



13 February 2013

PRESS SUMMARY

In the matter of Digital Satellite Warranty Cover Limited and another (Appellants) v Financial Services Authority (Respondent) [2013] UKSC 7

On appeal from: [2011] EWCA Civ 1413

JUSTICES: Lord Neuberger (President), Lady Hale, Lord Mance, Lord Clarke, Lord Sumption

BACKGROUND TO THE APPEAL

This appeal arises out of applications by the Financial Services Authority for orders to wind up the appellants in the public interest under s.367(1)(c) of the Financial Services and Markets Act 2000 (“FSMA”), on the ground that each of them “is carrying on or has carried on a regulated activity in contravention of the general prohibition.” The general prohibition is that at s.19 of FSMA, which provides that no person may carry on a regulated activity unless he is either an authorised or exempt person.

Regulated activities include a wide range of general insurance business, including effecting or carrying out any of the 18 classes of contracts of general insurance listed in Schedule 1, Part I to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. Class 16 is the class most relevant to the present appeal (“Miscellaneous Financial Loss”). This includes contracts insuring against risk of loss to the insured attributable to their incurring unforeseen expense, as well as any other kind of risk (not covered by other provisions). The classes substantially replicate the classes in the Annex to the First Council Non-Life Insurance Directive 73/239/EEC as amended by Council Directive 84/641/EEC (“the First Directive”).

The appellants sold and performed extended warranty contracts under which, in consideration of a periodic payment, they contracted to repair or replace satellite television dishes, satellite boxes and associated equipment. It was agreed that the contracts were contracts of insurance and that the appellants were not authorised under FSMA to carry on any kind of insurance business. Nonetheless, the appellants’ case is that the contracts were not of a kind which required their business to be authorised under FSMA because the classes of regulated activities did not extend to contracts which only provided benefits in kind, i.e. repair services and replacement goods. Warren J [2011] Bus LR 981 rejected this argument and ordered the appellants to be wound up, and the Court of Appeal dismissed their appeal.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Sumption gives the judgment of the Court.

REASONS FOR THE JUDGMENT

The appellants’ case depends on the proposition that in specifying certain categories of direct non-life insurance business which member states must regulate in accordance with EC law, the First Directive precluded member states from regulating further or wider categories under their national law. However, the Court concludes that the First Directive is concerned only to prescribe what kinds of

business national law must regulate and not what other kinds of business it may regulate. Even if Classes 1 to 17 in the First Directive are confined to insurance providing pecuniary benefit, there is nothing to prevent the UK from legislating to regulate insurance of those descriptions irrespective of whether they provide benefits in cash or kind or both [4].

The First Directive was never intended to impose a comprehensive scheme of authorisation. Nor can the 18 classes of business listed in the Annex to the First Directive have been intended to limit the freedom of member states to regulate in other categories of business [12]. The partial character of the scheme of authorisation in the First Directive is recognised by the recitals. These show that it was appreciated that significant differences between national schemes of authorisation would persist, and that these would continue to operate as partial barriers to the exercise of the right of establishment. The object of the First Directive as a whole is to impose certain uniform principles of regulation on insurance businesses in the standard classes, but not on any falling outside those classes. This is why Article 1 to the First Directive is concerned with the conduct of businesses “in the classes of insurances defined in the Annex to this Directive” [13]. Member states deal with each other’s authorisations by reference to the standard classes in the First Directive. As far as they are concerned, any difference between the content of those classes and that of the corresponding categories of business in national law is irrelevant [14]. If the First Directive could be read so as to preclude national regulation of insurance not within the First Directive, it would allow it to be carried on without any regulatory protection for consumers [15].

The Court agrees with the decision of the courts below that, on the facts, the appellants’ businesses fell within the risks identified in Class 16 [16, 19]. A contract which brings about the result an insured would otherwise have to pay to achieve (i.e. having functioning equipment) was a contract that protects him from financial loss irrespective of whether the insurer or the insured is obliged to pay in the first instance [18]. The only argument against this could be that the common law position (that insurance contracts are payments of sums of money or some corresponding benefit) is displaced by the requirement to construe domestic legislation so as to conform to EU law. However, there is no prohibition in the First Directive against regulating any insurance business falling outside the 18 classes in the Annex. Nor does the Directive throw any light on the meaning of the language of Class 16 (“Miscellaneous Financial Loss”) which was derived, not from the First Directive, but from the statutory definition of business covered by the previous, wholly domestic, scheme of statutory regulation [19-21].

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html