Neutral Citation Number: [2024] EWHC 1428 (Admin)

Case No: AC-2022-LON-002052

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/06/2024

Before :

MRS JUSTICE STACEY

- -

Between :

R (on the application of) LINEAR INVESTMENTS LIMITED	**Claimant**
- and -	
FINANCIAL OMBUDSMAN SERVICE LIMITED	**Defendant**
- and –	
PROFESSOR LESLIE WILLCOCKS	**Interested Party**

- -
- -

Gerard McMeel KC (instructed by **Trowers & Hamlins LLP**) for the **Claimant**
Stephen Kosmin (instructed by **Financial Ombudsman Service Ltd**) for the **Defendant**

Hearing dates: 5th & 6th March 2024

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Approved Judgment

This judgment was handed down remotely at 11.00am on 13th June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Amended under the Slip Rule CPR 40.12 on 20th June 2024 & approved by Mrs Justice Stacey

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MRS JUSTICE STACEY

Mrs Justice Stacey :

1. This is an application brought by the claimant, Linear Investments Ltd ("Linear"), for judicial review of a decision made by the defendant, the Financial Ombudsman Service Limited ("the Ombudsman"), in response to a complaint made by Professor Leslie Willcocks (the interested party) about Linear. Professor Willcocks' complaint against Linear was upheld by the Ombudsman (by one of its ombudsmen, Philip Gibbons) in its decision of 29 April 2022 ("the Decision"). Linear was ordered to compensate Professor Willcocks by reference to the performance of his investment in Linear's "Pembroke strategy" with that of the benchmark of the FTSE UK Private Investors Income Total Return Index and to pay him the difference between the fair value and the actual value of the investment, together with interest.

2. The application for judicial review was lodged on 28 July 2022 and sealed on 29 July 2022. By order dated 6 February 2023, Lang J granted permission to bring the claim on four of the five proposed grounds and ruled that the claim was not time-barred. Ground 2 was considered to be unarguable on consideration of the papers by Lang J and subsequently dismissed at an oral renewal hearing before Sir Ross Cranston on 7 June 2023.

3. Ground 1 challenges the Ombudsman's findings that Professor Willcocks was an eligible complainant by reason of DISP 2.7.9AR, in that he was a consumer in relation to the activity to which the complaint relates, and not an "elective professional client" contrary to Linear's categorisation of him as such. In his complaint to the Ombudsman, Professor Willcocks had not directly challenged how he had been categorised by Linear but had objected to what he described as a "misleading" contractual term that sought to exclude a right to complain to the Ombudsman. Ground 3 is linked and alleges wrongful interference in Linear's client classification assessment.

4. It follows that if grounds 1 and 3 are successful, grounds 4 and 5 do not arise because Professor Willcocks will not have been an eligible complainant. But if grounds 1 and 3 do not succeed, grounds 4 and 5 come into play. Ground 4 challenges the measure of redress ordered by the Ombudsman and ground 5 the decision that no deduction to the award be made for contributory fault on the part of Professor Willcocks.

5. The parties had helpfully agreed a list of issues and the issues narrowed further still during the course of the hearing as follows:

    i) Ground 1: Did the Ombudsman err by finding that Professor Willcocks was an eligible complainant by reason of DISP 2.7.9AR, in that he was a consumer in relation to the activity to which the complaint relates? The Court was not invited to make novel findings of fact, but rely on the findings of fact in the Decision when considering the proper scope of the relevant jurisdictional rules.

    ii) Ground 3:

        a) Was the Ombudsman only permitted to review Linear's client classification assessment on the basis of irrationality? If so, Linear accepted that this ground must fail and Linear no longer relied on (b) in the initial list of agreed issues.

b) No longer a live issue.

iii) Ground 4: Was the Ombudsman irrational in assessing redress based on the FTSE UK Private Investors Income Total Return Index benchmark? In particular:

a) Did the Ombudsman's use of the benchmark fail to reflect the circumstances of the case?

b) Did the Ombudsman irrationally fail to exercise his case management powers to order Professor Willcocks to disclose the performance of his investments after the termination of his relationship with Linear?

iv) Ground 5: In determining that Professor Willcocks had not contributed to his own losses by contributory negligence:

a) Did the Ombudsman fail to take into account relevant law and regulations; and/or

b) Was that finding irrational?

v) Was it highly likely that the outcome for Linear would not have been substantially different if the conduct complained of in grounds 3, 4 and 5 had not occurred? (S.31(2A) Supreme Court Act 1981 ("SCA 1981").

The background

6. Linear carries on business as a provider of investment services, including the management and administration of client money and other assets and is authorised to carry out investment business by the Financial Conduct Authority ("FCA") under the Financial Services and Markets Act 2000 ("FSMA 2000").

7. The Ombudsman is a statutory dispute resolution scheme under part XVI and Schedule 17 of FSMA 2000, established to adjudicate on complaints between eligible complainants and UK authorised financial services providers.

