Neutral Citation Number: [2023] EWHC 1061 (Admin)

Case No: CO/2183/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN LEEDS

Friday, 5th May 2023

Before:

MR JUSTICE FORDHAM

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Between:	
THE KING (on the application of PAUL RICHARD HOGAN)	**Claimant**
- and -	
(1) FINANCIAL OMBUDSMAN SERVICE LTD	**Defendants**
(2) FINANCIAL CONDUCT AUTHORITY	
-and-	
HARGREAVES LANSDOWN ASSET MANAGEMENT LTD	**Interested party**

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The **Claimant** in person
Stephanie David (instructed by Financial Ombudsman Service) for the **First Defendant**
Matthew Stanbury (instructed by Financial Conduct Authority) for the **Second Defendant**
The **Interested Party** did not appear and was not represented

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Hearing date: 28.4.23

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Approved Judgment

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

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This is a claim for judicial review. The target for the claim is a decision of the First Defendant ("the FOS") made on 16 March 2022 by Gideon Moore as Ombudsman ("the 2022 Decision"). Previous decisions of the FOS had been made by Terry Connor as Ombudsman, on 8 May 2018 ("the 2018 Decision") and 11 July 2019 ("the 2019 Decision"). All three Decisions relate to the same subject matter. At their heart are questions about whether an arrangement made for the Claimant ("Mr Hogan") by the Interested Party ("Hargreaves Lansdown") in 2011 was unsuitable for Mr Hogan. The arrangement involved the transfer, from a final salary occupational pension scheme with defined benefits ("DB"), to a self-invested personal pension ("SIPP") accompanied by an annuity. The transfer involved switching to a product known as the Vantage SIPP and a product known as the Just Retirement Annuity.

The "Materiality of New Evidence Exclusion"

2. Pursuant to section 228(2) of the Financial Services and Markets Act 2000 the Ombudsman determines a complaint "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case". However, Dispute Resolution Rules 3.3.4A and 3.3.4B combine to say this:

> ***The Ombudsman may dismiss a complaint … without considering its merits if the Ombudsman considers that: ... (5) dealing with such a type of complaint would otherwise seriously impair the effective operation of the Financial Ombudsman Service. Examples of a type of complaint that would otherwise seriously impair the effective operation of the Financial Ombudsman Service may include ... where the subject matter of the complaint has previously been considered … (unless material new evidence which the Ombudsman considers likely to affect the outcome has subsequently become available to the complainant)***

These Rules provide a basis on which a complaint is dismissed without considering its merits. I will call this an "Exclusion". As a shorthand, I will use the phrase "the Materiality of New Evidence Exclusion" to describe the scenario for which these Rules provide: where "the subject matter of the complaint has previously been considered" and there is no "material new evidence" which "has subsequently become available to the complainant" and "which the Ombudsman considers likely to affect the outcome".

3. The threshold for permission for judicial review is arguability with a realistic prospect of success. In applying that threshold for permission, it is important to keep the following point in mind. The judicial review court does not have a general substitutionary function. The Materiality of New Evidence Exclusion, seen in the Rules, is framed by reference to material new evidence which "the Ombudsman considers" likely to affect the outcome. That language reflects the fact that there are matters of evaluative judgment for the Ombudsman. The judicial review Court has a supervisory jurisdiction asking – by reference to well-established principles – whether the target decision was unlawful, unreasonable or unfair.

The 2018 Decision

4. A complaint about the arrangement and Hargreaves Lansdown's 2011 conduct had been made to the FOS by and on behalf of Mr Hogan in 2017. That complaint culminated in

the 2018 Decision. In the 2018 Decision Mr Connor recorded that Mr Hogan had contacted Hargreaves Lansdown in 2011, aged 51. He had not worked for a couple of years due to long-term sickness. He faced the prospect of not being able to draw-down benefits from the occupational pension scheme until aged 60. He was living on incapacity benefits. His complaint included the following: that Hargreaves Lansdown had "not followed the correct procedures"; that Mr Hogan was a vulnerable client; that Mr Hogan had not been properly advised; and that Mr Hogan had suffered financially as a result. The documents considered by Mr Connor in the 2018 Decision included what he called a "Suitability Letter" dated 12 September 2011 written by Hargreaves Lansdown to Mr Hogan, in which the writer had stated: "I recommend that you consider the transfer of your pension and the purchase of a pension annuity"; and "I have therefore referred your case to our in-house annuity specialists [who] will discuss your circumstances… and confirm the most suitable terms on which you should take your annuity". Reference was also made by Mr Connor to a "Fact Find" document dated 8 September 2011, completed and signed by Mr Hogan. The 2018 Decision recognised that in effect Mr Hogan's major asset was the defined benefits in the occupational pension; but that Mr Hogan had a stated immediate need for income and limited savings; such that transferring his benefits was the only option. The 2018 Decision concluded that Hargreaves Lansdown had not, in all the circumstances, given unsuitable advice. Mr Hogan's 2017 complaint failed.

