Neutral Citation Number: [2023] EWHC 333 (Admin)

Case No: CO/3076/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 February 2023

Before:

Margaret Obi
(sitting as a Deputy High Court Judge)

- -

Between:

The King (on the application of)
Greg Moniak

Claimant

- and -

Financial Ombudsman Service

Defendant

- and -

Barclays Bank UK Plc

Interested Party

- - - - - - - - - - - - - - - - - - -

James MacDonald KC (acting pro bono under the auspices of Advocate) for the **Claimant**
James Strachan KC (instructed by the **Financial Ombudsman Service**) for the **Defendant**
Rupert Allen (instructed by **TLT PLP)** for the **Interested Party**

Hearing date: 6 December 2022

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This judgment was handed down remotely at 10.30am on 17th February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

APPROVED JUDGMENT

Margaret Obi:

Introduction

1. This is a claim for judicial review. The Claimant ('Mr Moniak') challenged a decision ('the decision') of the Defendant ('the Financial Ombudsman Service - FOS') in which it refused to reconsider his complaint against the Interested Party ('Barclays'). The refusal was on the grounds that court transcripts ('the transcripts'), obtained by Mr Moniak after the complaint had been determined, did not amount to "*material new evidence*". Mr Moniak submitted that this decision was wrong, irrational, and/or unreasonable as the transcripts fundamentally contradict the core factual premise on which the Ombudsman had earlier rejected Mr Moniak's complaint.

2. The FOS is a statutory body established under Part XVI of the Financial Services and Markets Act 2000 (FSMA). Section 225(1) of FSMA provides for a scheme "*under which certain disputes may be resolved quickly and with minimum formality by an independent person*". The independent person is the Ombudsman. The compulsory jurisdiction of the FOS is established under section 226 of FSMA and exists, where the complaint "*relates to an act or omission of a person in carrying on an activity to which compulsory jurisdiction rules apply*". There are three conditions: (i) the complainant is eligible; (ii) wishes to have the complaint dealt with under the scheme; and (iii) is making the complaint against an authorised person. All three conditions were satisfied in this case.

3. The claim was issued on 8 September 2021. On 21 February 2022, Mr Justice Bourne ordered an oral hearing of Mr Moniak's permission application. At the oral hearing, which took place on 15 June 2022, Mr Vikram Sachdeva KC (sitting as a Deputy High Court Judge) granted permission.

<u>Relief Sought</u>

4. Mr Moniak in his claim form sought:

    i. An order quashing the decision of the FOS not to reopen and reconsider the complaint in light of the transcripts; and

    ii. A mandatory order requiring it to do so.

    iii. Alternatively, a mandatory order requiring the FOS to explain with reasons its conclusion that the transcripts were not material new evidence requiring the complaint to be reopened.

<u>The FOS' Offer</u>

5. The FOS maintained that the decision was not wrong, irrational, and/or unreasonable. However, in an attempt to resolve these proceedings, it offered to reconsider the decision not to reopen Mr Moniak's complaint. The offer (if it had been accepted) would entail a fresh Ombudsman: (i) reconsidering whether the transcripts constitute "*material new evidence*" likely to affect the outcome of the complaint; and (ii) whether such evidence had subsequently become available to Mr Moniak. It was submitted that it will be for that fresh

Ombudsman to decide whether or not to consider a second complaint about the same subject matter, having regard to all relevant factors, including any representations from Mr Moniak and Barclays. The FOS submitted that its proposal offers Mr Moniak the principal relief he seeks, namely reconsideration of the decision not to reopen his complaint. Therefore, the FOS submitted that these proceedings are "*essentially academic*".

6. The FOS stated that the offer was made for two main reasons. First, in light of the transcripts that Mr Moniak subsequently provided and based on what he says was his confusion as to what was meant by a court judgment. Secondly, the nature of the FOS' discretionary power to decide when to dismiss a complaint, without considering the merits, and its application to the unusual circumstances of this case. The FOS submitted that it cannot provide any guarantee that a second complaint about the same subject matter will be considered, as that is for the Ombudsman to determine, in accordance with the rules which govern its compulsory jurisdiction.

7. Mr Moniak was not satisfied that this offer of redress goes far enough, as it provided no assurance that the transcripts *would* be taken into account; only that consideration would be given as to whether they should be. Furthermore, the FOS does not accept that it was wrong to refuse to reopen the complaint and therefore could reach the same conclusion based on the same rationale. It is for these reasons that the FOS' offer was not accepted.

Agreed Issues

8. The key issues which arose for determination in these proceedings were narrow and were agreed to be as follows:

    i. What is the effect of the FOS' offer for a fresh Ombudsman to reconsider the transcripts?

    ii. Was the FOS' decision not to reopen Mr Moniak's complaint, without consideration of the merits, unlawful on the grounds alleged in the claim?

    iii. What, if any, relief should the Claimant be granted in his claim?

9. Before I turn to these issues, I will set out the factual background, the legal framework, and the key legal principles relevant to this claim. The sequence of events was not in dispute; what was disputed was how these events should be characterised and the extent to which they should be determined by the FOS or the Court.

Background

10. Mr Moniak was a customer of Barclays. In November 2010, the proceeds of the sale of a property, inherited by Mr Moniak, were paid into two bank accounts he held with Barclays. The savings account was credited with £370,000 and a smaller sum was paid into the current account. The total, when rounded up, was in the region of £500,000.

11. Mr Moniak lived abroad between December 2010 and March 2015. When he returned to the UK in 2015, he contacted Barclays to report fraudulent activity, having discovered that

both accounts had been emptied. It later transpired that the funds had been depleted by April 2011. Between April 2011 and February 2014, the accounts were kept in credit through cash deposits in the UK and bank transfers.

12. Mr Moniak notified the police, made a complaint to Barclays, and referred a complaint to the FOS.

13. Mr Moniak's funds had been stolen by Mr Rahim Saeed and his wife Ms Saima Jan ('the fraudsters'). The fraudsters were known to Mr Moniak. At the end of 2010, Mr Moniak and Mr Saeed travelled together in Thailand. In early 2011 they travelled together to Pakistan for a short trip, and then Mr Moniak returned to Thailand. Following the police investigation, the fraudsters were charged with theft and a trial took place at the Old Bailey in March 2018. Mr Moniak gave oral evidence during the two-week trial. Both Mr Saeed and Ms Jan were subsequently convicted of theft by the jury. The sentencing hearing was adjourned until 19 April 2018. Mr Moniak did not attend the sentencing hearing but a representative from Barclays did attend.

