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Case No: CA-2022-002297

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Mrs Justice Collins Rice
[2022] EWHC 2766 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 September 2023

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE SINGH
and
LORD JUSTICE WARBY

Between :

THE KING (on the application of ASSURANT GENERAL INSURANCE LIMITED) **Appellant**
- and -
(1) FINANCIAL OMBUDSMAN SERVICE LIMITED **Respondents**
(2) MRS JOANNE MANLEY
(3) MISS LYNN EVANS
(4) MS GILLIAN BRADLEY
(as administrator for the estate of Mrs Elaine Bradley)
(5) MRS RACHAEL GOODING

Saima Hanif KC and Tom Rainsbury (instructed by Pinsent Masons LLP) for the Appellant
James Strachan KC (instructed by the Financial Ombudsman Service Ltd) for the First Respondent

The Second to Fifth Respondents did not appear and were not represented

Hearing date: 26 July 2023

Approved Judgment

This judgment was handed down remotely at 10 am on 18 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Singh :

Introduction

1. The Financial Services and Markets Act 2000 (“FSMA”) establishes the Financial Ombudsman Service Ltd (“FOS”), the first Respondent to this appeal, and sets the limits of when the FOS has jurisdiction to consider a complaint made to it.
2. The second to fifth Respondents were consumers, who used well-known home-shopping catalogues to make purchases many years ago. Each took advantage of the retailer’s credit facilities to spread payment for their purchases, and were sold a payment protection insurance (“PPI”) policy to cover that credit arrangement. They have complained to the FOS that they were mis-sold the PPI. At the time, the retailers were not directly subject to statutory financial services regulation in respect of selling insurance (the position has since changed). However, the PPI policies were underwritten by a company now known as Assurant General Insurance Ltd (“Assurant” or “the Appellant”), which was the Claimant for judicial review in these proceedings.
3. By those proceedings the Appellant challenged four jurisdiction decisions taken by an Ombudsman of the FOS, Jan Ferrari, each dated 26 October 2021 (“the Jurisdiction Decisions”) under the FSMA. The Ombudsman decided to accept the individuals’ complaints against Assurant, on the basis that the acts complained about were carried out by a party that was Assurant’s agent (“the retailer”). The Ombudsman has so far reached a view on jurisdiction only and has not yet determined the merits of the complaints.
4. In a judgment given on 2 November 2022 Collins Rice J (“the Judge”) dismissed the Appellant’s claim for judicial review. With the permission of Males LJ, the Appellant now appeals against that decision. The FOS has submitted a Respondent’s Notice, inviting this Court to uphold the Judge’s decision on alternative grounds if it is necessary to do so.
5. The Appellant submits, first, that the Judge was wrong to conclude that the court would not consider the question of jurisdiction itself but would only review the FOS’s decision on public law principles, with the consequence that the Judge did not construe the agreements that existed between Assurant and the retailers. The Appellant also submits that the FOS was wrong to find that it did have jurisdiction: the Appellant submits that, on the true construction of the agreements between them, the retailers were not acting as its agents when they sold the PPI policies to the consumers.
6. At the hearing before this Court we heard submissions from Saima Hanif KC, who appeared with Tom Rainsbury for the Appellant, and James Strachan KC, who appeared for the first Respondent. I express the Court’s gratitude to them all for their written and oral submissions.

Material legislation

7. Part XVI of the FSMA establishes an Ombudsman scheme for the resolution of disputes between authorised firms in the financial services industry and their customers.
8. The FOS has two jurisdictions: a compulsory jurisdiction and a voluntary jurisdiction. The present case concerns the compulsory jurisdiction.
9. Section 225(1) of the FSMA states that the relevant part of the Act provides for a scheme under which certain disputes may be resolved “quickly and with minimum formality by an independent person.” The Scheme is referred to in the Act as “the Ombudsman Scheme”. Schedule 17 makes provision in connection with the Ombudsman Scheme and the Scheme operator.
10. Section 226 of the FSMA provides for the Ombudsman’s compulsory jurisdiction. Subsection (1) provides that a complaint which relates to an act or omission of a person (“the respondent”) in carrying on an activity to which compulsory jurisdiction rules apply is to be dealt with under the Ombudsman Scheme if the conditions mentioned in subsection (2) are satisfied.
11. The conditions in subsection (2) are that (a) the complainant is eligible and wishes to have the complaint dealt with under the Scheme; (b) the respondent was an authorised person at the time of the act or omission to which the complaint relates; and (c) the act or omission to which the complaint relates occurred at a time when compulsory jurisdiction rules were in force in relation to the activity in question.
12. Ms Hanif submits that the conditions which are set out in section 226 are objective conditions and go to the jurisdiction of the Ombudsman. She contrasts them with other provisions in the FSMA which are expressed in subjective language: see e.g. section 228(2), which provides that 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. See also section 229(2)(a), which provides that, if a complaint which has been dealt with under the Scheme is determined in favour of the complainant, the determination may include an award against the respondent “of such amount as the Ombudsman considers fair compensation for loss or damage” suffered by the complainant; and section 230(4), which refers to “the opinion of the Ombudsman” in relation to costs.
13. The rules for the purposes of section 226 are made by the Financial Conduct Authority pursuant to para. 2(3)(a) of Schedule 17 to the FSMA. In contrast, the procedural rules are made by the FOS itself, under para. 14(1) of Schedule 17, which states that the Scheme operator must make rules to set out the procedure for reference of complaints and for their investigation, consideration and determination by an Ombudsman.