The 2019 Decision

5. The 2019 Decision concerned a renewed complaint made by Mr Hogan about Hargreaves Lansdown's 2011 advice and conduct. One of the points being made by Mr Hogan was that a "Suitability Report" dated 26 September 2011, which Hargreaves Lansdown had now supplied, served or helped to demonstrate the unsuitability of the 2011 advice. Another of the points being made by Mr Hogan was that Hargreaves Lansdown had failed to supply the Suitability Report in connection with a Data Subject Access Request in 2017 (the "DSAR 2017"), for which Hargreaves Lansdown should also be held to account. The new complaints were rejected by Mr Connor in the 2019 Decision. The 2019 Decision was challenged by Mr Hogan in judicial review proceedings reference CO/3316/2019. In those 2019 judicial review proceedings the FOS did not oppose the quashing of the 2019 Decision, accepting that Mr Connor had not in the 2019 Decision considered all the circumstances. The High Court quashed the 2019 Decision on 7 April 2020 ("the 2020 Quashing Order"). The 2020 Quashing Order stated: "The decision of the Defendant dated 11 July 2019 is quashed and the Defendant shall, as soon [as] practicable, reconsider the complaints which resulted in the said decision of 11 July 2019".

The 2022 Decision

6. The 2022 Decision was preceded by three Provisional Decisions issued by Mr Moore: Provisional Decision (1) on 9 June 2021; Provisional Decision (2) on 2 December 2021; and Provisional Decision (3) on 14 February 2022. Mr Hogan provided witness statements for consideration by Mr Moore, dated: 30 June 2021; 16 December 2021; 5 January 2022; 9 February 2022; and 28 February 2022.

7. In the 2022 Decision, Mr Moore reasoned that Mr Hogan's complaint about the DSAR 2017 was a distinct matter to be looked at separately under a separate complaint reference. That position had provisionally been adopted in Provisional Decision (1) on

9 June 2021, and was maintained in the 2022 Decision. It left Mr Hogan's complaints about Hargreaves Lansdown's 2011 conduct. As to that, there were new documents. The Materiality of New Evidence Exclusion was treated as being engaged. As the 2022 Decision explained, there were "several further items" which had "emerged", which Mr Hogan was arguing "he never received before", and which Mr Hogan said were "material new evidence" which was "likely to affect the outcome of his complaint". In the 2022 Decision, Mr Moore identified these "items" – which he described as "the alleged new evidence" – as being: (i) a "TVAS" (transfer value analysis system) carried out on a software package on 20 September 2011 producing a 23 page printout; (ii) the Suitability Report dated 26 September 2011; and (iii) a note of a conversation on 26 September 2011 between Mr Hogan and the adviser at Hargreaves Lansdown ("the Note"). In these proceedings, Mr Hogan says that what Mr Moore described as the TVAS is better described as a "PTAR" (pension transfer analysis report).

8. In Provisional Decision (1) of 9 June 2021, Mr Moore had reasoned that, on the application of the Materiality of New Evidence Exclusion, the complaint should be considered on its merits. He reasoned that the late discovery of the Suitability Report of 26 September 2011 meant material new evidence had become available which was likely to affect the outcome of the original complaint about the suitability of the pension transfer and annuity purchase, so that the FOS could look at the subject matter again. By Provisional Decision (2) of 2 December 2021, Mr Moore had reconsidered that issue. He now reasoned that, on the application of the Materiality of New Evidence Exclusion, the complaint should not be considered on its merits. Leaving aside the distinct complaint about DSAR 2017, Mr Moore had provisionally decided to dismiss the complaint under the Materiality of New Evidence Exclusion. That position was maintained in Provisional Decision (3) of 14 February 2022. It was the ultimate position adopted in the 2022 Decision.

9. Mr Moore reasoned in the 2022 Decision that Mr Hogan's complaint – leaving aside DSAR 2017 – was about the same "subject matter" as his original complaint, which was "previously considered" in the 2018 Decision. So far as concerned the Suitability Report of 26 September 2011, Mr Moore concluded in the 2022 Decision that this had not "subsequently become available to the complainant". That was because he found that this document had been provided under cover of a letter on 26 September 2011 by Hargreaves Lansdown to Mr Hogan. But Mr Moore went on to conclude that, in any event, the PTAR, the Suitability Report (even if not provided to Mr Hogan in 2011) and the Note were not likely to affect the outcome. The complaint was rejected in the application of the Materiality of New Evidence Exclusion.