14. There is no dispute that the fraudsters stole money from Mr Moniak as evidenced by their convictions for theft. However, those convictions were not determinative of the question for Barclays, and subsequently for the FOS, as to whether Mr Moniak had complied with Regulation 57 of the Payment Services Regulations 2009. This regulation requires users of payment services to take all reasonable steps to keep the personalised security features of the payment instruments on their accounts safe.

15. Mr Moniak complained that many of the withdrawals made by the fraudsters were large (e.g. cash withdrawals of £12,000) and unusual, in that they were made within a very short period of time, to the same or similar beneficiaries, which ought to have alerted Barclays to the fraud. However, Barclays did not query these transactions and did not identify these withdrawals as red flags.

16. During Barclays' investigation, it produced a Money Management Form ('MMF') in Mr Moniak's name. Mr Moniak has consistently stated that this document is a forgery. Mr Moniak stated that his mother's maiden name was misspelt, the telephone number provided was Mr Saeed's number, and the email address did not belong to him. The MMF also purportedly bears Mr Moniak's signature. Mr Moniak stated that he did not sign the MMF. Barclays noted that the relevant bank card had never left Mr Moniak's possession and would have been required for the ATM withdrawals. Barclays also noted that most of the online banking transfers required authentication, using a PIN sentry card reader, which would only work with Mr Moniak's bank card. Barclays determined at the conclusion of its investigation that there was no evidence of "*a third party compromise to online banking or debit card credentials throughout the period of the fraud*", and on that basis, did not accept liability for the impugned transactions.

17. In March 2015, June 2017, and October 2019, Mr Moniak made a number of complaints to the FOS about Barclays. In short, Mr Moniak contended that Barclays had failed to protect him from fraud and was liable for the losses to his accounts. However, the relevant complaint was submitted by Mr Moniak to the FOS on 24 March 2020 ('the 2020 complaint'). Mr Moniak complained that Barclays had negligently permitted the fraudsters to have online access to his account and had failed to identify the fraudulent payments.

18. The 2020 complaint was initially investigated by a FOS investigator. As stated above, Barclays attended the fraudsters' sentencing hearing. During the FOS' investigation (and at the FOS' request) Barclays provided a note of the Judge's sentencing remarks ('the Barclays Note'). The Barclays Note states:

> "*1) Rahim Saeed and Saima Jan were married but have since separated.*
> *2) Rahim Saeed and Mr Moniak were friends before Mr Moniak came into these funds.*
> *3) Rahim Saeed and Mr Moniak were both drug addicts and Saeed supported Moniak before he came into his inheritance.*
> *4) When Mr Moniak inherited the funds both men travelled to Thailand.*
> *5) £390,000 was stolen from Mr Moniak.*
> *6) In evidence Mr Moniak stated that Rahim Saeed had spent the funds on 'Drugs and hookers'.*
> *7) £81,000 and £10,000 has been recovered from the defendants and should be deducted from the loss.*
>
> *Prior to sentencing the judge commented that 'Mr Moniak was living a chaotic lifestyle due to his drug addiction and he was completely incapable to (sic) running his financial affairs* ***so he turned to Rahim Saeed who took over the account*** [emphasis added] *and abused this trust to commit these offences. Rahim Saeed used the money for his own drug addiction and to pay for prostitutes. Some of the money had been paid back to Mr Moniak.'* "

19. In an email, dated 5 June 2020, Mr Moniak was invited to comment on the Barclays Note. Mr Moniak responded on 6 July 2020. He did not accept that the Barclays Note was an accurate record of the Judge's sentencing remarks and he denied that he had handed over his financial affairs to Mr Saeed.

20. The FOS investigator took the Barclays Note into account and subsequently issued a decision dated 31 July 2020 ('the Provisional Decision'). The Provisional Decision states:

> "*On balance considering all the evidence, I'm persuaded that the consumer authorised the transactions. This is supported by all of the evidence that has been provided by both sides and it corresponds with the conclusion of the Judge in the criminal trial. Whilst there's evidence of other parties involved in the transactions, I think it's more likely than not that this was through an earlier agreement with Mr Saeed which gave him "apparent authority" to operate the accounts*."

The Provisional Decision concludes as follows:

> *"My view is that I don't uphold this complaint because I think it likely* ***Mr Moniak handed control of his accounts to Mr Saeed****. It's accepted that Mr Saeed and his partner were found guilty of stealing a large sum from Mr Moniak. But this complaint is whether Barclays should repay that money to Mr Moniak because they failed to keep his accounts secure and allowed another person to operate the account without Mr Moniak's permission, I think it likely that Mr Saeed's details were introduced into the Barclays system to facilitate this arrangement, giving him "apparent authority" to operate the account.*

The comments by the presiding Judge in the criminal trial have to be taken into account, they're clear on the theft of a large portion of Mr Moniak's funds. But they also describe a situation that Mr Moniak handed control of his accounts over to Mr Saeed.

I don't think Mr Moniak realised the problem he'd created by allowing Mr Saeed access to his banking details. Once this was done, the ability for Mr Saeed and his partner to steal the funds was in place. Because Mr Saeed had all the details necessary to run the account, he could arrange for online banking access and answer any questions that the bank might ask if they questioned any of the payments. Irrespective of the intentions Mr Moniak had when he facilitated this arrangement, the transactions were authorised, and I don't think it's reasonable to ask the bank to repay them. [emphasis added]*"*

21. On 18 February 2021, the Ombudsman upheld the Provisional Decision for essentially the same reasons. This was the 'Final Decision'. However, such decisions are only binding and final if they are accepted by the complainant. The Ombudsman concluded that although Mr Moniak had not made the transactions himself, Barclays was entitled to treat them as authorised by Mr Moniak. In the Final Decision, the Ombudsman noted that Mr Moniak took the view that the MMF must have been the way in which the fraudsters gained access to his account. The Final Decision states:

"Barclays hasn't been able to tell us much about this form [the MMF]. It doesn't have any corresponding electronic records from the time it was added to Mr M's profile. All its (sic) been able to say is that, if someone wanted to use this document to update contact details in connection with the account, they'd have needed to visit a branch in person with a valid ID document, such as a passport."

