Neutral Citation Number: 2010 EWHC 2875 (Ch)

Case No: HC 09 C 02160

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 4th November 2010

Before:

HIS HONOUR JUDGE PELLING QC
(Sitting as a Judge of the Chancery Division)

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Between:

ANDREWS	**Applicant**
- and -	
SBJ BENEFIT CONSULTANTS	**Respondent**

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Mr Elkington (instructed by **Messrs Taylor Wessing**) for the **Applicant**.
Mr Evans (instructed by **Messrs Fishburns**) for the **Respondent**.

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Approved Judgment

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His Honour Judge Pelling QC :

Introduction

1. In these proceedings, the Claimant claims damages pursuant to section 150 of the Financial Services and Markets Act 2000 ("FSMA"), which are provisionally quantified at over £400,000. The claim is made by reference to an allegation that the Defendants contravened the statutory rules applicable to pension reviews that were required to be carried out in relation to pension transfer business transacted between 1988 and 2004.

2. It is common ground that the Defendant made a complaint to the Financial Ombudsman Service ("FOS") which resulted in a final determination, dated 28th March 2008, by which the FOS awarded the Claimant sums totalling £103,860.93 which included compensation assessed at the maximum sum that can be awarded by FOS of £100,000.

3. As will shortly become apparent, the statutory provisions which apply to the activities of the FOS permit a claimant either to accept or reject the FOS's final determination. Here, the Claimant accepted it. The Defendant maintains that the cause of action by reference to which these proceedings have been commenced, merged in the award of the FOS once the Claimant had accepted the final determination of the FOS and, accordingly, it was extinguished. In advancing this submission, the Defendant relies on the principle that a person in whose favour a tribunal of competent jurisdiction has provided a final judgment is precluded from afterwards recovering from any other English tribunal a second judgment for the same relief in respect of the same subject matter: see Thoday v Thoday [1964] PR 181 and the Indian Grace [1993] AC 410. I refer to this doctrine hereafter as "the merger doctrine". In the alternative, if for purely technical reasons the merger doctrine does not apply, then it is alleged that the commencement of these proceedings is nonetheless an abuse of process.

4. These being the issues that were pleaded between the parties, Master Bragge directed the trial of a preliminary issue, to the following effect:

> "Whether as alleged in paragraph 14.4 of the Defence (1) the claim has been extinguished by operation of the doctrine of merger and judgment, (2) the Claimant is estopped from asserting the claim by a cause of action estoppel; or (3) the claim is an abuse of process such that the claim should be dismissed."

Before me, the Defendant advanced its claim that these proceedings ought to be dismissed by reference to the first and third of these propositions only. With that qualification, this is the trial of the preliminary issue ordered by the Master. Although various witness statements were served, in the end, most if not all the relevant factual material was agreed and was set out, at any rate in summary form, in the Statement of Agreed Facts at page 21 and following in the bundle.

Factual Background

5. The Defendant is a company whose business is the provision of financial advice. Prior to 1989, the Claimant, who is now aged 67 and is retired, was a member of an employees' pension scheme. In 1988-9, the Defendant advised the Claimant to transfer his pension benefits out of the employees' pension scheme and into a personal pension policy. The Claimant acted on that advice in May 1989, and it is common ground that the Claimant would have been better off if he had not acted on that advice.

6. From 1995, the Defendant became obliged to comply with an industry-wide review of pension transfer business which had been transacted between 1988 and 1994. In March 2000, the Defendant contacted the Claimant and offered to include him in the review process then being carried out. The Claimant agreed to this course. The review process was completed in the summer of 2002 and, by a letter dated 28th June 2002, the Defendant advised the Claimant that it had established that it was likely he would have been better off had he remained in the employer's scheme. There was thereafter no dispute that the Defendant was liable to compensate the Claimant.

7. There followed correspondence concerning the Defendant's proposals to compensate the Claimant. There was no discussion concerning liability because that had already been accepted or conceded. The effect of the correspondence between March and July 2003 was that agreement could not be reached as to the appropriate method for calculating the Claimant's losses and, in consequence, agreement could not be reached either concerning the appropriate level of compensation.

8. In the light of this, the Claimant made contact with FOS. The Claimant described what happened thereafter in his letter to FOS of 25th January 2005, in these terms:

> 'In January 2004, I spoke to the FOS, but their response indicated that the size of my claim precluded their involvement. I then sought the advice of the FSA, whose responses confirmed that actual annuity rates could be used in the loss calculation and that a redress annuity should restore the pension that would have been provided by the employer's scheme. In the meantime, SBJBC, claiming to have checked the position with the FSA, announced that they would be imposing acceptance of their offer by purchasing an annuity by the end of March. I objected to this, restating my reasons, but SBJBC ignored these and reaffirmed their stance. I asked SBJBC for details of their calculations and of the FSA guidelines with which they claimed to comply, but their "final response" letter refused to give this information, claiming they were not obliged to provide it and suggesting that I refer the matter to the FOS, although I told them you could not handle it. Before contemplating further action, I decided to seek professional actuarial advice and this reassured me that SBJBC's calculation and form of redress

> offer was inappropriate. I told SBJBC but they remained unmoved.'

9. Correspondence was sent by the Claimant to the Defendant down to August 2004 without any response being received from the Defendant, who considered that they had by this stage done all that they could be properly expected to do. As the Claimant puts it in paragraph 13 of the 25th January 2005 letter:

> "Still hesitant to initiate costly court proceedings, I learnt that the practice of the FOS in cases over £100,000 might not be entirely as I had believed and a phone call on 13th January confirmed that consideration would be given if I submitted the form previously issued."

10. The Claimant therefore initiated a complaint to FOS concerning the conduct of the Defendant. In the letter under cover of which the Claimant sent his complaint form to FOS, the Claimant said:

> "Naturally, I'm aware that you are unable to enforce an award in excess of £100,000, but a recommendation in my favour establishing the principle on which SBJBC should have based their compensation offer would, I believe, greatly increase the chances of my reaching a satisfactory settlement with them without resorting to litigation."