Judicial Review

10. Mr Hogan commenced these proceedings for judicial review on 15 June 2022. By a decision dated 8 September 2022, provided to the parties on 26 September 2022, HHJ Jackson refused permission for judicial review. She also awarded the FOS their Acknowledgement of Service and Summary Grounds of Resistance costs of £2,370. By Notice of Renewal dated 2 October 2022, Mr Hogan sought reconsideration of the question of permission for judicial review at an oral hearing, and contested the costs. The judicial review claim form (Form N461) dated 15 June 2022 had named the Financial Conduct Authority ("FCA") as Second Defendant. The FCA did not file an Acknowledgement of Service and did not feature in HHJ Jackson's order. Hargreaves Lansdown have not participated.

This Hearing

11. This renewal hearing was fixed for 28 April 2023, with a Notice of Hearing being issued on 13 March 2023. This was originally listed for the conventional 30 minutes. The Administrative Court Judicial Review Guide 2022 explains at §9.5.1: "Renewal hearings are expected to be short, with the parties making succinct submissions. The standard time estimate for a renewed permission application is 30 minutes. This includes the time needed for the judge to give an oral judgment, if appropriate, at the end of the hearing." The Guide explains at §9.5.4 that, where a party requests a longer hearing: "the Court will only allocate such Court time as it considers appropriate, bearing in mind the pressure on Court time from other cases".

12. In the run up to the hearing on 28 April 2023 there was a flurry of activity, and I made an Order on 21 April 2023. At various stages, Mr Hogan made applications and requests for the hearing to be vacated. I declined those requests and applications. I was and remained satisfied – having regard to the overriding objective – that the hearing should remain listed; and that it could be dealt with fairly and justly. I extended time for skeleton arguments.

13. In emails to the Administrative Court in Leeds ("ACL") Mr Hogan requested that the time estimate for the renewal hearing be extended to 4 hours. The staff at ACL informed him on 6 April 2023 that the hearing would be listed for 60 minutes and the question of whether further time would be allowed will be a matter for the Judge. Mr Hogan maintained that a 4 hour slot should be allocated. In my Order on 21 April 2023 I explained that 4 hours of court time for the renewed application was not appropriate, that the solution which the staff had adopted was appropriate, that the case would be remain listed for 60 minutes, and that it would be possible on the day to allow further time if it was needed. In the event, Mr Hogan's made oral submissions which took 1¾ hours, which I was happy in the circumstances to accommodate. The hearing was concluded within 2¼ hours. I decided to reserve my judgment.

14. In emails to ACL, the FOS had requested a hybrid hearing so that they could appear by London-based Counsel, avoiding the cost and time of travelling to Leeds from London, that cost and time being described as disproportionate for a short court hearing. The ACL staff explained that renewal hearings are in-person in the court room. The FOS made an application, on 11 April 2023, for consideration by a Judge. In my Order of 21 April 2023 I refused that application. I explained that I found the reasons for a hybrid hearing (proportionality, travel and cost) wholly unconvincing; I reiterated that the practice of in-person hearings had been explained; that the Leeds venue was an appropriate one; that the parties should be assisting the Court from within the court-room; and that it was a matter for the FOS whether it wished to attend the permission renewal hearing.

15. Then there was a request by the FCA to be removed as a defendant, made by email on 20 April 2023. It was not agreed by Mr Hogan. In my Order of 21 April 2023 I declined to remove the FCA as defendant, in the absence of an agreement. I explained that the FCA had not taken the opportunity to ask to be removed in September 2022 when a Judge (HHJ Jackson) had dealt with this case on the papers. I said I was not prepared to make a ruling, on the papers, on an unagreed aspect, based on an informal request. I emphasised that there was no requirement for the FCA to participate and that I had seen no Acknowledgement of Service from the FCA. I said I could deal with this aspect, as

appropriate, at the hearing. In the event the FCA decided to instruct Leeds-based Counsel to attend the hearing, solely for the purpose of seeking to be removed as a defendant. A skeleton argument was produced with a schedule of costs and the Court was invited to make a costs order against Mr Hogan. In the event, having first heard Mr Hogan's oral submissions in support of permission for judicial review, I was able to deal with the position of the FCA at the end of the oral hearing. The position was this. Mr Hogan had named the FCA as a defendant because there was one aspect of the 2022 Decision – namely complaints handling by Hargreaves Lansdown – which Mr Moore described as not covered within the FOS's compulsory jurisdiction, and which would be a matter for the FCA as regulator. In my judgment, that was not a good and sufficient reason to name the FCA as a defendant. No conduct of the FCA was impugned in the grounds for judicial review, and Mr Hogan confirmed that position when I put it to him. He also confirmed at the hearing that he did not resist the FCA being removed as a defendant. I ordered that the FCA be removed. But I dismissed the FCA's application for costs. This aspect could and should have been raised at the outset by the FCA. Mr Stanbury, fairly and rightly, accepted that the FCA should have been aware of the judicial review claim, and that it had received a copy of HHJ Jackson's Order provided by the court on 26 September 2022. The point could and should have been raised far earlier. It could, in any event, readily have been dealt with without attendance by the FCA, which was voluntary; without a skeleton argument which did little more than repeat what had already been said in emails; and without the costs of a skeleton argument and attendance.

