Neutral Citation Number: [2025] EWCA Civ 1369

Case No: CA-2024-001533

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Mrs Justice Stacey
[2024] EWHC 1428 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 29 October 2025

Before :

LORD JUSTICE NUGEE
LORD JUSTICE SNOWDEN
and
LORD JUSTICE JEREMY BAKER

- -

Between :

LINEAR INVESTMENTS LIMITED	**Appellant/ Claimant**
- and -	
FINANCIAL OMBUDSMAN SERVICE LIMITED	**Respondent /Defendant**
- and -	
LESLIE WILLCOCKS	**Interested Party**

- -

Sonia Tolaney KC and Joshua Crow (instructed by **Trowers & Hamlins LLP**) for the **Appellant**
Stephen Kosmin (instructed by **Financial Ombudsman Service Limited**) for the **Respondent**
The Interested Party did not appear and was not represented

Hearing date : 15 July 2025
Further written submissions : 17 July 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 29 October 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Snowden :

1. This appeal concerns an application for judicial review of a decision of the respondent Financial Ombudsman Service Limited (the "Ombudsman") dealing with a complaint by a client of the appellant, Linear Investments Limited ("Linear"). In essence, the Ombudsman found that Linear had wrongly permitted its client, Professor Leslie Willcocks ("Professor Willcocks"), to invest in a computer-driven trading strategy (the "Pembroke strategy") that included dealing in derivatives (contracts for differences or "CFDs"). The Pembroke strategy was designed for professional investors. Professor Willcocks was not, however, a professional investor and had no experience of trading in derivatives.

2. The Ombudsman ordered Linear to compensate Professor Willcocks in full for the losses that he had sustained on his investment, calculated by reference to a notional investment of the same amount in a benchmark FTSE UK private investors income total return index, together with 8% interest from the date of the closing of the account to payment of the award.

3. Linear contends that it only permitted Professor Willcocks to invest in the Pembroke strategy because he applied to be treated as an "elective professional client" as defined by the Financial Conduct Authority's Conduct of Business Rulebook ("COBS"), and he misrepresented in his application that he had traded in substantial volumes of equities and CFDs for several years.

4. Linear's primary contention is that it was entitled to rely on Professor Willcocks' representations when accepting him as an elective professional client and that the decision of the Ombudsman to hold it liable was wrong in law and irrational.

5. Secondly, it argues that the Ombudsman's selection of a low risk benchmark portfolio based upon the FTSE index for the computation of Professor Willcocks' award was also irrational, because irrespective of whether he should have been accepted as an elective professional client, he had sought a higher risk investment.

6. Thirdly, Linear contends that even if it was liable for having wrongly accepted Professor Willcocks as an elective professional client, the Ombudsman ought to have reduced Professor Willcocks' award to reflect his contributory negligence in misrepresenting his trading experience to Linear.

7. Linear's application for judicial review of the decision of the Ombudsman was rejected by Stacey J (the "Judge"): [2024] EWHC 1428 (Admin). Linear appeals with permission granted by Lewison LJ on three grounds which broadly reflect its arguments as outlined above.

8. For the reasons that follow, I would dismiss Linear's appeal on the first and second grounds as to liability and the use of a FTSE index benchmark for the computation of the award. I would, however, allow Linear's appeal on the third ground in relation to contributory negligence and remit the matter to the Ombudsman to determine an appropriate reduction in that respect.

Contracts for Differences

9. Before summarising the facts, given their importance to the issues in the case, I should briefly outline the nature of CFDs. As indicated above, CFDs are financial derivatives – i.e. a financial product, the value of which is *derived* from another financial product.

10. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 defines CFDs as including a contract, the purpose or pretended purpose of which is to secure a profit or avoid a loss by reference to the fluctuations in the value or price of a specified piece of property, an index or any other factor designated for that purpose (often referred to simply as "the underlying").

11. One essential difference between becoming a party to a CFD and buying or selling a specified piece of property, such as a share in a company, is that the parties to a CFD do not intend the underlying property which is the subject of the CFD actually to be delivered, but that only a monetary difference shall be payable at the end (close out) of the contract. In *City Index v Leslie* [1992] QB 98, Leggatt LJ explained that,

> "A contract for differences is a contract intended by both parties to end in the payment of differences. For this purpose a difference is the difference between a sale (or purchase) price at the time when a contract is made and the corresponding purchase (or sale) price when it is closed out. In order to give rise to a difference, the price by reference to which the sale or purchase is notionally supposed to take place is the published price of a stock, commodity or other property, or alternatively of an index."

12. Because CFDs do not require actual delivery of the underlying assets, they create a financial exposure to fluctuations in the price of a specified quantity of the underlying assets, without any need for the buyer actually to pay the full (or any) price for those underlying assets. This means that the price of a CFD is different from the price of the underlying assets. Such ability of CFDs to create a financial exposure to movements in the price of potentially large quantities of underlying assets without the need to pay the price for them is generally referred to as "leverage" or "gearing", and can result in gains or losses for a counterparty which are many times the price of the CFD itself.

13. These characteristics of CFDs have the consequence that whilst CFDs can be used for strategic management of the risks attached to other investments (hedging), they are more frequently used for pure speculation. Indeed, a number of old cases held that cash-settled CFDs were void as gambling contracts, contrary to the Gaming Act 1845: see *Universal Stock Exchange v Strachan* [1896] AC 166.

14. Trading in CFDs is usually done by reference to "lots". The concept of a "lot" refers to a standardised quantity of the particular underlying asset to which the CFD refers. However, the size of a standardised lot varies from market to market, so without further information as to the particular underlying asset and the particular market to which the CFD relates, it is impossible to calculate the size of the transaction and the exposure to which it might give rise. It is, however, clear that the greater the number of lots or proportion of a lot to which the CFD relates, the greater the potential exposure for the investor.

Background

15. At all material times, Linear was (and remains) a specialist investment firm which was (and is) regulated under the Financial Services and Markets Act 2000 ("FSMA"). At the time of his application to become a client of Linear, Professor Willcocks had been employed at the London School of Economics (the "LSE") for about 12 years and was an emeritus professor specialising in robotic automation.

16. In August 2017, Professor Willcocks was introduced to Linear by email by a friend who was the father of one of Linear's wealth managers. At the time, Linear was marketing its Pembroke strategy, which it described as a managed investment account strategy based upon a computer-driven trading system developed by a third party which was named "Apollo".

17. On 11 September 2017, the wealth manager at Linear emailed Professor Willcocks a factsheet for the Pembroke strategy for September 2017 (the "Factsheet"). The Factsheet stated prominently at its top under the heading "Key Information" that its "Target Client" was "Professional & Institutional Investors. High Growth. Medium Risk", that its "Focus" was on "Euro Stoxx 600[1] Equity & Derivative" and that its "Investment Process" was "Fundamental & Technical Analysis – Computer Driven". The Factsheet also stated that the Pembroke strategy was run as an "equal-weighted portfolio of best trades, rather than requiring a hedging system", with "between 25-35 open positions [being] run long/short", with an average holding time of two calendar months. It specified a minimum subscription of £100,000.

