Neutral Citation Number: [2023] EWCA Civ 367

Case No: CA-2022-001430

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Stephen Houseman KC (sitting as a Deputy High Court Judge)
[2022] EWHC 1355 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 April 2023

Before :

LORD JUSTICE SINGH
LADY JUSTICE CARR
and
LORD JUSTICE NUGEE

- -

Between :

THE OFFICIAL RECEIVER	**Defendant/ Appellant**
- and -	
SHOP DIRECT FINANCE COMPANY LIMITED	**Claimant/ Respondent**

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- -

Michael Gibbon KC and Maxim Cardew (instructed by **Legal Services Directorate, Insolvency Service**) for the **Appellant**
Javan Herberg KC and Oliver Assersohn (instructed by **Weil, Gotshal & Manges (London) LLP**) for the **Respondent**

Hearing dates: 8 & 9 March 2023

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on 5 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh:

Introduction

1. This appeal concerns the time limit for referring complaints to the Financial Ombudsman Service ("FOS") under the Financial Conduct Authority ("FCA") Dispute Resolution: Complaints Sourcebook ("DISP") in respect of mis-sold payment protection insurance ("PPI"), in particular where a person to whom PPI was mis-sold has subsequently become bankrupt. DISP is a statutory scheme found in the FCA Handbook ("the Handbook"). It is delegated legislation made under the Financial Services and Markets Act 2000 ("the FSMA 2000").

2. I will describe the scheme set out in DISP in more detail later but will refer to the key provisions on limitation now in order to explain the issue which arises on this appeal. DISP 1.8.1R provides that a respondent which receives a complaint outside the time limits for a referral to the FOS (as set out in DISP 2.8) may reject the complaint without considering the merits, but must explain this to the complainant in a final response.

3. The central provision which falls to be construed in this case is DISP 2.8.2R(2)(b). This provides that the Ombudsman cannot consider a complaint if the complainant refers it to the FOS more than "three years from the date on which the *complainant* became aware (or ought reasonably to have become aware) that he had cause for complaint; …" (emphasis added). The issue in this case is whether the reference to "complainant" in that provision is a reference to (1) the bankrupt or (2) the Official Receiver ("OR"), in his capacity as trustee in bankruptcy.

4. Mr Stephen Houseman KC, sitting as a deputy High Court judge ("the Judge"), agreed with the Respondent and granted a declaration that the relevant awareness is that of the OR. The OR now appeals and submits that the Judge should have concluded that the relevant awareness is that of the bankrupt. Permission to appeal to this Court was granted by the Judge himself in view of the importance of the legal issue and the fact that there is no previous authority on it.

5. At the hearing we heard submissions from Mr Michael Gibbon KC, who appeared with Mr Maxim Cardew for the Appellant, and from Mr Javan Herberg KC, who appeared with Mr Oliver Assersohn for the Respondent. I express the Court's gratitude to them all and those instructing them for the preparation and presentation of this appeal.

Factual Background

6. From the 1980s PPI was mis-sold to private customers by financial institutions on a massive scale. Between 2011 and April 2020, over 32.4 million complaints about PPI had been made and £38 billion had been paid in redress. A report by the FCA in 2020 described this as "by far the largest consumer redress exercise in the UK's history."

7. Customers who were mis-sold PPI are entitled to redress under DISP. Numerous individuals who were mis-sold PPI subsequently went bankrupt, and it is common

ground that any compensation obtained by way of redress falls into the bankrupt's estate, to be distributed in accordance with the provisions of the Insolvency Act 1986 ("the 1986 Act").

8. The rules in DISP were amended in 2017 so as to insert a "backstop deadline" for PPI mis-selling complaints of 29 August 2019.

9. The Respondent is the UK financial services arm of The Very Group. It is a consumer credit lender, which from the mid-1980s to approximately 2014 sold various forms of PPI to its customers.

10. The OR is the trustee in bankruptcy of hundreds of thousands of bankrupts and in that capacity has referred mis-selling complaints to a large number of financial institutions which sold PPI. By the end of the 2020-21 financial year the OR had recovered over £500m in respect of mis-selling claims.

11. In May 2019 the Appellant indicated its intention to bring a significant number of PPI mis-selling complaints against the Respondent, seeking compensation for PPI policies held by bankrupts before their bankruptcy orders were made. On 29 August 2019, i.e. the backstop deadline, the Appellant requested that the Respondent treat its correspondence as an expression of dissatisfaction in relation to any PPI policy identified as held by the bankrupt prior to their date of bankruptcy.

<u>The proceedings in the High Court</u>

12. The Respondent brought a Part 8 claim in the High Court, seeking a declaration that the relevant awareness for the purposes of DISP 2.8.2R(2)(b) is that of the OR.

13. There was a second, parallel claim brought by Canada Square Operations Limited and Citifinancial Europe Limited, which raised the same primary issue as in the present case. That claim was compromised on confidential terms a few days before trial. The witness evidence filed in that claim stands as evidence in the present case.

14. In the Part 8 Claim Form the Respondent identified the dispute between the parties as to the correct construction of DISP 2.8.2R(2)(b) but then asserted in the alternative that:

> "even if it is the bankrupt's awareness that is relevant for the purposes of DISP 2.8.2R(2)(b), the bankrupt would have become aware (or ought reasonably to have become aware) that he had cause for complaint at the time of bankruptcy or shortly thereafter (this arises from the *attribution* of the Official Receiver's knowledge to the bankrupt) …" (Emphasis added)

15. The Respondent confidently asserted that the claim did not give rise to any dispute of fact. Accordingly, it would appear that this alternative declaration, like the primary one, was sought as a matter of pure law.

16. In the High Court proceedings, which at that time included the parallel claim, the parties prepared an Agreed Case Memorandum for the purpose of the Case Management Conference to be held on 26 November 2021. The Respondent's alternative case was again set out, at para. 10 of that Memorandum.

17. In preparation for the hearing before the Judge, the parties, at that time still including those in the parallel claim, prepared an Agreed List of Common Ground and Issues. It was agreed, at para. 6, that a trustee in bankruptcy is not, as a matter of general law, the bankrupt's agent or authorised to act for the bankrupt. It was also agreed, at para. 8, that the rules establishing the eligibility of complainants to pursue complaints before the FOS are made under section 226 of the FSMA 2000.

18. In the list of issues, the primary issue was identified, at para. 1, as being whether the relevant awareness for the purpose of DISP 2.8.2R(2)(b) is that of the OR or that of the bankrupt. At para. 3(2), the issue raised by the Respondent's alternative case was summarised as follows:

> "If the relevant awareness for the purposes of DISP 2.8.2R(2)(b) is that of the bankrupt, whether it is the case that the bankrupt would have become aware (or ought reasonably to have become aware) that he had cause for complaint at the time of bankruptcy or shortly thereafter."

19. Further, at para. 4, it was said that points that may arise in answering those questions included, at sub-para. (2):

> "If awareness of individual bankrupts is what is material, whether awareness (if any) on the part of the Official Receiver can or should be *attributed* to individual bankrupts, and if so on what basis." (Emphasis added)

20. In the skeleton argument on behalf of the Respondent in the High Court, its alternative case was set out at paras. 87-93. The analysis advanced there was that if, contrary to its primary case, the relevant awareness for the purposes of DISP 2.8.2R(2)(b) is that of the bankrupt, then the knowledge of the OR ought to be "imputed" to the bankrupt. The analysis was conducted in terms of conventional agency law: for example the well-known textbook on the subject, Bowstead and Reynolds on Agency, was quoted.

21. It is clear therefore that the Respondent's case before the High Court was primarily that the relevant awareness is that of the OR; but that, in the alternative, even if the relevant awareness is that of the bankrupt, the awareness of the OR should be "attributed" or "imputed" to the bankrupt. It is common ground that the relationship between the OR and the bankrupt is not the conventional one between agent and principal. Nevertheless it is also common ground that the OR is "authorised by law" to act "on behalf of" the bankrupt in this context: see para. 19 of the judgment below.

22. However, the Respondent's alternative case was not pursued (at least not with any vigour) before the Judge; and it certainly formed no part of the Judge's reasoning. In the result the Judge granted the primary declaration sought by the Respondent but declined to grant any further declaratory relief in the exercise of his procedural management and/or equitable remedial discretion: see paras. 64-68. There has been no appeal to this Court against that aspect of the Judge's decision. Nor has the Respondent's alternative case as to attribution or imputation of the OR's knowledge to the bankrupt been revived in the Respondent's Notice (although there are other grounds raised in that Notice, which I will address below).

The judgment of the High Court

23. The Judge set out a helpful summary of the nature of the office of the OR at paras. 8-10. The main features are as follows:

(1) The OR is a statutory office created in 1883. Appointments are made by the Secretary of State pursuant to section 399 of the 1986 Act.

(2) The OR is also an officer of the court with certain investigatory powers: see section 400 of the 1986 Act.