11. Although the Claimant now maintains that the complaint concerned what he calls the "misselling claim", it is clear from the complaint form that the complaint was concerned with, and only with, the basis on which his losses had been computed by the Defendant. In the box on the form that requires the complainant to summarise the nature of the complaint made, the Claimant said this:

> 'Customer unhappy the firm are only calculating loss on basis of prospective loss even though customer retired approximately two months ago. Customer has been told by actuaries that this basis of calculation is incorrect as retirement date has past. Firm has since "imposed" settlement, which fails to cover actual loss by a very significant amount. Firm claimed to have followed FSA guidelines but refused to provide any explanation or evidence of this.'

The relief sought was summarised as being:

> "Providing additional annuity and tax-free cash to restore me to the same financial position as I would have enjoyed had I not acted on their advice (including interest and costs incurred in pursuing my claim)."

The covering letter made clear that the Claimant considered that the Defendant had failed to provide redress in accordance with the rules that applied to the review. So, in paragraphs 4 to 6 of his letter of 25th January 2005, the Claimant said:

> '4. The basis for redress in cases of actual loss (which SBJBC agree this is as distinct from prospective loss) was clearly laid down by the SIB at the outset of the pensions review. SBJBC's method of fixing the costs of the annuity rather than addressing the amount of pension to be purchased and ignoring the loss of lump sum benefits is in conflict with these requirements. I have a professional actuarial opinion that SBJBC have not made a redress offer in a form that meets the guidelines. SBJBC maintain that they have carried out their loss assessment entirely in accordance with FSA guidelines, using "FSA approved calculation software", a term whose validity is disputed by my actuary. They have calculated a "target fund" of £712,812 based on an annuity interest rate of 5.5% "set by the FSA" (in published tables), though the FSA have confirmed to me that in this situation actual annuity rates currently available should be used.
>
> As the comparator, they have used the section 32 policy value at my retirement date on the grounds that the pension payments had not yet started at the date of their final offer. This ignores the fact that the delay in drawing pension, which was eventually backdated, was due to their failure to augment the policy in time, compounded by their earlier failure to forward necessary documentation from AXA Sun Life.
>
> SBJBC have refused my request for a detailed explanation of their calculation and evidence of how it meets FSA guidelines, claiming they are not obliged to provide this. My further request citing disclosure guidelines has been ignored. SBJBC have consistently understated the target pension by failing to take account of a revised entitlement, confirmed by the MC Trustees prior to the section 32 transfer of which they have evidence. Their claim that their software ignores "additional months" as unacceptable. This alone should require a recalculation.'

In his conclusions set out at the end of his letter, the Claimant said this:

> "Desired outcome of this application. I recognise the limitations on the amount of award that the FOS can enforce. I believe, however, that a favourable ruling from the FOS would enable me to negotiate a fair settlement of my claim against SBJBC without resorting to litigation. Specifically, I would appreciate it if you could (a) confirm that SBJBC have failed to comply with relevant guidelines, (b) direct SBJBC to recalculate based on the correct figure for my deferred

> pension … (e) recommend that SBJBC take all steps needed to restore me to the same financial position as I would have enjoyed had the section 32 transfer not taken place in terms of both annuity, income and cash, including interest and costs incurred in pursuing my claim."

12. On 28th March 2008, FOS issued its final determination. As will be apparent when I come to consider the statutory framework applicable to this claim, the Claimant was entitled to and was given a period of one month in which to decide whether to accept FOS's award or reject it. It is common ground that, if he had rejected it, the Claimant would have been entitled to commence proceedings in the High Court.

13. The nature of the complaint that the FOS was resolving is apparent from the terms of the final decision. As is there stated at the outset and under the heading "Complaint":

> "Mr Andrews has complained that the firm failed to perform its loss assessment in accordance with FSA guidelines for the review. Consequently, he has argued, with the benefit of independent expert advice, that the level of redress calculated and subsequently paid by the firm was insufficient."

That liability was not in issue at any stage was confirmed in the paragraph of the final decision that refers to the events of 28th June 2002: see page 110 in the second volume of the trial bundle.

14. The conclusions reached by the FOS were as follows:

> "In my opinion, the calculation was … clearly not in accordance with the guidance. I note also that the regulator has stated in Pensions Review bulletin 23 issued in February 2003 that in future the assumptions were to be reviewed annually and that the annual review date was to be 1st April. The first annual review date was to be 1st April 2003."

15. As was confirmed in the "Findings" section of the decision, he concluded that:

> "My opinion [is] that it failed to carry out the loss assessment correctly and in accordance with the relevant regulatory guidance."

In the result, FOS directed that Mr Andrews should recover £100,000 and, in addition, various other sums in relation to costs and the like. In addition, the FOS made a non-binding recommendation, as was permitted by the rules, to which I will shortly turn. The recommendation was to this effect:

> "If the amount produced by the calculation of fair compensation exceeds £100,000, I recommend that the firm pays the balance plus simple interest at 8% per annum on the balance from the date of this decision until the date of

> payment. This recommendation is not part of my determination or award. It does not bind the firm. If it does not pay the recommended balance and Mr Andrews decides to sue for the balance in court, the court would make its own decision as to whether or not to award anything."

16. Thereafter, the Defendant chose not to act on the non binding recommendation of FOS and on 23rd June 2009 these proceedings were commenced in which, as I have said, damages are claimed for breach of the statutory obligation to carry out the review of the Claimant's case and compensate him in accordance with relevant rules applicable to the review.

The Statutory Framework

17. By section 150 of FSMA:

> (1) 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, subject to the defences and other incidents applying to actions for breach of statutory duty."

It is common ground that, pursuant to section 150, a contravention by an authorised person of a rule is actionable in the circumstances set out in the section. It is also common ground that, for the purposes of the section, the Claimant is a "private person" and the Defendant an "authorised person".

18. Pursuant to section 404(6) of FSMA, a failure on the part of an authorised person to comply with any provision of an authorised scheme is to be treated as a failure to comply with a rule. By the Financial Services and Markets Act 2000 (Transitional Provisions)(Review of Pension Business) Order 2001, a pensions review provision which has been designated by the FSA has effect as if it were a provision of an authorised scheme. By the designation of Pensions Review Provisions Instrument 2001, the FSA designated the Pensions Review Provisions listed therein and, consequently, it is common ground between the parties that a contravention by the Defendant of the pensions review provisions listed in the Schedules to the 2001 instrument is actionable at the suit of the Claimant if he suffered a loss as a result of the contravention by reference to section 150 of FSMA.