Arguability of the Grounds

16. I turn to the arguments that were advanced by Mr Hogan. In terms of written argument by Mr Hogan, the substantial documentation filed with this Court meant that I had the benefit of the following in particular. There were Judicial Review Grounds dated 15 June 2022; Renewal Grounds dated 2 October 2022; and a Skeleton Argument dated 26 April 2023. In terms of written argument from the FOS, I had the benefit in particular of Summary Grounds of Resistance dated 12 July 2022 and a Skeleton Argument dated 24 April 2023. The oral hearing was an excellent forum to bring to the fore Mr Hogan's key arguments. He was able to develop and explain the points that mattered. He did that with great clarity. I was able, later in his submissions, to run through with Mr Hogan all of the key points which he was advancing. That gave me valuable clarification. What follows is my explanation of the grounds of challenge being advanced and legal arguments being made, and what I made of them. The threshold for permission for judicial review is that the claim need only be arguable, with a realistic prospect of success: Judicial Review Guide §9.1.3. No discretionary bar, such as alternative remedy or delay etc (see Judicial Review Guide §§6.3-6.4), arises in the present case. The essence of the claim for judicial review is that, for one or more of the reasons given by Mr Hogan, it was unlawful or unreasonable or unfair for Mr Moore in the 2022 Decision to reject Mr Hogan's complaint by applying the Materiality of New Evidence Exclusion. It was unlawful or unreasonable or unfair not to allow Mr Hogan's complaint to proceed to merits-evaluation applying the s.228(2) fairness and reasonableness test. A number of key points are advanced by Mr Hogan. I have considered all of them, individually and cumulatively. I will discuss them in the following order, but the order in which the points are taken does not affect the substance or reasoning.

Dissection and the DSAR 2017

17. A first key point made by Mr Hogan is this. It was arguably wrong for Mr Moore in the 2022 Decision to "dissect out" that part of Mr Hogan's complaint that concerned the DSAR 2017. Mr Hogan's complaints should have been treated as a holistic whole. I am unable to see in this point an arguable ground for judicial review with a realistic prospect of success. It is clear that Hargreaves Lansdown's 2017 conduct in relation to the DSAR 2017 is not relevant to questions regarding Hargreaves Lansdown's 2011 conduct and the transfer from the occupational pension scheme with the defined benefits to the Vantage SIPP and Just Retirement Annuity. At the hearing before me Mr Hogan expressly accepted – rightly – that the 2017 conduct is not relevant to the 2011 conduct. It was plainly lawful, reasonable and fair for Mr Moore to treat the DSAR 2017 aspect as being distinct, to be looked at on its own merits. It was plainly lawful, reasonable and fair for Mr Moore to consider whether the remaining aspects of the complaint did or did not fall foul of the Materiality of New Evidence Exclusion. It is plain that, shorn of the DSAR 2017 aspect, the complaints being made by Mr Hogan were the same subject matter as the 2017 complaint. Mr Hogan – rightly – accepts that. It could not be right that the inclusion of DSAR 2017 into one complaint could avoid the application of the Materiality of New Evidence Exclusion. What was needed was for the Materiality of New Evidence Exclusion to be lawfully, reasonably and fairly applied. If that – arguably – did not happen, permission for judicial review is appropriate.

Effect of 2020 Quashing Order

18. A second key point made by Mr Hogan is this. Mr Moore was duty-bound to proceed to a merits consideration, in the application of the s.228(2) fairness and reasonableness test, by reason of the 2020 Quashing Order. That was an order quashing a purported dismissal of the complaints on the merits: the 2019 Decision. It was a quashing order which remitted the complaints for a merits reconsideration. Mr Moore was not entitled to narrow down the remitted reconsideration, by reference to the application of the Materiality of New Evidence Exclusion. I am unable to see in this point an arguable ground for judicial review with a realistic prospect of success. Nothing in the 2020 Quashing Order (which I quoted above) gave rise to an obligation to disapply the Materiality of New Evidence Exclusion. Nor could the quashed 2019 Decision do so. The Materiality of New Evidence Exclusion arose from Rules which are and were applicable within the framework of rules with which an Ombudsman is concerned. Mr Hogan was entitled to a lawful, reasonable and fair application of the Materiality of New Evidence Exclusion. But he was not, even arguably, entitled to bypass the Materiality of New Evidence Exclusion.