(3) The office is held, and its functions discharged, by 16 individuals at present.

(4) Upon the making of a bankruptcy order, the OR becomes the first trustee in bankruptcy unless the court appoints another trustee: see section 291A of the 1986 Act. The bankrupt's estate vests in the OR immediately and automatically upon such appointment, i.e. by operation of law and without any conveyance or assignment or transfer: see section 306 of the 1986 Act.

(5) Like any trustee in bankruptcy, the OR holds the estate on a statutory purpose trust but is not a trustee for the purposes of the Trustee Act 1925; it is not an agent of, or for, the bankrupt in any recognised sense. It steps into the shoes of the bankrupt, including for the purposes of bringing or defending legal proceedings in its own name and capacity.

(6) The OR's paramount function is to "get in, realise and distribute the bankrupt's estate", pursuant to section 305(2) of the 1986 Act. The bankrupt's estate, so far as material, consists of all property belonging to or vested in the bankrupt at the commencement of the bankruptcy: see section 283(1) of the 1986 Act. The concept of "property" is defined very widely in section 436(1) of the 1986 Act, to which I will return.

24. The Judge's conclusions on the central issue in this case can be found at paras. 45-46:

> "45. The '*complainant*' whose awareness matters in the context of limitation is, therefore, the person who refers the relevant complaint with requisite capacity and who (therefore) has the relevant cause for complaint as the vested holder of the statutory right or rights relating to such complaint and any ensuing award. In the scenario posited for present purposes,

> that is [the OR] and not the bankrupt consumer – even if the latter's actual or constructive awareness may have pre-dated that of the former in any particular instance."
>
> "46. Turning to the position of [the OR], it seems to me that whatever statutory rights exist in relation to bringing a complaint and obtaining redress through FOS they each constitute property as so widely defined in s.436(1) IA86. The entirety of such entitlement vests in [the OR] by operation of law upon its appointment. Whether this is a single composite right or two (or more) distinct rights does not ultimately matter: the same characterisation applies on either analysis, in my judgment. The statutory right (or each of them, if distinct) is a '*thing in action*' and/or an '*interest ... incidental to property*', namely the underlying ppi policy."

Grounds of Appeal

25. In formal terms there are five grounds of appeal, although the Appellant's written and oral submissions did not refer to them separately in this way:

Ground 1: The Judge erred in his conclusion as to the natural meaning in the context of DISP of the word "complainant" in DISP 2.8.2R. He should have concluded that (in the relevant context) it meant the bankrupt, rather than the trustee in bankruptcy.

Ground 2: The Judge erred in concluding that determining whether the trustee in bankruptcy was "authorised by law" to bring a complaint within the meaning of DISP 2.7.2R required a detailed analysis of (a) what did and did not vest in the trustee in bankruptcy as a matter of insolvency law (in particular s 283(1) and the definition of "property" in s 436(1) of the IA86), and (b) the nature of authorisation required as a matter of the technicalities of insolvency law. He should have concluded that it was the clear intention of the draftsperson that the trustee in bankruptcy would (by virtue of his appointment) be "authorised by law" for the purposes of DISP 2.7.2R to bring a complaint "on behalf of" the bankrupt.

Ground 3: If (contrary to Ground 2 above) the Judge was correct to conclude that determining whether the trustee in bankruptcy was "authorised by law" to bring a complaint "on behalf of" the bankrupt required a detailed analysis of insolvency law, then he should nevertheless have concluded that the trustee in bankruptcy was so authorised.

Ground 4: The Judge erred in concluding that it was repugnant for the bankrupt to continue to be identified as the complainant within the meaning of DISP 2.8.2R but for any redress for mis-selling to vest in the trustee in bankruptcy. He should have concluded that the relevant question for determination was the legislative intention as discernible from the drafting of DISP; and if (as submitted by the OR) that was the correct analysis of the legislative intention, then there was no reason in law to prevent effect being given to that intention.

Ground 5: In all the circumstances, the Judge erred in declaring that the relevant awareness was that of the OR as trustee in bankruptcy.

The FOS

26. The introduction to DISP makes it clear that:

(1) The complainant is expected to complain initially to the respondent, which will usually be the firm alleged to have mis-sold the PPI policy; and may then complain to the FOS.

(2) The jurisdiction of the FOS includes both a compulsory jurisdiction and a voluntary jurisdiction. In the present case we are concerned with the compulsory jurisdiction.

27. 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."

28. DISP 2.7.2R provides that:

> "A complaint may be brought on behalf of an eligible complainant (or a deceased person who would have been an eligible complainant) by a person authorised by the eligible complainant or authorised by law. It is immaterial whether the person authorised to act on behalf of an eligible complainant is himself an eligible complainant."

29. DISP 2.7.3R defines "eligible complainant" and includes (1) a consumer. At sub-para. (4) it also includes a "trustee of a trust which has a net asset value of less than £5 million at the time the complainant refers the complaint to the respondent". I will return to this when I address the Respondent's Notice.

30. As we have seen, DISP 2.7.2R uses the phrase "on behalf of". In *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61; [2014] 1 WLR 4222, at para. 30, Lord Sumption JSC said that, in their ordinary and natural meaning, the words "on behalf of" import agency. Nevertheless, he accepted that a special statutory context may require the phrase to be read more widely as meaning "in the place of", or "for the benefit of" or "in the interests of". For that proposition he relied on a number of authorities, including *Rochdale Metropolitan Borough Council v Dixon* [2011] EWCA Civ 1173; [2012] PTSR 1336, at paras. 49-50 (Rix LJ).

31. In the present context, it is clear that the phrase "on behalf of" does not refer only to a relationship of agency. It has a broader meaning than that. Nor can it mean "for the

benefit of" or "in the interests of". In my view, in the present context, it has the meaning "in the place of".

32. The origins and key features of the FOS were set out by Arden LJ in *Clark v In Focus Asset Management and Tax Solutions Ltd* [2014] EWCA Civ 118; [2014] 1 WLR 2508, at paras. 17-28. It is unnecessary for present purposes to recite those here save to note that a defining feature of the FOS is that a complainant can choose not only whether to submit his complaint to it in the first place but also whether to accept the decision of the Ombudsman but, if he accepts the determination within the time limit, it is final and binding on both parties. This follows from the provisions of section 228, as amended by the Financial Services Act 2012, in particular subsection (5): see para. 27 in the judgment of Arden LJ. An award that involves the payment of a sum of money can be enforced as a County Court Judgment: see section 229(8)(b), para. 16 of Schedule 17: para. 26 in the judgment of Arden LJ.

33. It is common ground that the Ombudsman's function is to deal with complaints and not legal causes of action: see *R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642; [2009] 1 All ER 328, at para. 80 (Rix LJ). However, this does not prevent the doctrine of *res judicata* applying to an award made by the Ombudsman: that is what this Court decided in *Clark*.

<u>Key provisions of DISP</u>

34. As I have mentioned, the central provision which falls to be construed on this appeal is para. 2.8.2R(2)(b). This provides that the Ombudsman cannot consider a complaint if the complainant refers it to the FOS more than "three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint; …". There are then set out some exceptions to that general rule, which are not material on this appeal.

35. The word "complaint" appears in italics. As the guidance on the Glossary of definitions makes clear, at para. 4, expressions used in the Handbook which are defined in the Glossary appear in italics in the text. An expression which is not shown in the text in italics has its natural meaning unless the context otherwise requires.

36. The word "complainant" is not defined in the Glossary but the word "complaint" is. So far as material that definition is:

> "any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service, claims management service or a redress determination, which:
>
> (a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and

> (b) relates to an activity of that respondent … which comes under the jurisdiction of the Financial Ombudsman Service."

37. It is clear from those provisions, read as a whole, that the word "complainant" is there being used to describe the person who has suffered (or may suffer) financial loss etc. but at the same time contemplates that that person may not be making the complaint because it can be made on their behalf. Accordingly, the word "complainant" is not being used there simply to refer to the person who makes the complaint to the FOS.

38. Appendix 3 to DISP sets out the FCA's Rules and Guidance on Handling PPI Complaints. This was introduced in 2010.

39. In considering the various steps which are set out in Appendix 3, to assist firms in handling PPI complaints, it is clear that, where the word "complainant" is used, it refers to the person to whom the PPI policy was sold. For example, Step 1(2) refers to determining "the way the complainant would have acted if a breach or failing by the firm had not occurred": see App 3.1.2G. App 3.1.3G states that, at Step (1), for some breaches or failings "the firm should presume that the complainant would not have bought the payment protection contract they bought". At (2) it refers to "where the complainant bought a single premium payment protection contract …"

40. App 3.1.5G defines the phrase "historic interest" in the Appendix to mean "the interest the complainant paid to the firm because a payment protection contract was added to a loan or credit product".