8. Professor Willcocks is a former client of Linear who entered into a Managed Discretionary Advisory Agreement ("MDAA") under which Linear provided discretionary management services to him. On 5 December 2017, he completed an account opening form ("AOF"), the client application, gave a Power of Attorney to SAXO, the broker selected by Linear (it later changed to ETX but nothing turns on it) and entered into the MDAA. He deposited funds of £100,000 with SAXO on 8 January 2018 and from 1 February 2018 to 19 February 2019, Linear made trades in Contracts for Difference ("CFDs") under its "Pembroke strategy" through their broker's platform. Linear states that it acts exclusively for professional clients and Professor Willcocks was categorised by Linear as an "elective professional client". That classification is at the heart of this dispute as to whether Professor Willcocks was an eligible complainant within the scope of the Ombudsman's scheme.

9. On 19 February 2019 Professor Willcocks removed the power of attorney from Linear for his account with ETX and his relationship with Linear ended. He submitted a

complaint to Linear on 24 May 2019 ("the Complaint") that Linear 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 sought to exclude a right to complain to the Ombudsman. The Complaint was rejected on 23 July 2019. Professor Willcocks then submitted a complaint to the Ombudsman on 26 November 2019 in which he sought to be put back in the position he would have been in, had he not invested with Linear.

10. The Ombudsman issued two provisional decisions on 5 August 2021 and 11 February 2022 before making its Decision on 29 April 2022, which is the subject of these proceedings. It concluded that the Complaint was within its jurisdiction, Professor Willcocks was an eligible complainant, and upheld his complaint. It concluded that in order to compensate him for any losses, Linear must pay him the difference between the performance of the FTSE UK Private Investors Income Total Return index and Linear's Pembroke Strategy in which he had been invested together with interest. There was no contributory fault on the part of Professor Willcocks.

The legal and regulatory framework

11. Linear is authorised to carry on investment business in the UK by FCA under FSMA 2000 and as such, in carrying out its investment business, it is subject to the regulatory rules set out in the FCA's Handbook of rules and guidance and its rules for the conduct of business ("COBS").

12. The FCA is charged with a statutory objective of consumer protection, that is "securing an appropriate degree of protection for consumers." (s.1B(3)(a) and s.1C(1) FSMA 2000). By s.1C(2) the FCA must have regard under FSMA to:

> "(a) the differing degrees of risk involved in different kinds of investment or other transaction;
>
> (b) the differing degrees of experience and expertise that different consumers may have;
>
> …
>
> (d) the general principle that consumers should take responsibility for their decisions…."

13. COBS contains detailed rules on client classification, principally in Chapter 3 of COBS, central to grounds 1 and 3 of Linear's claim. COBS 3.5.1R provides that:

> "A professional client is a client that is either a per se professional client or an elective professional client."

14. At the material time, COBS 3.5.3R provided as follows:

> "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 instruments 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."

15. The Ombudsman was established pursuant to Part XVI of FSMA 2000 with the statutory objective to provide an independent and informal complaint resolution procedure for the financial services industry without the need for complainants to resort to the courts. Linear, as an authorised person under Part 4A of FSMA 2000, must submit to the compulsory jurisdiction of the Ombudsman established under Part XVI of that Act. Challenges may be brought only by way of judicial review. The objective is set out in the statute:

> "This Part provides for a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person" (s.225 (1))

16. A complaint is first considered by an investigator. If either party is dissatisfied with the opinion of the investigator, the complaint is then considered by a statutory ombudsman who may issue a provisional decision prior to issuing a final determination under DISP 3.5.4 R (2) and (3) (see below).

17. Section 228(3) places a duty on the Ombudsman to give written reasons for their determination.

18. The Ombudsman has a compulsory jurisdiction over certain complaints. S.226(2)(a) FSMA 2000 requires, as a condition, that the complainant is eligible. A complainant is eligible if they fall within the class of person specified in the rules as eligible (s.226(6)).

19. There are two tiers of relevant legal provisions in respect of the Ombudsman. First, the statutory rules which provide the basis for the Ombudsman's jurisdiction under FSMA 2000, Part XVI and Schedule 17. Secondly the rules made thereunder by the FCA, pursuant to s225(4), and paragraphs 13 and 14 of Schedule 17 to FSMA. The rules governing complaint handling are made by the Ombudsman with the consent of the FCA, and are set out in the FCA's handbook in the section entitled "Dispute Resolution Complaints" ("DISP"). Within DISP, "R" denotes a rule and "G" denotes guidance.

20. DISP 2.7.1R states that:

> "A complaint may only be dealt with under the Financial Ombudsman Service if it is brought by or on behalf of an eligible complainant."

21. An eligible complainant must be a person that is a "consumer" under DISP 2.7.3R(1) (or one of the other persons stipulated in one of the other categories set out in DISP 2.7.3R(2)-(7), which are not relevant to the facts in this case).

22. A "consumer" is defined in the FCA Handbook's glossary as having

> "the meaning in regulation 3 of the ADR Regulations, which is an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession."

23. DISP 2.7.9R provides a number of exceptions:

> "the following are not eligible complainants"
>
> (1)….
>
> (2) (in the Compulsory Jurisdiction) a complainant, other than a trustee of a pension scheme trust, who was:
>
> (a) a professional client; or
>
> (b) an eligible counterparty;

> in relation to the firm and activity in question at the time of the act or omission which is the subject of the complaint.