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In the Final Decision, the Ombudsman also relied on the Barclays Note and in particular stated:

"*In all the circumstances of this case, I think it's fair and reasonable for Barclays to treat these payments as having been authorised by Mr M.* ***I say that because I think the most likely thing that happened here is that Mr M relinquished control of his accounts to the fraudsters. That is supported by the commentary of the judge at the sentencing hearing.*** *The judge will have had the opportunity to consider a much wider range of evidence than that which is available to me in deciding this case. And in a criminal trial, evidence is given under oath and witnesses can be subject to cross examination.* ***I need to give appropriate weight to these comments when considering how the fraudsters were able to take Mr M's money.***

I know Mr M says that he doesn't think the Barclays representative accurately recorded what was said. But ***in the absence of a transcript of the sentencing hearing (which neither party has been able to provide), they're the best evidence I have of the conclusions reached by the judge***. [emphasis added]"

22. Mr Moniak rejected the Final Decision on 24 February 2021.

The Content of the Transcripts

23. On 5 March 2021, Mr Moniak requested the transcripts of the Judge's summing up to the jury and the Judge's sentencing remarks. He received the transcripts on 21 April 2021.

24. In summing up the evidence to the jury the Judge stated:

> *"The defendants deny stealing this money. In short, Mr Saeed said that everything he did with Mr Moniak's money was with Mr Moniak's knowledge and consent and in connection with an investment that Mr Moniak wanted to make. Mr Saeed denies acting dishonestly, Mr Moniak's account was not taken over, nor was Mr Saeed making card payments, payments or writing cheques.*
>
> *Ms Jan in summary says…[s]he did not act dishonestly and everything she did was the knowledge and consent of Mr Moniak (sic)…*
>
> *…*
>
> *The prosecution in this case cannot point to the exact mechanisms by which Mr Moniak's bank accounts were accessed but they say as a matter of inference that his personal details were known to at least one of the defendants who had lived with him."*

25. The Judge's sentencing remarks included the following observations:

> *"Greg Moniak was a man who was completely disorganised about money and led a chaotic lifestyle due to his drug addiction to Class A substances. He was in my view, vulnerable to exploitation."*
>
> *…*
>
> *…This was a planned and sophisticated offence and, in your case, Mr Saeed, a blatant breach of the trust that Mr Moniak had placed in you as a long-term friend.*
>
> *…*
>
> *I have no doubt, Mr Saeed, that you were the instigator of the course of conduct by which this money was systematically taken from Mr Moniak. You targeted him and you abused his trust. You took steps to prevent him from finding out what had happened, and you effectively took over his bank account and used it as your own in the most cynical way imaginable.*
>
> *In my view, you behaved in a thoroughly dishonest and manipulative way towards your friend and your defence as presented was implausible and rejected by the jury.*

The Decision

26. On 17 May 2021, Mr Moniak sent an email to the FOS, inviting the Ombudsman to reconsider the Final Decision in light of the transcripts. The FOS responded on 10 June 2021, stating that it had reviewed the transcripts but concluded that they were not *"material new evidence*". Mr Moniak was not satisfied with that response and requested that the FOS provide reasons for its decision.

27. On 30 June 2021, the FOS replied stating:

> *"It is very rare that we would consider a second, fresh complaint about the same set of circumstances. There are occasions when material new evidence could potentially change a situation, but what is considered to be material new evidence is, in practice, very narrow.* ***Material new evidence would be information that was not available to the consumer when the complaint was considered*** [emphasis added]
>
> *From what I have seen, the documentation recently provided…is dated from the time in 2018. This means it was evidence that existed and could have been provided before the Ombudsman determined the complaint. I can see that you were concerned about a discrepancy in the sentencing remarks from the very early stages of the dispute, so this information could have been obtained and provided for consideration at an earlier point."*

28. Once again, Mr Moniak sought an explanation of the FOS' position that the transcripts were not *"material new evidence*". He subsequently received an email, dated 16 July 2021, in which the FOS stated that the Ombudsman's decision was the "*final say on [his] case*". In that same email, the FOS indicated that it may not respond to any further correspondence with regard to the complaint.

Correspondence relating to the transcripts

29. During the course of Mr Moniak's earlier complaints, the FOS emailed his sister (who was initially representing Mr Moniak) in relation to the difference between the fact of the convictions and the nature of the complaint being made against Barclays. The email from the FOS, dated 22 June 2018, states:

> *"… The conviction of theft by the two individuals does benefit Mr Moniak's case but it is difficult to conduct a thorough investigation without access to the* ***court papers and transcripts of what was said****. Whilst the bank accept the conviction of theft, they still feel that Mr Moniak misplaced his trust in the perpetrators of the fraud and in doing so, had acted with gross negligence – which is against the terms of the account. I think this issue is still the greatest piece of outstanding information. Have you had a chance to chase this up with DC Brown?* [emphasis added]"

30. The FOS subsequently chased "*the court papers*", which in an email, dated 23 July 2018, were said to be "*crucial*" in progressing the complaint. In a further email, dated 21 September 2018, the FOS chased the "*court judgment*". Mr Moniak's sister responded on 1 October 2018, stating that she had not been able "*to obtain the Judgment.*". She sent a further email, on 14 November 2018, in which she stated that she had "*tried incredibly hard*" to ensure that the FOS could receive a copy of the "*Judgment*". She also queried why the FOS did not send someone to court if the "*Court Papers*" were considered crucial.

31. Mr Moniak reiterated his complaint in a letter to the FOS dated 24 March 2020. The letter states:

> "*I have not to date been able to obtain a copy of the indictment against Rahim Saeed and Saima Jan* ***or the remarks on sentencing***" [emphasis added]"

In that same letter, Mr Moniak suggests that Barclays might have copies of the documents, or the FOS could use its "*investigative capacity*" to locate the information.

32. Mr Moniak commented on the Provisional Decision in an email dated 13 August 2020. Amongst other things, he was critical of the FOS' reliance on the Barclays Note and complained that they were "*not a transcript of the entire summing up*".