18. A disclaimer at the end of the Factsheet stated that,

> "The Managed Long Term Equity strategy is intended for eligible counterparties and professional investors only. The strategy is a high risk investment and investors considering the strategy should only invest in the strategy if they are comfortable losing all or part of their original invested capital. Investors could lose more than their initial investment."

19. On 5 December 2017, Professor Willcocks completed and signed a number of documents in order to invest in the Pembroke strategy. The first document was an Account Opening Form provided by Linear. At the top of the document it stated,

> "All sections of this Account Opening Form must be completed in order for Linear to assess your suitability to open an account. It is essential that the information provided is accurate and if, at a future date, any circumstances affect this information you are required to write to us advising us of these details."

20. On the Account Opening Form, Professor Willcocks stated that he had been employed by the LSE in the education business for 12 years. He gave his approximate net worth as £2.2 million and the approximate value of his investment portfolio as £800,000. He

[1] The STOXX Europe 600 is a commercial index designed to provide a broad measure of the equity market across Europe's developed economies.

also put a cross in the "Yes" box in answer to the question "Do you understand that only risk capital should be invested?".

21. Under the heading "Investment Experience" there were a series of boxes into which Professor Willcocks inserted crosses to indicate whether he had traded various types of investments. The first set of boxes related to trading in equities. Professor Willcocks inserted crosses in the boxes to indicate that he had traded in equities on an execution only and advisory basis for over two years, with a frequency of 40-80 transactions a year, and with an average transaction size of in excess of £25,000.

22. The second set of boxes related to trading in CFDs. Professor Willcocks inserted crosses to indicate that he had traded CFDs on an execution only and advisory basis for over two years, and with 40-80 transactions a year. Professor Willcocks also put a cross in the box to indicate that his trading in CFDs had been with an average transaction size of "20+" lots per transaction. This was the largest option on the form, which gave as alternatives, 1-5, 6-20 and 20+ lots per transaction.

23. Professor Willcocks also put crosses in further boxes to indicate that he had invested in Alternative Investments/Funds on an execution only and advisory basis, but that he had not traded in options, futures or foreign exchange (FX).

24. The boxes referred to above were then followed by a section of the form headed "Market Knowledge and Individual Objectives". Importantly for present purposes, the first box stated,

> "Briefly explain your experience and knowledge in relation to the transactions that the account manager plans to execute via Linear Investments Limited."

Professor Willcocks' answer was,

> "Have invested for +15 years in blue chip stocks."

25. At the end of the Account Opening Form, and above the place for Professor Willcocks' signature, there was an Account Opening Declaration that read,

> "I confirm that the information provided to Linear Investments Limited in this Account Opening Form is true and accurate and may be relied upon by Linear Investments Limited in assessing whether I meet the detailed requirements to be treated as a Professional Client."

26. Professor Willcocks also completed and signed Appendix B to the Account Opening Form. That explained that he could request to be an "elective professional client" if he satisfied what were described as the "qualitative test" and the "quantitative test". Those terms are to be found in the provisions of COBS 3.5R which are central to this case.

27. As in force at the relevant time at the end of 2017, COBS 3.5.1R provided that a professional client would be either a *per se professional client* as defined by COBS 3.5.2R (e.g. a regulated financial institution or investment firm) or an *elective professional client* as defined by COBS 3.5.3R. That rule provided,

> "A firm may treat a client as an elective professional client if it complies with (1) and (3) and, where applicable, (2):
>
> (1) the firm undertakes an adequate assessment of the expertise, experience and knowledge of the client that gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved (the "qualitative test");
>
> (2) in relation to MiFID or equivalent third country business in the course of that assessment, at least two of the following criteria are satisfied:
>
> (a) the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;
>
> (b) the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds EUR 500,000;
>
> (c) the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged;
>
> (the "quantitative test"); and
>
> (3) the following procedure is followed:
>
> (a) the client must state in writing to the firm that it wishes to be treated as a professional client either generally or in respect of a particular service or transaction or type of transaction or product;
>
> (b) the firm must give the client a clear written warning of the protections and investor compensation rights the client may lose; and
>
> (c) the client must state in writing, in a separate document from the contract, that it is aware of the consequences of losing such protections."

28. As envisaged by COBS 3.5.3(3)(b), Appendix B to the Account Opening Form set out the protections in the FCA rules for retail clients that would not apply to elective professional clients.

29. Appendix B ended with a section headed "Elective Professional Declaration" which Professor Willcocks signed to request that he wished to be classified as an elective professional client, and that he was aware that being treated as an elective professional client would afford him less investor protection than being treated as a retail client. At the end of that Declaration and below the place for signature, the form stated in bold

type, "Please ensure to attach appropriate evidence to support categorisation". Professor Willcocks did not attach any documents to the form.

30. At the same time as completing the Account Opening Form, Professor Willcocks also completed a client application form for SAXO in connection with the Pembroke strategy (the "SAXO Form"). SAXO was a broker which held Professor Willcocks' funds and positions and Professor Willcocks gave Linear a power of attorney to manage his account with SAXO.

31. On the SAXO Form, Professor Willcocks put a cross in boxes to indicate that he had continuously traded financial products on an execution-only basis for more than 5 years. He also put a cross in a box to indicate that he had worked in the financial sector for at least one year in a professional position which required knowledge of the nature and risk of the type of trading that he intended to carry out. In that respect, he filled in numbers by hand to indicate that he had carried out 40-80 trades on an execution-only basis in the last 12 months in each of shares, gilts and bonds, and CFDs.

32. Finally, on 5 December 2017, Professor Willcocks executed a Managed Discretionary Advisory Agreement ("MDAA") with Linear. That MDAA included specific terms dealing with the management of Professor Willcocks' account in accordance with a number of different strategies including the Pembroke strategy. In the section headed "Specific Terms" it stated,

> "The portfolio will be designed with the objective of producing long term capital growth. The portfolio may be invested in multiple strategies or just one depending on your investment requirement. Active management will be used to capitalise on short term opportunities with varying levels of holding time across strategies, Pembroke and Trinity are both equity focused. Wolfson is focused on Equity Indices.
>
> Pembroke will hold stocks on an equal weighted basis across typically 35 positions with an average investment horizon of 40 trading days leverage up to 2x will be optional.
>
> …
>
> Derivatives will be used to enhance growth as well as balance the investment portfolio providing flexibility to take on short positions. We may look to hedge the stock strategies trading indices if we feel it will help to mitigate risk."

