

CO/4536/2011

Neutral Citation Number: [2011] EWHC 3161 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 28 October 2011

B e f o r e:

HIS HONOUR JUDGE BIDDER QC

Between:

THE QUEEN ON THE APPLICATION OF RICHARD BAMBER & CO

Claimant

v

FINANCIAL OMBUDSMAN SERVICE

Defendant

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Mr John Virgo (instructed by Foot Anstey) appeared on behalf of the Claimant

Mr James Strachan (instructed by Financial Ombudsman's Office) appeared on behalf of the Defendant

Judgment

As Approved by the Court

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1. JUDGE BIDDER: This is a renewed application for permission to apply for judicial review. Permission was refused on the papers by Miss Geraldine Andrews QC (sitting as a Judge of the High Court) on 16 August 2011.
2. The challenge is to three sets of decisions. Each of those decisions should be looked at as a final decision prefaced or preceded by a preliminary decision, which preliminary decision, as I understand it, is published to the parties with an invitation to make further submissions based on that. The decisions were of an ombudsman - I think one single ombudsman within the defendant Service - making monetary awards of compensation to three sets of complainants (one complainant and then two sets of complainants) for alleged mis-selling of endowment policies many years before.
3. The statutory scheme under the Financial Services and Markets Act 2000, and Regulations made under that Act, is set out in some detail in the defendant's summary grounds of resistance, for which I am grateful. I need not repeat that background here.
4. The defendant in those grounds of resistance has helpfully and, I think, correctly digested from the detailed statement of grounds or the claim, which does not itself attempt to enumerate the grounds, seven grounds of complaint of error of law or unfairness of the ombudsman who dealt with the complaints. It is said, and this is really the meat of the claim, that these complaints would have been dismissed under the old scheme as time-barred. I do not think there is any dispute that that would have been the case, but that if the legislature had wished to let the time-bar defence to continue into the new scheme they could have said so explicitly. It did not. It merely said in the transitional provisions that the ombudsman was to take into account what determination the former ombudsman under the old scheme might have been expected to reach.
5. The ombudsman in each of these cases had done precisely that. I judge that there is no merit in the argument that the ombudsman should inevitably have made no compensatory award on the basis that the time-bar would have existed but which had, in effect, been abolished by the new system. Indeed it is also the case that when the new scheme started in 2001 none of the three sets of complaints in issue in this review were actually time-barred. LONGSTOP FROM DATE OF ADVICE NOT FROM N2. ACCRUED RIGHTS ?
6. As to the argument that no adequate reasons have been given, that is in my judgment patently not the case. It seems to me in the extract which Mr Virgo sets out in paragraph 21 of the grounds he has actually set out a passage which, in my judgment, sets out in clear terms the reasons that the ombudsman gave for her decision. Indeed in my judgment they are meritorious reasons. It is in my judgment absolutely clear that Parliament was taking away a strict time-bar. While of course there is a presumption against retrospectivity, it is open to Parliament to remove a time-bar in these circumstances. In my judgment it is very clear that it intended to do so. Even if there existed a legitimate expectation that certain claims would be time-barred, Parliament is competent to legislate for the removal of such a bar. And in my judgment it is absolutely clear - it may be by necessary implication but if it is a necessary implication it is

a very clear one - and it is precisely what they intended to do. HOFFMAN –
CLARITY OF PURPOSE – ARTICLE 1

7. It is totally tolerably clear why it was doing that, namely to recognise that these products may take many years to mature and only when they do mature may consumers realise that they have been mis-sold. That is the nub of the issue properly recognised by the ombudsman in the very detailed reasons for giving awards in these three cases.

