

Fairness over formulas: the UK Financial Ombudsman's approach to complaints

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The recent Court of Appeal (**CA**) judgment in *Options UK Personal Pensions LLP v Financial Ombudsman Service* [2024] EWCA Civ 541 has confirmed the broad approach the Financial Ombudsman Service (**FOS**) may take in considering and resolving complaints in a fair manner. The judgment reinforces that it may consider both legal and non-legal standards, including the FCA's Principles for Businesses, contractual principles, statute, regulatory guidance, and best practice.

Key points

- When making a fair and reasonable decision considering all the circumstances of the case, the FOS may take into account legal and non-legal standards.
- Although the FOS must provide a rationale for a decision in a way that is sufficiently clear to enable it to be scrutinised (and potentially challenged), it is under no obligation to follow a formulaic approach when setting out what was considered in making the decision.
- The bar to establish that the FOS has made an irrational decision continues to be high, and mere disagreement with an ombudsman's conclusions without substantial evidence of irrationality is insufficient for a successful claim.

Background

The parties

This was a judicial review of a decision made by an ombudsman (the **Ombudsman**) of the FOS in March 2022. That decision related to a complaint made by an individual (the **Customer**) against the Claimant following the loss of his pension investment.

The Claimant operated self-invested personal pensions (**SIPP**) as an administrator on an "execution-only" basis, by executing investment and sale instructions in SIPP products received from individual investors, without offering regulated advice on the same (as it was not authorised to do so).

The Claimant accepted the referral of the Customer from an unregulated Spanish introducer firm and executed his investment instructions to invest the entirety of his pension into a SIPP product offered by the Spanish entity. The investment failed, and the Customer lost his entire pension fund. Initially, the Customer made a complaint to the Claimant but, after its refusal, complained to the FOS. The complaint was investigated and eventually referred to the Ombudsman, who reached the decision that became subject to judicial review in this case (the **Decision**).

The Decision

The Ombudsman's Decision found that the Claimant should have conducted due diligence on the Spanish unregulated introducer and the investment and should not have accepted the Customer's application based on the information available at the time.

Importantly, the Decision also noted that it considered what was fair and reasonable in all the circumstances of the complaint, and in doing so relevant '*law and regulations; regulators rules; guidance and standards; codes of practice; and where appropriate, [...] good industry practice at the relevant time*' had been taken into account.

The Claim

Permission for judicial review was originally refused by the High Court but subsequently granted by the CA, with a direction that the claim be retained and dealt with in the CA.

The Claimants grounds for challenge were as follows:

- The Ombudsman must acknowledge where compensation is awarded in circumstances where the court would or could not, and give reasons for doing so in circumstances where no liability would arise at law, and in this case failed to do so;
- The Ombudsman erred in finding that the Claimant owed a duty to prospective SIPP investors to carry out due diligence on introducer firms and the investments selected; and
- The Ombudsman's conclusions on breach of relevant duties were unreasonable/irrational.

Judgment

The CA rejected all three grounds and upheld the Ombudsman's Decision. It found that the Ombudsman had adequately explained the reasons for his decision, was entitled to find that a due diligence duty was owed and had not acted irrationally in finding that the duty had been breached. The treatment of each ground is considered in more detail below.

The need to give reasons for a decision and to explain departure from legal standards

Asplin LJ (giving the leading judgment) reiterated that the FOS is not required to determine a complaint exclusively in accordance with the common law. Instead, an ombudsman is required to reach an opinion about what is fair and reasonable in the circumstances of the particular complaint, having taken into account law and regulation, regulators' rules, guidance and standards, codes of practice, and, where appropriate, good industry practice. Notably, the Principles should be taken into account by an ombudsman as they create an overarching framework and indeed may form the basis for upholding a complaint and therefore an award for compensation. The fact that the Principles are not 'actionable' by way of a claim does not impact this conclusion. Indeed, there is authority to the effect that it would be a breach of statutory duty to reach a view on a complaint without taking the Principles into account.

The court recognised that an ombudsman must explain the reasoning of a decision clearly to ensure it can be understood and is capable of being judicially reviewed on the grounds of perversity and/or irrationality (per *R (Heather Moor & Edgecomb) v FOS* [2008] Bus LR 1486). However, the court clarified that it was not necessary for an ombudsman, '*in each and every case, [to] first, set out all the relevant contractual provisions and tortious duties which apply and state why it is considered appropriate in the*

particular case to go beyond them'. In fact, it was not intended that 'the same exercise should be carried out in a formulaic manner in relation to regulations which are actionable [...], before turning on to non-actionable regulations, guidance and best practice'.

Duty to conduct due diligence in relation to introducer firms and SIPP investments

In dismissing the argument that the Ombudsman had erred in law in finding that the Claimant owed duties to prospective SIPP investors to carry out due diligence on introducer firms and investments, the court noted that the Claimant was conducting pre-contract due diligence, albeit haphazardly, and the relevant documents contained references to this as a matter of best practice. The requirement of due diligence was not therefore novel but was based on the Principles and best practice.

The Ombudsman's alleged Irrationality

The Claimant argued that, even if a due diligence duty exists, it was irrational for the Ombudsman to decide it had been breached as 'reasonable efforts' had been made by the Claimant to investigate the introducer firm and the investment. However, the court agreed with the FOS that this ground amounted to a mere disagreement with the Ombudsman's Decision, which, absent any additional evidence, fell short of satisfying the high hurdle for a successful public law challenge on the basis of irrationality.

Comment

This judgment reaffirms the flexibility and discretion of the FOS to consider a broad variety of factors when reaching a fair and reasonable decision on a complaint. To minimise the risk of adverse rulings from the FOS, companies in the financial services sector should therefore ensure that their policies and procedures are purposive and intended to lead to fair outcomes, rather than being 'merely' legally compliant.

More broadly, this case serves as a reminder to all businesses that deal with consumers to be wary of relying on carve outs and exceptions to liability where these may be unfair to customers, as, even if such exceptions are effective in a court, they will not necessarily protect a business from adverse comments and negative rulings from other sources such as ombudsmen.