Professor Willcocks' losses and his complaint

33. Professor Willcocks was accepted by Linear as an elective professional client on the basis of these documents. He deposited £100,000 with SAXO on 8 January 2018. Between 1 February 2018 and 19 February 2019, Linear made a large number of trades under its Pembroke strategy on behalf of Professor Willcocks. These trades were almost exclusively in short-term CFDs and resulted in Professor Willcocks' portfolio losing about half its value by mid-February 2019.

34. Professor Willcocks terminated Linear's power of attorney on 19 February 2019. He then submitted a complaint to Linear on 24 May 2019 that it had used misleading terms and conditions relating to account fees; used misleading performance information relating to investment strategies; mismanaged his account including a failure to manage risk appropriately; and that it had used misleading contractual terms in the MDAA, in that it had sought to exclude a right to complain to the Ombudsman. He did not complain that he had been wrongly accepted as an elective professional client.

35. Professor Willcocks' complaint was rejected by Linear on 23 July 2019. Professor Willcocks then submitted a complaint to the Ombudsman on 26 November 2019. Again, he did not complain that he had been wrongly accepted as an elective professional client. However, an investigator appointed by the Ombudsman considered Professor Willcocks' complaint and concluded that he should not have been treated as an elective professional client.

36. The Ombudsman issued two provisional decisions on 5 August 2021 and 11 February 2022 before making a final decision on 29 April 2022 (the "Decision").

The Decision

37. In the Decision, the Ombudsman confirmed the view that he had expressed in his second provisional decision. He determined that Linear had not carried out an adequate assessment of Professor Willcocks' expertise, experience and knowledge to satisfy the qualitative test under COBS 3.5.3R(1).

38. In particular, the Ombudsman indicated, at [44], that he was not satisfied that Professor Willcocks' answers to the tick box questions on the Account Opening Form "amount to much more than self-certification on the part of the client". He concluded that alone they did not provide enough information to give Linear reasonable assurance that Professor Willcocks was capable of making his own investment decisions and understood the risks involved. The Ombudsman also pointed out, at [47]-[48], that contrary to the statement at the end of Appendix B on the Account Opening Form which envisaged the provision of evidence to support Professor Willcocks' application for classification as an elective professional client, Linear had not in fact required Professor Willcocks to provide any evidence to support his tick box answers.

39. The Ombudsman further found, at [49], that the information which Professor Willcocks had included on the Account Opening Form had put Linear on notice that it needed further evidence. The Ombudsman relied, in particular, on the fact that Professor Willcocks' handwritten explanation of his experience and knowledge in relation to the transactions Linear intended to execute on his behalf stated only that he had invested in "blue chip stocks" and said nothing about CFDs.

40. The Ombudsman summarised his findings at [57]-[58],

> "57. It was for Linear to carry out an adequate assessment of [Professor Willcocks'] investment knowledge and experience. It relied solely on the tick box answers in providing information about [Professor Willcocks'] past trading experience. It didn't try and test this information in any way by making further enquiries and obtaining documents that would have shown

> whether he had previous CFD experience, such as evidence of previous CFD trades he had carried out.
>
> 58. [Professor Willcocks] has said he hadn't previously traded CFDs, contrary to what he indicated in the Account Opening Form. I have seen no other evidence suggesting that he had any previous experience in CFDs, and I think it is more likely, than not, he didn't have such experience. In the circumstances if Linear had sought further evidence from [Professor Willcocks] to support the tick box answers, as I think it should have done, then I don't think he would have been able to provide this. He would not then have been able to satisfy the qualitative test and as such wouldn't have been categorised as an elective professional client."

41. The Ombudsman also found, at [60], that he was not satisfied that the quantitative test under COBS 3.5.3(2) was met on the basis of the information obtained by Linear. In particular, he found that although Professor Willcocks had an investment portfolio of sufficient value, contrary to the answers on the forms, he did not have any relevant experience in trading CFDs and had not previously worked in the financial sector.

42. In this respect, at [61]-[63], the Ombudsman expressed the view that Linear's Account Opening Form was in any event inadequate, because merely requiring a client to indicate the number of lots in the average CFD transaction that they had carried out over the last two years would not enable Linear to determine whether those transactions were of significant size, or that they were on the relevant market, for the purposes of the quantitative test under COBS 3.5.3(2)(a). That would require details of the market on which the trades had taken place and the size of the lots.

43. The Ombudsman also found that Linear had failed to provide Professor Willcocks with information about the fees and performance of his portfolio that was clear, fair and not misleading. He concluded that if Linear had provided such information in an appropriate form, it was more likely than not that Professor Willcocks would not have proceeded with his investment in the Pembroke strategy.

44. The Ombudsman further concluded that Linear had mismanaged Professor Willcocks' investment by trading almost every day in short-dated CFDs with a duration of much less than 40 days. He found that this was not consistent with a medium risk mandate and given the costs of trading, was likely to lead to a loss of capital.

45. The Ombudsman therefore concluded, at [118], that Linear (i) should not have categorised Professor Willcocks as an elective professional client and should not have provided its Pembroke service to him, (ii) gave him misleading information without which it is unlikely he would have agreed to the use of the Pembroke strategy, and (iii) mismanaged his account.

46. The Ombudsman also considered whether Professor Willcocks was responsible in part for his losses. In his first provisional decision, the Ombudsman had expressed the view that there was no reasonable basis for Professor Willcocks providing incorrect information to Linear, and that it would therefore not be fair and reasonable for Linear

to bear all responsibility for his losses. He suggested that Professor Willcocks should bear 25% of his losses. The Ombudsman explained,

> "Having considered the evidence, I am not satisfied there was any reasonable basis for [Professor Willcocks] completing tick boxes for CFDs and I think some account must be taken of him providing incorrect information to Linear.
>
> This doesn't mean that Linear isn't then responsible for failing to carry out an adequate assessment. However, I must make what I consider to be a fair and reasonable decision based on all the circumstances of the case which circumstances include [Professor Willcocks] providing the wrong information about his trading experience.
>
> I don't think it would be fair or reasonable for Linear to bear all the responsibility for [Professor Willcocks'] losses given he provided it with incorrect information in the first place. I think by doing so he has contributed to his losses and I think he should bear 25% of those losses.
>
> I do think that Linear bears the primary responsibility for the loss arising from it failing to comply with its obligations under the rules to carry out an adequate assessment which then led to [Professor Willcocks] wrongly being treated as an elective professional client. I think that it is responsible for 75% of his losses."