41. App 3.2.3G states:

> "A firm may need to contact a complainant directly to understand fully the issues raised, even where the firm received the complaint from a third party acting on the complainant's behalf. …"

42. App 3.6.2E states that:

> "in the absence of evidence to the contrary, the firm should presume that the complainant would not have bought the payment protection contract he bought if the sale were substantially flawed, for example where the firm … (2) did not disclose to the complainant, in good time before the sale was concluded, and in a way that was fair, clear and not misleading, that the policy was optional; …"

43. It seems to me that all of these and other similar references in Appendix 3 clearly use the word "complainant" to mean the person to whom the PPI policy was mis-sold. It clearly cannot refer to the OR or other person who brings a complaint "on behalf of" that person.

Correct approach to the interpretation of the Handbook

44. The FCA Handbook is similar in its drafting style to the Financial Services Authority's Client Assets Sourcebook (CASS), which was considered by this Court in *Re Lehman Brothers International (Europe) (No 2)* [2010] EWCA Civ 917; [2011] 2 BCLC 184. In his concurring judgment Lord Neuberger MR said, at para. 181:

> "… it appears to me that when considering how to interpret CASS7, the following factors are relevant. First, CASS7 must be construed in the light of its overall purpose, namely to protect the 'client money' held by a firm. Secondly, CASS7 must be construed on the basis that it is intended to produce a practical and commercially sensible result. Thirdly, CASS7 must be interpreted bearing well in mind the fact that it is intended to implement, and to comply with, the Directives. Fourthly, if at all possible, different provisions of CASS7 should be interpreted coherently, and different points at issue should be resolved mutually consistently. Fifthly, while such general points are of cardinal importance, the actual wording of CASS7 must ultimately govern any decision as to its effect. …"

45. In the main judgment, Arden LJ said, at para. 18, that the interpretation of particular provisions of such a document must be "an iterative process" but one has to begin somewhere. At paras. 57-58, she summarised the approach to interpretation of such a document as follows:

> "57. The issues on this appeal turn upon the interpretation of the statutory rules of CASS7. The process of interpretation of CASS7 involves assessing the provisions as a whole and testing preliminary conclusions on one provision by reference to the rest of the relevant provisions. There must, as the judge recognised, be an holistic and iterative approach to interpretation. There is a danger of compartmentalisation if issues are split up and dealt with separately. Accordingly, I have sought to condense them as far as possible, and to test my conclusions by reference to the rules of the scheme considered as a whole.
>
> 58. Although CASS7 looks like, and is, a set of rules for market participants and investors, it is also a set of statutory rules. In my judgment, the presentation of the rules in this form serves to remind a court that the rules must be given a sensible and practical construction. The court must bear in mind the overall scheme of the rules and keep in proportion any drafting infelicities. Since the rules are designed to protect investors (see the 2000 Act, s 138(1), set out above), the court should lean against interpretations which result in legal 'black holes'. The court has at least to start out with the view that the drafter

> intended to create a coherent scheme even if this is ultimately disproved in certain respects. The rules should also in my judgment be taken to be grounded in reality. The 2000 Act requires the rules to be the subject of detailed and far-reaching consultation in the market prior to adoption (s 155). It is thus improbable that the FSA was oblivious to the fact that mistakes or worse are made by firms in practice, and that serious mistakes have been made in the past. It can be assumed that the FSA as regulator would seek to ensure that the rules ensured investment protection even where mistakes were made."

46. For present purposes I derive the following propositions from the judgments in *Re Lehman Brothers*:

(1) Ultimately it is the actual wording of a provision that must govern any decision as to its effect.

(2) The Handbook should be read as a whole, taking an holistic and iterative approach, so that a preliminary view on one provision can be tested by reference to the rest of the relevant provisions.

(3) The provision should be construed in the light of its overall purpose.

(4) It should be construed on the basis that it is intended to produce a practical and commercially sensible result. The rules should be taken to be grounded in reality. The court should keep in proportion any drafting infelicities.

<u>The role of the trustee in bankruptcy</u>

47. In *Gabriel v BPE Solicitors* [2015] UKSC 39; [2015] AC 1663, at paras. 9-10, Lord Sumption JSC explained that a trustee in bankruptcy, unlike the liquidator of a company, is personally a party to legal proceedings which he has adopted. The reason is that the assets of the bankrupt at the time of the commencement of the bankruptcy vest in him personally, and the bankrupt has no further interest in them. This rule, which dates back to the beginning of the bankruptcy jurisdiction in England, is now embodied in section 306 of the 1986 Act. It follows that, with the exception of a limited class of purely personal actions, a bankrupt claimant has no further interest in the cause of action asserted in the proceedings. None of this means that the trustee is bound to adopt the action. If he does not adopt it, the action cannot proceed and will be stayed or dismissed if the bankrupt is the claimant: see *Heath v Tang* [1993] 1 WLR 1421.

48. Although it will often be theoretical, in particular where the estate of the bankrupt person is likely to be very small, as a matter of law the bankrupt does retain an interest in the actions of the trustee in bankruptcy because, if there is a surplus after distribution to the creditors, the trustee in bankruptcy holds that surplus on trust for

the bankrupt: see *KK v MA* [2012] EWHC 788 (Fam); [2012] BPIR 1137, at paras. 28-29 (Charles J). The surplus is identified as and when all debts, interests and costs have been paid.

The meaning of "property" in this context

49. The common law definition of property was set out by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, at 1247-1248:

> "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, *capable in its nature of assumption by third parties*, and have some degree of permanence or stability." (Emphasis added)

50. I am doubtful whether the right to make a complaint to the FOS under DISP is capable in its nature of assumption by third parties. However, it must be borne in mind that, in the present context, it is not the common law but the statutory definition of "property" which has to be applied. That definition, which is set out in section 436(1) of the 1986 Act, states that "property":

> "includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property".

As Sir Nicolas Browne-Wilkinson V-C observed in *Bristol Airport plc v Powdrill* [1990] 1 CH 744, at 759: "It is hard to think of a wider definition of property."

51. In *Dear v Reeves* [2001] EWCA Civ 277; [2002] Ch 1, at para. 40, Mummery LJ said that a distinguishing feature of a right of property, in contrast to a purely personal right, is that it is "transferable: it may be enforced by someone other than the particular person in whom the right was initially vested." In that case this Court held that a right of pre-emption was a "thing in action" within the meaning of section 436(1) of the 1986 Act.

52. The Judge in the present case followed an earlier decision which had been made in the County Court at Manchester: *Ward v Official Receiver* [2012] BPIR 1073, in which DJ Khan held that the right to complain in relation to the mis-selling of PPI policies was "property" within the meaning of section 436(1) of the 1986 Act. He did so on the basis both that it is an interest "incidental to" property and, alternatively, that it is a "thing in action": see paras. 13-14.

53. The reason why Mr Herberg places reliance on *Ward* is to support his submission as to the correct interpretation of the limitation provision in DISP. He submits that, since the right to make a complaint to the Ombudsman is vested in the trustee in bankruptcy, the word "complainant" ought to be construed as referring to the OR and not to the bankrupt.

54. In my view, that submission proves too much. In my view, and as was common ground before the Judge, the OR is "authorised by law" to bring a complaint "on behalf of" the bankrupt.

55. Furthermore, and more fundamentally, in my view, the correct construction of DISP does not turn on technical aspects of the law of insolvency. It would not be in keeping with the nature of the relatively simple scheme which DISP was intended to create.

56. That said, I am prepared to accept that the right to make a complaint under the scheme does fall within the definition of "property" in section 436(1) of the 1986 Act, certainly because it is an interest "incidental to" property, i.e. the PPI policy. In my view, it is unnecessary for present purposes to go further and decide whether it also falls within the definition of a "thing in action". I can see force in the argument made by Mr Gibbon that such a right has to be transferrable for it to qualify as such, as Mummery LJ said in *Dear v Reeves*.

57. It seems to me to be unnecessary for present purposes to consider in detail a number of interesting decisions which were cited to this Court: e.g. *Re Rae* [1995] BCC 102 (Warner J), which concerned a fishing licence, which was held to be incidental to the vessels concerned; and *In re Campbell (a bankrupt)* [1997] Ch 15 (Knox J), which concerned the ability of a person who suffered injuries as a result of criminal assault to obtain an award from the Criminal Injuries Compensation Board, which was held not to be property within the meaning of section 436(1) because it was not enforceable at that time.

58. Accordingly, I have reached the conclusion that the issue of whether the OR's right to bring a complaint falls within the definition of "property" is not critical to the correct interpretation of the limitation provision in DISP. That is the primary issue, to which I now turn.

<u>The primary issue</u>

59. On behalf of the Appellant Mr Gibbon submits that:

    (1) Although DISP is delegated legislation, it is drafted in a style which is very different from ordinary legislation. For example, it includes guidance and not only rules: these are designated with the initial capital G against the relevant paragraph, whereas a rule is designated with a capital R against it.