Haward and others v Fawcetts (a firm) - March 2006 - House of Lords

It is important, in my opinion, to keep in mind that limitation defences are creatures of statute. The expression "statute-barred" makes the point. And, in prescribing the conditions for the barring of an action on account of the lapse of time before its commencement, Parliament has had to strike a balance between the interests of claimants and the interests of defendants. It is a hardship, and in a sense an injustice, to a claimant with a good cause of action for damages to which, let it be assumed, there is no defence on the merits to be barred from prosecuting the cause of action on account simply of the lapse of time since the occurrence of the injury for which redress is sought. But it is also a hardship to a defendant to have a cause of action hanging over him, like the sword of Damocles, for an indefinite period. Lapse of time may lead to the loss of vital evidence; it is very likely to lead to a blurring of the memories of witnesses and to the litigation becoming even more of a lottery than would anyway be the case; and uncertainty as to whether an action will or will not be prosecuted may make a sensible and rational arrangement by the defendant of his affairs very difficult and sometimes impossible..... "

8. Article 7 gives a wide discretion in the ombudsman to take into account what determinations might have been made. It is in my judgment quite unnecessary for the proviso to specify how a very wide discretion given by Section 228 of the Act should be exercised. I simply cannot accept that it is arguable that the absence of more detailed guidance means that somehow the court should re-write these provisions to imply some necessity or exceptionality before awards of this nature can be made. SI2326/2001 TREASURY
CONSULTATION

Relevant new complaints

3.13 Article 7 deals with the requirements for determining relevant new complaints. In general this requires such complaints to be determined in accordance with sections 228 to 230 of FSMA - that is, subject to the remedies available under the rules of the new scheme. It is our understanding that the FSA and the FOS intend extending the definition of a complaint covered by the new scheme rules (see footnote 1 to paragraph 1.2) to include relevant new complaints.

3.14 However, as outlined in paragraph 3.1 above the remedies available under the existing schemes differ from each other and from those available under the new scheme. We recognise that fairness requires that the reasonable expectations of all parties as to what remedy might have been available if the complaint had been determined under the relevant former scheme should be taken into account. Therefore, article 7(2) requires FOS to take into account the determination, and if applicable, the award that would have been made under the relevant former scheme when determining a relevant new complaint.

3.15 Question 5 - comments would be welcome on the proposal that determinations of relevant new complaints should be on the basis of the new scheme. In particular we would be grateful for

views as to whether the safeguards set out in paragraph 3.14 above are adequate to ensure fairness to all the parties.

8.1.1. It is, I agree with the defendant, difficult to see how Article 1 of the First Protocol is actually engaged. But if it is, these awards are clearly subject to conditions provided by law and that the public interest has to be considered by the Protocol is very obvious. In my judgment there is nothing in that argument.

In *R v Misra* [2005] 1 Cr App R 328 Judge LJ referred to the principle of legal certainty and continued:-

"The principle enables each community to regulate itself: 'with reference to the norms prevailing in the society in which they live. That generally entails that the law must be adequately accessible -- an individual must have an indication of the legal rules applicable in a given case -- and he must be able to foresee the consequences of his actions' (SW v United Kingdom, CR v United Kingdom (1995) 21 EHRR 363)

In the House of Lords it has been suggested by Lord Hoffmann in *R(Alconbury Ltd) v Environment Secretary* [2003] 2 AC 295 at paragraph 73 that Article 1 of the First Protocol implies the rule of law.

8.1.2. I consider there is no merit in the discrimination point which I regard as a makeweight. Being financial advisers, in my judgment, is not arguably of sufficient status to engage Article 14 of the First Protocol. But even if it is, it seems to me that it is not arguable that there has been here any discrimination on the grounds of lack of status.

" The European Court of Human Rights in Stubbings v Webb (1993), Stubbings v UK(1996) upheld the right of a defendant to rely on a time bar defence provided under the Limitation Act 1980, emphasising that limitation periods were a common feature of European legal systems and must be legitimate in aim and proportionate in effect. ' They serve several important purposes, namely to ensure legal certainty and finality, to protect potential defendants from stale claims which might be difficult to counter and to prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time

Article 14 of the Convention stated: ' Prohibition of Discrimination - The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' Article 1 of the First Protocol stated: ' Protection of Property - Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and

by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties ”

8.1.3. I agree with the entirety of the arguments of the defendants in their grounds. I consider the claim to be plainly unarguable.