33. In a further email, dated 15 December 2020, Mr Moniak stated:

> "*Please find enclosed the copy of the Court's Judgement as Mr Chowdhury* [of the FOS] *stated in his email that it was 'crucial with the progress of this complaint* (sic)."

A certified copy of the certificate of conviction and sentence was attached to the email, rather than a transcript of any part of the criminal proceedings.

34. As stated above, Mr Moniak requested the transcripts on 5 March 2021 and received them on 21 April 2021.

The Legal Framework

FOS' Jurisdiction and Procedure

35. The statutory dispute resolution scheme under FSMA expressly gives the Ombudsman a broad discretion. Section 225(4) and paragraphs 13 and 14 of Schedule 17 to the FSMA provide for the making of rules which address the operation and jurisdiction of the FOS. The rules are contained in the FCA Handbook under the section entitled: "*Dispute Resolution: Complaints*" ("DISP"). They set out the procedures to be followed, jurisdiction, and matters to be taken into account when determining a complaint. Within DISP, the letter 'R' signifies that a particular provision is a rule, whilst the letter 'G' signifies that it is guidance. DISP 3.5.1 R states:

> *"[t]he 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."*

36. Section 228 sets out the basis upon which the determination of a complaint made under the compulsory jurisdiction will be made. Section 228(2) 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."*

37. The FOS' discretion includes a significant latitude in determining how to resolve a complaint and how to approach the use and disclosure of evidence. In accordance with DISP 3.5.5 R:

> *"[i]f the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by any means which the Ombudsman considers appropriate in the circumstances, including by telephone. No hearing will be held after the Ombudsman has determined the complaint."*

38. DISP 3.5.9 R provides (insofar as relevant), that the Ombudsman may:

> *"(1) exclude evidence that would otherwise be admissible in a court or include evidence that would not be admissible in a court;*
>
> *(2) accept information in confidence (so that only an edited version, summary 12 or description is disclosed to the other party) where he considers it appropriate;*
>
> *(3) reach a decision* ***on the basis of what has been supplied and take account of the failure by a party to provide information requested****...* [emphasis added]*"*

Outcomes of complaints to the FOS

39. Section 228(3) states that when an Ombudsman has determined a complaint, he must give a written statement of his determination to both parties. By section 228(4) that statement must, amongst other things, give the Ombudsman's reasons for his determination and require the complainant to notify him, before a date specified in the statement, whether he accepts or rejects the determination. In accordance with section 228(5), if a complainant accepts the determination, it is binding on both parties and final. By section 228(6) if the complainant does not accept the determination, within the specified period, he is treated as having rejected it.

40. There is no right of appeal against the FOS' decision. There is also no right to request a reconsideration or reopening of the decision. The means of challenging a decision of an Ombudsman is by way of judicial review. The FOS' jurisdiction to amend a final decision is expressly limited under DISP 3.6.7 R as follows:

> *"(1) An Ombudsman may correct any clerical mistake in the written statement of an Ombudsman's determination, whether or not the determination has already been accepted or rejected.*
>
> *(2) Any failure to comply with any provisions of the procedural rules made by the FOS Ltd does not of itself render an Ombudsman's determination void."*

Dismissal of Complaints

41. DISP 3.3.4A R provides that:

> *"The Ombudsman may dismiss a complaint referred to the Financial Ombudsman Service on or after 9 July 2015 without considering its merits if the Ombudsman considers that:*

> *(1) the complaint is frivolous or vexatious; or*
>
> *(2) the subject matter of the complaint has been dealt with, or is being dealt with, by a comparable ADR entity; or*
>
> *(3) the subject matter of the complaint has been the subject of court proceedings where there has been a decision on the merits; or*
>
> *(4) the subject matter of the complaint is the subject of current court proceedings, unless proceedings are stayed or sisted (by agreement of all parties, or order of the court) so that the matter may be considered by the Financial Ombudsman Service; or*
>
> *(5)* ***dealing with such a type of complaint would otherwise seriously impair the effective operation of the Financial Ombudsman Service*** [emphasis added]*"*

42. DISP 3.3.4B G further provides by way of guidance that:

> "*Examples of a type of complaint that would otherwise seriously impair the effective operation of the Financial Ombudsman Service may include:*
>
> *(1) where it would be more suitable for the complaint to be dealt with by a court or a comparable ADR entity; or*
> *(2) where the subject matter of the complaint has already been dealt with by a comparable dispute resolution scheme; or*
>
> *(3)* ***where the subject matter of the complaint has previously been considered or excluded under the Financial Ombudsman Service (unless material new evidence which the Ombudsman considers likely to affect the outcome has subsequently become available to the complainant)*** [emphasis added]; *or*
>
> *(4) it is a complaint which: (a) involves (or might involve) more than one eligible complainant; and (b) has been referred without the consent of the other eligible complainant or complainants, and the Ombudsman considers that it would be inappropriate to deal 14 with the complaint without that consent."*

43. The effect of these provisions is that the Ombudsman has a discretion to dismiss a complaint, without consideration of the merits, if dealing with the complaint would otherwise seriously impair the effective operation of the FOS. An example of such a complaint is where the subject matter has previously been considered, unless material new evidence which the Ombudsman considers likely to affect the outcome, has subsequently become available to the complainant (DISP 3.3.4B (3) G). The only contentious issue between the parties, with regard to the provisions, is the meaning of the discretion within DISP 3.3.4B (3) G.

Key Legal Principles

44. Although the FOS has a broad discretion it must ensure that in determining complaints its approach is fair and reasonable and the conclusions reached are not perverse or irrational – see *Clark v In Focus Asset Management & Tax Solutions Ltd* [2014] 1 W.L.R. 2502 (CA) at §24 where Arden LJ referred to the judgment of Stanley Burnton J in *R (IFG Financial Services Ltd) v Financial Ombudsman Service Ltd* [2006] 1 BCLC 534. In *IFG* it was stated that:

> *"The ombudsman is required to determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case. The words "in the opinion of the ombudsman" themselves make it clear that he may be subjective in arriving at his opinion of what is fair and reasonable in all the circumstances of the case.* ***Of course, if his opinion as to what is fair and reasonable in all the circumstances of the case is perverse or irrational, that opinion, and any determination made pursuant to it, is liable to be set aside on conventional judicial review grounds****.* [emphasis added]"

See also *R (Williams) v Financial Ombudsman Service* [2008] EWHC 2142 where at §26 Irwin J stated:

> *"The ombudsman is dealing with complaints, not causes of action. His jurisdiction is inquisitorial not adversarial. There is a wide latitude within which the ombudsman can operate. He can depart from the common law if justified, but must explain the extent to which the reasons for any such departure. Next, he can import his knowledge of good industry practice at the time, that being stipulated in the rules... .* ***Next, he must be fair and reasonable in his approach to the case and his conclusions. Next, he cannot be perverse or merely subjective, and will be susceptible to judicial review if he is, both as to the manner in which the decision is reached and as to the outcome*** [emphasis added]."