    (2) Although the word "complainant" is not defined as such in DISP, the word "complaint" is defined in the Glossary. It is clear from that definition, and also from the terms of Appendix 3, that the word "complainant" is throughout being used to refer to the underlying consumer who was sold the PPI policy.

    (3) The phrase "eligible complainant" in DISP 2.7 is defined by reference to a list, which does not include a trustee in bankruptcy like the OR. It is the underlying consumer who is the eligible complainant. The OR is "authorised by law" to bring a complaint "on behalf of" the bankrupt.

(4) Other uses of the word "complainant" in other parts of DISP can readily be understood in a practical sense, where necessary and appropriate, to refer to the person who acts "on behalf of" the underlying consumer. This would have to be the case, for example, where the consumer has died and so the complaint has to be brought by the personal representatives. For example, DISP 2.8.2R(1) requires the respondent to send notification of a decision to the "complainant", but, submits Mr Gibbon, where necessary, that could be read as meaning the personal representatives (where the consumer is dead); or (in a pure agency situation) the complainant's agent (e.g. their solicitor). Mr Gibbon submits that this feature of DISP gives practical effect to the scheme but does not detract from the fundamental point that the subject matter of a complaint is what happened to the consumer and it is that person's knowledge which is therefore relevant.

60. Mr Gibbon also submits that it was unnecessary and inappropriate for the Judge to introduce complicated and technical aspects of insolvency law into what is intended to be a relatively informal and simple scheme.

61. Finally, Mr Gibbon submits that the Judge's interpretation would lead to highly unsatisfactory consequences, in particular that time would begin to run again for three years from the appointment of the OR as a trustee in bankruptcy even in circumstances where the consumer has known for more than two years, perhaps with only one day left, that they could bring a complaint.

62. On behalf of the Respondent Mr Herberg submits that there are three principal difficulties in the way of the OR's appeal:

(1) The interpretation advanced by the OR is contrary to the natural meaning of the word "complainant", both in its immediate provision and when DISP is read as a whole. The natural meaning is, according to the Oxford English Dictionary, the person who makes the complaint. That is the OR and not the bankrupt. Mr Herberg also submits that this is consistent with the underlying purpose of a limitation provision, which is to focus the attention of the person who brings the complaint on the need to do so as quickly as possible once they have the relevant knowledge.

(2) The OR's interpretation is not consistent with and is contrary to the vested rights of the OR as a matter of insolvency law.

(3) The OR's interpretation would have very unsatisfactory consequences: for example, the OR could sit on a claim for years and yet there would be no time limit running against it at all. This would also be so in the case of a person who has died and so there will be no time limit running against the personal representatives.

63. Finally, Mr Herberg submits that the presence of the backstop deadline does not alter this fundamental feature of the limitation regime. This is because the backstop deadline only applies in the specific context of PPI claims, whereas the limitation regime operates more generally. Further, the backstop deadline was only inserted in 2017.

64. I have reached the following conclusions.

65. First, I see considerable force in Mr Gibbon's fundamental submission, that the overall thrust of DISP is that the subject matter of a complaint focuses on the underlying consumer who bought the PPI policy. This is clear from the definition of "complaint" in the Glossary and also from the terms of Appendix 3. Although the word "complainant" is not defined in the Glossary, it is clear that it is used on numerous occasions to refer to the consumer, even where it is expressly stated that someone else is making the complaint on that person's behalf.

66. Secondly, this is consistent with the general nature of DISP, which is not like conventional legislation. Its drafting style is very different and it is intended to create a relatively informal and simple scheme for and on behalf of consumers. It is also not intended for respondents to have to deal with highly complicated legal concepts.

67. As the Judge rightly observed, at para. 16 of his judgment, the purpose of the FOS, as reflected in DISP, is "to provide a consumer-facing, user-friendly, free-of-charge process for seeking redress without recourse to formal legal proceedings."

68. I can readily see how the phrase "on behalf of", which is not a legal term of art, can be interpreted in the present context as meaning simply "in place of" and does not introduce the entire body of insolvency law which would otherwise be required.

69. The view I have reached also derives some support from the Interpretation Act 1978, section 11 of which provides that:

> "Where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act."

It is clear that in, for example, section 226(2)(a) of the FSMA 2000, the phrase "the complainant is eligible" is a reference to the consumer and not a person such as the OR.

70. Most fundamentally, it seems to me that Mr Herberg's submission, and the interpretation given by the Judge, is unsustainable because of the absurd consequence it would have, particularly in a situation where the bankrupt has had the relevant awareness for perhaps as long as two years and 364 days. On that interpretation, the time limit would start to run again for three years once the OR was in post as the trustee in bankruptcy. That cannot have been the intention of DISP. Mr Herberg found it very difficult to sustain that interpretation but that is the consequence of the declaration which he successfully obtained from the Judge.

71. The declaration which the Respondent succeeded in obtaining from the High Court was as follows:

> "To the extent that the Defendant as trustee in bankruptcy brings a complaint in relation to mis-selling of payment protection insurance held by a bankrupt, the relevant awareness for the purpose of DISP 2.8.2R(2)(b) of the FCA Handbook is that of the Defendant not that of the bankrupt."

72. I have reached the conclusion that that declaration cannot stand in the light of submissions that we heard before this Court. Mr Herberg's primary submission to this Court was that the relevant rule must be read in a purposive way, so that, if the bankrupt person had the relevant awareness before the date of bankruptcy, time would begin to run but would have to be aggregated with the time which fell after the date of bankruptcy. This would have the effect that the trustee in bankruptcy would have less than the full three years in which to bring a complaint. Mr Herberg did not submit that time begins to run again, so that the trustee in bankruptcy has the full three year period in which to make a complaint. In the alternative, Mr Herberg submitted that, were it necessary to do so, that would indeed be the consequence but so be it.

73. That alternative submission would, in my view, lead to an absurdity. That cannot be the correct interpretation of the rule. I am not surprised that this alternative submission was not made with any enthusiasm before this Court.

74. However, the fundamental difficulty with Mr Herberg's primary submission is that that is not what the declaration made by the High Court says. Nor is it supported by any reasoning in the judgment below. I also note that no Respondent's Notice has been filed to argue this ground. This is despite the fact that there is a Respondent's Notice in this case, in which three other grounds are advanced but not this one. Although this point was raised during the course of the hearing before this Court, and Mr Herberg was given the opportunity to take instructions after reflecting on the point, he did not invite this Court to grant permission to file a late Respondent's Notice.

75. So far as the possible consequences of the OR's interpretation are concerned, I find it impossible to reach a conclusion on that part of Mr Herberg's submissions. This is because the underlying facts have never been gone into by the High Court, which was not asked to do so since this was a Part 8 claim. Furthermore, and fundamentally, the Respondent's alternative case as initially set out in the High Court proceedings was not pursued and was never the subject of any decision by the Judge. It may well be that the Respondent's alternative case is correct with the consequence that, even if the relevant awareness is that of the bankrupt, the knowledge of the OR must be attributed or imputed to the bankrupt. I say no more about the merits of that argument because it was not argued before this Court and Mr Gibbon has not had the opportunity to consider it or respond to it. But, if it is correct, that would address many if not all of the supposedly absurd consequences which Mr Herberg said would arise if the OR's interpretation were correct.

76. I also do not consider that the presence in the rules of the backstop deadline of 29 August 2019 is irrelevant in the present context. That deadline shows that, where the legislator wished to do so, it was well able to introduce an express provision to address the mischief identified of very stale claims being brought. If the OR's interpretation does lead to the possibility of very stale claims being brought, the answer lies in the ability of the legislator to amend the legislation.

77. I turn therefore to the three grounds which are advanced in the Respondent's Notice.

The Respondent's Notice

Ground 1

78. The first ground raised on behalf of the Respondent is that any ambiguity in the interpretation of the limitation provision can and should be resolved by reference to the consultation papers and policy statement by the Financial Services Authority which led up to the drafting of DISP. I would reject that submission because those consultation papers are not properly admissible as aids to interpretation. I agree with the OR that they are only admissible for the limited purpose of identifying what the mischief may have been which was the subject of the legislation.

79. Mr Herberg relies upon the following documents (1) a consultation paper, CP33, 'Consumer complaints and the new single ombudsman scheme' (November 1999); (2) a consultation paper, CP49, 'Complaints handling arrangements: feedback statement on CP33 and draft rules' (May 2000); and (3) a policy statement, PS49, 'Complaints handling arrangements: response on CP49' (December 2000).

80. Mr Herberg relies on Bennion, Bailey and Norbury on Statutory Interpretation (8th ed., 2020), at para. 24.24, citing the decision of Sales J in *Harrow London Borough Council v Ayiku* [2012] EWHC 1200 (Admin); [2013] PTSR 365, at para. 29:

> "In cases of doubt or ambiguity, official statements in the period immediately following promulgation of legislation by the Government department which is responsible for administering it may be treated as an aid to its interpretation, as a form of *contemporanea expositio* … In my view, contemporaneous official statements by the relevant Government department will be still more significant as a guide to the proper interpretation of subordinate legislation, as in this case, since that is typically drafted in-house by the department itself rather than by Parliamentary Counsel and is promulgated primarily by the relevant Secretary of State rather than Parliament."