24. DISP 2.7.9AR states that:

> "DISP 2.7.9R (1) and DISP 2.7.9R (2) do not apply to a complainant who is a consumer in relation to the activity to which the complaint relates."

25. The complaints-handling procedures and basis on which the Ombudsman makes decisions is set out in chapter 3 of DISP and DISP 3.2 which states:

> "3.2.1R The Ombudsman will have regard to whether a complaint is out of jurisdiction".
>
> 3.2.2R …
>
> 3.2.3R Where the respondent alleges that the complaint is out of jurisdiction, the Ombudsman will give both parties an opportunity to make representations before he decides.
>
> 3.2.4R Where the Ombudsman considers that the complaint may be out of jurisdiction, he will give the complainant an opportunity to make representations before he decides.
>
> 3.2.5R Where the Ombudsman then decides that the complaint is out of jurisdiction, he will give reasons for that decision to the complainant and inform the respondent.
>
> 3.2.6R Where the Ombudsman then decides that the complaint is not out of jurisdiction, he will inform the complainant and give reasons for that decision to the respondent.

26. Complaints to the Ombudsman are determined:

> "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case" (FSMA 2000 s.228)

As repeated in DISP 3.6.1R:

> "The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case."

27. DISP 3.6.4R provides:

> "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."

28. Pursuant to s.231(1) the Ombudsman may, by notice in writing, require a party to a complaint to provide specified information or specified documents.

29. The law governing awards by the Ombudsman in the compulsory jurisdiction relevant to this claim are set out in section 229(2):

"(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 claimant ("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.

…

(5) A money award may not exceed the monetary limit; but the ombudsman may, if he considers that fair compensation requires payment of a larger amount, recommend that the respondent pay the complainant the balance.

(6) The monetary limit is such amount as may be specified."

30. At the material time, the upper financial limit was £160,000.

31. The provisions are repeated in DISP 3.7.1R which provides:

"Where a complaint is determined in favour of the complainant, the Ombudsman's determination may include one or more of the following:

> (1) a money award against the respondent…"

And DISP 3.7.2R states:

> "… a money award may be such amount as the Ombudsman considers to be fair compensation for one or more of the following:"
>
> (1) financial loss (including consequential or prospective loss); or
>
> (2) pain and suffering; or
>
> (3) damage to reputation; or
>
> (4) distress or inconvenience;
>
> whether or not a court would award compensation."

The Court's Powers and relevant case law

32. The parties agree that the proper approach to a jurisdiction challenge to a decision of the Ombudsman has been recently set out by the Court of Appeal in the judgment of Singh LJ in *Assurant General Insurance Limited, R (On the Application Of) v Financial Ombudsman Service Ltd* [2023] EWCA Civ 1049 *('Assurant')* resolving any previous possible tension between *R (Bluefin Insurance Services Ltd) v FOS* [2014] EWHC 3413 (Admin), [2015] Bus LR 656 and *R (Chancery (UK) LLP) v FOS* [2015] EWHC 407 (Admin). It was held in Assurant that:

> "… issues of fact are for the Ombudsman to determine, subject to judicial review on conventional grounds such as irrationality or procedural unfairness. This is true even of facts which go to the Ombudsman's jurisdiction, i.e. "jurisdictional facts". The mere fact that a fact is a jurisdictional fact does not automatically render it a precedent fact, which has to be established to the satisfaction of the Administrative Court if judicial review proceedings are brought. [39]
>
> …..
>
> 57. In the present case, I would have no difficulty in general in accepting the submissions made by Mr Strachan on behalf of the Ombudsman that questions of fact are primarily for the Ombudsman to determine, subject only to judicial review on conventional public law grounds. It is important to recall that judicial review is not an appeal. It does not therefore provide an opportunity simply to re-argue a case in front of the High Court. I would endorse what Ouseley J said in *Chancery* and *TenetConnect* in the passages I have quoted above, about the respective roles of the FOS and the court on judicial review.

> 58. Mr Strachan made it clear before this Court that the FOS accepts that the question of the correct construction of a document, such as a contract, is, on well-established principles, a question of law. It is therefore a question for the court itself to determine.
>
> ….
>
> 60. In some complaints made to the FOS there may be a relevant dispute as to what are the terms of a contract, in particular where the contract is an oral one or where there are said to be terms which are to be implied into it by reason of the conduct of the parties. Such a dispute concerns questions of fact and, where it arises, I accept Mr Strachan's submission that the determination of those questions of fact is primarily for the FOS, subject to judicial review on conventional principles of public law. I would also endorse Mr Strachan's concession that the construction of a document such as a contract is a question of law and must be determined by the court itself. This is not a departure from conventional principles of public law; it is simply an application of them, since one of those principles is that a public authority whose decisions are the subject of judicial review must get the law right."

33. In light of *Assurant*, which, to be fair to Linear had not been decided when the application was issued, it is now common ground that the court must decide whether the Ombudsman's application of the law to the facts was wrong, not whether it was reasonable. As in *Assurant* there is no relevant dispute of fact material to the question of statutory construction.