The Dispute Resolution Scheme

14. The Dispute Resolution Scheme is set out in a document known as “DISP”. The way in which DISP is drafted is that certain paragraphs have the initial R against them which denotes that they set out a rule, whereas other paragraphs have the letter G, which denotes that they set out guidance.
15. Chapter 2 addresses the jurisdiction of the FOS. Para. 2.1.4G, which is headed ‘Interpretation’, states that, in this chapter, “carrying on an activity” includes (1) offering, providing or failing to provide a service in relation to an activity; (2) administering or failing to administer a service in relation to an activity; and (3) the manner in which a respondent has administered its business, provided that the business is an activity subject to the FOS’s jurisdiction.
16. Para. 2.3.1R provides that the Ombudsman can consider a complaint under the compulsory jurisdiction if it relates to an act or omission by a firm in carrying on one or more of the following activities, which include, at sub-para. (1), regulated activities (other than auction regulation bidding and administering a benchmark). Para. 2.3.3G states that complaints about acts or omissions include those in respect of activities for which the firm is responsible (including business of any appointed representative or *agent* for which the firm has accepted responsibility). It is that reference to agency in particular which is relevant in the present case.
17. Chapter 3 of DISP addresses complaint handling procedures of the FOS. Section 3.2 concerns jurisdiction. Para. 3.2.1R states that the Ombudsman will have regard to whether a complaint is out of jurisdiction. Para. 3.2.3R states that, where the respondent alleges that the complaint is out of jurisdiction, the Ombudsman will give both parties an opportunity to make representations before he decides. Para. 3.2.4R states that, where the Ombudsman considers that the complaint may be out of jurisdiction, he will give the complainant an opportunity to make representations before he decides. Paras. 3.2.5R and 3.2.6R provide that the Ombudsman will inform the relevant party and give reasons for a decision that the complaint is, or as the case may be is not, out of jurisdiction.
18. Mr Strachan emphasised before this Court that para. 3.5.1R states 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.” He submits that this is consistent with the fundamental nature of the scheme, which is intended to give consumers access to resolution of their complaints which is relatively informal, speedy and inexpensive. It should not therefore be over-judicialised.

The decisions of the FOS

19. There are four Jurisdiction Decisions under challenge in these proceedings. We were taken through one in particular by way of example, that concerning Miss L Evans.
20. Mrs R Gooding made a complaint in respect of a PPI policy which she was sold by Express Gifts Ltd, trading as Studio in June 2000.

21. Mrs J Manley complained that she was mis-sold a PPI policy by Freemans plc in October 2003.
22. Mrs E Bradley complained that she was mis-sold a PPI policy by Express Gifts Ltd, trading as Studio in August 2004.
23. Each of the decisions was in similar terms to the decision of Miss Evans, to which I now turn in more detail.
24. Miss Evans complained that she had been mis-sold PPI by Grattan plc (“Grattan”) in November 2004. She said that the PPI was mis-sold because she had health problems at the time of the sale, which would have limited her ability to benefit from the policy but this had not been explained to her.
25. The PPI was underwritten by a company then known as Bankers Insurance Company Ltd, which is now known as Assurant. Assurant had in the past accepted that the FOS could look at complaints against it in cases where the policy was sold in similar circumstances but, in April 2016, Assurant advised the FOS that it had re-evaluated the legal position on all PPI programmes in which it was involved before the regulation of insurance intermediation by the then Financial Services Authority (“FSA”).
26. Insurance intermediation only became regulated by the FSA on 14 January 2005. Ms E had taken out the PPI in November 2004, at which point the seller did not have to be a member of the scheme or one of the former schemes (for example the General Insurance Standards Council or “GISC” Scheme) because most of these were voluntary. Accordingly, the Ombudsman concluded that she could not consider the complaint against Grattan itself but she went on to consider whether she could consider a complaint against Assurant on the ground that Grattan was acting as its agent when it sold the PPI to Miss Evans.
27. At para. 13 of her decision, the Ombudsman noted that she had a copy of an Insurance Agreement dated 1 July 2001 (“the Grattan agreement”). This included a copy of the PPI policy terms and conditions, which in turn referred to a “master policy” also dated 1 July 2001. I will refer to those documents insofar as they are available to the Court later.
28. As the Ombudsman observed at para. 22, the evidence available from the time of the sale is limited. As the agreement she had before her pre-dated the sale to Miss Evans by three years, she could not be certain whether that document showed the terms that would have been presented to Miss Evans and, further, the evidential value of the master policy was necessarily limited by the fact that the actual document was not available. Nevertheless it did demonstrate the existence of a master policy.
29. The Ombudsman received lengthy and detailed submissions on behalf of Assurant, contesting the issue of agency, including reference to the textbook Bowstead and Reynolds on Agency and to case law. At para. 24, the Ombudsman accepted that there were arguments in favour of Assurant’s submission and acknowledged that there was no express agency clause to appoint Grattan in a general sense as Assurant’s agent. Nevertheless, looking at the agreement as a whole, she concluded, on balance, that it did amount to an implied agency arrangement which extended to Grattan’s

marketing and selling of the insurance cover to consumers. She referred to the relevant legal principles and set out the reasons for her conclusion in detail.

30. In the course of her decision the Ombudsman took account of the terms of another agreement, known in these proceedings as “the Door-to-Door Parcel Cover Agreement”. She considered that in substance the terms of that agreement were very similar to those of the Grattan agreement, the main difference being that the former did expressly refer to an agency relationship whereas the latter did not. Since, however, the question is one of substance and not form, the Ombudsman concluded that the agreements were intended to operate in largely the same way and this gave further weight to her views about the Grattan agreement.

The judgment of the High Court

31. The Judge recognised, at para. 11, that, in general, a court undertaking judicial review of a public authority’s decisions will take a different approach to questions of law and questions of fact. She said that, if an error of law is alleged, “a court must make up its own mind about what the law is, and decide whether there has been an error accordingly.” She also recognised, at para. 12, that matters are less simple when a question arises as to a matter of fact which goes to an authority’s jurisdiction. In that case she said:

“A reviewing court may have to take its own view of whether that fact does or does not exist.”

32. Having considered the relevant case law, which I will address below, the Judge was particularly influenced by what she called the “iterative approach” to determination of the FOS’s jurisdiction. She said, at para. 24:

“It must form a preliminary view about its jurisdiction, and, if a respondent alleges that a complaint is out of jurisdiction, the FOS must give both parties an opportunity to make representations before it decides. It then issues a ‘final’ reasoned decision. That was the process followed in the present case; ...”