81. I note that that passage refers to official statements by the relevant Government department which follows immediately *after* the promulgation of legislation by it. That is not a reference to *prior* consultation papers, which may or may not in the end lead to legislation being enacted in the terms which were then proposed or envisaged.

82. Mr Herberg also relies upon *R (Critchley) v Financial Ombudsman Service Ltd* [2019] EWHC 3036 (Admin); [2020] Lloyds Law Reports 176, at para. 52, where Lang J said that she was fortified in her view as to the correct interpretation by the opinion of the Financial Services Authority, expressed in consultation papers when DISP Appendix 3 was drafted. I would observe, first, that Lang J was merely saying that she was "fortified" in the interpretation which she would presumably have reached in any event. Secondly, this does not appear to have been an issue on which there was detailed argument in that case. If it were necessary to do so I would hold that Lang J was wrong to rely upon the consultation papers in that case.

83. It appears to me that reliance on such documents for a wider purpose than to identify the mischief to which the legislation was directed is impermissible as a matter of principle. What must be interpreted is the legislation as enacted, not what may or may not have been intended by an earlier proposal. It is also inconsistent with the authority of this Court: see *Re Lehman Brothers*, at para. 36, where Arden LJ said that a number of documents issued by the Financial Services Authority ("FSA") before CASS 7 was published were not admissible on the interpretation of the rules save to show the mischief to which the rules were directed. She observed that the Court had not been shown any passage in those documents which specifically dealt with the precise issue of interpretation which arose before it. Accordingly those materials were "of no more than background interest." In my view, the same applies here.

84. Mr Herberg submits that the consultation documents and policy statement stated that the purpose behind the limitation provision was to ensure "alignment" and "broadly mirror the English law of limitation". He submits that this must clearly have been a reference to section 14A of the Limitation Act 1980. He relies upon the statement of Potter LJ in *Graham v Entec Europe Ltd t/a Exploration Associates* [2003] EWCA Civ 1177, at para. 36, that "the spirit and purpose of the Act is to concentrate on the knowledge of the person who has the right and interest in pursuing the claim …", thus section 14A(5) makes plain that it is the knowledge of the person in whom the cause of action is vested that is relevant.

85. The difficulty with that submission is that, while it may be true that, at a high level of abstraction, the purpose of the limitation provision was broadly to mirror the general law of limitation, the provisions of DISP do not (as they could have done) contain the precise language of section 14A of the Limitation Act. These references do not therefore ultimately assist in resolution of the question of interpretation which has arisen in this case.

86. Mr Herberg also relies upon the consultation papers because he submits that the drafting history suggests that, at one time, it was envisaged that trustees in bankruptcy could fall within the category of "personal representatives" as eligible complainants. He also submits that in the policy statement response to CP49 it was said that "their effect remains unchanged". He submits that the "inevitable inference" is that the FSA intended that it was the awareness of the OR that was relevant and there was no indication that it intended to separate the awareness of the "complainant" from the person actually making the complaint.

87. The difficulty with this submission is that the final version of the scheme did not in fact (subject to another ground to which I will return later) make the OR a person who could be an eligible complainant. This part of the history is therefore unhelpful as an aid to interpretation even if it were admissible. Indeed, this submission reinforces my view as to why such documents are inadmissible: the public are entitled to rely on the words of the legislation as enacted and should not have to delve into earlier documents, still less have to draw inferences as to what may have been intended.

Ground 2

88. The second ground raised by the Mr Herberg in the Respondent's Notice is that the OR's construction of the limitation provision would be *ultra vires* section 226 of the FSMA 2000. Subsection (1) provides that a complaint which relates to an act or omission of a person in carrying on an activity to which compulsory jurisdiction rules apply is to be dealt with under the Ombudsman scheme if the conditions mentioned in subsection (2) are satisfied. Those conditions include, at para. (a):

> "The complainant is eligible and wishes to have the complaint dealt with under the scheme."

89. Mr Herberg submits that, if the "complainant" means the bankrupt, then it cannot sensibly be said, in the present context, that he or she "wishes" to have the complaint dealt with under the scheme. He or she may have no views either way; indeed may actively not wish to assist his or her creditors to recover. He submits therefore that the OR's interpretation would render DISP *ultra vires* the empowering legislation and this interpretation should be avoided if at all possible. He submits that it is more than possible: if the OR is seen as standing in the place of the eligible complainant then this resolves the difficulty.

90. The Judge was not persuaded by this argument if it had been necessary for him to address it: see para. 61. I am not persuaded by it either.

91. First, Mr Herberg's submission proves too much and would cause difficulties for the Respondent's interpretation of the limitation provision as well. This is because section 226(2)(a) refers to the complainant having to be "eligible". That reference to "complainant" clearly cannot be a reference to the OR, since the OR is not an eligible complainant within the meaning of the scheme. If Mr Herberg is right, that would suggest that the Respondent's interpretation would lead to an *ultra vires* outcome as well.

92. Further, and in any event, it seems to me that both parties' interpretations are consistent with the language of the enabling Act. This is because, even on Mr Gibbon's interpretation, the OR stands in the place of the bankrupt and so, in that sense, it can be said that the complainant wishes to have the complaint dealt with under the scheme.

93. I would therefore reject the Respondent's *ultra vires* ground.

Ground 3

94. Mr Herberg's third ground in the Respondent's Notice is that the OR could be deemed to be the "eligible complainant" pursuant to DISP 2.7.3(4) and DISP 2.7.6(5)-(6). He submits that the OR is an eligible complainant at least in respect of all estates with a net asset value of under £5 million.

95. I would be willing to accept Mr Herberg's submission that a trustee in bankruptcy such as the OR could be regarded as being a statutory trustee: see *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167, at 178 (Lord Diplock). As Lord Diplock observed, a statutory trust of this kind does not necessarily have to be the kind of trust which would have been recognised by the Court of Chancery in the past.

96. The fundamental difficulty, however, with Mr Herberg's submission is that this is a necessary but not a sufficient condition for him to succeed. In order to be an eligible complainant there must also be the type of relationship which is then set out in DISP 2.7.6 and there is no such relationship in the present context.

97. 2.7.6R(5) refers to where "the complainant is a person *for whose benefit* a contract of insurance was taken out or was intended to be taken out with or through the respondent" (emphasis added). The OR is clearly not a person who falls within that definition.

98. 2.7.6R(6) refers to where "the complainant is a person on whom the legal right to benefit from a claim against the respondent *under a contract of insurance* has been devolved by contract, assignment, subrogation or legislation…" (emphasis added). In my view, the OR is not such a person. Mr Herberg's submission requires the phrase "under a contract of insurance" to be interpreted as meaning simply "in relation to a contract of insurance". That is clearly not its correct meaning. Its natural meaning is that the claim arises "under" the PPI policy. It is both unnecessary and impermissible to substitute another phrase for the one used in the legislation.

99. For those reasons I would reject the alternative grounds for upholding the Judge's order which were raised in the Respondent's Notice.

The next steps

100. That, however, leaves the question of what this Court should do next. On behalf of the OR Mr Gibbon submitted that we should make a declaration in favour of the Appellant to the effect that, where the OR as trustee in bankruptcy brings a complaint in relation to mis-selling of payment protection insurance held by a bankrupt, the relevant awareness for the purpose of DISP 2.8.2R(2)(b) is that of the bankrupt, not that of the OR. I am unable to accept that submission. There are two reasons for this.

101. First, I can see force in the views of Nugee LJ, in his concurring judgment, that this may be going too far to the other extreme. This is principally because it would have the consequence that in certain cases there would be no time limit at all, for example where the bankrupt person has died and even though the OR has every reason to know that a complaint can be brought but simply sits on it.

102. The second reason is that there may be force in the Respondent's alternative case in the proceedings below but which was not pursued with any vigour in the High Court, and has not been pursued at all before this Court, to the effect that, if the rule does refer to the relevant awareness of the bankrupt, nevertheless the awareness of the OR may be attributed or imputed to the bankrupt.

103. It seems to me that both of these possibilities potentially raise issues of fact as well as of law and it would not be appropriate, in the exercise of this Court's discretion, to grant the declaration sought by Mr Gibbon as things stand. Since there are likely to be further proceedings, in which the factual and other legal issues will be considered, I conclude that, while this appeal should be allowed, and the declaration of the High Court set aside, this Court should decline to make any further order.

Conclusion

104. For the reasons I have given I would allow this appeal and set aside the declaration granted by the High Court but make no other declaration.

Lady Justice Carr:

105. I agree that the appeal should be allowed and the High Court's declaration set aside, for the reasons given by Singh LJ.