34. The jurisdictional rules in DISP are to be "read as a whole", with each provision "construed in the light of its overall purpose" (*Official Receiver v Shop Direct Finance Co Ltd* [2023] EWCA Civ 367 at [46].

35. The authorities relevant to a challenge to the approach of the Ombudsman's approach to redress and ss.228(2) and 229(2) FSMA 2000 make clear that the Ombudsman is not required to determine complaints in accordance with the common law (*R.(on the application of IFG Financial Services Ltd) v Financial Ombudsman Service Ltd* [2005] EWHC 1153 (Admin), [2006] 1 B.C.L.C. 534, [2005] 5 WLUK 434 and *R. (on the application of Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642, [2008] Bus. L.R. 1486, [2008] 6 WLUK 233), as followed in *R. (on the application of Charles Street Securities Europe LLP) v Financial Ombudsman Service* [2023] EWHC 448 (Admin); [2023] 2 WLUK 203 (*Charles Street (No. 2*)) per Heather Williams J:

> "…there is no obligation on the Ombudsman to apply civil law principles, whether in relation to upholding the complaint or in relation to the assessment of the award. She is required to take common law principles into account in the sense of considering them; she is not required to provide a detailed, legalistic analysis

> of her reasons for departing from the common law, if she does so. "[110]

36. The Ombudsman is required:

> "to indicate that they have considered the common law principle that is urged upon them but in the circumstances they have concluded that the fair and reasonable outcome is otherwise for reasons that they identify." [112]

After the hearing of this case the Court of Appeal handed down its judgment in *Options UK Personal Pensions LLP v Financial Ombudsman Service Ltd* [2024] EWCA Civ 541 on 20 May 2024 confirming the correctness of this approach at [73]-[79] (per Asplin LJ).

37. An error of law or irrationality is required to establish a successful challenge, such as in *Garrison Investment Analysis, R (on the application of) v Financial Ombudsman Service* [2006] EWHC 2466 (Admin), where a decision of the Ombudsman as to redress was quashed because "there was no logical connection between the redress ordered and the error found" [26].

The facts

38. At the time, Professor Willcocks had been employed at the London School of Economics for 12 years and is now an Emeritus Professor. He specialises in robotic automation and his expertise is not directly in finance. He had an investment portfolio of around £800,000 with approximate annual income from all sources of £220,000 derived from savings and investments and an approximate total net worth of £2.2 million. He had no debts.

39. He was introduced to Linear by a Mr Robert Craig who was employed by Impact Wealth Solutions ("IWS") which was an appointed representative of Linear and introduced clients to Linear for managed accounts. Professor Willcocks disputed Linear's contention in its Statement of Facts that he had been a client of Mr Craig both prior to and after Mr Craig's employment with IWS. He disputed Linear's assertion that Mr Craig had continued as his financial advisor after Mr Craig's employment with IWS had ended and Professor Willcocks' relationship with Linear had ceased.

40. After being introduced to Linear in or around August 2017, as noted above, Professor Willcocks completed an AOF, entered into the MDAA, completed the client application form and Power of Attorney for Linear's selected broker on 5 December 2017 and on 8 January 2018 deposited £100,000 with SAXO for investment into Linear's Pembroke strategy.

The Decision

41. As set out briefly above, Professor Willcocks submitted his Complaint to Linear on 24 May 2019 which eventually led to the Decision of the Ombudsman on 29 of April 2022 which sets out the full history of the Complaint. In it, Professor Willcocks is referred to as Mr W.

42. Linear accepted Professor Willcocks as an elective professional client based on the AOF in which he had set out his previous investment experience. The investigator appointed to consider the Complaint after it had been rejected by Linear upheld the Complaint on the basis that Professor Willcocks was wrongly treated as an elective professional client. He was not satisfied that Linear had carried out an adequate assessment of Professor Willcocks' expertise, experience and knowledge as required by COBS. Following Linear's challenge to the upholding of the Complaint by the investigator, the matter was referred to the Ombudsman, Philip Gibbons. He issued two provisional decisions and the final Decision upholding the complaint which helpfully incorporated the earlier provisional decisions and summarised the submissions made by both parties during the process. It repays a careful and full reading. The main focus of attention was on whether Linear had been entitled to categorise Professor Willcocks as an eligible complainant and although Linear did not agree with the Ombudsman's conclusions on the substance of the complaint - misleading performance information, account fees and mismanagement – they are not under challenge in these proceedings, so are not necessary to recite in full here.

43. The Ombudsman correctly noted that Linear may only treat a client as an elective professional client if it has complied with the version of COBS 3.5.3R in force at the material time and complied with both the qualitative and quantitative tests, as well as satisfying the procedural requirements, set out therein.

44. The Ombudsman considered the AOF which required Professor Willcocks to provide his employment details and the length of time he had been in that employment. His answers showed that he worked in education and had been with the same employer for the past 12 years. He gave the approximate size of his investment portfolio as £800,000. In terms of investment experience, he had to provide tick box answers to questions about equities, CFDs, alternative investments/funds, options, futures and FX. He ticked "yes" for experience in equities, CFDs and alternative investments/funds, but "no" for options, futures and FX.