She continued at para. 27, that “the distinctly iterative approach to jurisdiction required of FOS in the Scheme, ... remains in my view an important consideration for a reviewing court considering its own role. It is of particular relevance to cases in which the test question is one of mixed (and not easily separable) law and fact, where jurisdictional and merits considerations shade into each other, and where the fact-finding requires a measure of expertly-informed evaluation.”

33. The Judge then turned to apply that approach to the present case. She acknowledged that the question of whether there was an agency in this context was “undoubtedly a determinative jurisdictional question”: see para. 31. But she did not regard it as being in the same category as questions such as whether a complainant is eligible to

complain or did so in time. Rather, at para. 33, she said that whether a relationship of agency exists or not is best characterised as “a mixed question of fact and law.” In the same paragraph, she also said that “a further question of mixed law and fact arises – the correct interpretation of the contract.” Ms Hanif submits that this betrays an error of law in the Judge’s approach, since the interpretation of a contract is a matter of law and not a mixed question of law and fact.

34. The Judge concluded this section of her judgment, at para. 37, by saying that:

“My conclusion in all these circumstances is that the jurisdictional question in the present case is one in which it is plain that Parliament intended the scheme to operate so that the agency question should properly be regarded as a matter for the FOS to decide, subject only to a reviewing court’s duty to constrain it to the usual public law demands – procedural fairness, rationality in fact-finding, and the avoidance of error of law.”

35. Having then summarised the principles of the law of agency, the Judge considered the decisions under challenge. It is plain, however, that she did not engage in the exercise of construing the contracts in this case herself. Rather she directed herself that “the question for me is whether these decisions disclose error of law or irrationality on the facts”: see para. 53. She said that the challenge was that the law had been misapplied to the contracts “and the conclusion of agency was not properly open to the decision-maker by reference to the law and the contract terms.”: see para. 54. She said that the FOS had not fallen into error and had only taken into account matters to which it was entitled to have regard: see the end of para. 59. In a number of other passages in that section of her judgment, it is plain that the Judge was applying the standard of review which she had already decided was appropriate and that she did not engage in construction of the contracts for herself. For example, at the end of para. 62, she said that:

“I cannot find fault with that conclusion. Much less does Assurant come close to persuading me now that *no other* interpretation was properly open to FOS at all.” (Emphasis in original)

36. She concluded this section of her judgment, at para. 64, as follows:

“FOS’s conclusion was both entirely rational on the materials and in the factual context before the decision-maker, and the product of legal analysis with which the authorities are fully aligned and with which I cannot find fault.”

Grounds of Appeal

37. The Appellant advances two grounds of appeal:

- (1) Ground 1: In determining the lawfulness of the FOS's decision that it had jurisdiction to consider the complaints, the Judge erred in adopting a traditional judicial review approach. The question whether there was a relationship of agency between the retailers and Assurant was one of "precedent fact", which the court itself was required to decide, in particular because the correct construction of the agreements between the retailers and Assurant was a question of law.
- (2) Ground 2: Having erroneously determined that it would only approach the matter on traditional judicial review grounds, the Judge wrongly concluded that she could not find fault with the FOS's conclusion that it had jurisdiction.

Ground 1: the approach to be adopted by the Court

38. I would accept the Appellant's submissions under Ground 1 to some extent but not completely.

39. The Judge was right to take the view that, generally speaking, issues of fact are for the Ombudsman to determine, subject to judicial review on conventional grounds such as irrationality or procedural unfairness. This is true even of facts which go to the Ombudsman's jurisdiction, i.e. "jurisdictional facts". The mere fact that a fact is a jurisdictional fact does not automatically render it a precedent fact, which has to be established to the satisfaction of the Administrative Court if judicial review proceedings are brought. Professor Paul Craig explains the position as follows in Administrative Law (9th edition, 2021), at para. 17-031:

"The court should not ... engage in *de novo* review merely because the allegation relates to a jurisdictional fact that conditions the existence of the public body's power."

40. Ultimately the issue is one which turns on the correct interpretation of the statute which confers the jurisdiction on the relevant public body: see the decision of the Supreme Court in *R (A) v London Borough of Croydon* [2009] UKSC 8; [2009] 1 WLR 2557. In that case a contrast was drawn between the concept of a "child", defined as a person under the age of 18 in the Children Act 1989, which was held to be an objective precedent fact, which had to be proved to the satisfaction of the court; and the concept of a "child in need" for the purpose of engaging a local authority's duty under section 20(1) of the 1989 Act, which required a number of different value judgments to be made. It was entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the courts on ordinary principles of judicial review: see paras. 26-32 (Lady Hale JSC).

41. In the *Croydon* case Lady Hale summarised the legal principle as follows, at para. 31:

“31. This doctrine [of precedent fact] is not of recent origin or limited to powers relating to the liberty of the subject. But of course it still requires us to decide which questions are to be regarded as setting the limits to the jurisdiction of the public authority and which questions simply relate to the exercise of that jurisdiction. This too must be a question of statutory construction, although Wade and Forsyth on *Administrative Law* 9th ed (2004), p 257 suggest that ‘As a general rule, limiting conditions stated in objective terms will be treated as jurisdictional’. ...”

42. That passage in Wade and Forsyth, Administrative Law is now to be found in the 12th edition (2023), at p. 187.

43. To similar effect Lord Hope DPSC said the following, at para. 52:

“In the Court of Appeal and in the argument before us, reference was made to the rule that where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will, if called upon to do so in a case of dispute, decide whether the requirement has been satisfied: *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, 110, per Lord Scarman. On the other hand, as Sir Thomas Bingham MR observed in *R v Secretary of State for the Home Department, Ex p Onibiyo* [1996] QB 768, 785, where the question is one that is to be determined by the executive itself, its determinations will be susceptible to challenge only on Wednesbury principles: *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC514. In order to decide into which class of judgment the case falls one must, of course, first construe the statutory language used and the scheme of the legislation.”

