



2 TEMPLE GARDENS

“The View from Chambers”

Sonia Nolten
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- *Clark v In Focus Asset Management* [2014] EWCA Civ 118
- Challenging the FOS
- Judicial review

Clark v In Focus

- Attempt to obtain £150,000 (max financial award before FOS) and use as a “fighting fund”
- COA:
 - Not allowed.
 - Res judicata?
 - Public policy?

Challenging the Ombudsman

- *“If the complainant notifies the Ombudsman that he accepts the determination it is binding on the respondent and the complainant and final”*

(Section 228 FSMA 2000, “Determination under the compulsory jurisdiction”)

- Is that the end of the matter?

What are the criteria for JR?

- *“Where a statutory appeal is available it will normally not be proper to seek to challenge by judicial review a decision that can be challenged through the statutory appeal process”.*

(Larkin and Scoffield, *Judicial Review in Northern Ireland* § 8:02)

- *“... It is different with an insurance company because of course the decision is binding upon the insurance company and therefore one can see that the insurance company would have a proper interest in setting it aside.”*

R (On the application of Duff) v Financial Service Ombudsman [2006]

EWHC 1704

Key principles

- There must be a “*judiciable issue*”
- No hypothetical decisions
- The role of the Court in JR is NOT to examine the merits of the decision
- Duty of the Court is to ensure that the public body concerned has exercised its powers lawfully.

Key principles

- What are FOS's powers?
 - By Section 228(2) of FSMA FOS is required to determine such complaints *“by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case.”*
 - In other words it does not look at the strict legal rights of the parties but determines such complaints on the basis of the evidence and the Ombudsman's own expertise of what is *“fair and reasonable in all the circumstances of the case”*.



- Meaning outside the limits of jurisdiction
 - Narrow sense: makes a decision when it has no power to do so (eg orders payment of more than £150,000)
 - Wide sense: has power to exercise jurisdiction but abuses its power, acts in a procedurally irregular manner, behaves in a “*Wednesbury unreasonable*” manner, commits an error of law.

Abuse of power

- A decision which is so perverse that that no reasonable body could have applied this decision
 - *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223
 - *R v (Keith Williams) v Financial Ombudsman Service* [2008] EWHC 2142
- A narrow ground in any event.

Abuse of power

-and particularly so in the case of the FOS given that it is not bound to apply the law:

“The court should treat a decision of the FOS with respect and give it a reasonably generous margin of appreciation in order to reflect the particular expertise which the FOS has and which he will make use of in reaching any conclusion” R v Financial Ombudsman Service, ex. p. Walker [2013] NIQB 12, § 11

An error of law

- How is this ground relevant to a public body which avowedly need not apply the law?
 - Unsuccessfully argued in *R v FOS ex.p Heather Moore & Edgcombe Ltd* [2008] EWCA Civ 642 that FOS was on a true construction of s. 228 bound to apply the law.
 - Uncharted territory: misinterprets statute or other legal document; decision on basis of no evidence; rejection of relevant evidence
 - Although FOS does not have to follow the law, what if it makes an error of law and that error played a part in its reasoning?

Relevant and irrelevant considerations

- how is it possible to determine when the FOS has taken into account irrelevant considerations given the nebulous requirement to act fairly and reasonably?
- Will vary according to context:
 - Where complainant has received compensation
 - This particular insurer has been before FOS “too many times”
 - Giving excessive or insufficient weight to matters
 - Failing to give an affected party a right to a hearing *R v FOS ex.p Moore & Edgecomb*)
- Broad ambit: *R v FOS ex.p Williams*

Other grounds

- Lack of proportionality
- Fettering discretion
- An improper purpose
- Bad faith

Procedural fairness

- Specific statutory requirements as to procedure
- Natural justice
- The duty to give reasons: Re Poyser & Mills' Arbitration [1964] 2 QB 467:
- R (On the application of IFG Financial Services Ltd) v Financial Ombudsman Services Ltd & Anor
- R (On the application of Williams) v Financial Ombudsman Service
- Lack of bias

Concluding thoughts

- Uncharted territory, especially in terms of insurers
- Fact sensitive
- The more “judicial” the FOS becomes, the more susceptible it will be to certain challenges to the exercise of its function
- Even if this interpretation is not adopted there are potential routes home
- Is Judicial Review a way to make the FOS more accountable?
- Time limits: ASAP and in any event within 3 months