8.1.4. I refuse permission.

8.1.5. MR STRACHAN: I raise one matter. The deputy judge when dealing with the refusal of permission on the papers made an order for costs in a certain sum.

8.1.6. JUDGE BIDDER: The AOS.

8.1.7. MR STRACHAN: The AOS. She indicated that if the claims were renewed then the issue of costs should be dealt with at the hearing.

8.1.8. JUDGE BIDDER: In other words, it was a provisional, conditional award of costs.

8.1.9. MR STRACHAN: Indeed.

8.1.10. JUDGE BIDDER: I am looking at the back of the bundle. By happenstance and mischance, this matter was originally before the same judge who refused permission on the papers. She hastily shovelled it across. There was a swap. I was not badly dealt with at all. As night follows day, it went before her. You are quite right. She does say it is only if the claimant does not seek reconsideration that the costs were awarded, and so I have to take a fresh look at those.

8.1.11. I wonder whether Mr Virgo has anything to say about those costs, the AOS costs, which would normally - - I think it is the general practice to give the AOS preparation of costs in the case of an unsuccessful renewal of permission. I suspect there would be more opposition to an award of the costs of today.

8.1.12. MR STRACHAN: I am not going to ask for my costs of today because of the exceptional circumstances I need to demonstrate.

8.1.13. JUDGE BIDDER: Exactly, Mount Cook.

8.1.14. MR STRACHAN: Obviously you found it tolerably straightforward to deal with it without my assistance.

8.1.15. JUDGE BIDDER: I am not sure that would necessarily be an exceptional circumstance.

8.1.16. MR STRACHAN: I am not asking for the costs of my attendance today. There is one slight alteration. The deputy judge summarily assessed the costs

we put in downwards because the sum we claim in the summary grounds was, I think, £2,013. The judge summarily assessed it downwards but plainly made it clear that if there was a renewal the issue would arise again for this court. I would like you to award the sum we actually spent, bearing in mind that I am not seeking my costs of today.

8.1.17. JUDGE BIDDER: How long did it take? Let us look at the principle of it. Let us see if Mr Virgo disputes the principle that you should have appropriate costs of preparing the AOS.

8.1.18. MR VIRGO: That is not something I can dispute.

8.1.19. JUDGE BIDDER: Shall we look at the summary assessment of those costs.

8.1.20. MR VIRGO: I have not seen a schedule.

8.1.21. JUDGE BIDDER: Neither have I.

8.1.22. MR STRACHAN: The figure was in the summary grounds.

8.1.23. JUDGE BIDDER: I should say this in deference to Mr Virgo's arguments. This was a case where I had very, very detailed summary grounds of defence. I frequently do not get such detailed grounds of defence. It is no disrespect to Mr Virgo, none was intended to Mr Virgo's arguments, that I did not call upon you. It was because of the detail of those summary grounds that I was able, on papers that were prepared, to make my views.

8.1.24. MR STRACHAN: I did not take it any other way.

8.1.25. JUDGE BIDDER: Where is the schedule?

8.1.26. MR STRACHAN: I do not think the schedule was submitted with the summary grounds, but I can give you a breakdown.

8.1.27. JUDGE BIDDER: I really ought to see the schedule if there is one.

8.1.28. MR STRACHAN: There is only an internal schedule.

8.1.29. JUDGE BIDDER: If you want summary assessment you should follow the summary assessment schedule within the rules.

8.1.30. MR STRACHAN: I can tell you in short how it breaks down.

8.1.31. JUDGE BIDDER: You are going to let me see that, are you?

8.1.32. MR STRACHAN: Certainly. This is the internal legal costs of the ombudsman. The remainder - the bulk - is counsel's fees and drafting summary grounds. It breaks down to £1,500 plus VAT. (Document to judge)

8.1.33. JUDGE BIDDER: Was this costing sheet sent to the defendants at least 24 hours before the hearing?

8.1.34. MR STRACHAN: No, because we are seeking costs of today. It was not a schedule for today.

8.1.35. JUDGE BIDDER: Or, indeed, at all.

8.1.36. MR STRACHAN: No. It has not been sent to them. It did appear as a figure in the summary grounds. I do not think - - so far as I am aware, no issue has previously been taken by the claimant about the levels of costs.