45. For both equities and CFDs Professor Willcocks had to provide further tick box answers for the length of activity, frequency of trades and average transaction size. He ticked the same boxes for both equities and CFDs for the length of activity (two years plus) and number of transactions a year (40 – 80). For average transaction size there were three options and he ticked the third option for both. However, for equities this was by reference to consideration (measured in £000s) to which he ticked 25+, whereas for CFDs it was by reference to number of lots, to which he ticked 20+.

46. For alternative investments/funds, he just had to tick to confirm if he had experience in fixed income, bonds and funds and he ticked to confirm experience with all three. He also had to identify the capacity in which he traded – execution-only, advisory, or discretionary managed by a third party in respect of those investments he had experience of. He ticked both execution–only and advisory for equities, CFDs and alternative investments/funds.

47. The Ombudsman correctly identified that the question was whether the answers provided enough information to enable Linear to undertake an adequate assessment. He noted that such tick box questions are not uncommon as one of the tools used by firms when obtaining information about a client. [43] He concluded that

> "I am not satisfied that they amount to much more than self-certification on the part of the client and I am not persuaded that tick box answers alone amount to an adequate assessment of a client's experience, knowledge and expertise, or provide enough information to give Linear reasonable assurance that he was capable of making his own investment decisions and understanding the risks involved."[44]

48. The Ombudsman further noted that although the AOF itself required a potential client to attach appropriate evidence to support categorisation, Professor Willcocks did not provide any evidence to support the tick box answers about his trading experience he had given, such as evidence of trades that showed he had previously traded in CFDs.

49. Furthermore, the Ombudsman found that the tick box answers and information in the AOF put Linear on notice that it needed further evidence and to make further enquiry. The form required Professor Willcocks to provide a brief explanation of his experience and knowledge in relation to the transactions the account manager planned to execute. The transactions planned were to trade CFDs, yet the information provided by Professor Willcocks was that he had invested for more than 15 years in blue chip stocks. Such an answer clearly did not demonstrate evidence of his experience and knowledge in relation to CFDs, but rather was suggestive of the opposite and that he did not have such experience.

50. The Ombudsman also noted that there was conflicting information in the broker application form – although Professor Willcocks had ticked to confirm he had worked in the financial sector for at least a year in a position which required knowledge of the nature of, and risk involved with, the type of trading Linear carried out, this was contradicted by the employment information provided. His employment history stated that he had been employed not in the financial sector, but in education. The Ombudsman concluded that Linear was on notice that it needed to clarify the information it had been given because of the inconsistency. Although Linear had suggested in its submissions and representations over the process of the Ombudsman investigation of the Complaint that Professor Willcocks had made reference to his trading history on "numerous occasions", no evidence had been provided by Linear to support their assertion. The Ombudsman accepted that Professor Willcocks had made reference to experience in CFDs in his AOF and his account opening form for both SAXO and EDX, but this was mere repetition about having carried out 40 to 80 CFD transactions. Linear could provide no evidence that it had verified the details during Professor Willcocks' onboarding process. The Ombudsman concluded:

> "57. It was for Linear to carry out an adequate assessment of Mr W's [the ombudsman's reference to Professor Willcocks] investment knowledge and experience. It relied solely on the tick box answers in providing information about Mr W's 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. Mr W 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 Mr W 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.
>
> 59. All in all I am not satisfied that Linear did enough to satisfy the qualitative test."

51. As to the quantitative test required under COBS 3.5.3R in which a client must satisfy any two of the three criteria identified, the Ombudsman found that Professor Willcocks satisfied one criteria only – the requirement to have a portfolio that exceeded €500,000. As the Ombudsman found that Professor Willcocks did not have previous CFD experience, he would not have been able to provide evidence that he had carried out transactions on the relevant market in significant size (see COBS 3.5.3R(2)(a). As to the third criteria, he had not worked in the financial sector and could not therefore satisfy that criteria.

52. The Ombudsman concluded:

> "64. In summary, for the reasons I have set out above, I remain of the view that Linear didn't carry out an adequate assessment before classifying Mr W as an elective professional client and as such he wasn't appropriately classified as such. I am also of the view that if Linear had taken adequate steps in relation to the classification of Mr W as an elective professional it is more likely than not it would have concluded he shouldn't be so classified."

53. Having concluded that, the Ombudsman went on to uphold his Complaint. He found that it was more likely than not that Professor Willcocks was misled into investing all of the funds into the Pembroke strategy as a result of it being described as medium risk when it was a high risk investment. He was not satisfied that Professor Willcocks would have invested in the strategy if he had known that it was high risk [75]. He also found that there had been failures to provide the required information in relation to costs and charges as well as likely returns and other misleading information. He was also not satisfied that the way Linear had managed Professor Willcocks' account had paid due regard to the best interests of the client as required by Principles 2 and 6 of the FCA's high-level principles (see for example [103], [109], [115]).