19. The statutory basis of the Financial Service Ombudsman Scheme is set out in Part XVI of FSMA. In so far as it is material, section 225 provides as follows:

> "(1) This Part provides for a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person.
>
> …
>
> (4) Schedule 17 makes provision in connection with the ombudsman scheme and the scheme operator."

There are two jurisdictions which are exercised by the Ombudsman, one called the "compulsory jurisdiction" and the other the "voluntary jurisdiction". It is common ground that the Claimant's complaint was one that came within the compulsory jurisdiction.

20. Determination of complaints considered under the compulsory jurisdiction are subject to section 228, which, in so far as is material, provides as follows:

> "228. Determination under the compulsory jurisdiction.
>
> …
>
> (2) A complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case.
>
> (3) When the ombudsman has determined a complaint he must give a written statement of his determination to the respondent and to the complainant.
>
> (4) The statement must—
>
> …
>
> (c) require the complainant to notify him in writing, before a date specified in the statement, whether he accepts or rejects the determination.
>
> (5) If the complainant notifies the ombudsman that he accepts the determination, it is binding on the respondent and the complainant and final."

21. The power of the FOS to make an award in a compulsory jurisdiction case is set out in section 229, which, in so far as is material, provides as follows:

> '229. Awards.
>
> …
>
> (2) If a complaint which has been dealt with under the scheme is determined in favour of the complainant, the determination may include—
>
> (a) an award against the respondent of such amount as the ombudsman considers fair compensation for loss or damage (of a kind falling within subsection (3)) suffered by the complainant ("a money award");
>
> (b) a direction that the respondent take such steps in relation to the complainant as the ombudsman considers just and appropriate (whether or not a court could order those steps to be taken).

> (3) A money award may compensate for—
>
> (a) financial loss; or
>
> (b) any other loss, or any damage, of a specified kind.
>
> (4) The Authority may specify for the purposes of the compulsory jurisdiction the maximum amount which may be regarded as fair compensation for a particular kind of loss or damage specified under subsection (3)(b).
>
> (5) A money award may not exceed the monetary limit; but the ombudsman may, if he considers that fair compensation requires payment of a larger amount, recommend that the respondent pay the complainant the balance.
>
> (6) The monetary limit is such amount as may be specified.'

It is common ground that the relevant financial limits as at the date of the award with which I am concerned in these proceedings was £100,000. It is also common ground, as I have said, that, for the purposes of section 228(4), the Claimant was given from 28th March until 28th April 2008 to decide whether to accept the final award of FOS or not: see FOS's letter of 28th March 2008 to the Claimant, a copy of which appears at page 106 in the second volume of the trial bundle.

22. It is also common ground that FOS warned the Claimant before the expiry of this time limit that, if he accepted the award, there was a risk that he would not be able to recover the alleged balance of his losses over the maximum sum awarded by FOS: see the letter to the Claimant of 17th April 2010, a copy of which is to be found at page 120 in the second volume of the trial bundle.

23. The scheme is the subject of further provision, as contained in Schedule 17 of FSMA. By paragraph 14, it is provided that:

> '(1) The scheme operator must make rules, to be known as "scheme rules", which are to set out the procedure for reference of complaints and for their investigation, consideration and determination by an ombudsman.
>
> (2) Scheme rules may, among other things—
>
> …
>
> (b) provide that a complaint may, in specified circumstances, be dismissed without consideration of its merits
>
> …
>
> (3) The circumstances specified under sub-paragraph (2)(b) may include the following—

> …
>
> (b) legal proceedings have been brought concerning the subject-matter of the complaint and the ombudsman considers that the complaint is best dealt with in those proceedings …'

The rules made pursuant to this power are contained in the FSA Handbook in the section known as the "Dispute Resolution: Complaints" section. In so far as is material, the rules provides as follows:

> "3.3.4 The Ombudsman may dismiss a complaint without considering its merits if he considers that:
>
> …
>
> (2) the complaint is frivolous or vexatious; or
>
> (3) the complaint clearly does not have any reasonable prospect of success
>
> …
>
> (8) the subject matter of the complaint has been the subject of court proceedings where there has been a decision on the merits; or
>
> (9) the subject matter of the complaint is the subject of current court proceedings, unless proceedings are stayed or sisted (by agreement of all parties, or order of the court) in order that the matter may be considered under the Financial Ombudsman Service; or
>
> (10) it would be more suitable for the subject matter of the complaint to be dealt with by a court, arbitration or another complaints scheme …"

Further provision as to how complaints were to be resolved were dealt with at paragraph 3.5 of the rules, where it is provided, in so far as it is material, that:

> "The Ombudsman will attempt to resolve complaints at the earliest possible stage and by whatever means appear to him to be most appropriate, including mediation or investigation …
>
> 3.5.4 If the Ombudsman decides that an investigation is necessary, he will then:
>
> (1) ensure both parties have been given an opportunity of making representations;

> (2) send both parties a provisional assessment, setting out his reasons and a time limit within which either party must respond; and
>
> (3) if either party indicates disagreement with the provisional assessment within that time limit, proceed to determination."

In relation to hearings, paragraph 3.5.5 of the rules provides:

> "If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by any means which the Ombudsman considers appropriate in the circumstances, including by telephone. No hearing will be held after the Ombudsman has determined the complaint.
>
> 3.5.6 A party who wishes to request a hearing must do so in writing, setting out:
>
> (1) the issues he wishes to raise; and
>
> (2) (if appropriate) any reasons why he considers the hearing should be in private;
>
> so that the Ombudsman may consider whether:
>
> (3) the issues are material;
>
> (4) a hearing should take place; and
>
> (5) any hearing should be held in public or private."

In relation to evidence, 3.5.8 provides:

> "The Ombudsman may give directions as to:
>
> (1) the issues on which evidence is required;
>
> (2) the extent to which evidence should be oral or written; and
>
> (3) the way in which evidence should be presented."