Effect of Provisional Decision (1)

19. A third key point made by Mr Hogan is this. Mr Moore was duty-bound to proceed to a merits consideration, in the application of the s.228(2) fairness and reasonableness test, by reason of Provisional Decision (1) of 9 June 2021. That was a decision by Mr Moore which expressly recognised the appropriateness of dealing with the matter on the merits, in light of the new evidence. It was unreasonable for Mr Moore to change his position subsequently. I am unable to see in this point an arguable ground for judicial review with a realistic prospect of success. Again, Mr Hogan was entitled to a lawful, reasonable and fair application of the Materiality of New Evidence Exclusion.

If it was lawful, reasonable and fair to conclude in the 2022 Decision that the complaint fell foul of that Exclusion, nothing in Provisional Decision (1) of 9 June 2021 can assist. Provisional Decision (1) of 9 June 2021 was precisely that: a "provisional" decision. It was not final or binding. It did not constitute a promise or representation. The point can be tested by supposing that the "provisional" conclusion had been that Mr Hogan's complaint failed by reason of the Materiality of New Evidence Exclusion. That "provisional" decision would not have precluded Mr Moore from changing his position in the ultimate decision. There was no arguable unfairness. The "provisional" nature of the decision was express. The change of position was itself articulated, "provisionally" and after a full review, in the reasoned Provisional Decision (2) of 2 December 2021. Mr Hogan had a full and fair opportunity to seek to persuade Mr Moore that the correct position, in the application of the Materiality of New Evidence Exclusion, was to revert to the position in Provisional Decision (1). He attempted, but failed, to persuade Mr Moore that this was so. The question – once again – is whether the 2022 Decision was a lawful, reasonable and fair application of the Exclusion.

Evidence Disregarded

20. A fourth key point made by Mr Hogan is this. The 2022 Decision involved an unlawful, unreasonable or unfair focus on the three documents: the PTAR (TVAS) of 20 September 2011, the Suitability Report of 26 September 2011 and the Note of 26 September 2011. These were identified as the "new evidence". What that approach overlooked were the witness statements provided by Mr Hogan, and in particular the first witness statement dated 30 June 2021. What Mr Moore overlooked was that those witness statements were themselves "evidence" and should therefore have been included and considered, for their materiality and likely impact, alongside the three contemporaneous documents identified. I am unable to see in this point an arguable ground for judicial review with a realistic prospect of success. What Mr Moore did in the 2022 Decision was to describe the three items collectively as the "alleged new evidence". That was plainly an appropriate description of the "further items" which had "emerged", which Mr Hogan was arguing he had never before received and constituted "material new evidence… likely to affect the outcome of his complaint". These were appropriately grouped together. They were contemporaneous documents. They all related to the key point in time: September 2011. They were central to what the Ombudsman had to consider. They were also the central focus of what the Rules describes as material new evidence which has "subsequently become available to the complainant". A new witness statement by the complainant is not, in the same way as a contemporaneous document, evidence which has "subsequently become available to" the complainant. Naturally, what Mr Hogan had to say in the witness statements, about the new documents and about the complaint as a whole, was itself relevant. But critically, there was no question of Mr Moore disregarding or failing to consider the witness statements. It had, for example, been recorded in Provisional Decision (2) that all the materials were being considered, including the then available witness statement of 30 June 2021. It plainly continued to be Mr Moore's position that he considered, and had regard to, everything that Mr Hogan had put in and relied on. That included what had been said in the various witness statements. In the 2022 Decision Mr Moore said he was satisfied that the evidence "boils down to the three items" which he had described. But that was itself a characterisation which, in terms, was based on "having considered everything Mr [Hogan] has said". What Mr Hogan had "said" – which had been "considered" – included the five witness statements.

An Inapt Starting-Point

21. A fifth key point made by Mr Hogan is this. The 2022 Decision involved an arguably unlawful, unreasonable or unfair approach to the 2018 Decision. In the 2022 Decision, Mr Moore adopted the following position as the appropriate "starting-point" (or "premise"): he proceeded on the basis that the 2018 Decision was a sound decision on the evidence then available to Mr Connor. That was an error of approach. No such starting point (or premise) should have been adopted. In making the 2022 Decision, Mr Moore should have reopened and re-evaluating the soundness of the 2018 Decision on the evidence available to Mr Connor at the time of the 2018 Decision. If Mr Moore had done this, he would have been able to see that Mr Connor had got it wrong on the evidence which Mr Connor had considered in 2018. For example, Mr Moore would have seen that the 2017 complaint was about the suitability of the Vantage SIPP, whereas Mr Connor described it as a complaint about the suitability of the Just Retirement Annuity. By way of further example, Mr Moore would have seen that the letter of 12 September 2011 was not a "Suitability Letter" advising that a transfer to a SIPP with an Annuity was a suitable transfer; instead, it was advice on the suitability of a transfer to the 'annuity desk' (the in-house specialists) to advise on whether a transfer to a SIPP with an Annuity was or was not suitable and, if suitable, what specific SIPP and Annuity product were suitable. These, and other, errors made the 2018 Decision unsound, on the evidence which was before Mr Connor when he made that decision. All of this should have been reopened in the making of the 2022 Decision.