47. However, in his second provisional decision (repeated at [121]-[123] of the Decision), the Ombudsman reversed that view. His reasons were as follows,

> "121. … whilst [Professor Willcocks] did provide some incorrect information in response to questions in the account opening form … Linear should not have relied on what was in effect self-certification by him as to his knowledge and experience. The onus was on it to properly assess his knowledge and experience and it failed to do so. Even if it did nothing wrong in taking the information [Professor Willcocks] provided at face value, it failed to obtain sufficient information about the size of trades to satisfy the quantitative test and so should not have categorised him as an elective professional client in any event. In the circumstances, … it is responsible for all his losses.
>
> 122. Furthermore, … Linear provided unclear and misleading information and but for this [Professor Willcocks] wouldn't have invested as he did. The information [Professor Willcocks] provided in the account opening form has no bearing on this second failing by Linear and given this it would not be fair or reasonable for [Professor Willcocks'] redress to be reduced in any event.

> 123. Put simply, if Linear had complied with its regulatory obligations [Professor Willcocks] would not have used its service – firstly because he would not have qualified to use it and secondly because he would not have used the service if the level of risk and true impact of costs had been explained to him. Furthermore, [Linear] mismanaged his account once it started providing a service to him. Given these various failings on the part of Linear … it is fair and reasonable for it to pay the redress in full."

48. In his Decision, the Ombudsman rejected further arguments made by Linear in response to these provisional findings. The essence of his reasoning, at [148]-[153], was as follows,

> "148. The provisions set out in COBS 3.5.3(1)R require Linear to carry out an assessment that is adequate and gives reasonable assurance that the client is capable of making his own investment decisions and understanding the risks involved. The use of the words 'reasonable assurance' suggests an objective test. … this is further indicated by COBS 3.5.6(R) which refers to firms taking "all reasonable steps". The quantitative test in COBS 3.5.3(2)(R) is also an objective test even if a business may subjectively decide what evidence it should rely on.
>
> …
>
> 150. Linear has suggested that I haven't given any, or sufficient, weight to the information [Professor Willcocks] provided to it when opening his account and that I have gone behind the answers he provided. This suggests that [Professor Willcocks] provided clear and unambiguous information that Linear was entitled to rely upon at face value and which it had no reason to question.
>
> 151. However, [Professor Willcocks] provided inconsistent/contradictory information. I have not gone behind the information provided by him. Instead I have applied the weight I think is appropriate to this taking into account the fact that there are inconsistencies in the information- something that Linear should have identified and sought clarification about …
>
> 152. Linear suggests that the account opening form was a sophisticated document, but it mostly consisted of simple tick boxes …
>
> 153. That aside, my reasoning for upholding the complaint on the basis [Professor Willcocks] was wrongly categorised as an elective professional client isn't limited to finding that the answers amounted to self-certification. There were other factors I relied upon in my reasoning. These included; the account opening form indicating supporting evidence – which wasn't

> obtained - was required; that [Professor Willcocks] had provided conflicting information both in the form itself and in the SAXO application form; the questions in the form didn't provide all the information that were needed to satisfy the requirements of COBS 3.5.3(R)."

49. The Ombudsman also confirmed his revised decision not to reduce the award to Professor Willcocks because of the incorrect information he had provided on his Account Opening Form. The Ombudsman's reasoning was set out at [155]-[158] of the Decision,

> "155. The findings in my second provisional decision identified several failings by Linear. In short I have found that; [Professor Willcocks] was wrongly categorised as an elective professional client; Linear provided misleading information to him; Linear failed to provide the information it should have done about costs. The redress for each of these failings is the same, as I have already pointed out.
>
> 156. The only one of these failings for which I think there is any possible argument for finding contributory negligence - on the basis that [Professor Willcocks] provided incorrect information in the account opening form - is that Linear wrongly categorised him as an elective professional client.
>
> 157. However, even if I was persuaded I should make a finding of contributory negligence in relation to the professional client issue - and I am not - it would not be fair or reasonable to reduce the redress payable to [Professor Willcocks] for this.
>
> 158. This is because I have also found that Linear provided misleading information and failed to provide the costs information it should have done and that but for those failings [Professor Willcocks] would not have used its services. There is no reasonable basis for finding him contributorily negligent for those failings by Linear and he is entitled to redress in full for those failings regardless of any findings about him being wrongly categorised as an elective professional client."

50. On quantum, the Ombudsman required Linear to pay Professor Willcocks the difference between the actual value of his investment at the end of the period during which it was managed by Linear and the value it would have had if invested in a benchmark FTSE portfolio together with simple interest at 8% from the end date of its management of the investment in February 2019. The Decision gave four reasons, at [165] why the Ombudsman considered this remedy to be suitable,

> "· [Professor Willcocks] wanted capital growth and was willing to accept some investment risk.
>
> · The FTSE UK Private Investors Income total return index … is a mix of diversified indices representing different asset

> classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.
>
> · Although it is called income index, the mix and diversification provided within the index is close enough to [be] a reasonable measure of comparison given [Professor Willcocks'] circumstances and risk attitude.
>
> · The additional interest is for being deprived of the use of any compensation money."

The judgment of Stacey J

51. Linear applied for judicial review of the Decision. Stacey J rejected the application. She first held that the Ombudsman had been entitled as part of his broad remit to investigate whether Professor Willcocks had been correctly classified by Linear as an elective professional client.

52. On that point, Stacey J also held that the Ombudsman was not limited to reviewing Linear's classification of Professor Willcocks on the grounds that it was irrational, but that it had been entitled to investigate and determine whether Linear had complied with COBS 3.5.3R. She explained her reasoning,

> "79. COBS 3.5.3R requires a firm such as Linear to undertake an adequate assessment of the expertise, knowledge and experience of their client to meet the qualitative test and for the perfectly cogent reasons carefully set out in his Decision, the Ombudsman concluded that Linear had not conducted an adequate assessment. Their own paperwork required evidence of investment experience that was not provided. The inconsistent and contradictory answers provided by Professor Willcocks should have alerted Linear to the need to conduct further enquiries. So too did his non-sequitur answer to the question about experience in trading CFDs which cited his experience in investing in blue chip companies, which tended to show a lack of understanding of a CFD. It is to be remembered that a CFD is a generally high risk niche form of financial derivative trading where (at the risk of over simplification) the differences between the open and closing trade prices are cash-settled. In other words they leverage and trade on margin and are a very different concept to investing in blue chip companies.
>
> 80. There is no dispute that given the underlying investment was CFDs, the version of COBS 3.5.3R in force at the time provided that a firm such as Linear could only treat a client as an elective professional client if it had undertaken a process in compliance with the qualitative test (COBS3.5.3R(1), the procedural requirements (COBS 3.5.3R(3)) and the quantitative test (COBS 3.5.3R(2)). Due diligence is part of the Principles

> for Businesses in the FCA Handbook, and principles 2 and 6 and underpin COBS.
>
> 81. The Ombudsman clearly and rationally explained why he concluded that Linear was not permitted to treat Professor Willcocks as an elective professional client."