24. And by 3.5.9, it is provided that:

> "The Ombudsman may:
>
> (1) exclude evidence that would otherwise be admissible in a court or include evidence that would not be admissible in a Court …"

25. In R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service Ltd [2008] EWCA Civ 642, it was recorded as being common ground that Article 6 of the European Convention on Human Rights and Article 1 of the First Protocol thereto applies to the activities of FOS: see paragraph 42 of the lead judgment in that case. Both Counsel before me expressly accepted that the concession in Heather Moor had been rightly made and was made likewise in this case. In that case, the Court of Appeal said, at paragraph 44:

> 'A1P1 must be read alongside Article 6, which envisages decisions of courts or tribunals in civil proceedings holding a respondent liable to a claimant. A determination by a court or tribunal complying with Article 6 requiring a respondent to pay a sum of money to a claimant does not infringe the respondent's rights under A1P1. Provided the scheme established under the 2000 Act satisfies the requirements of "law", and satisfies the requirements of Article 6, no question of incompatibility arises.'

An attack based on incompatibility was advanced before the Court of Appeal but was rejected by that Court for the reasons summarised in paragraph 49 of the lead judgment, which was to the following effect:

> 'Does the scheme established under the 2000 Act, interpreted in accordance with its natural meaning, comply with these requirements? In my judgment, it can and does. The ombudsman is required by DISP 3.8.1 to take into account the relevant law, regulations, regulators' rules and guidance and standards, relevant codes of practice and, where appropriate, what he considers to have been good industry practice at the relevant time. He is free to depart from the relevant law, but if he does so he should say so in his decision and explain why. The other matters referred to in this rule are matters that a court would take into account in determining whether a professional financial adviser had been guilty of negligence or breach of his contract with his client. Again, if the ombudsman is to find an advisor liable to his client notwithstanding his compliance with all those matters, the ombudsman would have to so state in his decision and explain why, in such circumstances, assuming it to be possible, he came to the conclusion that it was fair and reasonable to hold the adviser liable. In these circumstances, I consider that the rules applied by the ombudsman are sufficiently predictable. All the matters listed in DISP 3.8.1 are formulated or ascertainable with sufficient precision. So far as guiding the conduct of financial advisors are concerned, provided that they comply with "the relevant law, regulations, regulators' rules and guidance and standards, relevant codes of practice and, where appropriate, … good industry practice", they can be assured that they will not be liable to their client in the absence of some exceptional factor

> requiring a different decision. Lastly, the common law requires consistency: that like cases are treated alike. Arbitrariness on the part of the ombudsman, including an unreasoned and unjustified failure to treat like cases alike, would be a ground for judicial review.'

26. Rix LJ in a concurring judgment said this at paragraph 80:

> 'The effect of these provisions is not to leave the Ombudsman's determination to his entirely subjective views, as though he was operating according to the length of his foot, so to speak. That, it seems to me, is not the effect of the statutory language which defers to the "opinion of the Ombudsman". Rather, that is typical language to emphasise that the decision is for the Ombudsman, not for a judge. However, the Ombudsman remains amenable, through the ordinary process of judicial review, to a challenge on such grounds as perversity or irrationality. That was not in dispute. It was the view of Stanley Burnton J, as he then was, in *R v. FOS Ltd ex parte IFG Financial Services Ltd [2005] EWHC 1153 (Admin)*, unreported 19 May 2005, at para 13. That is not the same, however, as saying that the Ombudsman is bound to apply the common law in all its particulars. He is, after all, dealing with complaints, and not legal causes of action, within a particular regulatory setting. Rather, he is obliged ("will") to take relevant law, among other defined matters, into account.'

27. These conclusions, which I have set out at some length, are relevant to the question whether FOS is to be regarded as a tribunal for the purpose of the merger doctrine.

The Parties' Respective Cases

28. The Claimant's case was that the doctrine of merger upon which the Defendant relies is of no application in the circumstances of this case because (a) the doctrine can apply only to judgments of competent courts and tribunals, and FOS is not to be regarded as either a court or a tribunal for these purposes; nor is an Ombudsman's decision to be regarded as a judgment or equivalent; but (b) in any event, as a matter of fact, the subject matter of the complaint considered by the FOS in this case is not the same as the cause of action that is the foundation of the claim in these proceedings and thus, even if the merger doctrine is capable of applying in principle to the decision of the FOS the Defendant's claim to rely upon that doctrine fails on the facts.

29. The Defendant's case is that, on a proper analysis of the complaint and the claim advanced in these proceedings, they are, or are substantially, the same and that, on an application of relevant principle, FOS is to be treated as being a court or tribunal for the purposes of the merger doctrine. An Ombudsman's decision is likewise to be treated as the equivalent of a judgment or award. I

address the Defendant's secondary case as to abuse of process at the end of this judgment to the extent that it is necessary to do so.

Discussion

30. I turn first to the question of whether the cause of action the subject of these proceedings is in law the same as the subject matter of the complaint to FOS. I do this at this stage because if, as the Claimant alleges, they are different, then it will not be necessary for me to consider further whether the merger doctrine in principle is capable of applying to an accepted final decision of FOS.

31. In my judgment it is important for these purposes to distinguish between the juridical basis of a claim or complaint and the facts that give rise to it. In my judgment it is by reference to the latter that the issue I am now considering is to be resolved. I say this because it is now well established that in English Law a cause of action is simply the minimum facts that the claimant must allege and prove to succeed in his claim: see Letang v Cooper [1965] 1 QB 232. The juridical basis of the claim made in these proceedings is tortious, being a claim for damages for breach of statutory duty, and thus I proceed on the assumption that damage is of the essence of the claim. However, this does not mean that a claimant is entitled to bring more than one claim to recover damages for a particular type of loss arising out of the same incident: see generally *Phipson on Evidence*, 17th Edn paragraphs 43-18 and see also specifically Wright v London General Omnibus Co [1877] 2 QBD 271 and Clarke v Yorke [1882] 52 LJ Ch 32. The question which has to be asked is whether the facts that are said to give rise to liability in these proceedings are or include the same facts relied upon by the Claimant in his complaint to the FOS or whether the losses he claims in these proceedings are of a different nature to those the subject of the FOS's award.

