Neutral Citation Number: [2021] EWHC 3429 (Admin)

Case No: CO/986/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
14th December 2021

Before:
MR JUSTICE FORDHAM

- -

Between:

The Queen on the Application of DOMINIC O'CARROLL	**Claimant**
- and -	
FINANCIAL OMBUDSMAN SERVICES LIMITED	**Defendant**
-and-	
S4 FINANCIAL SERVICES LIMTED	**Interested Party**

- -
- -

The **Claimant** appeared in person
Joseph Barrett (instructed by Financial Ombudsman Services Ltd) for the **Defendant**
Simon Howarth (instructed by RPC Ltd) for the **Interested Party**

Hearing date: 14.12.21

Judgment as delivered in open court at the hearing

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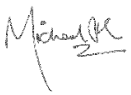
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM:

Introduction

1. This is a renewed application for permission for judicial review. Permission was refused on the papers by Collins Rice J on 16 July 2021. The case concerns a set of seven linked decisions of the Defendant ("the Ombudsman") dated 16 December 2020. The Claimant ("Mr O'Carroll") had made complaints concerning advice given by the Interested Party ("S4") between March 2005 and October 2010. That advice related to investments known as unregulated collective investment schemes ("UCIS"). Mr O'Carroll's case is that he suffered nearly half a million pounds worth of losses as a result of his following that financial advice. Following the grant of permission for judicial review in previous proceedings the matter was considered afresh by the Ombudsman. The question for me today is whether the claim for judicial review has been shown to be properly arguable.

2. So far as the law is concerned, three points require emphasis. The first is that, under the applicable statutory provision (section 228(2) of the Financial Services and Markets Act 2000), the Ombudsman determines a complaint by reference to what is in the "opinion" of the Ombudsman "fair and reasonable", "in all the circumstances of the case". The second is that the standard applied in judicial review to substantive conclusions and findings of the Ombudsman is the unreasonableness (irrationality) test: see eg. R (Heather Moor & Edgcomb Ltd) v FOS Ltd [2008] EWCA Civ 642 at §40. The third is that the legal adequacy of the Ombudsman's reasons is approached in judicial review by asking whether the complainant has been told in "clear and comprehensible" terms 'why they have lost': see eg. R (Williams) v FOS Ltd [2008] EWHC 2142 (Admin) at §51.

3. At this in-person hearing Mr O'Carroll sought – and has had – the opportunity to bring to life, through verbal submissions, the claim which he has advanced in very great detail in writing before the Court.

The Ombudsman's decision

4. The substance of the adverse decision (seen in the two of the seven decisions which were included within the Claim Bundle) can be summarised by reference to the following headline points.

    i) The Ombudsman concluded that S4 had advised Mr O'Carroll that the UCIS investment was a product suited to a balanced risk profile, viewed in isolation. The Ombudsman concluded, in Mr O'Carroll's favour, that that was a misdescription. The Ombudsman concluded that the UCIS investments could not properly be described, viewed in isolation, as suited to a balanced risk profile. Putting that into common-sense language, if there were an investor whose only resources were in play and they were being advised, and if that person were advised to invest their resources into a UCIS (or more than one UCIS), that could not be suitable if that individual had a balanced risk profile. It follows from this first conclusion that there had been a misdescription by S4.

    ii) The Ombudsman concluded that Mr O'Carroll was entitled to believe, and did reasonably believe, that the UCIS investments on which S4 was advising formed

part of a balanced risk portfolio. On that point, the Ombudsman went on to conclude that – on an objective evaluation of all the evidence – Mr O'Carroll's overall portfolio was reasonably and properly to be described as a suitable overall balanced risk portfolio. Mr O'Carroll has been able helpfully to bring to life for me, by means of this oral hearing, that his overall portfolio comprised: equity holdings and funds; cash balances; and other investments including UCIS investments and other "bits and pieces".

iii) The Ombudsman went on to deal with a third main topic. It was this. The Ombudsman addressed the question of what the position would have been had Mr O'Carroll been informed of two things. The first was that the UCIS investments, viewed in isolation, were not suited to a balanced risk profile. The second was that the overall level of risk to which Mr O'Carroll was exposed in the overall portfolio was nevertheless reasonable as an overall balanced risk portfolio, notwithstanding the UCIS investments, alongside the other features of the portfolio. On that topic, the Ombudsman concluded on the evidence that – had Mr O'Carroll been told those two things – Mr O'Carroll would have accepted, and proceeded with, the UCIS investment or investments on which S4 was advising him. One of the features which informed that conclusion was evidence relating to an August 2010 investment which the Ombudsman regarded as a reliable indicator.

