A3/2014/3286

Neutral Citation Number: [2015] EWCA Civ 667
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
(HIS HONOUR JUDGE KEYSER QC)

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 10th June 2015

B E F O R E:

LORD JUSTICE KITCHIN

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MTR BAILEY TRADING LIMITED
Second Claimant/Applicant

-v-

BARCLAYS BANK PLC
Defendant/Respondent

(Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
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Official Shorthand Writers to the Court)

Mr D Berkley QC & Mr S McGarry (instructed by Anthony Jeremy) appeared on behalf of the **Applicant**

APPROVED J U D G M E N T

1. LORD JUSTICE KITCHIN: This is an application by the second claimant for permission to appeal against the judgment of His Honour Judge Keyser QC given on 27th August 2014 and his consequential order dismissing the second claimant's application for permission to amend its particulars of claim and granting summary judgment for the defendant. Permission to appeal was refused on the papers by Lewison LJ on 17th December 2014. The second claimant has requested that this decision be reconsidered at an oral hearing which has come on before me today. It has been represented upon this application by Mr David Berkley QC and Mr Steven McGarry. The judge referred to the first claimant as Mr Bailey, the second claimant as the Company and the defendant as the Bank, and I shall do the same.

2. For the purposes of this application, the background may be summarised as follows. Mr Bailey is a businessman and over the years has conducted his business through various limited companies, one of which is the Company. Mr Bailey is a director of the Company and its sole shareholder. Mr Bailey was at all material times a customer of the Bank and in 2007 took a loan from the Bank of £1.26 million at a marginal rate of 1.1 per cent over base rate, repayable over ten years. At about the same time the Bank also told Mr Bailey that it would extend to him a personal loan of £650,000, provided that he entered into an interest rate swap agreement for a notional figure of £2 million at a fixed rate of 5.64 per cent for a fixed term of ten years. Mr Bailey entered into the swap agreement after receiving advice from the Bank that interest rates were going to rise and that the swap agreement would provide him with appropriate protection.

3. In the event, interest rates fell, but, despite Mr Bailey's protestations and complaints to the Bank, he found himself tied into the transaction because the swap agreement contained provision for the payment of substantial fees, referred to as breakage fees, in the event of its premature termination.

4. In 2011 and after taking advice from his accountants, Mr Bailey sought to restructure his borrowings and transfer various properties from his personal portfolio to the Company. He met representatives of the Bank who, he says, made it clear that the Bank would not agree to the transfer of his loans to the Company unless it also took over the swap agreement. He maintains that he was also told that the only alternative was for him to terminate the swap agreement but that this would involve him in paying the large breakage fees. He also says that he felt he had no choice in these circumstances but to "novate" the swap agreement to the Company, and that is what happened on 14th April of that year.

5. In these proceedings Mr Bailey and the Company sought a declaration that the swap agreement was unenforceable against the Company, rescission of that agreement and damages.

6. In 2014, and following a review by the Bank of its sales of interest rate hedging products to non-sophisticated small businesses, the Bank wrote to Mr Bailey with an offer of redress, observing that it had been determined in the review that it "did not meet the necessary standards and principles at the point of sale [and] that [it] should terminate the [swap agreement] with effect from the date of the original sale". The letter also contained an offer of monetary compensation.

7. Shortly before the hearing Mr Bailey accepted the offer of compensation because, as the judge observed, it gave to him substantially all of the relief that he sought to achieve in the proceedings. Accordingly, the judge was only concerned with the particulars of claim of the Company. The judge dealt with these particulars in their proposed amended form and, in the course of his long and careful judgment, he addressed each of the claims. Some of them are no longer pursued. Those that remain fall into two broad categories: first, those based upon alleged breach of the FSA's rules for the conduct of business, the COBS rules, and, second, those which are not, namely a claim for rescission of the swap agreement and a claim for alleged breach of fiduciary duty.

8. The claims based upon breaches of the COBS rules were founded principally on rule 2.1.1R, which, so the Company contends, required the Bank to act honestly, fairly and professionally in accordance with the best interests of the Company, the so-called client's best interests rule. In broad terms, the Company maintains that the Bank did not act fairly because it would only agree to the transfer of Mr Bailey's loans to the Company on the basis that the Company also agreed to undertake all of Mr Bailey's obligations under the swap agreement. It maintains that the payments under the swap agreement and the breakage cost were exceptionally high. Further, it continues, the Bank had other reasonable options to it: for example, it could have waived the breakage fees if they were ever payable.

9. The judge was not impressed with any of these arguments, essentially, as I understand it, because he took the view that by 2011 both Mr Bailey and the Company were fully conscious of the disadvantageous terms of the swap, that the Bank simply required the loans and the swap agreement to remain together, but it was up to Mr Bailey whether or not to transfer them to the Company, that the Bank was acting on a non-advisory basis, that the breakage charges would never otherwise have been payable by the Company and that, whatever might have been the position as between the bank and Mr Bailey, the Bank had never acted unfairly towards the Company.

10. Mr Berkley has persuaded me that in so finding the judge has, at least arguably, fallen into error and that the company has a real prospect of establishing upon an appeal that the judge took what may be described as too narrow a view of the relationship between the Bank, on the one hand, and Mr Bailey and the Company, on the other hand, and that the Bank was not acting fairly either towards Mr Bailey or the Company in requiring the Company to assume Mr Bailey's obligations and liabilities under the swap

agreement, including the obligation to pay the breakage fees as a condition of its agreement to the transfer to the Company of the loan agreements.