32. The Claimant's case is that the subject matter of the complaint to the Ombudsman was what he characterises as the misselling claim. That is a claim actionable had it been sued upon in negligence. He submits that that is different from the claim the subject of these proceedings, which is a claim for breach of statutory duty brought pursuant to section 150 of FSMA and is for breach of duty in failing to carry out the required review in accordance with the regulations that applied to it. The damages, while the same in amount and in their calculation, are claimed by reference to different routes.

33. I am not able to accept the Claimant's submission in relation to this issue. As is apparent from the factual history set out above, no issue ever arose between the parties concerning whether misselling had occurred. That was either admitted or conceded literally years prior to the complaint to FOS as is apparent from the terms of the final decision of FOS. It is entirely clear from the terms of the Complaint Form completed by the Claimant, from the terms of the covering letter (the material part of which I have set out above) and from the terms of the FOS's final decision that the complaint considered by him related to the failure as he saw it of the Defendant to carry out a review of the Claimant's case and assess his entitlement to compensation by reference to the applicable rules.

34. That is precisely what is being alleged in these proceedings. It is not alleged that the losses for which damages are claimed in these proceedings are any different in nature from those that were the subject matter of the complaint to FOS. The fact that there is no mention of section 150 of FSMA is nothing to the point. Section 150 is the juridical basis on which a claim can be made in these proceedings, but that has no impact on the issue I am now considering. Formulation of a second claim as a claim for damages for breach of statutory duty does not avoid the applicability of the merger doctrine simply because the earlier proceedings were formulated as a claim in negligence if the earlier action had relied on the same facts and the same types of loss were claimed. So, against that background, I now turn to what in truth is the main issue in these proceedings, namely whether the doctrine of merger can apply at all.

35. In my judgment, the question whether a decision of FOS is to be treated as that of a court or tribunal for the purpose of the merger doctrine is to be determined as a matter of general principle. In this regard, it was common ground that the relevant English Law principles were correctly summarised in the 4th Edition of *Spencer Bower & Handley on Res Judicata* at paragraph 2.03 by reference to statements of principle to be found in two decisions, one of the High Court of Australia and the other of the Supreme Court of Victoria, which together were in these terms:

> 'As Gibbs J said:
>
> > "The use of the phrase 'judicial tribunal' in this context is convenient as indicating that an estoppel of this kind does not result from a mere administrative decision, but the question whether such an estoppel is raised is not answered by enquiring to what extent the tribunal exercised judicial functions, or whether its status is judicial or administrative ... The doctrine of estoppel extends to the decision of any tribunal which has jurisdiction to decide finally a question arising between parties, even if it is not called a court, and its jurisdiction is derived from statute or from the submission of parties."
>
> In *Pastras v The Commonwealth* Lush J stated the test for distinguishing between decisions which are judicial for present purposes and those which are purely administrative:
>
> > "The underlying principle of this form of estoppel is that parties who have had a dispute heard by a competent tribunal shall not be allowed to litigate the same issues in other tribunals. When the decision making body is an administrative body not affording the opportunity of presenting evidence and argument … there is no room for the operation of this principle …. It appears to me that both upon the general language of the authorities … and upon … principle … no estoppel can arise from the decision of an administrative authority which cannot be classed as either 'judicial' or as 'a tribunal', and that an

> authority cannot be given either of those classifications if it … is under no obligation to receive evidence or hear argument.'''

In my judgment, there can be no real doubt that on this analysis the FOS fulfils the requirements of a relevant tribunal. My reasons for this conclusion are as follows.

36. First, as I have already noted, the Court of Appeal in Heather Moor & Edgecomb (ante) proceeded on the basis that the FOS was a court or tribunal to which the provisions of Article 6 of the European Convention on Human Rights and Article 1 of the First Protocol thereto applied. It would not be consistent with that decision to conclude that FOS is not to be treated as a court or tribunal for the purposes of the merger doctrine.

37. Secondly, as I have demonstrated by reference to the rules that apply to complaints considered by FOS, the procedure set out in the rules satisfy the requirements, and bear all the hallmarks, of a court or tribunal, and FOS cannot be dismissed as an administrative body that does not afford parties the opportunity of presenting evidence or argument. Indeed, quite the contrary is the case, as is apparent from the rules to which I have referred.

38. Thirdly, although the Claimant maintains that FOS should not be treated as a tribunal for these purposes because its procedures are informal in nature, FOS is entitled to resolve issues by reference to what it considers fair and reasonable and/or is not obliged to apply English Law, I do not regard any of these points as at all cogent. First, I regard the points made by reference to procedure as untenable once it is accepted that the FOS cannot be regarded as simply an administrator or administrative body, as in my judgment is the case for the reasons already given. Many tribunals adopt informal procedures for resolving matters coming before them, but that does not render them any less a judicial as opposed to an administrative entity, particularly when Article 6 applies to their activities. Secondly, I regard the reference to the ability of the FOS to proceed otherwise than by reference to strict principles of English Law to be of no assistance in resolving the issues I am now concerned with. There are many arbitral bodies that are entitled to resolve issues by reference to systems of law other than English Law, or by reference to international or transnational principles of law, or sometimes by reference to principles which are very similar to those identified in section 228(2) of FSMA. That does not lead to the conclusion that the award of such a body is not capable of engaging the merger doctrine. More importantly, however, there are limits on the capacity of FOS to depart from relevant law and practice - see paragraph 49 of the lead judgment in Heather Moor & Edgecomb, the full text of which I have already set out. Further, and as is made clear both in that paragraph and in paragraph 80 in the judgment of Rix LJ, any irrationality or arbitrary decision making is remediable by judicial review. It is simply not possible in those circumstances to advance the argument that is advanced in this case by reference to the simplicity of procedure and decision making by reference to what is fair and reasonable that that results in the conclusion that the FOS is not to be regarded as a relevant tribunal. In my judgment, such an argument simply cannot be advanced in the light of the conclusions reached by the Court

of Appeal in Heather Moor & Edgecomb in the parts of the judgment to which I have referred.

