succeed, resulting in the quashing of the Scheme, the defendant would be under no legal obligation to put another in its place. That, in my judgment, is an important indicator against any public law element being involved.

34 When I put these propositions to Mr Coppel initially this morning, he appeared to accept them. It may be that I misunderstood his position. But that did appear to be consistent with para.14 of the claimant's skeleton (see [27] above). The focus of the claimant's case had been that this was a public body creating an *ex gratia* compensation scheme. But subsequently in his oral submissions, Mr Coppel QC said that the defendant had been obliged to create a scheme of the present kind as a matter of public law. He sought to rely upon the 2019 deed. When pressed on the point, he said that this had created a substantive legitimate expectation that a scheme would be created by the defendant, presumably on the lines set out in Schedule 6.

35 Mr Coppel QC relied on a number of provisions in the deed. It is not necessary in this judgment to refer to all of them in order to summarise his argument fairly. He began with cl.9.1, whereby the defendant acknowledged the criticisms that had been made in one of the judgments of Fraser J about its dealings with postmasters. He then referred to cl.9.2, by which the defendant states that it is committed to improving its culture and has a new management team which intends to make fair, just and reasonable improvements in accordance with a plan annexed at Schedule 5. That schedule describes a range of improvements addressed to relations with sub-postmasters.

36 Mr Coppel QC relied upon cl.9.4 and schedule 6, to which I have already referred. He submitted that non-group litigants, such as the claimant, cannot enforce the deed. They are not parties to the deed and any ability they might otherwise have had to rely upon it has been excluded under cl.14. He then submitted that the group litigants who were parties to the deed have no standing to enforce cl.9.4 and Schedule 6 of the deed. Non-compliance with those provisions would not cause them to suffer any loss sounding in damages and they would be unable to obtain specific performance. He therefore submitted that there is an absence of a private law remedy to secure the promises made in cl.9.4 linked to Schedule 6. His analysis is that in the absence of private law remedies these clauses serve no purpose other than a public purpose, and on that basis a public law obligation was thereby created. Having said that, Mr Coppel recognises that it is well-established by cases such as *Aegon* and *Holmcroft* that the mere fact that there may be a gap in the provision of a remedy in private law does not

suffice to justify intervention by the Administrative Court. That does not connote that a function has a public law element.

37 This new line of argument emerged for the first time in oral submissions this morning. It is not in the pleadings and it is not even in the skeleton. I should refer to the recent decision of the Court of Appeal in *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605; [2021] 1 All E.R. 780, where Lord Burnett LCJ re-emphasised the need for procedural rigor in proceedings for judicial review and that the courts generally will not tolerate attempts to rely upon arguments which have not been pleaded. They will not accept that skeleton arguments can be treated as some alternative form of pleading. *A fortiori* it must follow that the pursuit of new points in the form of oral submissions is unacceptable. However, I recognise that this is a permission hearing and, however unsatisfactory the manner in which this point was raised, I recognise that it is important for the court to grapple with it appropriately.

38 I acknowledge that the settlement deed was, at least in its inception, a confidential document. But it arrived in the public domain, so far as the court has been informed, on 6 August 2020, pursuant to a Freedom of Information Act request.

39 The court does not know the circumstances in which cl. 9.4 and schedule 6 were included. It may be that the group litigants wished to secure promises of this kind from the defendant irrespective of any issue as to their legal enforceability. Sometimes provisions of this nature may find their way into a document by way of "comfort" or as part of the overall vindication of the rights of those in the same position. By putting it in that way, I am not meaning to understate the importance of such provisions. At all events, the absence of a private law remedy does not mean that a public law remedy should necessarily be available to deal with any perceived gap in enforceability.

40 These provisions of the settlement deed cannot be equated with other documents which may give rise to a legitimate expectation, such as a circular or a public announcement made by a minister or an authority. The mere fact that promises of this kind may have had a wider purpose than the immediate resolution of the civil litigation issues raised by the group litigants does not, of itself, mean that the functions they relate to are impregnated with any public law element. One must not confuse public interest or public importance with the incidence of judicial review applying public law principles. No authority has been cited to support this new analysis on behalf of the claimant.

41 Mr Coppel QC points out, perfectly fairly, that the Secretary of State has an interest in the Scheme in as much as he provides funding for it. He also draws attention to a letter dated 6 January 2021, which dealt with requests for information from the Secretary of State's department. The extent to which it was prepared to provide information is explained in terms of, for example, public interest issues, transparency and commercial confidentiality. But, again, it is necessary to be careful about material of this kind. The mere reference to public interest does not, of itself, mean that a function has a public law character. There are many examples of public interest issues which are related to purely private law matters.

