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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2021] EWHC 2203 (Admin)



No. CO/4533/2020

Royal Courts of Justice

Wednesday, 14 July 2021

Before:

PETER MARQUAND

(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

THE QUEEN ON THE APPLICATION OF
JULIE NEW

Applicant

- and -

FINANCIAL SERVICES COMPENSATION SCHEME LTD

Respondent

MR S. McGARRY (instructed by APJ Solicitors) appeared on behalf of the Applicant.

MR J. STRACHAN QC (instructed by Bevan Brittan LLP) appeared on behalf of the Respondent.

J U D G M E N T
(Via Cloud Video Platform)

THE DEPUTY JUDGE:

- 1 This is a renewal application for permission for judicial review brought by the Claimant, Ms Julie New, against a decision of the Defendant on 9 September 2020. She seeks to quash that decision on the basis that the Defendant had not considered what is termed as "a backwards liability".
- 2 I will briefly outline the facts. Ms New transferred money from her existing pension provider to a SIPP administered by Berkeley Burke SIPP Administration Ltd ("Berkeley Burke"). Ms New had been given advice by an unauthorised and unregulated intermediary, Grapevine Investments ("Grapevine"). It was on the basis of that advice that she transferred the money. Berkeley Burke invested the transferred money into "Harlequin Marquis Estate (St Lucia)". Berkeley Burke and Harlequin Marquis Estate both became insolvent. Ms New made a claim for compensation to the Defendant. The Defendant, operating its statutory scheme, assessed Ms New as being entitled to compensation. This was on the basis that Berkeley Burke was a regulated entity and that it should have carried out due diligence and other investigations into the investment in Harlequin Marquis Estate. The Defendant assessed compensation on the basis that Ms New should receive compensation in the amount of the money that she had invested – the "monies in, monies out" approach.
- 3 To summarise the grounds, the argument put forward by the Claimant is that there was an error by the Defendant in not considering the "backwards" position in the chain of the transaction. In other words, Berkeley Burke had an obligation to the Claimant under COBS 2.1.1R and/or section 27 Financial Services and Markets Act 2000 (FSMA) and articles 25 and 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO") for the activities of Grapevine. If so, there was a civil liability owed by Berkeley Burke to Ms New in relation to the activities of Grapevine in respect of the transfer of her pension to Berkeley Burke. If there were such a liability, the Claimant says, that creates a bigger loss for her because it is the notional loss of the value of her pension and not "money in, money out" that should have been considered by the Defendant in coming to its conclusion on the amount of compensation.
- 4 Since the Defendant made the decision under challenge in this case, to some extent the law has moved on because of the decision in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. The first instance decision of HHJ Dight (sitting as a Judge of the High Court) is cited as [2020] EWHC 1229 (Ch). The Court of Appeal reversed the judge's findings. At first instance, the judge had found, in very similar circumstances to Ms New¹, that the defendant in *Adams* was not responsible to the claimant for the "backwards" part of the transaction under COBS 2.1.1R or section 27 FSMA. The Court of Appeal did not decide the position in relation to COBS 2.1.1R, but did decide it in relation to section 27 FSMA and found that the claim was a good one. However, the Court of Appeal decision was not available to the Defendant at the time of the decision which is challenged in this case, as it was handed down on 1 April 2021.
- 5 The Defendant's scheme is a statutory one involving the identification of a civil claim and then an assessment of fair compensation, including an exercise of discretion at various points. The Claimant only has to show that the claim is arguable before me and I am deciding the case on this basis: Does the Claimant have an arguable claim in relation to the grounds that are brought? My conclusion is she does not have an arguable claim. The principal reason for that is that the Defendant, carrying out its activities when it did in

¹ The defendant was not in administration in *Adams* and the claim for compensation was against it directly.

September 2020, had to take into account the information that was then available to it within the context of the statutory scheme that it was operating. As such, the information available to it at that time in terms of the legal position for civil liabilities would have been as set out in *Adams* at first instance.

- 6 I do not find that the decision that was taken could be said to be *Wednesbury* unreasonable/irrational. The Defendant analysed the statutory scheme it had to apply; it analysed the information available to it at the time and made a rational and reasonable decision. It is not for me to substitute my decision, but to consider whether within the statutory scheme that it operates, the Defendant's decision was arguably unreasonable. My conclusion is that it was not such a decision and cannot be said to be arguably unreasonable or irrational.
- 7 I also record that submissions were made by the Defendant that as the Claimant had cashed the compensation cheque sent to her she had accepted the sum in full and final settlement. I do not make any findings on that. I will leave that undecided, as what I have decided is enough to dispose of the matter. If I had thought the substantive claim was arguable, I would have allowed it to proceed notwithstanding this argument.
- 8 Permission is refused.

CERTIFICATE

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This transcript has been approved by the Judge.