53. On the issue of the adoption of the FTSE index as the benchmark for the purposes of assessing the quantum of the award, Stacey J held,

> "87. Linear accepts that the challenge to the Ombudsman's adoption of the Private Investors Income Total Return Index benchmark as a measure of redress can only succeed if it was irrational. As noted above, s.229(2) FSMA 2000 defines how the Ombudsman may calculate "fair compensation" and as Mr Kosmin noted he has a wide latitude. The Ombudsman explained carefully giving four reasons why he considered that his chosen benchmark was apt. It was self-evidently not irrational and expressly took account of the circumstances of the case."

54. Finally, on the question of contributory fault, Stacey J held,

> "88. … There are three difficulties with Linear's arguments which can only succeed on irrationality grounds. Firstly the Ombudsman carefully considered contributory fault and addressed it at length in his Decision and explained why he had changed his mind from his initial first provisional decision: the issues were before him. Secondly, his reasoning was sound by reference to established principles of contributory negligence – the mistakes in the [Account Opening Form] were not causative of Professor Willcocks' losses for the reasons explained by the Ombudsman. Thirdly, the Ombudsman is not required to cite or apply common law principles in any event, as per the express provisions of the statutory and regulatory regime."

The appeal

55. Linear appeals on three grounds.

56. Ground 1 relates to Linear's classification of Professor Willcocks as an elective professional client. In summary, Linear contends,

    i) That COBS 3.5.3R merely imposed a procedural requirement on Linear to conduct an adequate assessment. It did not impose an obligation upon Linear to get Professor Willcocks' classification right.

    ii) Linear made an adequate assessment by obtaining detailed, signed, representations from Professor Willcocks in the Account Opening Form about his investment experience, upon which it was entitled to rely.

    iii) The Judge should have held that the Ombudsman wrongly and irrationally (a) ignored the importance that the law places upon written representations of fact,

> (b) treated Linear's account opening process as a mere 'tick box' exercise amounting to 'self-certification' when it was not, (c) held that Linear was required to obtain further evidence from Professor Willcocks in support of his statements, and (d) departed from the law in this respect without giving proper reasons for such departure.

57. Ground 2 relates to the Ombudsman's decision in respect of redress. Linear contends that even if Professor Willcocks was wrongly classified as an elective professional client, the Judge should have found that it was irrational for the Ombudsman to award him damages assessed by reference to a FTSE index holding mainly UK equities and bonds, in circumstances in which Professor Willcocks had voluntarily applied to invest in a higher risk strategy for professionals that made it clear that it would be using leverage from derivative products to enhance growth.

58. Ground 3 relates to contributory negligence. Linear contends that the Judge should have held that it was both wrong and irrational for the Ombudsman not to reduce Professor Willcocks' award by reason of his own fault in making inaccurate statements as to his experience of trading in CFDs. Linear contends that even if it made other errors in dealing with Professor Willcocks, those misrepresentations were causative of his losses because they induced Linear to enter into the relationship with him in the first place. Linear contends that this would plainly have been a case of contributory fault falling within the Law Reform (Contributory Negligence) Act 1945 and the Ombudsman gave no good reasons for departing from the law in that respect.

59. The Ombudsman resists all three grounds of appeal and, by a Respondent's Notice, contends that the decision of the Judge should be upheld pursuant to section 31(2A) of the Senior Courts Act 1981, on the basis that even if one or more of the grounds of appeal was made out, it is highly likely that the outcome would not have been substantially different if the Ombudsman had not made the error(s) in question.

Analysis

The legal framework

60. Under section 228(2) FSMA, the Ombudsman is to determine a complaint by reference to what, in his opinion, is fair and reasonable in all the circumstances of the case. This is further explained in the FCA Handbook DISP 3.6.4R,

> "In considering what is fair and reasonable in all the circumstances of the case, the ombudsman will take into account:
>
> (1) relevant:
>
> (a) law and regulations;
>
> (b) regulators' rules, guidance and standards;
>
> (c) codes of practice; and
>
> (2) (where appropriate) what he considers to have been good industry practice at the relevant time."

61. The power of the Ombudsman to award what he considers to be fair compensation for financial loss is contained in section 229 FSMA,

> "(2) If a complaint which has been dealt with under the scheme is determined in favour of the complainant, the determination may include–
>
> (a) an award against the respondent of such amount as the ombudsman considers fair compensation for loss or damage (of a kind falling within subsection (3)) suffered by the complainant ("a money award");
>
> (b) a direction that the respondent take such steps in relation to the complainant as the ombudsman considers just and appropriate (whether or not a court could order those steps to be taken).
>
> (3) A money award may compensate for–
>
> (a) financial loss; or
>
> (b) any other loss, or any damage, of a specified kind."

62. In *R (Options UK Personal Pensions LLP) v Financial Ombudsman Service Limited* [2024] EWCA Civ 541 at [73], Asplin LJ explained,

> "[73] There can be no doubt that the Ombudsman in this case, and the FOS in general, is not required to determine a complaint in accordance with the common law. Section 228 creates a much wider jurisdiction which has been recognised in all the cases to which we were referred. An ombudsman is required to reach an opinion about what is fair and reasonable in the circumstances of the particular complaint, having taken into account the matters set out in DISP 3.6.4R. As s 225(1) FSMA 2000 makes clear, the ombudsman service is intended to provide a quick and informal means of resolving certain disputes."

63. As Asplin LJ also explained, at [77] –[78], the Ombudsman is required to explain his reasoning, including any departure from the relevant law, albeit not in a formulaic way,

> "77. … As Rix LJ described it in [*R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642] at [80], despite the fact that the ombudsman is required to arrive at an opinion as to what is fair and reasonable in all the circumstances, he is not operating by the length of his foot. The ombudsman must take the matters in DISP 3.4.6R into account and must make the reasoning clear so that decisions can be understood and be amenable to judicial review on the grounds of perversity and/or irrationality … I have no doubt that a clear explanation of the matters taken into account and their relevance or otherwise provides sufficient safeguard.

> 78. In the passage in the *Heather Moor* case at [49] … Stanley Burnton LJ refers to the need to explain a divergence from the 'relevant law' and goes on to state that if the ombudsman finds an advisor liable notwithstanding that he has complied with all other relevant matters he would have to say so and explain why… I do not understand the dicta to mean that in each and every case, the ombudsman must first set out all the relevant contractual provisions and tortious duties which apply and state why it is considered appropriate in the particular case to go beyond them. Nor do I consider that it was intended that the same exercise should be carried out in a formulaic manner in relation to regulations which are actionable pursuant to s 138D(2) FSMA 2000, before turning on to non-actionable regulations, guidance and best practice."

64. As indicated in that extract, the decisions of the Ombudsman are amenable to judicial review on conventional grounds – which include the making of an error of law, a misinterpretation of the relevant rules (e.g. COBS), irrationality or perversity.