106. The Judge was presented with a purely binary choice: "the complainant" in DISP 2.8.2R(2)(b) was said to mean either the OR (the Respondent's position) or the bankrupt (the OR's position). The Judge decided that "the complainant" meant the OR. That cannot be right, as Singh LJ identifies. Amongst other things, it would lead to absurd consequences, for example, if the bankrupt gained the relevant awareness before bankruptcy. However, I am not persuaded that this conclusion means that we should go on to declare that "the complainant" means simply the bankrupt. Although that construction would be consistent with what Singh LJ describes (at para. 65) as "the overall thrust of DISP", it is also potentially problematic. It could mean, for example, that in certain cases there would be no time limit at all.

107. In this context I have had the benefit of seeing the alternative detailed analysis of Nugee LJ as set out in his concurring judgment below. I can see the force of his reasoning that "the complainant" for the purpose of DISP 2.8.2R(2)(b) means the person who for the time being has both the right to bring the complaint and an interest in doing so. Thus, whether "the complainant" for the purpose of DISP 2.8.2R(2)(b) means the consumer (pre-bankruptcy) or the trustee in bankruptcy depends on the facts arising in each case. However, the parties have not had the opportunity to address such an outcome in argument. Further, the issue of attribution of the OR's knowledge to the bankrupt, as discussed by Singh LJ in particular at para. 75 of his judgment, may be directly relevant to the issue of construction in play. In these circumstances, I prefer not to express any view on the merits of Nugee LJ's approach.

108. The parties will now have to consider how best to take these matters forward. Claims for declarations as to the construction of documents and questions of law are often appropriate for the procedure under CPR Part 8. However, CPR Part 8 has not proved to be a satisfactory vehicle for resolution of this particular dispute. It has led to an over-simplification of analysis, and a failure to consider the wider potential consequences of the competing arguments of construction by reference to specific facts. We were told that consideration was given at a pre-action stage to whether or

not the issues of construction should be tested by reference to "test cases in relation to particular facts". Albeit perhaps with the benefit of hindsight, it seems to me that that would have been by far the preferable (and safer) procedural course.

Lord Justice Nugee:

Introduction

109. I am very grateful to Singh LJ for setting out the facts and issues so clearly and I will adopt the same abbreviations as him. I agree with him (and Carr LJ) that the appeal should be allowed and the declaration made by the Judge should be set aside. But my reasons for concurring in the result are not the same as theirs, and I will explain my own view of the matter.

110. The question posed to the High Court, and answered by the Judge, was formulated in the Agreed List of Issues for trial as follows:

> "Where the OR as trustee in bankruptcy brings a complaint in relation to mis-selling of PPI held by the bankrupt, is the relevant awareness for the purpose of DISP 2.8.2R(2)(b) that of the OR, or that of the bankrupt?"

This question assumes that the answer is (in all circumstances) either one or the other. It is not surprising therefore that the Judge gave an answer that assumed this too. But in my view both the parties and the Judge were mistaken about this. Since we are considering the construction of a set of rules which are, as Singh LJ points out, a statutory scheme in the form of delegated legislation made under the FSMA 2000, I do not think we are bound by the parties' agreed assumption, if we consider, as I do, that it is erroneous. In my view I am entitled (if indeed not bound) to interpret the rules in accordance with what I consider to be their true construction.

Interpretation of DISP – principles

111. There is no dispute as to the principles on which the provisions in DISP should be interpreted (and for this purpose I do not understand it to be suggested that there is any distinction to be made between the rules strictly so called (identified by an R) and guidance (identified by a G)). DISP is a part of the Handbook.[1] The Handbook contains a very large number of provisions, arranged in parts, each with a distinguishing prefix (such as DISP) and divided into chapters. Technically speaking the provisions in DISP are not all made by the same body: as explained in the

[1] The Handbook is constantly updated, but it was not suggested that there have been any material changes since the date when the complaints were made in this case (which is said to have been on 29 August 2019, the last date for bringing PPI mis-selling claims: see paragraph 11 of Singh LJ's judgment above). Where provisions of the Handbook were provided to us I have used the version so provided. This includes the whole of DISP 2, various other provisions of DISP and GEN 2.2. In the relatively few instances where I have referred to other provisions of the Handbook I have used the current version of the rules, but have sought to check that they have not materially altered since August 2019.

Introduction to DISP, it includes rules and directions made by the FCA (including chapter 1, which contains rules as to how respondents should deal with complaints), and rules made (and standard terms set) by FOS Ltd (the corporate body which operates the FOS) with the consent of the FCA (namely parts of chapter 2, most of chapter 3 and all of chapter 4, which set out how the FOS considers unresolved complaints). But this does not affect their interpretation. They have obviously been drafted so as to produce a coherent whole, and the provisions in DISP must all be read together.

112. The Handbook contains its own provisions in relation to interpretation. These are found in chapter 2 of GEN (General Provisions), which is headed "Interpreting the Handbook". The substantive provisions are made by the FCA but GEN 2.1.8R (technically made by FOS Ltd: see GEN sch 4.13G) provides that chapter 2 applies to all provisions made by FOS Ltd, and GEN 2.1.9G confirms that this means that it applies, among other things, to those provisions in chapters 2, 3 and 4 of DISP that were made by FOS Ltd. The relevant provisions on interpretation are found in GEN 2.2 and are as follows:

> "2.2.1R Every provision in the *Handbook* must be interpreted in the light of its purpose.
>
> 2.2.2G The purpose of any provision in the *Handbook* is to be gathered first and foremost from the text of the provision in question and its context among other relevant provisions. The *guidance* given on the purpose of a provision is intended as an explanation to assist readers of the *Handbook*. As such, *guidance* may assist the reader in assessing the purpose of the provision, but it should not be taken as a complete or definitive explanation of a provision's purpose.
>
> …
>
> 2.2.6G Expressions with defined meanings appear in italics in the *Handbook*, unless otherwise stated in sourcebooks or manuals.
>
> 2.2.7R In the *Handbook* …
>
> (1) an expression in italics which is defined in the *Glossary* has the meaning given there …
>
> …
>
> 2.2.9G Unless the context otherwise requires or unless otherwise stated in a particular sourcebook or manual, where italics have not been used, an expression bears its natural meaning (subject to the *Interpretation Act 1978*; see *GEN 2.2.11 R* to *GEN 2.2.12 G*)."

113. To these provisions can be added the guidance given by Lord Neuberger MR and Arden LJ in *Re Lehman Brothers International (Europe) (No 2)* [2010] EWCA Civ 917 at [181] and [57]-[58] respectively on the analogous interpretation of CASS7, which is quoted by Singh LJ at paragraphs 44 and 45 above and usefully summarised by him at paragraph 46.

114. We are ultimately concerned in this case with the interpretation of DISP 2.8.2R, and specifically with the interpretation of the reference to "the complainant" in DISP 2.8.2R(2)(b), but one plainly cannot interpret this rule in isolation. The guidance in GEN 2.2.2G refers to gathering the purpose of any provision in the Handbook from not only its text but "its context among other relevant provisions". The guidance given by Arden LJ includes "assessing the provisions as a whole" (that is the provisions of CASS7 in that case and of DISP in this case); taking "an holistic and iterative approach"; bearing in mind "the overall scheme of the rules"; leaning against "interpretations which result in legal 'black holes'"; and at least starting out with the view that "the draftsman intended to create a coherent scheme". So to understand the purpose of DISP 2.8.2R, it is helpful to read DISP as a whole. I would accept that is not necessary to read the Handbook as a whole, which Mr Gibbon rightly described as enormous, but it is not difficult to read through the whole of DISP, or at least the potentially relevant provisions of it.

115. If one does this, three things are to my mind immediately apparent. I will expand on each of these below but in summary they are as follows:

(1) The rules are primarily drafted with what Mr Gibbon called "the paradigm case" in mind. This is the case where an eligible complainant (what he called the "underlying customer" or "underlying consumer") pursues a complaint himself or herself.

(2) The rules do however expressly contemplate that in certain circumstances a complaint may be pursued by someone other than the eligible complainant.

(3) The rules have not been clearly drafted with this non-paradigm case in mind and require to be given a purposive interpretation to make them work coherently in such a case. In particular the word "complainant" must in many of the rules mean the underlying consumer, that is, in the case of PPI mis-selling, the person to whom the PPI policy was sold. But there are some rules where it must mean the person who actually pursues the complaint. Which it means in any particular case must depend on the purpose of the rule in question.

The overall scheme of DISP

116. I will start with an examination of the overall scheme of DISP. It has four chapters, DISP 1, 2, 3 and 4. As already explained DISP 1 is made by the FCA. It is headed "Treating complainants fairly" and is concerned with complaints that users of financial services may have against a provider of those services. As explained in

DISP 1.1.1G it contains rules and guidance on how respondent firms should deal promptly and fairly with complaints in respect of business carried on by them. For these purposes "complaint" is broadly defined in the Glossary as follows:

> "(in *DISP 1.1* ...) any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a *person* about the provision of, or failure to provide, a financial service …, which alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience."