45. Where matters of the FOS' jurisdiction are concerned, the statutory scheme and the DISP Rules will govern what is a matter for the Ombudsman's discretion in accordance with ordinary judicial review principles. For example, see *R (Chancery) v Financial Ombudsman Service Ltd* [2015] EWHC 407 (Admin) as recently discussed in *R (Assurant Ltd) v Financial Ombudsman Service Ltd* [2022] EWHC 2766 (Admin).

46. The FOS' statutory jurisdiction is an alternative dispute resolution process to litigation. It is not subject to the same rules of procedure and evidence as are applicable in the courts. In *Westcott Financial Services Limited & Ors v Financial Ombudsman Service* [2014] EWHC 3972 (Admin) at [§32] Thirlwell J stated that:

> *"The ombudsman scheme is designed to permit disputes to be resolved quickly and informally by people who have appropriate qualifications and experience. There is no requirement that processes (or indeed decisions) should mirror those of the courts. On the contrary this is an alternative method of resolving disputes."*

Furthermore, a determination reached by an Ombudsman may differ from the conclusion that a court would reach. In determining whether or not a decision is irrational Jay J summarised the question for the court in *R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017] EWHC 352 (Admin), as follows: [at §58]:

> "*…whether the Ombudsman's decision was irrational, in the sense of being "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*" (see Lord Diplock in CCSU v Minister of the Civil Service [1985] AC 374).*"*

47. A decision may also be quashed if it was based on a material error of fact: *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 at [§66]. There are four requirements: (i) the mistake must be about an existing fact (including mistake as to the availability of evidence on a particular matter); (ii) the fact must be uncontentious; (iii) the claimant must not be responsible for the mistake; and (iv) the mistake must have played a material (but not necessarily decisive) part in the reasoning.

The Issues

Issue 1: What is the effect of the FOS' offer for a fresh ombudsman to reconsider the transcripts?

Submissions

48. Mr Strachan KC submitted in his Skeleton Argument that the FOS' offer provides Mr Moniak with the principal relief he is seeking; the opportunity for his reconsideration request to be reassessed. He further submitted in his Skeleton Argument, that to the extent that Mr Moniak has sought to persuade the Court to exercise the functions of the Ombudsman, that would not be appropriate, as reconsideration is necessarily a matter for an Ombudsman under the statutory scheme. During his oral submissions, Mr Strachan suggested that Mr MacDonald KC was "*trying to drag [the Court] into forbidden territory*" by inviting the Court to usurp the role of the Ombudsman. He submitted that Mr MacDonald, in effect, had sought to persuade the Court that there is only one rational outcome and therefore the Court should make a declaratory judgment in relation to the facts. He submitted that this would be wrong in principle. Mr Strachan confirmed that the FOS' offer "*remains open*".

49. Mr Allen, on behalf of Barclays, made a similar submission. He submitted that the terms of the offer are the most that Mr Moniak could hope to obtain, as it is for the FOS, as the decision-maker, to determine whether there is "*material new evidence*" which would be likely to affect the outcome and which has subsequently become available to the complainant; it is not for the Court to re-take the decision. Mr Allen expressed reservations as to whether the FOS' ongoing offer "*makes good sense*", given that there was no indication that it would be accepted, and the Court has already heard lengthy legal arguments.

50. Mr MacDonald's submissions, on behalf of Mr Moniak, can be summarised as follows: (i) the transcripts were clearly "*material new evidence*" which any rational Ombudsman would consider likely to affect the result and which had "*subsequently become available*" to Mr Moniak within the meaning of DISP 3.3.4B (3) G. Accordingly, the FOS never had a discretion to dismiss Mr Moniak's request to reopen his complaint without consideration of its merits, as it purported to do; (ii) the FOS wrongly treated '*material new evidence*' as

a hard-edged technical requirement and confusingly and inaccurately told Mr Moniak to get copies of the "Court judgement"; (iii) alternatively, even if the FOS did have a discretion to reject Mr Moniak's request to reopen his complaint, without consideration of the merits, it was still irrational to exercise that discretion in the way the FOS did; and (iv) further and alternatively, the FOS' refusal to reopen Mr Moniak's complaint was made on the basis of a material mistake of fact which satisfies all four of the criteria set out in *E v SSHD*.

51. Mr MacDonald refuted the suggestion that the Court was being invited to trespass on the function of the Ombudsman. He submitted that the court should intervene if the law has been misapplied, or if the relevant body has made irrational findings of facts, and that both apply in the circumstances of this case. He reminded the Court that the FOS did not accept that it was wrong to refuse to consider the transcripts and reopen Mr Moniak's complaint. Therefore, it could reach the same decision for the same incorrect reasons. He further submitted that it is not Mr Moniak's case that there is only one rational outcome; simply that the decision that *was* made by FOS was not rational.

Analysis and Conclusion

52. It was common ground that it is not the Court's role to determine for itself whether the transcripts amount to "*material new evidence*". It is to decide whether the FOS erred in law when *it* decided that the transcripts did *not* amount to "*material new evidence*" and whether that decision was based on a rational application of the rules and guidance under the statutory scheme. The rules and guidance have to be applied within the context of the FOS' overarching objective, which is to provide quick, informal, and flexible dispute resolution as an alternative to costly and long drawn-out civil litigation. In general, a court undertaking judicial review of a public authority's decision will take a different approach depending on whether it relates to questions of law or fact. When errors of law are alleged, a court must determine what the law is, and decide whether the alleged error has occurred. However, a court will show appropriate deference to the fact-finding functions of an authority and intervene only if it determines that the relevant decision falls outside the range of reasonable decisions open to the decision-maker. However, as stated by Collins Rice J in *Assurant,* where a challenge is based on a jurisdictional question, which itself depends on the existence of a matter of fact, then a reviewing court may have to take its own view of whether that fact does or does not exist.