22. I am unable to see in this point an arguable ground for judicial review with a realistic prospect of success. The point of the Materiality of New Evidence Exclusion is that it disallows the reopening of an original complaint, by reference to evidence which was available previously. A complainant cannot advance the same complaint on the same subject-matter, inviting a different conclusion because the Ombudsman got it wrong on the evidence available when the previous decision was made. Certainly, the soundness of the previous conclusion can be reopened. The evidence originally considered remains relevant. But the basis for reopening the previous conclusion has to be new evidence which has become available to the complainant, and the new evidence has to be "material" and "likely" to "affect" the "outcome". In other words, the new evidence has to be capable – when considered alongside the other evidence – of demonstrating the unsoundness of the previous decision. In my judgment, beyond argument, what that means is that the starting-point (or premise) is the soundness of the original decision on the evidence as it then stood. This is what "material" and "affect" mean in the Materiality of New Evidence Exclusion. So, when Mr Moore said (in the 2022 Decision) that Mr Connor had concluded (in the 2018 Decision) that Mr Hogan's "need for income from the defined benefits was so strong that [Mr Connor] was satisfied that Mr Hogan would have transferred come what may", that was being taken as a sound conclusion on the evidence before Mr Connor. From that starting-point, Mr Moore did not consider that the Suitability Report, TVAS (PTAR) and the Note were material new evidence likely to affect the outcome. That involved no arguable public law error. Put another way, this judicial review challenge – whose target decision is the 2022 Decision – is not, whether by reference to the Materiality of New Evidence Exclusion or at all, a vehicle for impugning the soundness of the 2018 Decision on the then evidence.

Suitability Report Unsupplied

23. A sixth key point made by Mr Hogan is this. In the 2022 Decision, Mr Moore wrongly and unreasonably concluded that the Suitability Report of 26 September 2011 was a document which Hargreaves Lansdown had supplied to Mr Hogan in September 2011. I am unable to see in this point an arguable ground for judicial review with a realistic prospect of success. In the first place, the 2022 Decision provides a reasoned basis for this factual conclusion, and I can see no realistic prospect of it being overturned on judicial review. But secondly, the 2022 Decision concluded that – even if it was not provided to Mr Hogan in 2011 – the Suitability Report, together with the other materials, was not material new evidence likely to affect the outcome. Mr Hogan needs a viable public law ground for impugning that second conclusion.

Positive Recommendation

24. A seventh key point made by Mr Hogan is this. The Note of 26 September 2011 records Hargreaves Lansdown as positively recommending a transfer to the Vantage SIPP with the Just Retirement Annuity. This contrasts with the original letter of 12 September 2011 which did no more than advise transfer to the 'annuity desk' (the in-house specialists) to advise on whether a transfer to a SIPP with an Annuity was or was not suitable and, if suitable, what specific SIPP and Annuity product were suitable (see §21 above). I am unable to see in this point an arguable ground for judicial review with a realistic prospect of success. In the 2018 Decision, Mr Connor found that Hargreaves Lansdown did not simply advise transfer to the 'annuity desk' for suitability advice. He found that Hargreaves Lansdown did advise on the transfer to the SIPP and Annuity. The 2018 Decision concluded that the advised transfer to the Vantage SIPP and the Just Retirement Annuity was not unsuitable advice, given Mr Hogan's circumstances as they were in 2011. The documented positive recommendation is consistent with the position as found by Mr Connor in the 2018 Decision.

Unsuitability of Transfer

25. An eighth key point made by Mr Hogan is this. The transfer from the defined benefits within the occupational pension scheme to the Vantage SIPP and the Just Retirement Annuity was an unsuitable transfer for him in 2011. I am unable to see in this point an arguable ground for judicial review with a realistic prospect of success. In the 2018 Decision, Mr Connor concluded that Hargreaves Lansdown advised Mr Hogan in 2011 to transfer to the Vantage SIPP and the Just Retirement Annuity, which advice was not unsuitable. That was because of the circumstances which Mr Hogan faced in 2011. Mr Hogan was in very difficult circumstances. He was clearly unwell. He had little income and only modest savings. He had an immediate need for income. His major asset was the defined benefits within the occupational pension scheme. The Annuity gave him certainty of income on a risk-free basis for the rest of his life. In those circumstances, the advised transfer was not unsuitable. As Mr Moore recorded in the 2022 Decision, Mr Hogan in 2011 had an overwhelming need to access income by transferring out of the defined benefits occupational pension scheme. As he also explained, the Suitability Report underscored that Hargreaves Lansdown was recommending that Mr Hogan transfer his pension out of the defined benefits occupational pension scheme to purchase the Annuity, because of Mr Hogan's unavoidable need for income. As Mr Moore put it in the 2022 Decision: "Through of his submissions, Mr Hogan hasn't been able to explain how he could have managed without the income this transfer produced", adding that "importantly, in any event, his opportunity to explain this was before the first decision was reached". In my judgment, beyond argument, the 2018 Decision

clearly found the advised transfer to the Vantage SIPP and Just Retirement Annuity not to have been unsuitable, and the 2022 Decision finds – with no arguable public law deficiency – that nothing in the new evidence subsequently available to Mr Hogan is likely to affect that conclusion.