44. As Lord Hope mentioned there, a well-known example of a precedent fact was the concept of “illegal entrant” in the context of the Secretary of State’s power to detain a person under the Immigration Act 1971: see *R v Secretary of State for the Home Department, ex p. Khawaja* [1984] AC 74.

45. It is also important to bear in mind that many questions are not “hard-edged” and call for evaluation on matters of degree and opinion: see e.g. *R v Monopolies and Mergers Commission, ex p. South Yorkshire Transport Ltd* [1993] 1 WLR 23, at 32 (Lord Mustill). In that case the statutory formula which had to be applied was whether an area was a “substantial part” of the United Kingdom. That was held not to be a “hard-edged” question but one that called for evaluation, a task that was for the primary decision-maker, subject to judicial review on conventional public law grounds.

46. In the present appeal counsel drew our attention to six decisions of the High Court which have considered the jurisdiction of the FOS. Since one of the reasons why permission to appeal was granted by Males LJ is that the issue of the correct approach which should be taken when the jurisdiction of the FOS is challenged by way of judicial review has not previously been considered by this Court, I will examine each of those decisions. I should stress, however, that it is not the function of this judgment to set out a comprehensive treatise on the subject of jurisdictional facts, either generally or specifically in relation to the FOS. As will become apparent, in my view, the issue of law which arises in this particular case is a relatively narrow one.
47. The first case is *R (Bankole) v Financial Ombudsman Service* [2012] EWHC 3555 (Admin). It should be noted that this was an unreserved judgment by Sales J after a hearing at which the claimant appeared in person, although the defendant was represented by counsel. The issue in that case was whether the complaint had been referred to the FOS within the time limit. Sales J considered that it was clear from DISP, and in particular para. 2.2, that the Scheme envisages that it will be the Ombudsman who determines whether or not a complaint is made within the time limit specified in the rules: see para. 15. As he went on to say at para. 20, although the decision is primarily for the FOS, it may be subject to review by the court “on usual judicial review grounds.”
48. In *R (Bluefin Insurance Services Ltd) v Financial Ombudsman Service* [2014] EWHC 3413 (Admin); [2015] Bus LR 656 Wilkie J had to consider the question whether the requirement that the complainant must be “eligible” to make a complaint to the FOS was a precedent fact. Having considered a number of earlier decisions, including *Croydon* and *Bankole*, Wilkie J concluded that the issue before him was one of precedent fact: see para. 72. However, if he were wrong in that analysis, he continued at para. 73 that he was satisfied that the nature of the decision was such that there was a right or wrong answer. It was not an evaluative issue, to be determined by the FOS subject to the control of the courts on ordinary principles of judicial review. He concluded, at para. 74, that, if the FOS had got the answer to that question wrong, this would necessarily have involved a misdirection in law so as to render the FOS’s decision challengeable by way of judicial review. It should be noted that Wilkie J did not consider that his decision was in conflict with *Bankole*: at para. 61, he considered that that decision was “wholly correct on the issue he [Sales J] had to decide.”
49. In *R (London Capital Group) v Financial Ombudsman Service* [2013] EWHC 2425 (Admin) Leggatt J had to consider whether the FOS had jurisdiction to deal with a complaint about the management of a foreign exchange trading account. This issue turned on whether the operation of the account involved dealing in contracts for differences or investments of a similar kind which are regulated under the FSMA. In the course of his judgment Leggatt J analysed at length the terms of the contract in that case. It is also clear that he performed the usual judicial task of arriving at the true interpretation of that contract. Ms Hanif submits that it is implicit that Leggatt J (rightly) regarded the question of the correct construction of a contract going to the FOS’s jurisdiction as being a question of law and therefore one which the court itself had to decide. In my judgment that is plainly correct.
50. To similar effect is the decision of HHJ Walden-Smith, sitting as a judge of the High Court, in *R (TF Global Markets (UK) Ltd) v Financial Ombudsman Service* [2020]

EWHC 3178 (Admin). In her judgment, at paras. 29-31 and 42-45, it is clear that the task which the Judge in that case performed was the conventional one of interpretation of the relevant contract for herself.

51. I have found particularly helpful the judgment of Ouseley J in *R (Chancery (UK) LLP) v Financial Ombudsman Service* [2015] EWHC 407 (Admin). At para. 66, Ouseley J said:

“I accept the proposition that the FSMA should not be construed so as to make the FOS master of the limits of its jurisdiction, right or wrong. It is for the court to decide whether it has acted with or without jurisdiction. It cannot act without jurisdiction simply because its error was reasonable. It is a matter of statutory construction as to how the limits of its jurisdiction are resolved: what decisions are challengeable only on traditional judicial review grounds and what decisions require a different approach, whether one in which the court decides the law, finds the facts and applies the law to the facts, deciding whether the FOS’ decision was simply right or wrong and considering new evidence if it wishes, or one in which the court decides the meaning of the words at issue, and the FOS finds the facts and applies the correct meaning in law to them as a matter of its own reasonable judgment, or one in which the court decides, on the facts found by the FOS, whether the application of the law to them is correct rather than reasonable. Of course, the fact finding is subject to review on traditional grounds.”

52. At para. 69, Ouseley J considered that *Bankole* was rightly decided because it concerned the FOS’s judgment on a procedural aspect of a complaint and Parliament cannot have intended that the question of whether a complaint was made to the FOS on one day or another was for determination anew by the High Court. He considered that *Bankole* was distinguishable from *Bluefin*, where the issue was far from a procedural one and, if the FOS were wrong, it would be deciding that someone was not eligible on the facts to complain was indeed eligible, and so would be giving itself jurisdiction which it did not have. Ouseley J considered that the language was not so wide or uncertain as to its scope as to put it into the realms of the *South Yorkshire Transport* case.