"Complainant" is not itself a defined term in the Glossary, but it is evident from this definition of complaint that it is here used to refer to the person who is complaining that he has suffered financial loss, distress or inconvenience as a result of the unsatisfactory provision of, or failure to provide, a financial service, or in other words the underlying consumer.

117. It is not necessary to refer to the rules in DISP 1 in any detail. DISP 1.3.1R requires respondents to establish, implement and maintain effective and transparent procedures for the reasonable and prompt handling of complaints. DISP 1.4.1R sets out what is required by respondents in terms of investigation, assessment and resolution of complaints. This includes (by DISP 1.4.1R(4)) an obligation to explain to the complainant promptly and, in a way that is fair, clear and not misleading, its assessment of the complaint, its decision on it, and any offer of remedial action or redress; and (by DISP 1.4.1R(5)) an obligation to comply promptly with any offer of remedial action or redress accepted by the complainant. By DISP 1.6.2R a respondent must send its final response to the complainant within 8 weeks after receipt of the complaint; among other things this must inform the complainant that if he remains dissatisfied with the response he may now refer his complaint to the FOS.

118. DISP 1.8, headed "Complaints time barring rule" contains one provision, DISP 1.8.1R. This provides that if a respondent receives a complaint which is outside the time limits for referral to the FOS, it may reject the complaint without considering the merits. The practical significance of this in the present case is that if the Respondent is right that for the purposes of the time limits for referral to the FOS the relevant awareness is that of the OR, it will contend that in all or virtually all cases the OR was or should have been aware of the matters giving rise to a complaint well over 3 years before the complaints were brought, and hence that it does not have to deal with them.

119. If the complainant accepts the respondent's response, the complaint is resolved (DISP 1.5.2AR). If the complainant is still unhappy however the next stage is to refer matters to the FOS.

120. As with the complaint procedure under DISP 1, it is a matter for the complainant whether to refer matters to the Ombudsman. It is the complainant who decides whether to bring a complaint: this is the effect of s. 226(2)(a) FSMA 2000, cited by Singh LJ at paragraph 88 above. And it may be noted that when the Ombudsman has determined a complaint, which he does by reference to what is in his opinion fair and reasonable in all the circumstances of the case (see s. 228(2) FSMA 2000), the complainant is not bound to accept the determination. He has a choice whether to accept it, in which case it is final and binding on both parties, or to reject it: see

s. 228(5) and (6) FSMA 2000. The Ombudsman's determination may include a money award as compensation for loss or damage (up to certain limits) and if it does so such an award is enforceable, if the County Court so orders, as if it were an order of that Court: see s. 229(2)(a), (5) and 8(b), and sch 17 para 16(a) FSMA 2000.

121. Since the Ombudsman's determinations can in this way become binding on a respondent, it is not surprising that the rules of the scheme carefully delineate the scope of the Ombudsman's jurisdiction, specifying both who can bring a complaint and what they can complain about. The Ombudsman in fact has two jurisdictions, called the compulsory jurisdiction and the voluntary jurisdiction, but we need not concern ourselves with that distinction in the present case, it being common ground that complaints of PPI mis-selling come under the compulsory jurisdiction.

122. The rules of the FOS scheme, as already referred to, are found in DISP 2, 3 and 4. DISP 2 is headed "Jurisdiction of the Financial Ombudsman Service" and, as DISP 2.1.1G explains, the purpose of the chapter is to set out rules and guidance on the scope of the FOS's two jurisdictions.

123. A summary of the requirements is given in DISP 2.2, headed "Which complaints can be dealt with under the Financial Ombudsman Service?". The substantive provision is DISP 2.2.1G, which provides as follows:

> "The scope of the *Financial Ombudsman Service*'s two jurisdictions depends on:
>
> (1) the type of activity to which the *complaint* relates (see DISP 2.3, DISP 2.4 and DISP 2.5)
>
> (2) the place where the activity to which the *complaint* relates was carried on (see DISP 2.6)
>
> (3) whether the complainant is eligible (see DISP 2.7); and
>
> (4) whether the *complaint* was referred to the *Financial Ombudsman Service* in time (see DISP 2.8)."

As this indicates the remainder of DISP 2 sets out the detailed rules and guidance on each of these four requirements. DISP 2.3 and DISP 2.5 duly contain detailed provisions as to which activities come within the compulsory and voluntary jurisdictions respectively (DISP 2.4 is no longer used), and DISP 2.6 contains provisions on the territorial scope of the jurisdiction.

124. These first two requirements depend on what the complaint is. "Complaint" for these purposes is again defined in the Glossary, the relevant parts being as follows:

> "(in *DISP*, except *DISP 1.1* and …) any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a *person* about the provision of, or failure to provide, a financial service…, which:
>
> (a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and

> (b) relates to an activity of that *respondent*, or of any other *respondent* with whom that *respondent* has some connection in marketing or providing financial services or products …, which comes under the jurisdiction of the *Financial Ombudsman Service*."

As can be seen, this is slightly more elaborate than the definition applicable to DISP 1.1 (paragraph 116 above), so as to confine it to activities which come under the jurisdiction of the FOS, but the essential point remains that the complainant is here the person who is complaining that he has suffered financial loss, distress or inconvenience as a result of the unsatisfactory provision of, or failure to provide, a financial service, or in other words the underlying consumer.

125. The third requirement referred to in DISP 2.2.1G is that the complainant is eligible. This is dealt with in DISP 2.7, headed "Is the complainant eligible?". This starts off with the general provision in DISP 2.7.1R 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*."

As the italicisation shows, "eligible complainant" is a defined term, but the definition in the Glossary is not in fact very helpful, being as follows:

> "a *person* eligible to have a *complaint* considered under the *Financial Ombudsman Service*, as defined in DISP 2.7 (Is the complainant eligible?)."

In other words this simply refers one back to the detailed provisions of DISP 2.7. To discover what the requirement means in practice one has to read on in DISP 2.7.

126. I can pass over for the moment DISP 2.7.2R, which expands on the permission given by DISP 2.7.1R for a complaint to be brought "on behalf of" an eligible complainant, although it is a significant provision for the present case and I will have to come back to it below.

127. DISP 2.7.3R is the next relevant provision. It sets out what sort of person can be an eligible complainant. "Person" is a defined term, and includes (in accordance with the Interpretation Act 1978) any person, including a body of persons corporate or unincorporate. But to be an eligible complainant the person has to be one of a limited class of persons, such as a consumer (itself a defined term, the primary definition being a natural person acting outside his trade, business or profession), and a variety of smaller entities such as charities, trusts and small businesses. Subject to an argument raised by Ground 3 of the Respondent's notice it is not, and could not be, suggested that the OR satisfies any of the requirements in DISP 2.7.3R to be an eligible complainant. The argument in Ground 3 is that the OR is within DISP 2.7.3R(4) as being in each case a trustee of a trust (so long, as is almost certain to be the case, the net asset value of the estate in bankruptcy is less than £5m): see paragraphs 29 and 94 of Singh LJ's judgment above. Taken by itself, that is at least arguable and may very well be right.

128. But, as Singh LJ points out at paragraph 95 above, it is also necessary for an eligible complainant to satisfy the requirements of DISP 2.7.6R. This provides that:

> "To be an *eligible complainant* a *person* must also have a *complaint* which arises from matters relevant to one or more of the following relationships with the *respondent*:"

This is then followed by a list of possible relationships, starting with:

> "(1) the complainant is (or was) a customer … of the *respondent*;"

129. Again, subject to the argument raised by Ground 3 of the Respondent's notice, it is not suggested that the OR had any of the requisite relationships with the Respondent. The contention in Ground 3 of the Respondent's notice here is that the OR can bring himself within DISP 2.7.6R(5) as "a *person* for whose benefit a *contract of insurance* was taken out", or alternatively within DISP 2.7.6R(6) as "a *person* on whom the legal right to benefit from a claim against the *respondent* under a *contract of insurance* has been devolved". I agree with Singh LJ that both limbs of this contention fail for the reasons given by him at paragraphs 97 and 98 above. It follows that whether or not the OR can be regarded as a trustee of trusts with a net asset value of less than £5m within DISP 2.7.3R(4), he is not an eligible complainant because he does not have a complaint arising from any of the relationships in DISP 2.7.6R. There are various other provisions in DISP 2.7, but none of them affects this point and it is not necessary to refer to them.

130. The fourth and last of the requirements referred to in DISP 2.2.1G is that the complaint was referred to the FOS in time. This is dealt with in DISP 2.8, headed "Was the complaint referred to the Financial Ombudsman Service in time?".