53. Whether the transcripts are "*material new evidence*" which would be likely to affect the outcome, and which have subsequently become available to Mr Moniak, is undoubtedly for the FOS to determine. However, this is subject to the usual public law demands of rationality and the avoidance of errors of law. The outcome of this judicial review will determine whether there is any prospect of Mr Moniak's request being reconsidered.

54. In my judgment, the effect of the FOS's offer is exactly as stated by Mr Strachan. The new Ombudsman will reconsider the transcripts and form a view as to whether they constitute "*material new evidence*" likely to affect the outcome, which has subsequently become available to Mr Moniak, in accordance with DISP 3.3.4B (3) G. I have no reason to doubt that the new Ombudsman will invite representations from Mr Moniak and Barclays in deciding whether it is appropriate to reconsider the complaint. But how will the discretion under DISP 3.3.4B (3) G be approached?

55. In general, the Court is concerned with the route by which a decision was reached rather than the merits of the decision itself. However, it can also be argued (as it has in this case) that the findings of fact are irrational or alternatively that they are based on a clear mistake of fact. These exceptions to the general position preserve the court's jurisdiction to restrain the decisions of public bodies, where there are factual errors which have resulted in an error of law. The FOS' offer does not resolve these issues. Furthermore, a court should avoid intervening when a claimant has obtained all the practical relief that could be afforded to them. But that is not the position in this case. The issues, in this case, go beyond Mr Moniak receiving some general benefit from the Court's narrative judgment.

56. The FOS does not accept that it erred in law, nor does it accept that its findings of fact are irrational. Therefore, despite the concession that has been made, there are still live issues between the parties regarding the status of the transcripts and the nature and scope of the guidance which has the potential to affect the obligations of the FOS. As a consequence, I do not accept Mr Strachan's submission that the claim is "*essentially academic*".

Issue 2: Was the FOS' decision not to reopen Mr Moniak's complaint without consideration of the merits unlawful on the grounds alleged in the claim?

57. Mr Moniak's claim essentially advances two grounds of challenge:

- Ground 1 - the conclusion that the transcripts were not '*material new evidence*' was wrong, irrational, and/or unreasonable; and

- Ground 2 - the conclusion that the transcripts could have been obtained earlier was wrong, irrational, and/or unreasonable. I shall refer to this as the timing argument.

58. Although there is some overlap, these grounds are both directed at challenging the rationality of the decision not to reopen Mr Moniak's complaint. Mr Moniak did not challenge the lawfulness of the Ombudsman's decision in not upholding his complaint about Barclays. Therefore, the lawfulness of that decision, based on the evidence presented to the Ombudsman, is not in dispute.

Ground 1 – 'material new evidence'

Submissions

59. Mr MacDonald submitted that the transcripts are '*material*' as they provide no support for the Ombudsman's conclusion, that Mr Moniak had "*handed over control*" of his accounts to the fraudsters. This conclusion was based on and influenced by the Barclays Note. Therefore, the transcripts undermine a central plank in the Ombudsman's reasoning. He further submitted that the transcripts were "*new*" evidence which, should be regarded as having "*subsequently become available*" to Mr Moniak. A core part of Mr MacDonald's submissions centred on the first limb of the principle in *Ladd v Marshall* [1954] 1 WLR 1489, which prevents the admission of fresh evidence on appeal if it could, with "*reasonable diligence*", have been obtained at the trial. He submitted that the FOS effectively imported a hard-edged requirement, analogous to the first limb of the rule in

Ladd v Marshall and that this erroneous approach led the FOS to determine that Mr Moniak's previously determined complaint could not be reopened.

60. Mr Strachan did not positively submit in his Skeleton Argument that the transcripts are '*material*' but, during his oral submissions, he conceded that the transcripts have '*potential materiality*'. However, he submitted that the test as a whole is whether the transcripts are likely to affect the outcome and whether they subsequently became available to Mr Moniak. Mr Strachan submitted that the question of whether or not to dismiss a fresh complaint without considering its merits is a matter of discretion for an Ombudsman. He refuted the contention that it had been suggested that the guidance in DISP 3.3.4B (3) G is a '*hard-edged rule'* similar to the first limb of the rule in *Ladd v Marshall.* He submitted that it has simply been pointed out that the guidance is expressed in a way akin to the approach to *Ladd v Marshall* and has in the past been viewed in that way (for example in *R (Cook and Cook) v Financial Ombudsman Service* [2009] EWHC 426 (Admin)). He further submitted that ultimately it is a matter of discretion for the Ombudsman in light of the guidance.

61. Mr Allen submitted, on behalf of Barclays, that the transcripts are not '*material*'. He invited the Court to conclude that the Final Decision did not turn on the Judge's remarks at the criminal trial; it was based on ample other evidence. He submitted that the alleged discrepancies between the transcripts and the Barclays Note are not significant. He further submitted that the Barclays Note is clearly a summary of what was said, rather than a verbatim note, but it is materially accurate when compared with the transcripts. Mr Allen also submitted that the transcripts are not "*new*" evidence as they have always been available to Mr Moniak. He could and should with reasonable diligence have obtained them before the Final Decision. Furthermore, (insofar as it matters) Mr Moniak was well aware that he could obtain the transcripts and that the FOS regarded the Judge's comments at the criminal trial as potentially relevant.

Analysis and Conclusion

62. DISP 3.3.4B (3) G is a composite test. The materiality of any purportedly new evidence is only one factor that the Ombudsman should take into account when exercising its discretion. Although the decision clearly states that the transcripts are not "*material new evidence*", it is not clear to what extent the FOS properly considered the issue of materiality, as the focus of the decision is on the availability of the transcripts in 2018. The primary question for this Court is whether such a finding was irrational in the sense that no reasonable Ombudsman, could rationally conclude that the transcripts were not material new evidence.