53. Importantly, at para. 70, Ouseley J made it clear that this does not mean that the court should itself engage in the primary fact-finding exercise. He said:

“Of course, the facts were not at issue in *Bluefin*, but that does not alter the principle. It merely goes to the point at which the court should deal with the issue, whether before or after the full facts have been found by the FOS. But nothing in that case suggests that it is the court which would find the facts, or that Wilkie J would have done so if they had not been agreed. Given that the FOS provides an informal but specialist dispute

resolution, with its own rules, it is my view that Parliament cannot have intended that the High Court should act as the primary fact finder on jurisdiction issues, especially since those issues will often overlap with merits issues, as they do here. Two bodies would otherwise be involved in considering the same issues, but on potentially different evidence. The facts are not agreed here; the Interested Party has not given evidence to the FOS or the court. The facts as laid before the court by the Claimant would require a full trial before the disputes could be resolved by a court. So I consider that the FOS must be the fact finder and that its fact finding is reviewable only on traditional grounds.”

54. At paras. 71-72, Ouseley J continued:

“71. But I do not think that the same applies to its application of the law to the facts. Of course, on any view, the FOS must direct itself correctly on the law, as to the meaning of words and phrases, and as to the defining characteristics which must be present for a phrase to apply. The FOS should expect that a reviewing court would regard its assessment of the way in which the law, correctly understood, applied to the facts, as at least persuasive. But that is not the complete answer. If the court is persuaded that on the facts found by the FOS, the correctly understood law had been applied wrongly, the court must rule that the FOS had no jurisdiction. Otherwise, the intention of Parliament that only those who met certain conditions or that only certain activities fell within its jurisdiction would be undermined. There can only be one right answer as to whether the complainant was eligible, whether the scheme was a CIS, and whether, to the extent that tax advice fell outside the FOS’ jurisdiction, the advice given nonetheless fell within it as investment advice. A statutory compulsory jurisdiction, resolving disputes, leading to compensation is rather different from those statutes as in *Shah v Barnet*, *Puhlofer* and *South Yorkshire Transport* where there is clearly an evaluative issue, an issue of application, which must have been intended to be left to the decisionmaker.

72. Although the question therefore is not whether the application of the phrase, properly understood, to the facts was reasonable, and the question is whether it was wrong, the reviewing court will have to be satisfied that the body experienced in dealing with these issues was wrong in its jurisdictional decision before overturning it. The court will give due weight to the decision of that body; however if it is wrong but reasonable, it will not have jurisdiction. There may be no great difference in the results between the two approaches. This is consistent with the approach implicitly

adopted by Leggatt J, in *London Capital Group*, which was a challenge to a jurisdictional decision of the FOS, though he did not consider, nor was he asked to decide, on what basis he should resolve the jurisdictional issue.”

55. In *Chancery* itself the main question for the Court was whether the giving of tax advice was within the jurisdiction of the FOS. The submission was made on behalf of the claimant that the giving of tax advice was not within its jurisdiction even if the product recommended for tax reasons was a specified investment: see para. 82 in the judgment of Ouseley J. It was submitted that the nature of the advice was “essentially a factual issue”: see para. 83. It was, however, submitted that it was a jurisdictional fact: see para. 85. It was further submitted that the conclusion reached by the FOS was simply not open to it on the facts: see para. 85. Ouseley J rejected the contention on behalf of the claimant in that case. He was of the view that there is “no necessary sharp distinction requiring advice to be pigeonholed as one or the other”, as between tax advice and investment advice; nor could such a distinction be sensibly drawn where there are mixed reasons behind advice: see para. 93. He concluded that the FOS had not erred in its approach: see para. 96.

56. Finally, we were referred to the decision of Ouseley J in *R (TenetConnect Services Ltd) v Financial Ombudsman Service* [2018] EWHC 459 (Admin); [2018] 1 BCLC 726, at para. 44, where Ouseley J cited his own judgment in *Chancery* and summarised the position as follows:

“The Ombudsman had to interpret the law correctly, and reach rational findings of fact, but ... it was for the Court to decide whether his application of the law to the facts was wrong, and not whether it was reasonable. ... Although the Ombudsman’s fact-finding was reviewable only on *Wednesbury* grounds (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223), the same did not apply to his application of the law to the facts, on an issue which went to jurisdiction, at any rate ...”

Ouseley J noted that there was no dispute as to the correctness of that approach in the case before him.

57. In the present case, I would have no difficulty in general in accepting the submissions made by Mr Strachan on behalf of the Ombudsman that questions of fact are primarily for the Ombudsman to determine, subject only to judicial review on conventional public law grounds. It is important to recall that judicial review is not an appeal. It does not therefore provide an opportunity simply to re-argue a case in front of the High Court. I would endorse what Ouseley J said in *Chancery* and *TenetConnect* in the passages I have quoted above, about the respective roles of the FOS and the court on judicial review.

58. Mr Strachan made it clear before this Court that the FOS accepts that the question of the correct construction of a document, such as a contract, is, on well-established

principles, a question of law. It is therefore a question for the court itself to determine.

59. If authority were needed for that proposition, it can be found in *Chatenay v Brazilian Submarine Telegraph Co Ltd* [1891] 1 QB 79, at 85, where Lindley LJ said:

“The expression ‘construction’, as applied to a document, at all events as used by English lawyers, include two things: first, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them. The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law.”

60. In some complaints made to the FOS there may be a relevant dispute as to what are the terms of a contract, in particular where the contract is an oral one or where there are said to be terms which are to be implied into it by reason of the conduct of the parties. Such a dispute concerns questions of fact and, where it arises, I accept Mr Strachan’s submission that the determination of those questions of fact is primarily for the FOS, subject to judicial review on conventional principles of public law. I would also endorse Mr Strachan’s concession that the construction of a document such as a contract is a question of law and must be determined by the court itself. This is not a departure from conventional principles of public law; it is simply an application of them, since one of those principles is that a public authority whose decisions are the subject of judicial review must get the law right.
61. In the present case, there was no relevant dispute of fact. Certainly none has been drawn to the attention of this Court. In this case, whatever might be said in other cases, the question whether or not there was a relationship of agency between the retailers and Assurant turned in essence on the true construction of the agreements between them. That is a question of law.
62. The Judge herself said that errors of law fall to be corrected by the court and appears to have appreciated that the construction of a contract is a question of law. She did not, however, apply that appreciation to the present case because she did not engage in the exercise of herself setting out what was the correct construction of the contracts in this case. Her approach was therefore wrong in law.
63. For those reasons I have reached the conclusion that this Court must embark on the exercise of construing the relevant contracts for itself and answer the question whether there was a relationship of agency between the retailers and Assurant.