Legal adequacy of reasons

5. In my judgment, the Ombudsman's decision is a clearly and logically reasoned evaluation. In my judgment, the Ombudsman's decision is also plainly one which contains legally adequate reasons, explaining to Mr O'Carroll the basis on which his complaints have been rejected. The question that remains is whether, on some issue which was material to the Ombudsman's decision, as part of the reasoning which I have just summarised, there was a conclusion which was arguably unreasonable.

Reasonableness

6. Mr O'Carroll set out in writing, and explained orally, by reference to a wide range of topics the basis on which he strongly disagrees with the Ombudsman's conclusions, both in relation to the second topic (§4ii above) and in relation to the third topic (§4iii above).

7. Prominent, for the purposes of this oral hearing, was Mr O'Carroll's submission that the Ombudsman failed in the decision to identify how, notwithstanding the misdescription (§4i above), the UCIS investments could fall to be assessed as being part of an overall suitable balanced risk portfolio (§4ii above). Mr O'Carroll emphasises that S4, for their part, were 'not tasked with managing the overall portfolio'. But, in my judgment, beyond argument, it was appropriate for the Ombudsman to pose, assess and answer the questions which arose under the second (§4ii above) of the three topics (§4 above), based on all the materials. Moreover, it is accepted that, at least to some extent, even the annual reports of S4 "made some reference" (as Mr O'Carroll put it) to other aspects of the overall portfolio. The example he gave was equity holdings. Mr O'Carroll submitted that the extrapolated prominence, on the Ombudsman's reasoning, of UCIS investments within his portfolio took them to a level of 36%. He submitted that, on his own analysis, it was a level of 45%, together with a further 25% of other 'high' risk

investment. He has referenced various materials which discuss and characterise UCIS investments. He also showed me how, from the perspective of one investment adviser organisation (Brewin Dolphin), the categories at the 'high' risk end – which Mr O'Carroll said would include UCIS – would be 'beyond the pale' and not recommended, even as part of a balanced risk portfolio. In my judgment, beyond argument, all of these points serve to demonstrate that in this case the Court is being invited to 'second-guess' the Ombudsman on matters of evaluative judgment, both as to the assessment of the evidence, and as to the conclusions that arise out of that assessment.

8. Mr O'Carroll submitted at one point that the Ombudsman treated a mortgage debt as though it were a cash balance in a bank account. He accepted that the two reasoned decision documents that have been put before the Court for the purpose of illustrating the alleged unreasonableness (irrationality) in the seven link decisions do not, and would not, include that topic. That illustrates, to my mind, that the point relating to the mortgage is quite incapable of being a 'vitiating feature' in relation to the approach taken by the Ombudsman in these linked decisions. If and insofar as that point features in some other decision – and I am told, and I accept for the purposes of today that it does – what I cannot accept is that it involves an unreasonableness (irrationality) in the judgment of the Ombudsman when put in the context of the overall evaluative judgment that was being performed.

9. All of this needs to be seen against the backcloth that what the Ombudsman is statutorily required to do is to form an opinion on fairness and reasonableness in the circumstances of the case.

10. It is clear, from Mr O'Carroll's written and oral submissions, that he also strongly disagrees with the Ombudsman in relation to the third topic (§4iii above). But, notwithstanding this opportunity at this oral hearing to ventilate the key headline points, and in light of everything that I have read and considered, I am unable to see any viable reasonableness (rationality) challenge to the Ombudsman's reasoning in that part of the decisions; still less is there any arguable inadequacy in the reasoning.

11. Mr O'Carroll emphasised in his oral submissions that the Ombudsman had adopted adverse reasoning on the question of Mr Carroll's 'own understanding' of the nature of UCIS investments. He submits that the Ombudsman materially concluded that Mr O'Carroll 'knew or ought to have known' that the UCIS investments, misdescribed by S4, were in fact 'high' risk investments. Mr O'Carroll emphasises the oddity of the position: where the financial investment advisers (S4) have been found to have misdescribed the risk nature of the product; then the suggestion that he, as the punter, somehow 'saw through' that misdescription, and was able to 'do their job better than they had'. That is an attractive submission. But the difficulty with it is that I have been quite unable to find in these decisions any passage which shows that the Ombudsman's evaluative conclusions turned on this aspect of the case. The reasoned logic which was the basis on which Mr O'Carroll lost before the Ombudsman, and his complaints were rejected, in my judgment – and beyond argument – rested on the three headline topics and conclusions that I identified earlier (§4 above). Those three topics are all, undoubtedly within the decision. In my judgment, beyond argument, they reasonably (rationally) support the adverse overall conclusion at which the Ombudsman arrived. I do not discount the possibility that it will be possible to point to a passage, even now, that touched on this feature of the case. But, in my judgment, what is very clear is that