11. The Company also maintained before the judge that the Bank was in breach of various other COBS rules, namely rule 9.2.1R, rule 10.2.1R and rule 11.2.1R. The judge held that each of these allegations was unarguable, and I agree with him. In response to a request by me, Mr Berkley has made clear during the course of his submissions to me this morning that the Company does not now seek to pursue them any further and I do not give permission in respect of them.

12. The next question is whether the Company has a cause of action against the Bank in respect of its alleged breach of the COBS rules. The Company has formulated its case in various different ways. First, it maintains that a cause of action is conferred by the provisions of section 150 of FSMA (now, as I understand it, section 138D) and the provisions of the Financial Service and Markets Act 2000 (Rights of Action) Regulations 2001. Section 150 provides that a contravention by an authorised person of a rule is actionable at the suit of a private person who suffers loss as a result of the contravention. A "private person" is defined in the 2001 Regulations so as to include a person who is not an individual unless he suffers the loss in question in the course of carrying out business of any kind. The Company contends that it did not enter into the transaction in the course of business in any relevant sense because it dealt in vehicles and property and not in derivatives or hedging instruments or any other financial products. The judge rejected this contention, relying principally upon the decisions of David Steel J in the Titan Steel Wheels case [2010] EWHC 211 and Flaux J in the Camerata Property case [2012] EWHC 7. Mr Berkley submits that both of these cases were wrongly decided and that their effect is to rob the provision of its substance because most companies will be in business of some kind. He has persuaded me that this issue does merit consideration by this court and it is one upon which the Company has a real prospect of success.

13. In the alternative to this primary contention, the Company also maintained that it was entitled to bring a claim pursuant to section 150(3) and paragraphs 6(2) and (3)(a) of the 2001 Regulations on the grounds that the Bank has contravened the rules that prohibited it from seeking to make provision excluding or restricting any duty or liability to the Company, namely COBS rule 2.1.1, rule 2.1.2 and rule 2.1.3. The fundamental difficulty facing the Company upon this application is, however, that the judge found that at no stage did the Bank purport to exclude or restrict use of liabilities arising under the regulatory scheme. Once again, Mr Berkley has made clear to me during the course of his submissions this morning that the Company does not pursue its application for permission to appeal in relation to these further claims and I do not give permission in respect of them.

14. The third way in which the case is put is that the breaches of the COBS rules are actionable by the Company in contract, and that is so even if it has no statutory right of

action. Specifically, the Company seeks permission to argue that its retail client agreement with the Bank arguably incorporated the applicable COBS rules. In this regard Mr Berkley has drawn my attention to clause 1.4 in particular. Focusing on the words "are subject to applicable regulations", Mr Berkley submits that it is clear that the relevant rules were indeed incorporated into the agreement. It seems to me that there is considerable force in the judge's conclusion that clause 1.4 draws a distinction between the terms of the contract and the applicable regulations. However, Mr Berkley has persuaded me that this too is a point which merits consideration by this court.

15. I turn now to the issue of the equity of rescission. The Company contends that Mr Bailey was induced to enter into the swap agreement by misrepresentations made by the Bank, that the swap agreement was therefore capable of being rescinded by Mr Bailey and that the effect of the transactions in 2011 was that the Company stepped into Mr Bailey's shoes and that his equity of rescission passed to it. I have been persuaded by Mr Berkley that it is arguable that the judge ought to have found that the effect of the various contractual documents was, at least arguably, to assign rights under the original swap agreement to the Company, to release Mr Bailey from his obligations under the original swap agreement and to achieve an undertaking by the Company of new liabilities equivalent to those of Mr Bailey under the original swap agreement. In broad terms, this was therefore not a transfer by novation, but rather by assignment, assumption and release, and that in consequence the 2011 swap agreement is capable of being rescinded by the Company just as the original swap agreement was capable of being rescinded by Mr Bailey. Accordingly, I grant permission on this ground.

16. The final matter I must consider is the allegation of breach of fiduciary duty. The Company contends that it properly regarded the Bank as a trusted adviser and that it was entitled to and did assume that the Bank was acting in its best interests and that in all the circumstances it owed to the Company a fiduciary duty to act in its best interests. The judge concluded that the claim was unarguable, essentially because there was nothing in the facts relied upon by the Company to indicate that there was anything exceptional in the case that could have given rise to a fiduciary relationship. Specifically, and on the Company's own case, there was no question of it having in any relevant sense reposed trust and confidence in the Bank or relied upon the bank to subordinate its interests to those of the company.

17. Mr Berkley seeks permission to challenge this aspect of the judge's reasoning on the basis that the relationship between the Bank and the Company was more than a commercial banking relationship and that the Bank had, in substance, taken on the role of a professional intermediary in relation to investment transactions and so the Company was entitled to assume that the Bank was acting in its best interests. I must say I have considerable doubt as to whether this argument has a real prospect of success. However, Mr Berkley has persuaded me, just, that the Company should have an opportunity to raise this issue too on the appeal.

18. Accordingly, I grant the Company permission to appeal but limited to the specific grounds that I have summarised in this judgment.