Fair compensation

54. Having concluded that Linear had mismanaged Professor Willcocks' account and failed to act fairly and reasonably in its dealings with him by, inter-alia, categorising him as an elective professional client, the Ombudsman next considered the question of fair compensation. In his first provisional decision, the Ombudsman had considered

Professor Willcocks was partly responsible (25%) for his losses since he had not completed the AOF as accurately or as carefully as he should have done [120]. In light of the further submissions however, in the Ombudsman's second provisional decision and the Decision itself, he concluded that he had given too much weight to Professor Willcocks' incorrect information in the AOF. He reasoned that Linear should not have relied on what was in effect self-certification by Professor Willcocks as to his knowledge and experience. The onus was on Linear properly to assess his knowledge and experience and Linear had failed to do so. It failed to obtain sufficient information about the size of Professor Willcocks' trades to satisfy the quantitative test and should not have categorised him as an elective professional client in any event. He therefore concluded that Linear was responsible for all its client's losses. This problem was compounded by Linear's failure to provide clear and accurate information such that it would not be fair or reasonable for Professor Willcocks' redress to be reduced in any event [122]. He reasoned:

> "123. Put simply, if Linear had complied with its regulatory obligations Mr W 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, I have found that it mismanaged his account once it started providing a service to him. Given these various failings on the part of Linear I now think it is fair and reasonable for it to pay the redress in full."

55. The Ombudsman rejected Linear's submissions that Professor Willcocks had been correctly categorised as an elective professional client, but in any event the redress payable as a result of the information failings would be the same as the redress payable for the wrong client classification: it made no difference to the outcome of the complaint or the redress payable [137 and 138]. He also rejected an argument that he was precluded from considering the categorisation of Professor Willcocks as a client since Professor Willcocks had not himself raised it. He concluded that the inquisitorial remit allowed the Ombudsman to take a broader approach to a complaint, beyond the specific issues raised by the complainant, where appropriate and it was appropriate in the circumstances of this case [140].

56. He also considered Linear's submission that Professor Willcocks had been contributorily negligent and his compensation be limited according. He found as follows:

> "155. The findings in my second provisional decision identified several failings by Linear. In short I have found that; Mr W 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 Mr W 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 Mr W 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 Mr W 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.
>
> 159. Linear has also suggested that there is no logical connection between the breaches I have identified and the redress awarded. It has provided no explanation for this assertion but I don't agree that the redress is in some way illogical. I am satisfied that the redress I have awarded is fair and I have explained why I have used the benchmark that is set out."

57. However the Ombudsman rejected Professor Willcocks' application for an award for distress and inconvenience since it had only been raised late in the day which was suggestive of his not having experienced too much distress and inconvenience from the experience.

58. The Ombudsman calculated compensation by a comparison between the performance of the Pembroke strategy Professor Willcocks' portfolio was invested in and a benchmark. The benchmark chosen was the FTSE UK Private Investors Income Total Return Index to be calculated from the date of investment to the date surrendered together with 8% simple interest per year on any loss from the end date to the date of settlement. Linear was ordered to compare the performance of their client's investment in the Pembroke strategy with that of the identified benchmark and pay the difference between the "actual value" and the "fair value". If the actual value was greater than the fair value no compensation would be payable. The "actual value" is the actual amount paid from the investment at the end date. The "fair value" is what the investment would have been worth at the end date had it produced a return using the benchmark. Any additional sum that Professor Willcocks paid into the investment should be added to the fair value calculation at the point it was actually paid in. Any withdrawal, income or other payment out of the investment should be deducted from the fair value calculation at the point it was actually paid so that it ceases to accrue any return in the calculation from that point on.

59. The Ombudsman had four reasons for choosing this method of compensation. Firstly Professor Willcocks wanted capital growth and was willing to accept some investment risk. Secondly the FTSE UK Private Investors Income Total Return Index is a mixture 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. Thirdly, although it is called an income index, the Ombudsman considered that the mix and diversification provided within the index was close enough to allow him to use it as a reasonable measure of comparison given Professor Willcocks' circumstances and risk attitude. The additional interest was for his being deprived of the use of any compensation money since the end date.

Submissions

60. For Linear, Mr McMeel KC's central challenge was to the Ombudsman's conclusion that Professor Willcocks was an eligible complainant (grounds 1 and 3). He challenged the Ombudsman's decision to address the issue of client classification, when that did not form part of Professor Willcocks' Complaint (ground 1) and his criticism of Linear's own assessment (ground 3).

61. Mr McMeel KC conceded that whilst Linear must accept in light of *Assurant*, that the Court is being asked to decide whether the Ombudsman's application of the law to the facts was wrong, not whether it was reasonable, the construction of DISP rules is a matter of statutory construction and therefore a question of law. As a matter of law the Ombudsman had erred in failing to acknowledge the central importance of the contract that Professor Willcocks had willingly signed and had overlooked fundamental and basic principles of contract law and the status of a signed agreement. The crucial importance of the signature rule in investment cases is trite law. The caveat emptor principle is enshrined in s.1C(2)(d) FSMA 2000. Linear was entitled to rely on Professor Willcocks' assertion that he was an elective professional client and that he had the relevant experience, expertise and knowledge that he said he had when he signed the AOF and other forms on 5 December 2017.