these decisions cannot arguably be impugned as unreasonable (irrational) by any conclusion which treated Mr O'Carroll as being 'in a position at the time of the advice to see these investments as high risk'. The decision, in my judgment, clearly does not turn on any such finding.

The advocates

12. I record that I did not need to trouble Mr Barrett or Mr Howell, except for the purposes of ensuring that they had discharged their duty – owed in the context of Mr O'Carroll being a litigant in person – to point to any passage, material to the Ombudsman's decision, in relation to the key points raised today.

Costs

13. On the question of costs there are two applications. They arise in circumstances where Collins Rice J, in refusing permission for judicial review, ordered that Mr O'Carroll pay assessed costs of the Ombudsman's Acknowledgement of Service, summarily assessed in the sum of £4,242.

14. The first application is made by Mr Barrett on behalf of the Ombudsman. He submits that there are cogent reasons in the present case for departing from the usual practice and ordering the Ombudsman their costs of successfully resisting permission for judicial review today and up to today. He points to the persistence of Mr O'Carroll; to what he characterises as the lack of legal merit in the challenge; and to the fact that costs have been caused to the Ombudsman who has sought to avoid them by answering the claim and pointing to its lack of viability. The circumstances of this case, in my judgment, do not begin to depart to a sufficient extent from the features so frequently encountered in judicial review cases. It can almost always be said by a defendant (seeking costs at an oral renewal hearing at which permission has been refused) that: they pointed out the lack of viability of the claim in the pre-action correspondence; that they did so again in the Acknowledgement of Service and summary grounds; and now they have done so again in a skeleton argument or in any oral submissions at a renewal hearing. It can almost always be said that a judicial review claimant who is refused permission at a renewal hearing has persisted, notwithstanding all of that. And it will certainly always be said that that persistence has led to the incurring of costs by the defendant. But these features, in my judgment, are insufficient to warrant a costs order and there is nothing in the circumstances of this case to justify such an order. Mr Barrett also sought to submit that really the Ombudsman's attendance at this hearing is linked to what this Court said when the hearing was adjourned by order of 8 October 2021. In the reasons within that Order, Lang J characterised the case as one involving complexity in which the Ombudsman should not have to instruct alternative Counsel. In my judgment, that is nowhere near the sort of action on the part of the Court that could justify a Defendant saying that there are exceptional circumstances warranting a costs order. What happened was that the Ombudsman had chosen to participate at the permission stage, as it is perfectly entitled to do. Having done so, it wished to avoid a situation where it had to instruct fresh Counsel. What the Court was recognising was that the Ombudsman ought not to be obliged to instruct fresh counsel, to exercise its right to appear at this hearing. That is miles away from the Court putting the Ombudsman in the position where it was somehow required or expected to attend. Nor does it support, whether as a standalone feature or alongside other features of the case, a costs order.

15. The second application is Mr O'Carroll's application to be relieved from the costs order made by Collins Rice J. The basis on which the Court is invited to disturb that order has been set out very clearly in writing. Mr O'Carroll has emphasised that judicial review was his only available recourse. And he has emphasised, as is entirely evident from everything that I have heard in this case, that his position is that he regards the Ombudsman's decision as unjustified, wrong and unfair. He says it is that which has driven him to the door of, and into, the Court, including the pursuit of this renewed application. In my judgment, there is nothing in this case approaching a proper basis for overturning the order. In judicial review, claimants need to understand that the courts will make costs orders – when permission is refused on the papers – namely as to the costs of the Acknowledgement of Service. That approach strikes a fair and proportionate balance. It recognises that the Court has been put in an informed position at the permission stage, in writing, by the defendant. The fair balance which is struck extends through to the principle applicable to defendant's costs orders at oral renewal hearings, where rather different considerations apply. So, the costs order made by Collins Rice J stands.

Order

16. The Order will be this. Permission for judicial review was refused. The costs order of Collins Rice J on 16 July 2021 stands. The Ombudsman's application for further order for costs is refused.

14.12.21