63. I do not accept the submission made by Mr Allen that the Barclays Note was materially accurate and that the transcripts support the FOS' belief that Mr Moniak had '*handed over control*' of his accounts to the fraudsters. The Barclays Note is a summary of the Judge's sentencing remarks but it cannot be properly described as materially accurate when the basis upon which the fraudsters were sentenced has been misrepresented. The transcript contains no statement by the Judge that Mr Moniak had "*handed over control*" of his accounts to the fraudsters. Although the Judge makes reference to Mr Moniak being "*completely disorganised about money"* and leading *"a chaotic lifestyle due to his drug addiction*", Mr Saeed was sentenced on the basis that, as the instigator, he had taken over

Mr Moniak's account and hidden what he had done from Mr Moniak. The Judge observed in his summing-up that Mr Moniak's evidence was that he was not aware of the payments from his account and had not authorised any payments to the fraudsters or the use of internet or telephone banking. The Judge also observed that the prosecution had been unable to identify precisely how Mr Moniak's account had been taken over. The case advanced by the fraudsters was that they had done everything with Mr Moniak's consent. This version of events was rejected by the jury as the fraudsters were found guilty of theft. The Barclays Note and the transcripts record that Mr Moniak placed his trust in Mr Saeed and that this trust was abused. It may have been reasonable to infer that Mr Moniak failed to take all reasonable steps to protect the security features of his accounts. However, trusting Mr Saeed, falls short of supporting a finding that he "*handed over*" or "*relinquished*" control of his accounts.

64. The meaning of "*material*" is elucidated by the words: "*likely to affect the outcome*." There is no requirement for the transcripts to be decisive. There were undoubtedly other factors that the Ombudsman could (and did) take into account when determining Mr Moniak's complaint, including: (i) the disputed ATM withdrawals, card payments, and online bank transfers; (ii) the MMF; (iii) the bank transfers and cash deposits which kept the account(s) in credit; (iv) and the length of time that the disputed transactions are said to have remained undetected. However, significant emphasis was placed on the extent to which Barclays' conclusion that Mr Moniak gave the fraudsters 'apparent authority' to carry out transactions on his account, was supported by the Barclays Note. Further, the Final Decision referred to the Judge having the opportunity to consider a much wider range of evidence, than that which was available to the Ombudsman, and noted that in a criminal trial, evidence is given under oath and witnesses can be cross-examined. The Ombudsman also stated that appropriate weight had to be given to the Judge's comments when considering how the fraudsters were able to steal Mr Moniak's money. Therefore, the Barclays Note was clearly important to the Ombudsman's reasoning.

65. The additional requirement in DISP 3.3.4B (3) G, that the material evidence should be 'new', is consistent with the finality principle. The resolution of complaints cannot be conducted with expedition and due regard to the procedural rules, unless it is on the basis that a complainant presents his whole and best case before the dispute is decided. When a complaint is not upheld the respondent should not have to worry that something will subsequently come along to alter the outcome. Therefore, reopening complaints is a jurisdiction that needs to be appropriately patrolled. The only decision on DISP 3.3.4B (3) G is the judgment of Mr Justice Walker in *Cook and Cook*. In that decision, DISP 3.3.4B (3) G was treated as requiring a test of "*reasonable diligence*" and the case proceeded on the basis of a concession made by the self-representing claimants, without any legal argument on that issue. Therefore, *Cook and Cook* does not establish any precedent.

66. The principles in *Ladd v Marshall* are applicable to appeals. Although the principles remain powerfully persuasive, even at the appellate level, they are not decisive as appeal courts have a broad discretion to admit evidence in accordance with the overriding objective: see *National Guild of Removers and Storers Limited v Bee Moved Ltd* [2018] EWCA Civ 1302 at [§18]. However, the *Ladd v Marshall* principles are fundamental to legal certainty and aim to strike a fair balance between the need for finality and the desirability that the judicial process should achieve the right result. I accept the submission made by Mr MacDonald, that there is no indication that there was a legislative intention to import the *Ladd v Marshall* principles into the FOS' procedures. The FOS is an alternative dispute resolution

procedure with its own rules and operates with "*minimum formality*" (FSMA s. 225(1)). It has the power to adopt far more flexible procedures and is not bound by the same rules of evidence as the courts. Furthermore, DISP 3.3.4B (3) G does not contain any reference to a requirement of "*reasonable diligence*". The guidance refers to "*material new evidence*" which has "*subsequently become available to the complainant*". There is, in my view, no magic to the words in DISP 3.34B (3) G; they should be given their ordinary natural meaning. Whether the evidence is "*new*" and has "*subsequently become available*" will depend on the facts and the context. However, there can be no doubt that any reasonable Ombudsman will (amongst other things) want to take into account the finality principle, the desirability of achieving a just result, and in appropriate cases, any explanation provided for not producing the evidence earlier. The importance of the finality principle will always be a weighty matter in the balance against reopening a complaint but the weight to be given to that principle will inevitably vary, depending on the facts of the case. But there are no hard and fast rules. Ultimately, an evaluative judgment has to be made.

67. The FOS' concluded that the transcripts do not amount to "*material new evidence*". As a factual finding, this conclusion is devoid of plausible explanation given that the Ombudsman's Final Decision placed significant reliance on the Barclays Note. The transcripts clearly demonstrate that a key part of the Barclays Note led the FOS to the erroneous conclusion that the Judge's sentencing remarks supported its finding that Mr Moniak had "*handed over his*" accounts to the fraudsters. Given the importance of the Barclays Note to the Final Decision as a whole, consideration of the transcripts would probably have an important influence on the decision made on 30 June 2021. Furthermore, there is evidence which indicates that Mr Moniak may have been confused by the FOS into looking for a court judgment (this issue is addressed in more detail below). Therefore, any suggestion that the transcripts did not amount to material new evidence likely to affect the outcome is, in my judgment, irrational.

68. Furthermore, DISP 3.3.4B (3) G is not hard-edged. The FOS does not have a general power to re-consider a complaint which has been determined. However, having considered its discretionary power to reopen a complaint, that consideration is subject to the public law demands of rationality. A fair and proper reading of the decision has led me to the conclusion that "*new*" evidence which has "*subsequently become available*" was treated as if it is a hard-edged technical requirement. I do not accept Mr MacDonald's submission that the FOS' discretion to refuse Mr Moniak's request to reopen his complaint, without consideration of the merits, never arose. In my judgment, this aspect of the decision is best characterised as an irrational exercise of its discretion. DISP 3.3.4B (3) G must be flexibly interpreted as it is guidance and subject to the overall requirement of reasonableness and fairness. It may be that a differently reasoned decision *could* come to the conclusion that, notwithstanding the materiality of the transcripts, Mr Moniak's request for his complaint to be reopened should be dismissed, without necessarily being irrational. But this Court is concerned with the decision that was made on 30 June 2021.