Ground 2: was there a relationship of agency?

64. The basic characteristics of the relationship of agency are set out as follows in Bowstead and Reynolds on Agency (22nd ed., 2022), at para.1-001:

“(1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.

(2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal’s legal relations with third parties.

(3) Where such authority results from a manifestation of assent that the agent should represent or act for the principal expressly or impliedly made by the principal to the agent personally, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority.

(4) A person may have the same fiduciary relationship with a principal where that person acts on behalf of that principal but has no authority to affect the principal’s relations with third parties. Because of the fiduciary relationship such a person may also be called an agent.”

65. That statement, as set out in an earlier edition, was cited with approval by this Court in *UBS AG v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567; [2017] 2 CLC 584, at para. 83 (Lord Briggs and Hamblen LJ).
66. At para. 87, this Court observed that the House of Lords had held in *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130 that the question whether or not a particular relationship is one of agency depends on what the parties have agreed in substance, rather than the label which they choose to place upon it.
67. At para. 88, this Court referred to the decision of the House of Lords in *Branwhite v Worcester Works Finance Ltd* [1969] 1 AC 552, describing it as “a heavily fact-based majority decision of the House of Lords about the relationship between a car dealer and a finance company in relation to a hire-purchase transaction”. This Court said that, although it was difficult to derive any clear statement of legal principle from that case, one that did emerge was that:

“there may be identified within a general relationship which is not one of agency, specific tasks for which one party assumes an ad hoc agency responsibility for the other, such as the delivery of the hired car to its new owner.”

68. In the present appeal, Ms Hanif submits that there was no general relationship of agency between the retailers and Assurant but that there was only a specific and limited agency relationship which led to a binding contract of insurance being created between the consumer and Assurant.
69. Before the FOS and in the High Court Assurant submitted that the retailers in the present case were not its agents in the legal sense but were rather “distributors” of its products. As Bowstead and Reynolds observes, at para. 1-035, suppliers of the goods of a manufacturer, whether on a retail or wholesale basis, who have some form of concession as a regular stockist, distributor or franchisee are often described as “agent”, “selling agent”, “main agent” and the like, for the manufacturer of the goods which they supply. The authors continue that, although it is possible that a distributor is an agent in the common law sense, it is nowadays much more likely that the distributor actually buys from the manufacturer and resells to its own customers.
70. In the Statement of Facts and Grounds in these judicial review proceedings, at paras. 48-49, it was submitted on behalf of Assurant as follows:
- “48. It is fundamental to the construction of the IAs ... to appreciate that the MPA represented the only policy of insurance underwritten by Assurant, for the benefit of customers of the Distributors. The Distributor, through its activities (in selling products and granting credit), could sell and extend that cover to its customers; this was a viable and proper approach to the writing of this type of insurance business.
49. In summary, under the MPAs, the Distributors directly obtained a policy of insurance from Assurant, the coverage under which they could market and sell themselves to customers arising out of their activities of selling goods and providing credit, without the need for or to return for authority from Assurant to bind (let alone the relevant authority to sell) further policies of insurance for and on behalf of Assurant.”
71. At the hearing before this Court, however, Ms Hanif clarified the position on behalf of Assurant. She conceded that the retailers were agents at least to some extent, since they were able to create a binding relationship between the consumer and Assurant with the consequence that the consumer was able to claim under the insurance policy directly against Assurant.
72. It is not entirely clear to me what the legal source of that direct relationship between the consumer and Assurant was. This Court does not have before it, nor did the FOS, any example of a document setting out that direct relationship. At the hearing before us Ms Hanif submitted that the source is to be found in the following words which appear on the front page of the Group Master Policy between Freemans plc and Assurant dated 1 August 2001:

“This Group Master Policy records that in consideration of the payment of the premium Assurant Group (Company) will provide the Product and Payment Protection Cover described in this Group Master Policy for those persons who become insured persons.”

The Group Master Policy between Grattan and Freemans with Assurant dated 1 August 2002 contains the same wording on the front page.

73. That wording seems to me simply to record the agreement between the retailer and Assurant and not to create a contract between the consumer and Assurant. Be that as it may, since Ms Hanif concedes that there was such a contractual relationship between the consumer and Assurant, it is clear that the retailers were agents acting on behalf of Assurant at least for some purposes and were not simply distributors.
74. This Court was not shown the master policy in each of the cases before us but it was not suggested that there was any material difference between them in this regard.
75. Similarly, there are some differences between the Insurance Agreements in each of the four cases but it was not suggested that there was any material difference between them. We were taken in detail by Ms Hanif through the Insurance Agreement dated 1 July 2001 between Grattan and “Company”, i.e. Assurant.
76. In that agreement Grattan, which was the retailer, was referred to as “Customer” but it is clear that this was not a reference to the ultimate consumer.
77. I will set out the main terms of that agreement, since it is important that it should be interpreted as a whole.
78. Schedule A to the Agreement, which was headed ‘Details of Insurance Companies’, set out the type of insurance cover provided by the Company, including life, involuntary unemployment and disability insurance.
79. Clause D of the Agreement, headed ‘Customer Commission’, provided that, in consideration of the services to be performed by the Customer, the Company agreed to pay monthly to the Customer an amount calculated by applying the Customer Commission Rate indicated in Schedule B.
80. Schedule B to the Agreement, headed ‘Details of Insurance as at 1st July 2001’, set out the maximum benefits and other details of the Payment Protection Cover provided.
81. It also set out the “Customer Commission rate”, which in this case provided that the retailer would obtain approximately 42 percent of the premium and Assurant would obtain the remainder.
82. Clause F of the Agreement, headed ‘Identification of Premiums’, said:

“Customer shall maintain appropriate systems in order to identify and report all premiums collected for Company, less Customer Commission, at all times. Customer shall, at all times, be able to provide clear audit trails within their accounts

and records in support of premiums collected and reported to Company in accordance with Clause C.3 of this Agreement.”