Ground 1

65. In the instant case, the Ombudsman's key finding against Linear was that it did not comply with the requirements of COBS 3.5.3(1)R when accepting Professor Willcocks' application to be treated as an elective professional client. In this regard, the relevant approach is that which was taken to a similar classification provision (COB 4.1.9R) by Morgan J in *Spreadex Ltd v Sekhon* [2008] EWHC 1136 (Ch) at [128],

> "128. The glossary in the FSA Handbook defines 'private customer', 'intermediate customer' and 'market counterparty'. In some respects, not directly relevant in the present case, the definitions refer to objective criteria and in order to settle on an appropriate classification one should ask whether the client does or does not satisfy those criteria. However, in the present context, the difference between a private customer and an intermediate customer is dealt with in COB 4.1.9R and those differences do not turn upon the objective characteristics of the client but turn on a number of matters such as complying with procedural requirements, including the all-important requirement that the client consents to the classification. Accordingly, the definitions of private customer and intermediate customer in the glossary distinguish between clients who have and those who have not been classified 'in accordance with COB 4.1.9R', rather than by reference to the objective characteristics of the client. This reading of the rules is also supported by COB 4.1.14R which allows a firm to classify as a private customer any client who would otherwise be an intermediate customer. *Thus, in determining whether there is 'appropriate' classification of a client as an intermediate customer where the classification procedure adopted is under COB 4.1.9R one does not ask whether the client has the characteristics, objectively considered, of an intermediate*

> *customer but one instead asks whether COB 4.1.9R has been complied with*."
>
> (my emphasis)

66. The essence of Linear's case in this respect is that the insertion of crosses in the boxes and the signature of the Account Opening Form by Professor Willcocks were more than mere "self-certification", but were unambiguous representations of fact as to his trading experience in CFDs. It is said that these representations bound Professor Willcocks in law, either because of the particular importance that the common law attaches to the terms of signed contracts or because they gave rise to an estoppel by representation. It is said that the statements gave Linear the "reasonable assurance" necessary to satisfy both the qualitative and quantitative tests under COBS 3.5.3R, and there was no obligation upon Linear to request any further documentation or make any further inquiry.

67. I would be inclined to accept that, if properly completed and accompanied by evidence as it envisaged, Linear's documentation would have amounted to more than "self-certification" by its client that he met the required criteria. But that is not what happened in the instant case, and for the reasons that follow, I do not accept the remainder of Linear's contentions.

68. As to the relevant principles of law upon which Linear relied, I do not think that cases such as *L'Estrange v Graucob* [1934] 2 KB 394 or *Peekay Intermark v ANZ Banking Group* [2006] EWCA Civ 386 are of any relevance. Those cases are authority for the general proposition that a person will be bound by the clauses in a written contract that they sign; and that if the parties have, in their contract, agreed that a specified state of affairs is to be taken to exist for the purposes of their contract, they will be held to that bargain: see e.g. *Chitty on Contracts* (35th ed.) at 7-029 and 7-030. But the question of whether Linear complied with COBS 3.5.3R is a matter of regulatory compliance rather than simply a matter of private contract; and the representations in the Account Opening Form upon which Linear relies were not express terms of the contract between it and Professor Willcocks.

69. The principles of estoppel by representation might provide a better analogy. The classic requirements for such an estoppel were described by Neuberger LJ in *Steria v Hutchinson* [2006] EWCA Civ 1551 at [93],

> "93. … They are (a) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise…"

70. It is thus evident that for there to be an estoppel, the representation must be clear and the representee's reliance on it must be reasonable. Thus, if the representation is unclear or incomplete, or if there are circumstances which suggest that it may not be accurate and call for further clarification or inquiry, the representee will not be able to hold the representor to it. Those considerations must be all the more relevant in a

situation in which the representor and representee are not simply private parties dealing on an equal footing, but where the representee is a regulated entity which is under a positive duty to make a careful assessment of matters to which the representation relates, and has formulated the questions for the representor to answer.

71. This analysis is consistent with financial services cases arising out of disputes over the classification of clients. Such cases have generally accepted that although the starting point for a firm's assessment of a client's knowledge and expertise may be the representations made by its client, the firm will not be able to rely upon those representations if there is a reason to make further inquiries. So, for example, in *Wilson v MF Global UK* [2011] EWHC 138 (QB), after hearing evidence from compliance experts, Eady J said, at [28],

> "It seems clear from the evidence of both these witnesses that the standards of "reasonable care" in this context, at the material times, did not extend to setting the client, or prospective client, a test or examination to assess his level of knowledge or competence. Nor was there any general understanding that a client's statements of fact about himself or his expertise should be tested or doubted. I see no reason why such statements should not be taken at face value *unless and until there is some reason to apply further scrutiny*."
>
> (my emphasis)

72. In the instant case, in finding that Linear had not satisfied the qualitative test in COBS 3.5.3(1)R the Ombudsman placed reliance upon the facts that although Professor Willcocks had put crosses in the boxes on the Account Opening Form to indicate that he had experience in trading CFDs, he had failed to provide any explanation of his supposed experience of doing so in the section of the form headed "Market Knowledge and Individual Objective", and had also failed to attach any evidence to the form to support his categorisation in this respect. For the reasons that follow, I consider that the Ombudsman's decision in this respect cannot be faulted, and that it was certainly not perverse or irrational.

73. I accept that, in carrying out its assessment under COBS 3.5.3(1)R, Linear would be entitled to start from an assumption that Professor Willcocks was an intelligent individual capable of understanding the Account Opening Form, and that he would provide truthful and accurate answers.

74. However, I also consider that it is unlikely to be enough to satisfy COBS 3.5.3(1)R for a firm simply to require a client to complete a few very general tick boxes containing bald statements in relation to their trading experience and do nothing more. But it is not necessary to decide that question in the instant case, because Linear's Account Opening Form itself envisaged that its client should supplement the tick boxes by providing a brief explanation of their experience and knowledge in relation to the specific types of transactions that Linear would be conducting on their behalf, and would support those statements by attaching appropriate evidence to the form.

75. The simple fact, however, is that Professor Willcocks did neither in relation to a key feature of the Pembroke strategy that Linear would be conducting on his behalf, namely

trading in CFDs. As I have explained above, trading CFDs for speculative purposes is a materially different activity from buying and selling stocks and shares in the conventional way. Trading in leveraged CFDs can generate enhanced returns but also exposes participants to the risk of much higher losses than investing in the underlying equities.

