Holmcroft: Skilled person not amenable to judicial review

By Jonathan Lewis

On 24 February 2016, in *R (Holmcroft Properties Limited) -v- KPMG LLP and others*,[1] the Divisional Court dismissed Holmcroft's judicial review challenge to the skilled person's role in a mis-selling redress scheme. The skilled person, KPMG, had approved Barclays' rejection of Holmcroft's claims for consequential losses it claimed to have suffered as a result of the mis-sale. The court found that the skilled person was not amenable to judicial review and that, in any event, it had acted fairly.

The Review

1. Following the large scale mis-selling of certain interest rate hedging products ("**IRHPs**") by a number of major UK banks, the Financial Conduct Authority ("**FCA**")[2] set up various voluntary redress schemes to compensate certain unsophisticated customers who had been sold inappropriate or unsuitable products. IRHPs, such as swaps, collars and caps, are sophisticated financial products the purpose of which is to protect customers from the risk of fluctuations in interest rates.

2. In June 2012, Barclays Bank PLC ("**Barclays**") voluntarily entered into an undertaking with the FCA which set out the terms for setting up the review and redress arrangements. Barclays undertook that it would not make any offer of redress unless an independent reviewer ("**IR**")

[1] *R (Holmcroft Properties Limited) v (1) KPMG LLP & (2) Financial Conduct Authority & (3) Barclays Bank PLC* [2016] EWHC 323 (Admin).
[2] Actually, its predecessor, the Financial Services Authority.

considered that the offer was "*appropriate, fair and reasonable.*" In July 2012, the FCA issued a Requirement Notice to Barclays pursuant to section 166 of the Financial Services and Markets Act 2000 ("**FSMA**") requiring it to provide a report, prepared by a "skilled person" appointed or approved by it, "*on any matter about which the Authority has required the provision of information*". The skilled person would be the same person as the IR.

3. Barclays entered into a contractual agreement with KPMG LLP ("**KPMG**") by way of a letter of engagement to act as the skilled person. The terms of the engagement emphasised that KPMG was undertaking to act only for Barclays, although with some third party rights conferred on the FCA (at [9]). It was expressly stated that KPMG owed no obligations of any kind towards Barclays' customers (at [9]). KPMG could not propose an offer and it had no direct dealings with customers; it merely reviewed offers proposed by Barclays as an independent third party.

4. The Divisional Court (Elias LJ and Mitting J) found that there was a contractual obligation on Barclays to make an offer, but that it could not do so unless approved by KPMG (at [14]). If it was determined that a customer had been mis-sold an IRHP, the customer would be paid "basic redress", which comprised the difference between the payments made under the IRHP and those which would have been made had there been no breach of the regulatory requirements. Further, customers were paid simple interest of 8% per annum to reflect the borrowing costs and the loss of an opportunity to use the moneys wrongly paid out.

5. Under the scheme customers could make claims for any consequential losses flowing from a mis-sale, such as a loss of profits. The burden was on the customer to show that the mis-sale caused such loss as a matter of fact: but for the mis-sale, the loss would not have been incurred. The loss had to be reasonably foreseeable and therefore not too remote as a matter of law (at [17]).

The Challenge

6. In 2005, Barclays loaned Holmcroft £2m and a related company £400k to support the purchase of the land, buildings, and fixtures and fittings at the Holmwood Nursing Home. Around that time, Holmcroft entered into a collar in respect of its borrowing. In 2008, it entered into a swap to hedge £1.5m. By April 2011, it had made net cumulative payments under both IRHPs totalling around £337k.

7. Meanwhile, by 2009, Holmcroft had encountered financial difficulties. In the review, Holmcroft claimed that its consequential losses (in the region of £5.2m) flowed from Barclays' decision in May 2011 to refuse to renew and/or call in its advances and to appoint Law of Property Act receivers of its properties. The determination of its consequential loss claims turned on whether it could prove that Barclays would not have called in the advances and appointed receivers but for the impact of the IRHP payments on its financial affairs (at [67]).

8. Barclays rejected Holmcroft's consequential loss claims in a detailed letter, essentially on the basis that the mis-selling had not caused the losses (at [56]). It identified factors other than the IRHP payments that put a strain on Holmcroft's cash flow and highlighted all the reasons why the account had been transferred to the business support unit (huge liabilities to HMRC, poor ratings of the care home, delays in selling properties etc.). Barclay's rejection of the claims was approved by KPMG.

9. The basis of Holmcroft's judicial review challenge to KPMG's actions narrowed as proceedings progressed until it was advanced on a limited basis: Barclays did not act fairly because it did not provide it with the information on which it had concluded that no consequential loss had been suffered; that it was thereby prevented from making an

informed response to Barclays' provisional decision; and that KPMG had acted unfairly and in breach of its public law duties in approving Barclays' stance (at [55]).

KPMG is not amenable to judicial review

10. The Divisional Court held that the question of whether KPMG is amenable to judicial review "*does not depend upon the particular facts in the claimant's case but rather on the proper characterisation of the redress scheme and its role within it*" (at [22]). It noted that, whilst the principles relating to the amenability of a body to judicial review are "*tolerably clear, albeit stated at a high level of abstraction*", "*their application in any particular case can be problematic*" (at [23]). The mere fact that the source of power is contract does not of itself necessarily result in the conclusion that public law principles are inapplicable (*R v Panel on Take-Overs and Mergers, ex parte Datafin*).[3]

11. The court accepted that KPMG was clearly "*woven into*" the regulatory function (borrowing the expression from *R v The Insurance Ombudsman Bureau ex parte Aegon Life*)[4] and that its function in approving the terms of any offers was critical in achieving the twin aims of objectivity and acceptability (at [39]). Moreover, there was a clear public connection between its function and the regulatory duties carried out by the FCA (at [40]).