39. Next it was submitted that the decision of the FOS was not a judgment for the purposes of the merger doctrine, because, on any view, rejection of a claim on the merits by the FOS did not operate to prevent the complainant from commencing proceedings raising precisely the same allegations as had been rejected by the FOS. I do not accept that as a correct analysis. The decision of the FOS becomes binding on both parties if it is accepted by the complainant. In theory, it would be open to a complainant to accept the decision of the FOS, even if he or she had lost, whereupon it would become binding on both parties. If the decision of the FOS is not accepted by the Claimant, then it is common ground that the decision is simply a nullity, and that is so irrespective of whether the Claimant has won or lost in front of the FOS. Thus it is, in my judgment, that this factor does not lead to the conclusion that an accepted decision of an FOS is not to be treated as a judgment or award for present purposes.

40. Next, the Claimant argued that there would be no point in empowering FOS to make recommendations of a non-binding nature if the Claimant was prevented from commencing or continuing Court proceedings to recover additional sums if the FOS's recommendations were not honoured. This is really part of a more general submission made on behalf of the Claimant, to which I turn in a moment, that if the statutory rules applicable to the activities of FOS are considered together, then it is to be implied that the legislature did not intend a binding decision of FOS to bar other Court proceedings. It is, however, convenient to deal with the non-binding recommendation point separately because it was treated in the submissions made on behalf of the Claimant as a free-standing point. In essence, it is submitted that the inclusion of a power to make recommendations is necessarily, albeit impliedly, inconsistent with the suggestion that the merger doctrine applies so as to preclude a claimant who had accepted the award of FOS from bringing a subsequent claim on the same facts. I do not accept this analysis. As I have said already on more than one occasion in the course of this judgment, the binding effect of a final decision of the FOS depends upon a decision being formally accepted by the complainant. The complainant has a month in which to decide whether to accept the decision or not. In that time, he is entitled to seek the agreement of the Respondent to comply with any non-binding recommendations made by the FOS and, in the light of the response or lack of it from the Respondent, to decide whether (a) to accept the decision, or (b) reject it and commence proceedings. That decision will be informed by a number of considerations including but not limited to the strength of the Claimant's putative claim legally and factually both in relation to liability and quantum issues. There is nothing in the statutory mechanism which implies that the Claimant can both accept the award or commence court proceedings.

41. It was argued by the Claimant next that the fact that the award was not immediately binding prevented it from being a judgment for the present purposes. I am not able to see why that should be so. There is nothing about this feature of the scheme which makes it wrong in principle to conclude that

the doctrine should apply once the complainant has agreed to accept the award.

42. In the course of his reply submissions, Counsel for the Claimant argued that findings of fact made by the FOS would not be binding on the parties in any subsequent court proceedings and it therefore followed that the merger doctrine could not consistently be held to apply to an award made by an FOS.I am not able to accept this submission. The reason a finding would not be binding was if a complainant had not accepted the award and thus the award was of no effect between the parties. This issue would only become a problem in circumstances where the FOS award had been accepted and the complainant was permitted to commence proceedings in relation to a similar claim in court proceedings in relation to the same cause of action. This in itself is not a reason for concluding that the merger doctrine does not apply. It is a reason, in my judgment, for concluding that the merger doctrine ought to apply in the circumstances as I have outlined them.

43. There remain two points left for consideration. The first of these concerns a submission that if it was to be concluded that the merger doctrine applied, the effect would be to exclude an individual from access to the courts and thus would violate the fundamental common law rule that recourse to the courts is not to be excluded save by clear words. In my judgment this point is entirely without merit. The true principle that applies in these circumstances is that identified by Viscount Simonds in Pyx Granite Co Ltd v Ministry of Housing and Local Government [1960] AC 260 at page 286, where Viscount Simonds said this:

> 'It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair J called it in Francis v Yiewsley and West Drayton Urban District Council (1957) 2 QB 136, a "fundamental rule" from which I would not for my part sanction any departure. It must be asked, then, what is there in the 1947 Act which bars such recourse. The answer is that there is nothing except the fact that the Act provides him with another remedy. Is it, then, an alternative or an exclusive remedy? There is nothing in the Act to suggest that, whiles a new remedy, perhaps cheap and expeditious, is given, the old and, as we like to call it, the inalienable remedy of her Majesty's subjects to seek redress in her courts is taken away.'

The position here is substantially the same as that identified by Viscount Simonds in the section of his opinion as set out above. The FOS scheme is an alternative machinery for resolving relevant disputes. It is, as it is put in section 225(1) of FSMA:

> " … a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person."

No question of excluding a claimant from the courts arises, not least because there is no compulsion on a claimant to use the scheme. Indeed, the Claimant has, as I have said, a free choice whether to accept the FOS's determination after it has been issued. It is only if and when a claimant decides to accept the FOS's decision that any question of a lack of access to the courts arises and, if the Defendant is correct, exclusion arises not as a result of any statutory provision within FSMA but as a result of the applicability of the merger doctrine. The absence of express words in these circumstances has never been held to be a relevant consideration - see by way of example Wright v London General Omnibus Co (ante). The position in substance is no different to the position that prevails where the parties have entered into an arbitration agreement.

44. The point which remains is that which Counsel for the Claimant opened to me as being his over-arching submission and one which he submitted was, in the end, determinative of this issue because it provided a complete answer, namely that, on a true construction of the statutory scheme taken as a whole, it contemplated that court proceedings could be commenced in respect of the same subject matter as a complaint. It will be necessary to consider the language of the statute and the subordinate legislation in a little more detail in a moment, but at the outset I mention these general points.

45. First, this has not been the understanding of at least two judges who have considered the statutory scheme in any detail. Stanley Burnton J (as he then was) described the scheme at paragraph 12 of his judgment in R (On the Application of IFG Financial Services Ltd) v Financial Ombudsman Services Ltd [2005] EWHC 1153 (Admin); [2006] 1 BCLC 524, in these terms:

> "The scheme is one which is compulsory so far as the financial adviser is concerned, but the result of a determination is not binding on a complainant such as Mr and Mrs Jenkins. They have an option to accept or to reject the determination. If they reject it they may, if they think fit, take legal proceedings in respect of their complaint. Nonetheless, the scheme as a whole is intended to provide, as required by section 225(1), a quick resolution of disputes within its scope with a minimum formality by an independent person."