76. Given Linear's stated intention in the Factsheet and the MDAA to use derivatives for leverage in the Pembroke strategy, Professor Willcocks' answer that he had "invested" for over 15 years in "blue chip stocks" but saying nothing about his experience of trading CFDs was a glaring omission. It called into question whether he understood the difference between the two activities and whether his tick box answers concerning trading in CFDs were accurate. His failure to attach any evidence of trading in CFDs to the form compounded that omission. In my view it was entirely right, and certainly not irrational, for the Ombudsman to conclude that Linear was put on further inquiry and that it was not entitled simply to rely upon the tick box answers that Professor Willcocks had given.

77. It follows that I would also not accept that the Ombudsman failed to give appropriate weight to accepted legal principles as regards statements of fact made in writing, or that he deviated from the law in that respect in any material way. On the contrary, his decision identifying a number of matters that put Linear on inquiry about the accuracy of Professor Willcocks' tick box statements was consistent with the law as to estoppel by representation. As such, the Ombudsman's conclusion that Linear's failure to pursue any further inquiries meant that it had not satisfied the qualitative test in COBS 3.5.3(1)R, was in my view entirely justifiable.

78. Although that is sufficient to dispose of Ground 1 of the appeal, I would add that I would also have rejected Linear's appeal in relation to the Ombudsman's decision as regards the quantitative test.

79. The quantitative test in COBS 3.5.3(2) is not felicitously worded. In contrast to COBS 3.5.3(1) it does not expressly refer to a firm being required to undertake an assessment as to whether two of the three criteria are satisfied. Although the opening words of COBS 3.5.3R do refer to a firm complying, where applicable, with (2), it might be thought that whether the quantitative test is satisfied should simply be determined objectively and without reference to what the firm may have done to ascertain the true position.

80. I note, however, that paragraph II.i of Annex II of MiFID from which COBS 3.5.3 derives, and the explanation of that provision by the European Securities and Markets Authority (ESMA), suggest that satisfaction of the criteria in the quantitative test is intended to form part of the assessment by a firm of the expertise, experience and knowledge of its client in the same way as is explicit in COBS 3.5.3(1)R.

81. We did not, however, receive any detailed submissions on this point and so I will simply assume for the purposes of my analysis, and in Linear's favour, that a firm may satisfy the quantitative test by carrying out an adequate assessment of whether two of the three criteria are satisfied, irrespective of whether the answer that it comes to is objectively right or not.

82. Even on this basis, I would not regard Linear's assessment based upon the Account Opening Form as adequate. COBS 3.5.3(2)(a) requires the client to have carried out the specified number of transactions "in significant size, on the relevant market". But the tick box options given on Linear's Account Opening Form in relation to the number of lots per transaction in CFDs did not require the client to specify which market they had previously traded on, and neither did it require the lot size to be specified. Without those details, and for the reasons that I have given in paragraph 14 above, it would be impossible accurately to relate the alleged experience of the client to the transactions proposed to be carried out by Linear.

83. That defect might be made good if the client gave the missing information as part of the brief explanation of their experience of trading in CFDs on the Account Opening Form under the heading "Market Knowledge and Individual Experience", or if the client attached relevant evidence from which those details could be ascertained. But Professor Willcocks did neither, and Linear did not pursue the matter.

84. Further, although Professor Willcocks had put a cross in the box on the SAXO Form to indicate that he had worked in the financial sector for at least one year in a professional position that required knowledge of the nature and risk of the type of trading that he intended to carry out, he provided no further details of that supposed employment and no evidence in support. That statement cried out for clarification given that Professor Willcocks also stated, in handwriting on the Account Opening Form, that he had been employed at the LSE for 12 years. Even if Professor Willcocks had worked for a year in the financial sector before being employed by the LSE 12 years ago, there would be a real and obvious question of whether, given the passage of time, he would have retained any relevant experience or knowledge, and whether it would in any event have been out-of-date as regards modern computerised trading in CFDs of the type intended to be carried out under the Pembroke strategy. Linear did not make any further inquiry to satisfy itself on the point.

85. For these reasons, I would dismiss the appeal on Ground 1. In my judgment the Ombudsman's Decision was one that he was quite entitled to come to and the Judge was right to reject the judicial review application on this basis.

Ground 2

86. As indicated above, Linear contends that the Ombudsman's choice of the FTSE UK Private Investors Income total return index – which it described as a "bland index" - was irrational given that Professor Willcocks had voluntarily applied to invest in a higher risk strategy. I do not accept that argument.

87. Although the Ombudsman's power to award compensation is expressed in broad terms under section 229 FSMA, it plainly must have some logical connection to the complaint that has been established: see e.g. *R (Garrison Investment Analysis) v Financial Ombudsman Service* [2006] EWHC 2466 (Admin). In the instant case, Linear's misconduct was accepting Professor Willcocks as an elective professional client without satisfying the tests on COBS 3.5.3R, and in particular without conducting an adequate assessment so as to give it a reasonable assurance that he was capable of understanding the risks involved in investing in its Pembroke strategy.

88. The Pembroke strategy was, as the disclaimer at the end of the Factsheet made clear, a high risk investment intended for investors who would be comfortable losing all or part of their original invested capital. Since Linear had not properly conducted an assessment to satisfy itself that Professor Willcocks was capable of understanding the high risks involved in investing in its Pembroke strategy, it would to my mind be illogical to base any compensation for that default upon an assumption that Professor Willcocks *was* capable of understanding those higher risks. That has never been established.

89. As such, it would not have been logical for the Ombudsman to choose a benchmark for an award of compensation based upon an assumption that if Professor Willcocks had not invested in the Pembroke strategy, he would have been permitted by some other firm to invest in some other similarly high risk strategy designed for professional investors.

90. In my judgment, therefore, the Ombudsman was not acting irrationally to choose a benchmark which did not reflect the Pembroke strategy, but in essence treated Professor Willcocks as a "medium risk" investor. The Judge was right to reject this basis for judicial review, and I would therefore dismiss the appeal on Ground 2.

Ground 3

91. As indicated in paragraphs 47 and 49 above, the Ombudsman's reason for not making any reduction in his award to reflect Professor Willcocks' provision of inaccurate information on the Account Opening Form was essentially that in addition to mis-classifying Professor Willcocks, Linear also provided him with unclear and misleading information as regards the risk and costs of using the Pembroke service. The Ombudsman reasoned that but for those other failings, Professor Willcocks would not have invested in the Pembroke strategy in any event.

92. The Judge stated that this reasoning was "sound by reference to established principles of contributory negligence" because the mistakes in the Account Opening Form were not causative of Professor Willcocks' losses for the reasons given by the Ombudsman. She added that the Ombudsman was not obliged to apply such principles in any event, but was merely required to take such principles into account under DISP 3.6.4R.

93. I do not agree that the Ombudsman's approach was in accord with the law on contributory negligence. Section 1 of the Law Reform (Contributory Negligence) Act 1945 provides in relevant part that,

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons … the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage …"

94. In applying this provision, the key principle is causation: see *Caswell v Powell Duffryn Associated Collieries* [1940] AC 152 at 155 *per* Lord Atkin; and a broad, common sense approach should be taken to judging cause and effect: see *Stapley v Gypsum Mines Ltd* [1953] AC 663.