83. Clause H, headed ‘Exclusivity’, said:

“Customer, during the term of this Agreement, shall not promote or sell any similar type of insurance product as detailed in Schedule B. Customer shall not terminate or replace or aid, directly or indirectly, in the termination or replacement of the Insurance during the term of this Agreement, unless initiated by a Participant.”

That reference to a participant was a reference to the consumer.

84. The duties of Assurant (“Company”) were set out in Clause B as follows:

“Company shall have the following responsibilities:

1. Prepare and issue reinsurance contract to Northside Insurance Company Limited (Northside) whose registered office is at PO Box 34, Albert House, South Esplanade, St Peter Port, Guernsey, GY1 4AU.
2. Process the premium reported in accordance with the rating structure of the programme.
3. Report and remit applicable insurance taxes to Customs and Excise.
4. Report & Remit Northside Premiums (being Customer's share of Risk Premium less ceding fee) within 30 days after the end of the month in which the Retail Premiums are written.
5. Process and pay insurance claims in accordance with applicable law and the terms of Insurance.
6. Maintain claims reserves (IBNR & CCR).
7. Provide Customer quarterly management reports.
8. Assist and advise Customer on the migration of existing customers on to new Product & Payment Protection programme together with the following marketing strategies:
 - (a) manage inbound and outbound telemarketing activity through approved external agency and Customer's own internal facilities. All costs to be met through Customer's marketing budget.
 - (b) assist in on-going product development strategies.

(c) support marketing efforts through data based marketing services and recommendations.

9. Provide on-going support on regulatory matters.

10. Provide marketing reports in respect of inbound and outbound telemarketing campaigns undertaken on behalf of Customer.”

85. The duties of the retailer, Grattan (“Customer”), were set out in Clause C as follows:

“Customer shall have the following responsibilities:

1. Market the Insurance to Participants in accordance with a marketing programme agreed to by Company.

2. Ensure that all final proofs of all pre-printed documents, marketing materials and advertisements issued under the Insurance are approved by Company prior to printing.

3. Collect insurance premium and taxes from Participants. Report and remit Retail Premiums, less Customer Commission (as defined in Section D), to Company, within fifteen (15) days after the end of the month in which the Retail Premiums are written.

4. Collect from Participants all applicable insurance taxes in accordance with Government requirements.

5. Process insurance cancellations and refunds.

6. Print and provide insurance certificates to Participants in accordance with the Company's guidelines and Terms and Conditions.

7. Perform such other administrative activities as may be mutually agreed upon by Customer and Company, which agreement shall not be unreasonably withheld.

8. Perform all duties of the Customer in accordance with Company's guidelines, manuals, and written instructions from time to time.

9. Co-operate in training all employees, representatives, agents, etc., who may be involved in administering the Insurance. All training materials shall be developed, provided and presented by Company.”

86. Clause M, 'Ownership of Expirations', stated:

"The Company undertakes not to market products to Participants introduced by the Customer other than those products which Customer requests Company to market on their behalf."

87. Clause O, headed 'Inspection of Records', provided:

"Customer shall, upon reasonable notice from Company's authorised representative, make available for inspection, during Customer's regular business hours, all records pertaining to the Insurance."

88. Clause T provided as follows:

"Codes of Practice.

1. For as long as the Association of British Insurers (ABI) Code of Practice is in force, Customer shall monitor and ensure that it and any agent appointed by Customer to market the Insurance to Participants, comply with ABI's Code of Practice (as detailed in Schedule D) and as may be amended from time to time.

2. Where both Company and Customer are members of the General Insurance Standards Council ('GISC') both Company and Customer hereby undertake to comply with the GISC Rules

in force from time to time. If Customer appoints an agent as an Appointed Agent as defined by the GISC Rules to market the Insurance to Participants, Customer shall monitor and ensure that such agent complies with the GISC Rules in force from time to time. Company shall provide Customer with GISC Rules and Code of Practice relevant documentation.

3. Where Company is a member of GISC and Customer is not, Company may appoint Customer as an 'Appointed Agent' for the purposes of the GISC Rules. Customer hereby undertakes to comply with all requirements of Appointed Agents as may be set out in the GISC Rules in force from time to time. Company shall provide Customer with GISC Rules and Code of Practice relevant documentation."

89. Clause V provided as follows:

"Miscellaneous.

1. Amendments. This Agreement may be amended only in writing signed by both parties, except as otherwise provided herein.

2. Governing Law. This Agreement shall be construed in accordance with English law and any disputes arising under it shall be determined in the English Courts.

3. Waiver. The failure by either party to enforce any provision of this Agreement shall not constitute a waiver of that provision.

4. Sections Surviving Termination. Sections E, F, G, H, L, N, O, P, Q, R, S, T, U, and V the second paragraph of Section D shall survive the termination of this Agreement.

5. Entire Agreement. This Agreement represents the entire agreement between the Company and Customer and supersedes all other prior oral or written agreements relating to the subject matter of this Agreement, except as otherwise provided herein.

6. No partnership. Nothing in this Agreement shall constitute a partnership between Company and Customer and neither shall have authority or power to bind the other or to contract in the name of or create liability against the other in any way or for any purpose save as expressly authorised in this Agreement.”