To similar effect was Lewison J's summary of the scheme, as set out in paragraph 22(iii) of his judgment in Bunney v Burns Anderson plc & Financial Ombudsman Service [2007] EWHC 1240 (Ch).

46. In both these cases the judges described the alternatives available as being either to accept the award or reject it and pursue a claim in court. Neither considered that the effect of the scheme to be as the Claimant alleges. Whilst it is true to say that the issue I am now concerned with did not arise directly in either case, it is, in my judgment, unlikely that either judge would have chosen to summarise the effect of the scheme in the terms adopted if they thought that what is now claimed was the arguable effect of the statutory scheme to which they gave extensive consideration.

47. The second general point that needs to be made at this stage is one I have mentioned already on a number of occasions. No question of an award becoming binding arises until after a final determination has been issued and it has been accepted by a claimant. In my judgment, this feature has to be born in mind when considering the terms of the statutory provisions. In my view, a and perhaps the key provision for present purposes is section 225(1) of FSMA. It provides that Part XVI of the Act:

> "… provides for a scheme under which certain disputes may be resolved …" (emphasis supplied)

If it was intended that a complainant could both accept an award from the FOS and commence proceedings in respect of the same dispute, then on no sensible use of language could the scheme have been described as one for resolving disputes, since by definition in at least some cases the dispute would not be resolved by the FOS's determination, even if the award was in favour of the claimant and accepted. Whilst I accept, as did the Defendant's Counsel in the course of his submissions, that section 228(5) does not resolve the question I am now considering determinatively, in my judgment, it is a relevant consideration because it is at least in part inconsistent with the case advanced by the Claimant as to the true construction to be applied to the scheme as a whole.

48. The Claimant argues that certain of the provisions within Schedule 17 and the FOS Rules which I have set out already in this judgment provide that a complaint procedure may be, but it is not required to be, stayed or dismissed if court proceedings are on foot. It is submitted that the absence of a mandatory requirement to stay or dismiss the complaint in those circumstances means that, by implication, the scheme recognises that concurrent court proceedings could and may be brought.

49. There is no doubt that the language of, in particular, paragraph 14 of Schedule 17 and DISP 3.3.4 of the FOS Rules provide that the FOS may rather than must dismiss proceedings before him if legal proceedings are brought concerning the subject matter of the dispute. However, I do not find that point at all helpful in resolving the question that I am now considering. In my judgment, a provision which required the FOS to dismiss a complaint before him would be inconsistent with the scheme as a whole. As I have observed, in the end a claimant may accept or reject a FOS award once he or she has seen it. Thus, to commence court proceedings may not necessarily lead to the conclusion that FOS proceedings ought to be dismissed. It may be, for example, that court proceedings were commenced in order to avoid a claim becoming statute barred. In those circumstances, it would be at least arguably inappropriate to require the dismissal of the FOS complaint simply because court proceedings had been commenced. On the other hand, where it is clear that legal proceedings are being actively pursued by a claimant or complainant, it may be appropriate to dismiss the complaint and leave the parties to resolve their dispute in court. There are a number of possible permutations of a fact sensitive nature which means that a rule in permissive terms is appropriate. I am encouraged in that view also by the fact that the same discretion appears to be extended to the FOS even in relation to claims

which have been the subject of previous court proceedings or which are regarded as frivolous and vexatious; and overall my judgment is that the proper inference to be drawn from the terms of the provisions relied upon by the Claimant is that there has been a degree of caution in the drafting of the provisions so as to make sure that relevant discretions are available to the FOS, but that does not lead to the conclusion that the scheme as a whole is to be construed as permitting court proceedings to proceed concurrently with and in relation to the same subject matter as complaints pending before or which have been determined by the FOS in a final way.

50. Thus, in my judgment, the fact that the rules do not provide for a mandatory dismissal of the complaint when court proceedings are commenced does not lead to the conclusion for which the Claimant contends. Indeed, I do not see what useful purpose would have been achieved by providing for this scheme unless it was to be regarded as an alternative to court proceedings, for, if the proceedings before the FOS were not to be regarded as binding if a final decision was accepted, then there was little point in creating the scheme at all.

51. The final point made on behalf of the Claimant is that it is unfair for the Claimant to be deprived of the prospect of recovering the whole of his losses by reference to the merger doctrine. Such an approach is entirely inconsistent with that of the Divisional Court in Wright v London General Omnibus Co Ltd (ante). In that case, Lord Cockburn CJ, said this:

> "Having appealed to the special jurisdiction given under the Act he [that is the plaintiff] must abide the result, and could not obtain a further award of compensation against the company by another tribunal … It seems to us that when the jurisdiction given by the section is exercised and compensation is awarded, the award is in full of the whole compensation recoverable by the party damaged, and he cannot recover anything more … It is true that the plaintiff did not originally ask for the exercise of the jurisdiction given by the section, but in the course of an inquiry upon a complaint made by other parties, the magistrate expresses his intention of awarding compensation, and asks if £10 will be sufficient. The plaintiff answers that it will not; but, nevertheless, when the magistrate proceeds to award this amount to him, he takes it. It seems to me that by taking the £10 he consented to the exercise of the jurisdiction, and was bound by it."

Mellor J said in the same case:

> "It is intended to give the party aggrieved a speedy and convenient mode of recovering in respect of slight injuries by means of the summary jurisdiction of the magistrate, so that when the complaint is brought before the magistrate with regard to the driver's misconduct, the whole matter may be settled, and the party injured may recover his compensation without being sent to the county court or

> compelled to engage in further litigation. It appears to me that there is no reservation of any further right of compensation, and that if the party aggrieved avails himself of the summary remedy given by the section he cannot afterwards proceed elsewhere. The plaintiff in the present case submitted himself to the magistrate's jurisdiction, in my opinion, by accepting the amount of compensation awarded. The matter thus became *res judicata*, and cannot be reopened."

To broadly similar effect is the judgment of Pearson J in Clarke v Yorke (ante) where Pearson J said:

> "I am of opinion that his cause of action was completely exhausted by the verdict in the action in the County Court. He might, if he was really entitled, in respect of that misrepresentation, to larger damages, have sought and obtained larger damages in the superior Court. If, therefore, he has recovered only £50 in the County Court, and £50 is not the measure of his damage, it is his own fault for having sued in a Court of limited jurisdiction instead of having sued in the superior Court."