Addendum

26. In response to receiving this judgment as a confidential draft, Mr Hogan has submitted that there are material errors in §§24-25 above. He says that the 2018 Decision made no mention of the SIPP and referred only to the Annuity; that Mr Connor did not find that Hargreaves Lansdown advised on the transfer to the SIPP; and that Mr Connor's reference to advice which was "not unsuitable" applied only to the Annuity and not the SIPP. I have left §§24-25 intact as circulated. This Addendum is new. As to §24 above, the starting point is that, in the 2018 Decision, Mr Connor found that Hargreaves Lansdown did not simply advise transfer to the 'annuity desk' for suitability advice. I agree that Mr Connor found that Hargreaves Lansdown advised Mr Hogan on the Annuity. But he also recorded the contents of the original letter of 12 September 2011 (as quoted in §4 above) about "the transfer of your pension and the purchase of a pension annuity". And the "transfer" of the occupational pension to a SIPP was part and parcel of – and necessary for – the purchase of the Annuity. Mr Connor referenced Hargreaves Lansdown as having "recommended a transfer to an annuity". He referenced Mr Hogan having complained about Hargreaves Lansdown not having followed "the correct procedures for a pension transfer". When Mr Connor concluded that Hargreaves Lansdown did advise Mr Hogan "on his annuity" which advice was "not … unsuitable", I cannot see how that can have excluded the transfer to the SIPP. The circumstances relevant to "unsuitability of transfer" are, in any event, those at §25 above (and §27 below). The fact that the subject-matter of complaint has remained the same has rightly been accepted (§17 above). In the 2018 Decision, Mr Connor recognised Mr Hogan's "stated need for immediate income", and that "transferring his benefits was the only option", in his "very difficult circumstances". In the 2022 Decision, Mr Moore explained the logic of the 2018 Decision as being that Mr Hogan "would have transferred come what may", going on to describe the "overwhelming need", "unavoidable need" and fact that "there was no alternative". I remain unable to see a viable judicial review claim.

Breaches of Rules

27. A ninth key point made by Mr Hogan is this. The new evidence served to demonstrate that Hargreaves Lansdown had in 2011 acted in breach of various rules with which they were required to adhere. In particular, they were under a rule-based duty to provide a copy of the PTAR (or TVAS) to Mr Hogan as their client which they failed to do (since that document is new evidence not previously available to Mr Hogan). Further, they were under a rule-based duty to provide a copy of the Suitability Report of 26 September 2011 to Mr Hogan as their client which they also failed to do so (since that too was not previously available, as was wrongly rejected in the 2022 Decision). Once it can be shown by new evidence that rules were breached by Hargreaves Lansdown in 2011, it must follow that this is "material' and can "affect the outcome". I am unable to see in this point an arguable ground for judicial review with a realistic prospect of success. So far as the Suitability Report is concerned, Mr Hogan faces the difficulty that Mr Moore has found that this report was provided in 2011 (§23 above). Leaving that to one side, the problem is this. The 2022 Decision, unassailably, identifies as the

crux of the complaint as concerning the suitability of the financial advice. The transfer to the Vantage SIPP and the Just Retirement Annuity have been found not to be unsuitable for Mr Hogan, in the particular circumstances that he faced in 2011. That central finding was unaffected by the complaint, recorded in the 2018 Decision, that Hargreaves Lansdown had "not followed the correct procedures". In the 2018 Decision Mr Connor was considering an evidential picture from which a TVAS (or PTAR) was absent. As it is put by Mr Moore in the 2022 Decision: "despite the apparent failings on [Hargreaves Lansdown]'s part, [Mr Connor] already thought that he had enough evidence on which to conclude – on the balance of probabilities – that Mr Hogan would still have transferred". This is in the context where Mr Hogan had "an overwhelming need to access income by transferring out" of the defined benefits occupational pension scheme. As the 2022 Decision explains: "Through all of his submissions, Mr [Hogan] hasn't been able to explain how he could have managed without the income this transfer produced". The point is that failings on Hargreaves Lansdown's part did not in the 2022 Decision – any more than they had in the 2018 Decision – provide a basis for a likely different "outcome" in Mr Hogan's favour. That was because of Mr Hogan's particular circumstances and needs and because – whatever their "failings" – the fact remains that Hargreaves Lansdown were arranging and advising on a transfer which was not unsuitable, to products which were not unsuitable, but rather produced the income for which Mr Hogan had an overwhelming need.