8.1.37. JUDGE BIDDER: If there is going to be a certificate accompanying the summary assessment it ought to be signed by a solicitor. That signature is - - it indicates - - I am prepared to accept it but it is not the right way of going about it, frankly.

8.1.38. MR STRACHAN: I appreciate what you are saying. What happened was we put the summary grounds in with the figure. The deputy judge was able to deal with - - - -

8.1.39. JUDGE BIDDER: With great respect, you knew the deputy judge had held the matter over to this hearing. If you win the hearing you are going to have to justify your - - anyway.

8.1.40. MR STRACHAN: I apologise to the court for any inconvenience.

8.1.41. JUDGE BIDDER: I would say this, they are bottom book, the ombudsman costings. If a solicitor had done them they would be five times as much.

8.1.42. MR STRACHAN: The bulk of the fees are, in fact, my fees for drafting the summary grounds. You will see we are dealing with three cases. We endeavoured to assist the court at every stage by setting out the full statements. In the long run it saved costs, I hope, in the long run.

8.1.43. JUDGE BIDDER: Let me let Mr Virgo have a look at the document. I do not know whether he does many summary assessments in the County Court. The ones I deal with, I would be pleased to see rates and hours as I have seen them.

8.1.44. MR VIRGO: I acknowledge one normally sees proper signed schedules for significantly larger sums.

8.1.45. That said, I wonder whether my friend seeks to place too much on the wording of the Deputy High Court judge. The note on paper refusal does say on claimant seeking reconsideration of the matter the costs will be re-assessed. My feeling on that is that - the suggestion is - it caters it for the position that if there is a reconsideration and at the reconsideration we were granted permission then in the light of those circumstances the acknowledgement - - provides for costs not to be paid at all and they become costs in the case.

8.1.46. JUDGE BIDDER: No. I do not agree that it was meant to obviate the need for a further re-assessment of the costs at reconsideration. No.

8.1.47. MR VIRGO: If I may press it, that is a slightly counter-intuitive position to take because if the deputy judge had information about the costs clearly in

respect of the acknowledgement of service and made assessment of those costs that exercise is completed. It does not become susceptible to enhancement - for the same assessed work - if there is a reconsideration. If permitted on reconsideration, then may be, being successful, in which case the costs should be set out.

8.1.48. My final submission is that the costs associated with the - - - -

8.1.49. JUDGE BIDDER: In other words, one assessment at the time when the material - what would be the same material - is there. And it is wrong to start - - summary assessment done once but waiting on the issue of the principle of the costs award.

8.1.50. MR VIRGO: Yes.

8.1.51. JUDGE BIDDER: What do you say? In a sense you are trying to appeal the summary assessment.

8.1.52. MR STRACHAN: I submit I am not doing that because the deputy judge was very clear in the terms. She, first of all, starts the costs award - "If the claimant does not seek reconsideration, the costs of preparing the AoS are " She sets out the procedure for challenging that. Then - "If the claimant seeks a reconsideration costs are to be dealt with on that occasion."

8.1.53. JUDGE BIDDER: Costs are to be dealt with on that occasion.

8.1.54. MR STRACHAN: Yes. That would be unnecessary in normal renewals because costs if provisionally granted go off anyway.

8.1.55. JUDGE BIDDER: Does Mr Virgo want to say anything about quantum apart from that point?

8.1.56. MR VIRGO: No.

8.1.57. JUDGE BIDDER: I think I am entitled to re-assess the quantum of costs. I have a considered schedule from the Ombudsman's Office as to costs of preparing trial. The costs, in my judgment, are extremely reasonable. They are far, far less than if this had been done, say, sent out to a private solicitor. Counsel's fees are entirely reasonable.

8.1.58. I therefore order that the claimant should pay the defendant's costs summarily assessed in the sum of £2,01