52. These authorities clearly contradict the suggestion that what would otherwise be the effect of the merger doctrine can be avoided on grounds of supposed unfairness where damages may be recovered in subsequent proceedings which exceed the sum so far recovered when recourse has been had to alternative and more summary processes. In any event, the correspondence I referred to at the outset of this judgment shows that the Claimant knew the risks that were being run by accepting the award. Thus, no question of surprise or unfairness arises. In my judgment, the position here is essentially that which applied in Wright, that is this Claimant, like Mr Wright in those proceedings, had a choice whether to accept the award in this case or the £10 in Wright and, having decided to accept the award, is not entitled now to seek a second set of proceedings to recover more in respect of the same subject matter.

Conclusion

53. Once it is concluded, as I conclude for the reasons set out above, that FOS is to be treated as a tribunal for merger doctrine purposes and that the claim in these proceedings is advanced in respect of the same subject matter as the award that the Claimant has chosen to accept, there can be only one outcome. The award of the FOS became final between the parties when it was accepted by the Claimant and the effect of the merger doctrine in those circumstances is to extinguish the cause of action the subject of these proceedings. In those circumstances, I resolve the question identified by Master Bragge in his order of 6th May 2010 by answering the question posed in the affirmative. I think it follows that the claim must be dismissed, but I will hear Counsel as to the terms of the order that should follow. It necessarily follows from the conclusions that I have reached that it is not necessary to resolve the

alternative abuse of process allegation. In the circumstances, it is not appropriate that is any anything further about it.

Legal argument

54. The first of the post-judgment issues I have to deal with concerns whether or not the successful Defendant should recover the costs of and occasioned by these proceedings.

55. In opposing the application for costs, the Claimant submits, in essence, that the successful Defendant should be deprived of their costs, first, because the only reason that the litigation was commenced was a failure on the part of these Defendants to accede to the non-binding recommendation of the Financial Services Ombudsman in the final determination. Secondly, it is said that, in any event, this was litigation which has resolved an issue of concern to those in the financial services sector and thus that would be a reason for not making an order as to costs which would otherwise be made. Thirdly, it is said, perhaps as an adjunct to the second, that there is a disparity between the parties in terms of financial shooting power between, on the one hand, a Claimant who is an individual of limited means against a significant corporation.

56. In my judgment, none of these points lead to the conclusion that the ordinary order as to costs should not be made.

57. So far as the first point is concerned, I accept the submission made on behalf of the Defendants that the Defendants were within their rights to refuse to accede to the recommendations of the Financial Services Ombudsman. Further, it seems to me the Claimant proceeded clearly in the knowledge that there was a risk that that would happen and that there was a risk concerning his ability to claim anything more in proceedings once he had accepted a final determination of the Ombudsman: see the correspondence referred to in the substantive judgment above.

58. The public service point is one which is equally unattractive. It may or may not be true to say that the issue I have to decide is one which has provided trouble for the financial services industry for some time. However, this was private litigation conducted for a private purpose. If incidentally a particularly significant point has been resolved, then that is simply the way in which a case law driven jurisdiction proceeds. There is no justification for depriving a defendant whose position has been vindicated of costs by reference to such a submission. Further, it seems to me that it was open to the Claimant to apply to the Master for a costs capping order in relation to these proceedings once the Defendant had filed a Defence raising the points mentioned, but chose not to do so.

59. So far as the disparity in financial fire power between the Claimant and Defendant is concerned, again, on established principles, that is not a relevant consideration. The general principle remains in English Law that the losing party pays the winner's costs subject to questions of relevant conduct and to any issue base arguments which would suggest that the costs otherwise

recoverable should be reduced. There are no true issue based points that arise in this case. The Defendant has won, the Claimant has lost. The Claimant chose to proceed in the face of the points which were being argued by the Defendant. In those circumstances, regrettably, he must pay the costs of the Defendant.

Legal argument

60. This is an application for an interim payment on account of costs. The total costs incurred by the Defendant, I am told, were £56,500-odd. About £8,000 of that appears to be VAT. There is a question in my own mind about the VAT position. I have been told that the Defendant is not registered for VAT. I do not for a moment conclude otherwise because I have not got the information to decide the point. However, it is something which will have to be ventilated ultimately before a Costs Judge, but it is something to be born in mind given that an interim payment on account has to be approached on a cautious basis.

61. The other issue which it seems to me might (and I emphasise might) generate an issue in front of the Costs Judge is the issue concerning the preparation of a witness statement in relation to a piece of legislation which in the end did not feature in the argument. There may be issues concerning the admissibility of that. More to the point, there may be issues concerning whether it was necessary for that evidence to be prepared for the purpose of assessing the costs on a standard basis. All of this leads me to conclude that a degree of caution needs to be exercised in assessing the interim payment.

62. On the other hand, the rates which have been adopted for the Solicitors are commendably restrained. That much is apparent when one compares the rates which have been adopted with those adopted by the Claimant's solicitors.

63. In those circumstances, and with a degree of caution for the reasons I have identified, it seems to me that the appropriate figure to award by way of an interim payment is £24,000. I direct that that be paid within two months of today.

Legal argument

64. This is an application for permission to appeal. There is no challenge to my conclusions concerning the subject matter point. The application is confined to the applicability in principle of the merger doctrine. There are two grounds, as always, relied upon: first compelling reasons, the basis for that being that this is an issue which is of concern to the financial services industry generally and, secondly it is said that an appeal is realistically arguable by reference to the points that were argued by the Claimant and in respect of which they lost.

65. Dealing with the second point first, I conclude that an appeal would not be realistically arguable for the reasons identified in the substantive judgment above.

66. So far as other compelling reason is concerned, it seems to me that that, with respect, is not a battle which a private individual should be concerned to fight, but, in any event, it seems to me inappropriate for a first instance judge to determine an issue of that kind. It is far better that the Court of Appeal with their experience of what is truly of public importance can decide the question. Accordingly permission is refused.

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