90. Although it was not suggested that there is any material difference between the Insurance Agreements in each of the four cases before this Court, we were shown some of those differences by reference to the agreement between Assurant and Express Gifts dated 1 July 2002. In particular, Clause E made it express that Express Gifts had to hold all premiums received for the Company, less expense reimbursement, “on trust for Company at all times.” In my view, this simply made express the fiduciary relationship which was implicit in the Grattan agreement.
91. The reference to “expense reimbursement” was in substance a reference to what was called Customer Commission in the Grattan agreement: see Clause D, which in turn referred to Schedule A.
92. Schedule A provided that the retailer was to receive 75 percent of the premium and Assurant the rest.
93. Ms Hanif drew our attention to the Profit Share Plan Addendum, at Addendum A. She submitted that the retailer was in fact to receive over 95 percent of the premium by reference to a table set out there. However, as Mr Strachan pointed out, this was a percentage of “Earned Premiums”. That term was defined in Clause A.4 of Addendum A as meaning “that portion of Net Written Premiums attributable to policies whose coverage expired during the Accounting Period.” In other words that

was to do with insurance policies which would not in fact lead to anything having to be paid by Assurant because no claim could now be made under them.

94. In any event, as Mr Strachan reminds this Court, the fact that very high percentages of income were receivable by the retailers is itself a potentially worrying indicator of mis-selling of PPI policies. Whereas Ms Hanif submits that no commercial organisation would sensibly enter into a sharing arrangement which meant that it had all the risk but very little of the profit, Mr Strachan points out the fact that two commercial organisations were prepared to negotiate such an arrangement is itself an indicator that it was not expected that Assurant would in fact have to pay under the insurance policies to consumers very often. This was precisely because they were often not able to make a claim because the policies covered matters such as unemployment and disability in circumstances where they were already unemployed or had health problems.
95. I have reached the conclusion that, on the true construction of the relevant contracts, there was indeed a relationship of agency which was created by them. The retailers did act as agents for Assurant in selling the insurance policies to the consumers.
96. As I have mentioned, in an important development at the hearing of this appeal, Ms Hanif accepted on behalf of the Appellant that there was a relationship of agency to some extent. In a concession which was, in my view, correctly made, she accepted that the retailer had the authority to affect the legal relations of third parties, in the sense that it was able to create a contract between the consumer and Assurant so that Assurant was bound to provide insurance cover to the consumer and, if it breached that agreement, the consumer would be able to claim under the insurance policy against Assurant directly.
97. Nevertheless, Ms Hanif submits that this does not mean that the retailers were acting as agents for Assurant when it came to the critical acts or omissions about which complaint is made to the FOS, in particular the act of actually selling the insurance policies.
98. I am unable to accept that submission. First, the way in which the retailers created the relationship between the consumer and Assurant (which Ms Hanif now accepts they did as agents for Assurant) was precisely by selling the insurance policies.
99. Secondly, analysis of the various terms of the insurance agreements in this case leads to the conclusion that they did create (by implication although not expressly) a relationship of agency between the retailers and Assurant when it came to the act of selling the insurance policies to consumers. I accept Mr Strachan's submission that the relationship created by the insurance agreements in this case had all the indicators of a relationship of agency, as set out in Bowstead and Reynolds on Agency. The main indicators are as follows.
100. First, there was a large degree of control exercised by Assurant over the retailers in relation to marketing and other matters.
101. Secondly, the retailers owed fiduciary duties to Assurant when they received premiums from the consumer and, having taken their agreed share of the payment, had to account for the rest of the money to Assurant.

102. Thirdly, the retailers were bound to market only Assurant's insurance policies: there was an exclusive arrangement clause in the agreement: see Clause H.
103. My view draws some support from Colinvaux & Merkin's Insurance Contract Law (2023), at para. D-0100, where it is said that:

“In English law and practice insurance intermediaries are either agents or employees of insurers, or independent persons who act on behalf of assureds.”

The authors continue that it is clearly important to the assured to know into which category an intermediary falls, as he will otherwise be unable to determine whether or not he is receiving independent advice, and the distinction is also important in deciding which of the parties to an insurance contract is bound by the intermediary's conduct. They go on to state that the single most important class of independent insurance intermediary is that of insurance brokers.

104. In the present case, the retailers were clearly not independent brokers or anything like that. They were tied to marketing the insurance policies of Assurant. This again is, in my view, an indicator that the retailers were acting as agents of Assurant when selling those policies to consumers.
105. The high point of the case for Assurant is that there is a clause in the Insurance Agreements, Clause V-6 in the Grattan and Freemans agreements and Clause X-6 and U-6 in the Express Gifts agreements, which, on one view, appears to exclude the possibility of an agency relationship. There are several difficulties with that interpretation. First, Ms Hanif herself rightly accepts that there was a relationship of agency to some extent. Secondly, the clause when correctly understood appears to be concerned only with excluding a partnership arrangement, as the heading to the clause suggests. Thirdly, the House of Lords made clear in *Garnac* that the question of agency is one of substance and not form. Whatever label is attached to the agreement between them if in truth there is a relationship of agency between the retailer and Assurant, that objective reality cannot be negated by a clause which appears to contradict that reality.
106. Finally, I should mention that our attention was drawn by Ms Hanif to the judgment of HHJ Kramer sitting in the County Court at Newcastle-upon-Tyne in *Ayton v Assurant General Insurance Limited* (14 October 2019). Ms Hanif pointed out that that case concerned an agreement under which the retailer was in fact expressly given authority to bind the defendants to insurance contracts: see para. 23. Even in those circumstances it was held that the retailer acted as Assurant's agent only for the purposes of binding Assurant to insurance contracts and not for any other purposes and indeed there was no provision that they were, for example, to be marketing agents for the defendants in the sense that they were obliged to promote and seek out a sale of a policy: see para. 25. In my view this can in fact be contrasted with Clause C1 in the Grattan Agreement, as to marketing.
107. I would therefore dismiss this appeal on Ground 2. In substance I accept Mr Strachan's submissions in the Respondent's Notice. I conclude that there was a relationship of agency between the retailers and Assurant and so the FOS was correct to decide that these four complaints fell within its jurisdiction.

Conclusion

108. For the reasons I have given, which differ from those of the High Court, I would dismiss this appeal.

Lord Justice Warby:

109. I agree.

Lord Justice Peter Jackson:

110. I also agree.