42 I return to the legal nature of the Scheme. A person in the claimant's position is not obliged to join. If he does, he or she may leave at any time before receiving an outcome letter. Outside the Scheme, a sub-postmaster is entitled to pursue a shortfall claim through the courts. Such a claim would be entirely governed by private law principles, be they matters of contract or tort. No element of public law would be involved at all. In my judgment, the nature of any such claim and how it may be resolved does not alter if the individual chooses to have the matter dealt with under the Scheme. Private law principles apply to eligibility and quantum

of compensation. If the offer put forward in a particular outcome letter is unacceptable to that participant, discussion and mediation would follow. If that does not produce an agreement the dispute would be resolved either by the county court or by arbitration, in either event, applying private law principles to what remains throughout a private law dispute. Any agreement or award would then be enforceable through the courts under private law.

43 Correctly understood, this Scheme is analogous to that dealt with by the Court of Appeal in *Aegon* and *Holmcroft*. There is no possible basis in my judgment for arguing that the Scheme has any public law character or engages any principle of public law. Because the Scheme is not arguably amenable to judicial review, the application for permission has to be refused on that ground alone. However, I go on to consider the arguability of the grounds of challenge in case I may be wrong about that first issue.

Ground 1

44 Ground 1, as pleaded, is wholly unsustainable. It is said that there was an inadequate time for potential applicants to decide whether to join the Scheme, given that (1) the full implications of the judgments of Fraser J were not yet known and (2) the Court of Appeal Criminal Division had yet to determine a number of appeals against conviction which may affect, it is said, the assessment of compensation. Neither point was properly explained in the statement of facts and grounds and, not surprisingly, they were not maintained in the claimant's skeleton.

45 That second point is inconsistent with the ambit of the Scheme, which excludes conviction cases. It is impossible to see how the outcome of the criminal appeals could affect the assessment of compensation for someone who was not convicted. The only example given under the first point was that the Metropolitan Police was still investigating the actions of witnesses in the group litigation. How this could affect the assessment of compensation for those joining the Scheme, who cannot include participants in the group litigation, is wholly unexplained and, in my judgment, impossible to see.

Ground 2

46 The points now raised under Question 5 in the skeleton are to do with an alleged inadequacy of the information to enable candidates to decide whether or not to join the scheme. That is an issue raised under ground 2, not ground 1. Mr Coppel did not demur from that understanding. I do not accept that it is arguable that the subsequent publication of these materials demonstrates that the information provided before the closing date for joining, some six weeks earlier, was inadequate, or that there was any unfairness.

47 At the outset of any discussion of fairness, it has to be remembered that where public law principles apply because a function is amenable to judicial review, fairness has to be judged by looking at the scheme as a whole (see, for example, the well-known case of *Lloyd v McMahon* [1987] AC 625). The earlier documentation had made it plain that claims related to shortfalls and consequential losses would be considered applying recognised legal principles, that is to say principles of English law, including those laid down in the judgments of Fraser J. Applicants were asked to provide information in support of their claims. The statements made by the defendant before 14 August 2020 in my judgment provided a sufficient framework for that to be done. Additional or amended information could always be provided following the publication of the September 2020 documents. If a participant in the Scheme objected to any part of those subsequent documents, he or she could withdraw at any point prior to the issuing of an outcome letter. They would be able to pursue their private law claims in the usual way.

48 In this context, Miss Carss-Frisk QC informed the court that, not surprisingly, no such outcome letters had been issued as early as the end of September 2020. Even if it could be shown that the arrangements post-14 August 2020 were in some way inconsistent with the terms of the Scheme to which parties had signed up, it would remain possible for a participant to withdraw, although I add straight away that the court was not shown any material inconsistency.

49 According to the court's understanding of the claimant's position in the skeleton argument, it did not appear to be suggested that the amount of information available from the end of September 2020 was inadequate. That is, no criticism was being made specifically of the documents issued after the closure of the scheme in August. If that had been intended, it would have been necessary for the claimant to set out in writing what he had in mind. He did not do so.

50 However, when the point was put by the court to Mr Coppel QC, he said that the claimant does, indeed, dispute the legal adequacy of these subsequent arrangements. He then proceeded to give a list of seven points, which he plainly had in mind but which had not been foreshadowed in the skeleton. According to my note, they were, in summary, as follows:-

> (1) What compensation will the defendant provide for?
> (2) What primary effects on a claimant should that person show?
> (3) There should be a clear statement of the defendant's knowledge of the failings in the Horizon system;
> (4) There should be a clear statement of the heads of losses which are said to be reasonably foreseeable;
> (5) The principles by which the defendant would evaluate loss of income should be set out;
> (6) There should be acceptance of liability for interest on losses;
> (7) The documentation should have identified the responsibility for determining the content of an outcome letter.

51 Mr Coppel QC analysed the matter in this way: he said that the court should balance the loss of civil rights which a participant in this Scheme has to give up against what a participant gets in return. If one looks at the loss of civil rights, including the inability to pursue a matter before a court, as against the seven criticisms of the details of the Scheme, the Scheme is inherently unfair.