Amended Document

28. A tenth key point made by Mr Hogan is this. The new evidence, unavailable at the time of the 2018 Decision, shows that a document was amended without his knowledge and consent. I am unable to see in this point an arguable ground for judicial review with a realistic prospect of success. This is a reference to a reissued annuity quotation dated 30 September 2011. In the 2022 Decision, Mr Moore said this:

> ***At this point I'd also like to address Mr [Hogan]'s concerns about the annuity quotations on [Hargreaves Lansdown]'s files – for example a reissued annuity quotation on 30 September 2011 with a different reference number, which he says [Hargreaves Lansdown] amended on his annuity application without his knowledge. Mr [Hogan] says that is material new evidence because it prevented him from depending on his 'lawful rights of contract cancellation'. I don't intend to investigate that point further as I can't see it is material nor that it has any prospect of success. Annuity quotes are valid for a certain length of time (typically, 14 days), so are often updated during an application so an 'in date' quote can be honoured when the annuity provider receives all its requirements. Mr [Hogan]'s contract is with that provider whose responsibility it is to set out how long its quotes are guaranteed for. I'm not persuaded that whether a quote's reference number changes during the application has any bearing on Mr [Hogan]'s ability to cancel the annuity during the cancellation period if he wishes to do so, once the rate he has secured is confirmed. So, this point has no relevance to the matters that the ombudsman covered in the decision of 8 May 2018, which Mr [Hogan] is asking this service to look at again.***

I cannot see any arguable public law error in that reasoned approach.

Arguability Overall

29. I have been unable to find any arguable judicial review challenge with a realistic prospect of success, on any of the key points made by Mr Hogan. That is the position considering those points individually, but also in combination and cumulatively. I have identified in turn each of the key points that were emphasised by Mr Hogan in his clear

and careful oral submissions. I make clear that I have not identified in his written submissions documents any other point which constitutes a ground for judicial review which is arguable with a realistic prospect of success. In all the circumstances and for all these reasons, and having looked at the matter entirely afresh, I will – like HHJ Jackson before me – refuse permission for judicial review.

The Costs Order

30. That leaves the contested question of the costs Order in favour of the FOS. Mr Hogan maintained orally the position set out in his Grounds of Renewal. There, he identified four points. First, that the Acknowledgement of Service costs are "set at a low bar". Secondly, that the costs provided for work done here is a "repeat" for the "free service" provided in the pre-action letter of response, with cutting and pasting. Thirdly, that HHJ Jackson assessed costs summarily with no adjustment downwards such as "30 to 50%" under laws relating to "fixed costs". Fourthly, that the costs should be taken to a detailed assessment before a specialist costs judge. I have not been persuaded by these submissions. The position in judicial review is this. When permission for judicial review is refused, a defendant will generally recover the costs which it has incurred in the Acknowledgement of Service and Summary Grounds of Resistance. Summary assessment is generally appropriate. There is no "30 to 50%" or other rule of downwards adjustment. There is no entitlement to a detailed assessment. The judicial review claimant is entitled to raise any point including as to the proportionality of the costs and Mr Hogan has had and exercised that right. He is correct that the costs relate to the Summary Grounds of Resistance and Acknowledgement of Service, and not the pre-action letter of response. But the judicial review defendant is required to identify those costs which are attributable to the Acknowledgement of Service and Summary Grounds of Resistance. That was done by the FOS in its cost schedule in this case. So far as costs are saved because of a 'block and paste' exercise, the costs claimed are lower than they would have been. The costs have been properly incurred and no point of objection raised by Mr Hogan calls that into question. The only "low bar" is that costs must be reasonable and proportionate for the limited purpose of the permission stage. But I am quite satisfied that the level of costs was properly claimed and properly recoverable. Some permission stage judges may be persuadable that a modest discount is appropriate, on the grounds that costs were not being awarded on an "indemnity basis". Other judges may be satisfied simply that the costs in their entirety are justified and proportionate. The costs order which HHJ Jackson made was an appropriate one and I am not persuaded that it should be revised, based on the points that have been raised or any other concern. No application for costs was made by the FOS in relation to costs of the Skeleton Argument or attending the hearing, and no further costs order is appropriate. I have refused the FCA's application for costs. The costs Order made by HHJ Jackson will stand.

Outcome

31. The outcome is this: (1) the application for permission for judicial review is dismissed; (2) the costs order made by HHJ Jackson stands; (3) the FCA is removed as a defendant; and (4) the FCA's application for costs is dismissed. I will make an Order to that effect. I repeat, as already explained, that the Addendum at §26 above was added after circulation of this judgment as a confidential draft.