69. For these reasons, the claim succeeds on Ground 1.

Ground 2 - 'timing argument'

Submissions

70. Mr MacDonald submitted that Mr Moniak did not know the transcripts existed prior to the Ombudsman's rejection of his complaint. He had earlier been misled by the FOS into looking for a "*Court judgement*", which he misinterpreted as a certificate of the sentence handed down by the court rather than a record of the Judge's summing up or sentencing remarks. The relevance and materiality of the transcripts only became apparent when he was provided with the Final Decision. Mr MacDonald submitted that having appreciated their importance, Mr Moniak then acted swiftly to obtain the transcripts and forwarded them to the FOS as soon as reasonably possible.

71. Mr Strachan made it clear that the FOS' offer is in light of Mr Moniak's stated misunderstanding of what was required. However, he submitted that it should have been clear to Mr Moniak throughout that a transcript of the sentencing proceedings was what was in issue, given that (amongst other things): (i) Mr Moniak was disputing the Barclays Note rather than the formal record of the conviction and sentence; and (ii) the importance of what was said during the criminal proceedings was made plain very shortly after the sentencing hearing in the email from the FOS adjudicator to Mr Moniak's sister on 22 June 2018.

72. Mr Allan submitted that Mr Moniak had almost 3 years in which he could have obtained the transcripts before the Final Decision. He submitted that it follows that the transcripts were *available* to Mr Moniak a long time prior to the Final Decision. Therefore the FOS was entitled to decline his request to reconsider his complaint.

Analysis and Conclusion

73. The decision refers to Mr Moniak expressing concern "*about a discrepancy in the sentencing remarks from the very early stages of the dispute*" and goes on to conclude that as a consequence "*this information could have been obtained and provided for consideration at an earlier point*." This appears to be a reference to the correspondence between the FOS and Mr Moniak and his sister with regard to the Judge's sentencing remarks. It is unclear exactly how much of the correspondence the author of the decision read but it was enough to have formed the view that the transcripts could have been provided earlier. In any event, the FOS's Summary Grounds of Resistance repeatedly states that "*the Claimant [was]… asked to provide copies of [the] transcripts on several occasions*" or words to that effect.

74. Mr Moniak was never asked, in terms, to provide copies of the transcripts to the FOS. The email from FOS, dated 22 June 2018, referred to "*court papers and transcripts of what was said*" but thereafter the language fluctuated between "*court papers*", and "*court judgments*". This culminated in Mr Moniak providing the FOS with the certificate of conviction rather than the transcripts of the Judge's summing up and sentencing remarks. This sequence of events indicates that Mr Moniak, as a litigant in person, was confused and had been misled by the FOS. However, there is evidence which points the other way. For example, Mr Moniak's claim form states that "*it only became worth spending money on the Transcripts when his (correct) account of the Judge's findings was ignored in favour of Barclay's (incorrect and incomplete) Note both by…the investigator, then by…the Ombudsman.*" Furthermore, Mr Moniak was disputing the Barclays Note of the sentencing hearing rather than the formal record of the conviction and sentence. He should also have

been aware, following the Provisional Decision, that significant reliance was being placed on the Barclays Note.

75. Nonetheless, to the extent that the FOS was under the impression that Mr Moniak had previously been asked on several occasions to supply the transcripts of the Judge's summing up and sentencing remarks, it was wrong. It would appear that it is that recognition led the FOS to offer Mr Moniak a form of redress. In any event, I am satisfied that for that reason alone the decision refusing Mr Moniak's request to reopen his complaint was based on a material factual error.

76. For these reasons, the claim succeeds on Ground 2.

77. The conclusions the Court has reached are sufficient to resolve this claim in favour of Mr Moniak and there is no need to consider the criteria as set out in E v SSHD.

Issue 3: Relief

78. Mr Moniak is seeking a mandatory order which either: (i) quashes the decision not to reopen Mr Moniak's complaint and requires the FOS to reconsider the complaint in light of the transcripts; or (ii) requires the FOS to explain with reasons its conclusion that the transcripts were not material new evidence requiring the complaint to be reopened.

79. Section 31(2A) of the Senior Courts Act 1981 provides that the court must refuse to grant relief on an application for judicial review, if it appears to the court, to be highly likely that the outcome would not have been substantially different if the conduct complained of had not occurred. Mr Allen, on behalf of Barclays, invited the Court to conclude, that in the event that there is or may be a "*material*" difference between the Barclays Note and the transcripts, and/or that the transcripts are properly to be regarded as "*new*" evidence, it is "*highly likely*" that the FOS would have declined to reconsider the Final Decision in any event. Alternatively, it would not have reached a substantially different conclusion if it had reconsidered the Final Decision.

80. The proper approach to the "*highly likely*" test has been considered in a number of authorities (see for example: *Cava Bien Ltd v Milton Keynes Council* [2021] EWHC 3003 Admin where Kate Grange QC (as she then was) sitting as a Deputy High Court Judge summarised the principles). I do not accept Mr Allen's submission. Bearing in mind the significant hurdle which the "*highly likely*" test represents, I am satisfied that the burden has not been discharged in this case. Disentangling the unlawful aspects of the decision from the other circumstances of the case to undertake a counter-factual exercise presents too much uncertainty about the outcome to satisfy the necessary test.

81. The decision must therefore be quashed so that the FOS can take the decision again. For the reasons I have stated above, I am satisfied that it is for the FOS to determine Mr Moniak's request for reconsideration of his complaint in light of this judgment; it is not for this Court to retake the decision. The FOS has a wide latitude within which to reach a fair and reasonable conclusion, and there is more than one rational outcome.

82. Accordingly, I allow the claim for judicial review and remit the matter back to the FOS for the decision to be retaken.

83. I am grateful to counsel and those instructing them for clear and focussed arguments, both in writing and at the hearing. The parties are invited to draw up an order which reflects my conclusions and agree the terms of any consequential matters including costs.