62. The Ombudsman was irrational in deciding that Professor Willcocks could be both a professional client for the purposes of investment business and simultaneously a consumer in respect of his portfolio. Seeking to ride two horses simultaneously had the inevitable result that the Ombudsman fell off both and had produced a flawed decision.

63. Professor Willcocks was a wealthy, sophisticated, highly intelligent investor as demonstrated by the scale of his assets and his academic standing. He was hardly the vulnerable sort of investor that the FSMA 2000 was aimed at protecting. Although he had not worked directly in finance, he has an international reputation in business technology and had even taken part in YouTube videos on technology and capital markets with his financial advisor, Robert Craig, subsequent to this Complaint, thus holding himself out in the online world as something of an expert. He could not now go back on the contents of his AOF and associated documentation that Linear was entitled to rely on when deciding whether to accept him as a client.

64. It was highly significant that Professor Willcocks did not challenge his elective professional client status in his detailed and articulate Complaint. He was not a consumer and Linear had correctly categorised him as an elective professional client and it's AOF and its onboarding exercise complied with its regulatory requirements under COBS.

65. The Ombudsman could not lawfully interfere with Linear's client classification, based on the information provided by its client, which it had reached after a properly

conducted assessment exercise and was a decision that it was entitled to reach under the discretion allowed to it in COBS 3.5.3R. He insisted on being treated as a professional client so that he could access the opportunity to invest in Linear's products and benefit from their investment expertise. It was irrational to infantilise an eminent scholar and go behind what he himself had said about his investment experience, knowledge and expertise.

66. As to grounds 4 and 5, these would fall away entirely if grounds 1 and 3 succeeded as then Professor Willcocks would not have been an eligible complainant. But if Linear did not succeed on grounds 1 and 3, the measure of redress (ground 4) was irrational and legally flawed and could not stand. The benchmark chosen was too mainstream and conservative. It was telling that Professor Willcocks had himself identified a "hedge fund" comparison in his Complaint, which are high risk alternative investments and would be a more apt comparison.

67. Furthermore the Ombudsman's refusal to request disclosure from Professor Willcocks of where he invested what remained of his £100,000 when he parted company with Linear meant that the Ombudsman deprived himself of crucial information that would have accurately identified Professor Willcocks' appetite for risk to enable a rational benchmark to be chosen.

68. Finally the Ombudsman's reasons, such as they were for adopting a standard benchmark were inadequate (cf *Garrison Investment Analysis, R (on the application of Garrison Investment Analysis) v Financial Ombudsman Service* [2006] EWHC 2466 (Admin)).

69. The Ombudsman's decision not to make a reduction for contributory fault was also irrational. Professor Willcocks was the author of his own misfortune (not that it was accepted by Mr McMeel that there was anything misfortunate about Professor Willcocks' decision to invest with Linear, he had merely not given it long enough to see the benefit). Mr McMeel submitted that the Ombudsman's first provisional decision was correct – he only had himself to blame by giving Linear misleading and inaccurate information about his investment expertise and knowledge of CFDs. The Ombudsman should have properly analysed the law of contributory negligence. He had failed to do so, and his determination that Professor Willcocks had not contributed to any alleged losses was irrational.

70. For the Ombudsman, Mr Kosmin argued that the Ombudsman was right for exactly the reasons he gave in his meticulous and detailed Decision. But in any event he did not need to show that the Ombudsman was right, or even reasonable, merely that he had been neither irrational nor erred in law.

71. Mr McMeel had not, and indeed could not, challenge the Ombudsman's clear findings of fact which entitled him to reach the Decision that he did for the reasons that he had given. The exercise is something of an iterative process and the fact the Ombudsman changed his mind from the first to the second provisional decision on the issue of contributory fault merely demonstrated that he had kept an open mind and fully considered the representations and submissions by both parties and adjusted his conclusions to take the parties' points on board. Linear had mischaracterised the careful

Decision of the Ombudsman which fully set out the rational basis for the decision in accordance with its obligations under the statute and the DISP Rules.

72. Linear overlooked the clear words of COBS 3.5.3R which required Linear to satisfy itself that a client can properly be regarded as an elective professional client only by undertaking "an adequate assessment" (COBS 3.5.3(1)) and the Ombudsman's finding that Linear had not done so could not be faulted.

73. The Ombudsman did not go beyond his remit given his inquisitorial powers, indeed had he failed to do so he could well have been vulnerable to a successful challenge by Professor Willcocks.

74. The measure of redress and decision on contributory fault were decisions well within the scope of the Ombudsman's powers and appropriate and aptly chosen for the reasons set out in the Decision. The Ombudsman was entitled to conclude that he did not need to know what Professor Willcocks had done with what was left of his investment with Linear after it had been returned to him.

Analysis

75. It is quite correct, as Mr McMeel observes, that complaints may only be brought by "an eligible complainant". An eligible complainant is someone who comes within the definition in DISP 2.7.3R There is no additional requirement of vulnerability, low intelligence or particular naivete. A "consumer" is a type of eligible complainant. There is a statutory definition of a "consumer" under DISP 2.7.3(1)R that an individual either meets or does not meet.