95. Whilst a broad, common sense approach is to be taken, the courts have held that the same approach should apply to the question of whether some fault on the part of the claimant caused his own loss, as applies to the question of whether some fault on the part of the defendant caused the loss. It is also clear that it is irrelevant whether the fault of the claimant occurs prior or subsequent to the wrongdoing of the defendant: see generally *Clerk & Lindsell on Torts* (24th ed.) at paragraphs 26-121 and 26-122.

96. Although the Ombudsman took the view in his first provisional decision that Professor Willcocks contributed to his own losses by providing inaccurate information on the Account Opening Form, his main reason for reversing that view in his subsequent Decision appears to have been that such provision of inaccurate information by Professor Willcocks had no bearing on the other failings of Linear in providing unclear and misleading information on costs and risks. The Ombudsman reasoned that but for the provision of such unclear and misleading information, Professor Willcocks would not have chosen to invest as he did, so that Linear should be liable in full, regardless of Professor Willcocks' own failings: see paragraphs [121]-[123] and [158] of the Decision set out at paragraphs 47 and 49 above. The effect of the Ombudsman's Decision was that the provision of misleading information by Linear was the only operative cause of Professor Willcocks' losses and that Professor Willcocks' own conduct was not an operative cause. But common sense suggests that this cannot be right.

97. Irrespective of what induced him to apply to Linear, Professor Willcocks was only able to participate in the Pembroke strategy because he made misrepresentations to Linear as to his trading history in relation to CFDs and his employment in the financial sector. If he had accurately stated that he had no experience in trading CFDs and had not worked in the financial sector, he would not have been accepted by Linear as an elective professional investor, he would not have been able to participate in the Pembroke strategy, and he would not have made the losses for which he now seeks compensation. Professor Willcocks' own misrepresentations to Linear were therefore plainly an operative cause of his loss.

98. That conclusion is not avoided by focussing on Linear's earlier provision of misleading information in relation to the costs and risk of its Pembroke strategy, and treating those failings as unaffected by Professor Willcocks' later provision of inaccurate information when he completed the Account Opening Form. As indicated above, when applying section 1 of the Law Reform (Contributory Negligence) Act 1945, the same causation approach should be applied to the acts or omissions of both claimant and defendant, and the sequence in which faults occur does not matter.

99. So, for example, in *The Volute* [1922] 1 AC 129, the *Volute*, the leading boat in a convoy, changed course without signalling, endangering another boat in the convoy. In attempting to take evasive action, that other boat, the *Radstock*, negligently put on full steam ahead, with the result that a collision occurred. The House of Lords pointed out that if the *Volute* had not neglected to signal before changing course there would have been no collision; but on the other hand, if the *Radstock* had not gone full steam ahead, there would also have been no collision. Since both parties were at fault, the principles of contributory negligence required an apportionment of damages.

100. In the same way, although it might be said that but for Linear's provision of misleading information, Professor Willcocks would not have applied to use the Pembroke strategy,

it is equally clear that if Professor Willcocks had not then made misrepresentations in the Account Opening Form, Linear would not have made those services available to him, and hence there would have been no trading and no losses. In my view it is clear that, as the Ombudsman indicated in his first provisional decision, both parties were at fault and contributed to Professor Willcocks' losses.

101. I therefore consider that the Ombudsman's Decision proceeded on an inaccurate approach to the law of contributory negligence. Whilst I fully accept that the Ombudsman was not obliged to apply the law in this respect, he was obliged by DISP 3.6.4R to take it into account. That implies that he should take it into account accurately. Moreover, according to the principles in *Heather Moor*, as explained in *Options UK* (above), if the Ombudsman was departing from the law, he ought to have explained why. I do not consider that he did either of those things correctly, and the Judge was wrong to hold otherwise.

The Respondent's Notice

102. The Respondent's Notice contends that even if the Ombudsman misunderstood the law on contributory negligence, he did not have to apply it and was entitled to reach his decision simply on the basis of what he considered to be fair and reasonable. It is contended that his Decision would have been the same, and reliance is placed upon a witness statement to that effect from the Ombudsman.

103. In this regard, the Ombudsman relies upon section 31(2A) of the Senior Courts Act 1981 that provides,

> "31 (2A) The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award [or damages etc] on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

104. The purpose of this provision is to ensure that even if there has been a flaw in a decision-making process, if the court can see that quashing the decision would be a waste of time and public money (because even if adjustment were made for the error it is highly likely that the outcome for the applicant would be the same), the application for judicial review should be rejected: see *R (Gathercole) v Suffolk County Council* [2020] EWCA Civ 1179 at [38]. It has also been held that the section provides a high test to surmount, and that to avoid impermissibly straying into the merits of the decision, the focus of the court should be on evaluating the significance of the error on the decision-making process, rather than trying to predict what the public body would have done had the error not been made: see *R (Bradbury) v Brecon Beacons National Park Authority* [2025] EWCA Civ 489 at [70]-[75].

105. Applying that approach to the decision-making process in the instant case, the *ex post facto* statement from the Ombudsman that even if he had not misunderstood the law on contributory negligence, he would have reached the same result as a matter of fairness and reasonableness, must be approached with some caution.

106. Of greater significance is the fact that in his first provisional decision, the Ombudsman was minded to make a reduction of 25% in the award, stating,

> "I don't think it would be fair or reasonable for Linear to bear all the responsibility for [Professor Willcocks'] losses given he provided it with incorrect information in the first place."

However, after the Ombudsman introduced a flawed analysis of causation in his second provisional decision (focussing on Linear's provision of unclear and misleading information about risk and costs), he reached a materially different outcome, making no reduction for contributory negligence.

107. Having regard to that course of the decision-making process in the instant case, I cannot have any confidence that it is highly likely that if the Ombudsman had not approached the issue of causation in the wrong way, he would still have reached the conclusion that it *was* fair and reasonable to make no reduction for Professor Willcocks' own fault. I would therefore reject the argument advanced in the Respondent's Notice.

Disposal

108. I would allow the appeal on Ground 3, and quash the Decision in so far as it relates to the quantum of the award. It is not for us to substitute our own views for those of the Ombudsman, and so I would remit the matter to the Ombudsman to make such reduction in the award as he might consider to be fair and reasonable to reflect Professor Willcocks' relative fault in misrepresenting his experience in trading CFDs and his employment history. It will be for the Ombudsman to determine whether he requires any further submissions in that respect from Linear and Professor Willcocks.

Lord Justice Jeremy Baker :

109. I agree.

Lord Justice Nugee :

110. I also agree.