12. Nonetheless, even though there were "*certainly pointers in favour of amenability*", the court ultimately decided that KPMG's duties did not have sufficient "*public law flavour*" to render it amenable to judicial review (at [38]) and that there was "*no direct public law element in KPMG's role*" (at [47]) for the following reasons:

[3] [1987] QB 815.
[4] [1994] CLC 88.

a. Although the FCA had a number of more draconian powers available to it to deal with the mis-selling (such as remedial action pursuant to s.404 FSMA or taking enforcement action), it nonetheless chose to adopt an essentially voluntary scheme of redress (at [42]).

b. The fact that KPMG's powers were conferred by contract is "*important, albeit not determinative, and in that context it is relevant that KPMG had no relationship with the customers at all*" (at [43]). Further, KPMG were not actually appointed by the FCA to do anything at all – it only approved KPMG's appointment and that approval did not suffice to attract public law duties.

c. *Aegon Life* and *YL v Birmingham City Council*[5] establish that "*the fact that private arrangements are used to secure public law objectives does not bring those arrangements into the public domain sufficient to attract public law principles*" (at [44]). These authorities suggest that "*the courts are reluctant to find amenability to judicial review merely because a private body is carrying out functions at the behest of a public body which, if performed by that public body, would be subject to public law principles*" (at [44]).

d. The FCA had no regulatory obligation to carry out the role which KPMG played had there been no willing skilled advisor (at [45]).

e. The FCA was not disqualified by the arrangements from taking a more active role in particular cases (at [46]) (if a customer complained that it was being treated unfairly by both Barclays and KPMG, the FCA would need to explore that complaint).

KPMG acted fairly in any event

[5] [2007] UKHL 40; [2008] 1 AC 95. The question in this case was whether a private care home provider was exercising a public function so as to bring it within the definition of a public authority within the meaning of section 6 of the Human Rights Act 1998.

13. The Divisional Court rejected Holmcroft's challenge, finding that KPMG was not subject to the range of public law duties originally proposed by Holmcroft because "*public law could not impose duties which undermined the basis of the private contractual arrangements*" (at [53]). It held that, in a context where the essential financial information is known to both parties, it was sufficient for Barclays to provide Holmcroft with the gist of its reasoning and the material on which it was based (at [58]). It was not necessary to disclose the full records available to Barclays. It then analysed Barclays' contemporaneous records and determined that there had been proper disclosure of the relevant materials by Barclays to Holmcroft.

14. It went on to hold that even if KPMG were under the public law duty for which Holmcroft contended, "*there was on the facts no unfairness by Barclays in the procedure adopted and therefore there could be no material breach by KPMG of any public law duty to secure fair process*" (at [86]). Further, it found that KPMG properly carried out its required reviewing task (at [87]).

Conclusion and comment

15. It is not entirely clear what Holmcroft actually hoped to achieve by this litigation because, as the court noted, any public law remedy is a limited one, with there being no damages against KPMG absent a civil cause of action (at [48]). The only relief that Holmcroft could have secured would have been to set aside the approval of the allegedly unfair offer and Barclays would have to consider the matter again (possibly rejecting it again). Perhaps Holmcroft hoped that the fear of a judicial finding that the skilled person was amenable to judicial review or that the redress scheme was in some aspect unfair would scare the defendants into settling on terms favourable to it. If so, this clearly backfired given that not only did the court find that the skilled person was not amenable to judicial review but

also found that the redress exercise "*appears to have been conducted in a conspicuously scrupulous way*" (at [16]).

16. It is interesting that the court went on to consider the merits of the substantive challenge to fairness of the skilled person's actions even though this was *obiter* given that it found that it was not amenable to judicial review. The result is that, whilst Holmcroft might have some prospects of securing permission to appeal on the amenability point, especially as the Divisional Court acknowledged that it had some hesitation as to its conclusion (at [41]), given the finding on the facts that there was no unfairness, there seems little point in pursuing such an appeal.

17. The court noted that customers such as Holmcroft are trying other routes to challenging unfavourable decisions made in the review process: by trying to establish a customer's contractual right to a fair and reasonable offer and by alleging that the skilled person itself could be liable in negligence. It noted that the latter challenge might face "*formidable difficulties*" (at [49]).

18. In *Suremime Ltd v Barclays Bank plc*,[6] the claimant is arguing that the bank owed it a duty of care in tort in agreeing to provide redress and that by entering into arrangements with the FCA, the bank agreed to confer on customers whose transactions were reviewed the benefits of such a review and of redress if appropriate, and therefore owed it a duty to implement the review process properly because any failure to do so would place the bank in breach of its agreements with the FCA in circumstances where FCA would suffer no loss but the claimant, as intended beneficiary of the FCA Review, would suffer a loss.

[6] [2015] EWHC 2277 (QB). This is only a procedural decision as to an application to amend the Particulars of Claim. Judge Havelock-Allan QC refused to allow in the claim based on contract on the basis that it faced the "*insuperable hurdle of lack of consideration*" (at [32]).

19. This decision is a resounding victory for both the banks and the skilled persons. It remains to be seen whether any other form of challenge to determinations under these review schemes will succeed but the prospects certainly do not seem high.

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