76. The Ombudsman has a broad inquisitorial remit and is obliged by DISP 3.2.1R to "have regard to whether a complaint is out of jurisdiction". In order to determine whether the complaint was out of jurisdiction it was necessary for the Ombudsman to consider if Professor Willcocks was an eligible complainant and whether he was a consumer under DISP 2.7.3R. Furthermore, the Ombudsman's jurisdiction is "inquisitorial not adversarial" (see *R (Williams) v Financial Services Ombudsman* [2008] EWHC 2142 (Admin) [26]). It was necessary to consider whether the complaint was in scope. Indeed it had been raised by Professor Willcocks in his Complaint, albeit obliquely, when he queried Linear's purported attempt to exclude complaints to the Ombudsman in the contractual terms.

77. There can therefore be no justified criticism of the Ombudsman considering whether he could entertain Professor Willcocks' Complaint.

78. But how about the way in which the Ombudsman answered the question (issue (i) identified in paragraph 5 above)? The difficulty for Mr McMeel in his carefully constructed argument and oral submissions on the law of contract and reference to many of the 25 cases in the 2 volume authorities bundle, is thar the meat of the case was in the statutory and regulatory provisions in FMSA 2000, COBS and DISP, and not in cases such as *L'Estrange v Graucob* [1934] 2 KB 394. DISP 2.7.9AR expressly states that DISP 2.7.9R(1) and DISP 2.7.9.R(2) (which set out the exceptions - those who are not eligible complainants) "do not apply to a complainant who is a consumer in relation to the activity to which the complaint relates". In other words, if DISP 2.7.9AR applies the person will be an eligible complainant as an exception to the exception. The

Ombudsman did not err in finding that Professor Willcocks was a consumer in relation to his investment in Linear's Pembroke strategy.

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.

82. Although the construction of DISP Rules is a matter of statutory construction, Linear has failed to identify how the Ombudsman had wrongly construed the DISP Rules. The Ombudsman was not trying to ride two horses in the circus act described by Mr McMeel, but was merely applying the wording of DISP 2.7.9AR which states that it is possible both to satisfy the definition of a "professional client" and, notwithstanding, be a "consumer" (and so an "eligible complainant"). DISP 2.7.9AR provides that DISP 2.7.9R(2) does "not apply to a complainant who is a consumer in relation to the activity to which the complaint relates." It is perfectly possible for a person to be a consumer for some purposes and not others. Ground 1 therefore fails.

83. Ground 3, alleges wrongful interference in the client classification assessment. The precise issue of law identified by the parties was whether the Ombudsman could only review Linear's assessment of Professor Willcocks' investment sophistication if Linear's assessment was irrational. It was submitted that in order to entitle an investment firm such as Linear to classify an investor as an elective professional client, the individual has to express a wish, untainted by duress or undue influence to be treated as a professional client and the firm has to characterise him as a professional on the basis of the information that the client provides. However the central difficulty with Linear's submission is that it bore little relation to the wording of COBS 3.5.3R(1) which requires the firm to:

> "…undertake 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")".

84. The question is whether COBS 3.5.3R(1) had been complied with and the answer that the Ombudsman found, and was entitled to find, was that the qualitative test had not been complied with. In *Spreadex Ltd v Sekhon* [2008] EWHC 1136 (Ch) Morgan J held:

> "… in determining whether there is "appropriate" classification of a client as an intermediate customer where the classification procedure adopted is under COB 4.1.9 R [an equivalent provision to COBS 3.5.3R] one does not ask whether the client has the characteristics, objectively considered, of an intermediate customer but one instead asks whether COB 4.1.9 R has been complied with." [128]

85. See also *Bank Leumi (UK) Plc v Wachner* [2011] EWHC 656 at §220; *Wilson v MF Global* [2011] EWHC 138 (QB) at §24; and *R (Charles Street Securities Europe LLP) v Financial Ombudsman Service (Charles Street No, 1)*[2022] EWHC 2401 (KB) at§§ [48], [53] and [65]. To the extent that this line of authorities sit uneasily with *R (TF Global Markets (UK) Ltd v Financial Ombudsman Service* at [2020] EWHC 3178 (Admin), the consistent line of authority from *Spreadex* is preferred.

86. The Ombudsman was not permitted only to review Linear's client classification assessment on the basis of irrationality, and ground 3 must therefore fail.

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 an 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. Similarly the Ombudsman's decision not to seek further disclosure from Professor Willcocks was not irrational. The issue for the Ombudsman was how to put right what had gone wrong in 2017. His Decision was made some 5 years after Professor Willcocks became a client of Linear. Information about Professor Willcocks' investments following termination of his relationship in February 2019 was not relevant. Though that information was requested and then provided by Professor Willcocks to the Ombudsman in the course of the Complaint in any event. Professor Willcocks' investment appetite may well have changed after his experience with Linear. What relevance to the calculation of fair compensation would it have had if he had placed his returned money from Linear under the mattress in March 2019? Ground 4 also fails.

88. Ground five: contributory fault. 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 AOF 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. Ground 5 must also fail.

89. It follows that issue 5, the Ombudsman's alternative reliance on s.31(2A) SCA 1981, does not arise.

Conclusion

90. All grounds of the claim for judicial review are dismissed.