52 This analysis turned out to be important, if not critical, to the claimant's case, so it is all the more surprising that it had not been previously set out in writing. I say that because in reply Mr Coppel QC told the court that if the Scheme had allowed participants to pursue private law remedies at any stage, in other words to withdraw at any stage, even after receipt of an outcome letter on compensation, then there would be no unfairness as a matter of public law, not even by reference to all or any of the seven points he had listed. Thus, the argument under ground 2 and, in fact, also under the closely related ground 3, turns on the allegation that there were insufficient details provided of the Scheme before any outcome letter on compensation may be issued. In my judgment, this has to be assessed by what has been published down to the end of September, given that at that stage no outcome letters had been issued.

53 Again, it is unsatisfactory that the claimant's argument should evolve in this way. The defendant had no warning that the application would develop in this way. It might have had more to say about the matter or it might have found it appropriate to present more written material to the court. This is why the *Dolan* decision is so important in the handling of

applications for judicial review. But putting these procedural concerns to one side, in my judgment, the point now raised is not arguable.

54 Going back to the list of seven points, points 3 and 4, according to Mr Coppel, would assist in establishing matters of common ground. He expressed them in terms of admissions that the defendant might be prepared to make. As Miss Carss-Frisk QC said, they would appear to go to issues of liability. These are matters which, in a situation outside the Scheme, that is to say where a civil claim is being brought, a claimant could not expect to obtain before starting litigation. I fail to see why the absence of such matters in a scheme of this kind can be said to be unfair.

55 Points 1, 2 and 5 essentially go back to the principle which is clearly stated in the Scheme that claims will be assessed in accordance with the principles of English law. I do not follow why it is necessary, in order for this Scheme to meet any of the requirements of fairness, that those principles should be elaborated. There would inevitably be a difficulty in deciding where to draw the line, where to stop. The Scheme is capable of applying to many different situations and Mr Coppel himself said that potentially many different types of tort might be involved. The important point is that the Scheme unequivocally states that principles of English law will be applied. That is a situation which any claimant would face if they were to start a civil claim in a court.

56 As regards point 7, I think it is tolerably clear that the structure of the Scheme published in May 2020 involved the creation of an independent panel to provide *advice*. There was no representation or statement that the defendant, who was said to be responsible for sending out an outcome letter, would simply reproduce the output from the advisory assessment panel.

57 Lastly, as to point 6, I do not accept that the omission to indicate whether liability for interest on losses is accepted arguably rendered the Scheme unfair.

58 Mr Coppel also criticised the way in which the panel has been established and submitted that there was insufficient independence. I do not accept this criticism as being arguable. There is no doubt that the panel is independent. The real criticism here does not go to the independence of the persons who comprise the panel, it is simply that their advice is not determinative. For a scheme of this kind, which is aimed at providing a framework for settlement discussions and alternative dispute resolution, I do not accept that this indicates unfairness. Again, *Lloyd v McMahon* is very much in point. It is necessary to look at the fairness of the Scheme overall assuming that public law principles are engaged. If that initial stage does not produce a result which is acceptable to the participant, they can then proceed to further discussions, mediation and, ultimately, if necessary, litigation.

Ground 3

59 In my judgment, ground 3 really overlaps with ground 2. Here, again, the claimant complains that the Scheme is unfair because, by agreeing to be bound by the terms of reference, an applicant gives up his other avenues of redress without being properly informed of his rights under the Scheme. Alternatively, it is even suggested that the information provided was misleading. As I have said, insofar as this ground is based upon inadequacy of information, it overlaps with ground 2, which I have already dealt with. In any event, the correct analysis remains that joining the Scheme involves a voluntary decision to follow a process for settling a claim, but ultimately if a settlement is not reached smaller claims may proceed in the county court and larger claims may proceed by way or arbitration. Either way, a participant still remains entitled to, in one eventuality a judicial decision and the other an arbitral determination, of his claim, applying principles of English law. The cessation of rights to

which Mr Coppel refers is not as stark as he claims and, in any event, so far as adequacy of information is concerned, a participant has been entitled, and remains entitled to withdraw from the Scheme before an outcome letter dealing with compensation is issued. There is no arguable unfairness in the arrangements which have been set out. I also reject the suggestion that it is arguable that the information published about the Scheme was misleading.

Delay

60 The last issue which has been raised is delay. In my judgment, there are arguments both ways on delay. I would not have been prepared at this stage to refuse permission, if it was otherwise going to be granted, because of delay. Instead, I would have adjourned any CPR issues relating to delay to the substantive hearing, so that that aspect could be looked at on a more informed basis. But in view of the earlier conclusions I have reached, that will not be necessary.

Conclusion

61 For those reasons the application for permission to apply for judicial review must be refused.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.