131. DISP 2.8.1R prevents complaints being referred to the FOS too early. It is designed to stop complaints being referred to the FOS before the respondent has had a chance to respond to them. It begins as follows:

> "The *Ombudsman* can only consider a *complaint* if:
>
> (1) the *respondent* has already sent the complainant its *final response* or *summary resolution communication*; or
>
> (2) in relation to a *complaint* that is not [of a certain type] eight weeks have elapsed since the *respondent* received the *complaint*; or …"

Various other possibilities are then set out, but the general position is that a complainant has to either wait until he has had the respondent's response, or at least 8 weeks have elapsed since his complaint.

132. DISP 2.8.2R by contrast prevents a complaint being referred to the FOS too late. This is of course the provision that ultimately falls to be construed. So far as relevant it provides as follows:

> "The *Ombudsman* cannot consider a *complaint* if the complainant refers it to the *Financial Ombudsman Service*:
>
> (1) more than six *months* after the date on which the *respondent* sent the complainant its *final response*, *redress determination* or *summary resolution communication*; or
>
> (2) more than:
>
> (a) six years after the event complained of; or (if later)
>
> (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;
>
> unless the complainant referred the *complaint* to the *respondent* or to the *Ombudsman* within that period and has a written acknowledgment or some other record of the *complaint* having been received…"

I need not refer to any other parts of DISP 2.8.

133. DISP 3, headed "Complaint handling procedure of the Financial Ombudsman Service", sets out, as DISP 3.1.1G explains, the procedures of the FOS for investigating and determining complaints, the basis on which the Ombudsman makes decisions, and the awards which the Ombudsman can make. These provisions, unsurprisingly, are replete with references to the complainant (or the parties). Thus, to take some examples, DISP 3.2.4R provides that 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, and DISP 3.2.5R and DISP 3.2.6R provide that he will inform the complainant once he has decided; DISP 3.3.1R and DISP 3.3.2R make similar provision where the Ombudsman considers that the complaint may be one that should be dismissed without consideration of the merits; DISP 3.4.1R provides that the Ombudsman may refer a complaint to another complaints scheme where he considers that that would be more suitable and the complainant consents to the referral; DISP 3.5.2G provides that the Ombudsman may inform the complainant that it might be appropriate to complain against some other respondent.

134. DISP 3.6 deals with determinations by the Ombudsman. It includes DISP 3.6.6 which provides that when the Ombudsman has determined a complaint, the Ombudsman will give both parties a signed written statement of the determination, and that the statement will require the complainant to notify the Ombudsman whether he accepts or rejects the determination.

135. DISP 3.7 deals with awards by the Ombudsman. It includes DISP 3.7.6G which provides that if the Ombudsman considers that fair compensation requires payment of a larger amount than the maximum permissible amounts, he may recommend that the respondent pay the complainant the balance. It also includes DISP 3.7.9R under which the Ombudsman has power to make a costs award of such amount as the

Ombudsman considers to be fair to cover some or all of the costs which were reasonably incurred by the complainant in respect of the complaint.

136. There are many other examples which it is not necessary to refer to; nor is it necessary to refer to DISP 4, which is concerned with the voluntary jurisdiction and can be ignored for present purposes.

137. The remaining parts of DISP are appendices, transitional provisions and schedules. I will at this stage simply note that Appendix 3, headed "Handling Payment Protection Insurance complaints", sets out in considerable detail how a respondent firm should handle complaints relating to the mis-selling of PPI.

The paradigm case

138. That being the overall structure of DISP, I can now return to the three points which I said were apparent from reading through DISP (paragraph 115 above). The first is that the rules are drafted with the paradigm case in mind. This is where an eligible complainant or underlying consumer pursues a complaint him- or herself. Here the rules are not difficult to apply. A consumer (or other person such as a small charity or trust or business) is provided with (or seeks to be provided with) financial services by a firm. The consumer is dissatisfied with the services provided (or the failure to provide them) and claims to have suffered financial loss, or material distress or inconvenience. He complains to the firm. The firm is obliged to deal with the complaint in accordance with DISP 1. If not satisfied with the firm's response the complainant is entitled to refer his complaint to the FOS. Provided he comes within the scope of the jurisdictional requirements in DISP 2, the FOS can deal with the complaint. One of those requirements is that the complainant brings his complaint within the time limits in DISP 2.8.2R, under which he has 6 years from the event complained of, or (if later) 3 years from the date when he became, or ought reasonably to have become, aware that he had cause for complaint. If the complaint is within jurisdiction, and the Ombudsman upholds it, he makes a determination and sends it to the parties, the complainant having an opportunity to accept or reject it.

139. None of that causes any difficulty of interpretation. There is no doubt who "the complainant" is for the purposes of the rules. It is the underlying consumer. This is the person who had the requisite relationship with the respondent firm, who was dissatisfied with their services, who claims to have suffered loss, distress or inconvenience, who brings the complaint first to the respondent and then to the FOS, and who is given the opportunity to accept or reject the Ombudsman's determination. And if the question of time-bar under DISP 2.8.2R is raised, it is that person's awareness that is relevant for the start of the three year period.

The pursuit of a complaint by someone other than the eligible complainant

140. The second point is that although the rules are drafted with the paradigm case in mind, they expressly contemplate that complaints may be pursued by someone else other than the eligible complainant. We have already seen that the definition of "complaint" in the Glossary refers to an expression of dissatisfaction "from, or on behalf of, a person" (paragraphs 116 and 124 above), and that DISP 2.7.1R provides

that a complaint may be dealt with by the FOS if the complaint is brought "by or on behalf of" an eligible complainant (paragraph 125 above).

141. This is expanded by DISP 2.7.2R which provides as follows:

> "A *complaint* may be brought on behalf of an *eligible complainant* (or a deceased person who would have been an *eligible complainant*) by a *person* authorised by the *eligible complainant* or authorised by law. It is immaterial whether the person authorised to act on behalf of an *eligible complainant* is himself an *eligible complainant*."

142. This provision runs together a number of different situations. One of them is where the eligible complainant in fact authorises someone else to bring his complaint on his behalf. That would be a straightforward case of agency and would not give rise to any difficulties: the complaint would remain the eligible complainant's complaint, and any award made by the Ombudsman would belong to the eligible complainant. There would be no reason to read references in the rules to "the complainant" in such a case as referring to anyone other than the eligible complainant. No doubt the Ombudsman would in practice correspond with the agent, but he would do so on the basis that the agent was authorised to receive communications on behalf of his principal, the eligible complainant.

143. A second case, expressly contemplated by DISP 2.7.2R, is that of death. The rule makes it clear that where someone who would have been eligible to complain dies, his personal representatives can pursue the complaint that he could have brought. This is also referred to as a case of the complaint being brought "on behalf of" the deceased person. It cannot of course be a case of agency in the strict sense as one cannot be an agent of a dead person, but it is not difficult to understand what is meant, namely that the personal representatives of a deceased person who would have been an eligible complainant may pursue the complaint he would have had. That would necessarily be for the benefit of his estate (and hence for the benefit of his creditors, and, if the estate is solvent, his beneficiaries). "On behalf of" therefore here means "in the place of" or "in the shoes of": see paragraph 31 above in the judgment of Singh LJ. It is not clear to me, but I cannot see that it matters one way or the other, whether the drafter of the rule thought that if the personal representatives were executors they would be "authorised by the eligible complainant" (the deceased) through his will, or whether they would be "authorised by law"; he clearly assumed that they would be one or the other, and in the case of administrators they could only be the latter. "Authorised" here therefore means "authorised to collect in the assets of the deceased, including the right to compensation under the FOS".

144. It is common ground, as recorded by the Judge in his judgment at [19], that a third case covered by DISP 2.7.2R is that of bankruptcy, and that the OR is entitled to bring a complaint "on behalf of" the bankrupt where the bankrupt was or would have been an eligible complainant. Here too "on behalf of" is not used to denote a relationship of agency in the strict sense, as it is also common ground (as recorded in the Agreed List of Issues for trial) that the OR is not in fact an agent of the bankrupt, or authorised to act for, or acting for, the bankrupt. But again it is not difficult to see

what is meant. What is meant is that just as the personal representatives of a deceased person can pursue the complaint that the deceased could have brought, and can do so for the benefit of the deceased's estate, so too the OR as trustee in bankruptcy of the bankrupt can pursue the complaint that the bankrupt could have brought, and can do so for the benefit of the bankruptcy estate (and hence the bankrupt's creditors). So "on behalf of" again means "in the place of" or "in the shoes of". And like the case of administrators, that must have been regarded by the drafter of the rule as a case of the OR being "authorised by law" to bring the claim.

145. There may be other cases covered by the rule as well, for example in the case of lack of capacity, or perhaps in the event of the appointment of a receiver by way of equitable execution. But it is not necessary to consider these and I will confine my attention to the cases of death and bankruptcy which are accepted to be covered by the rule. Mr Gibbon referred to these cases as "bolted on" to the paradigm case.

The need for a purposive interpretation of "the complainant"

146. The third of the three points which I said was apparent was that although the drafter of the rules has contemplated that there will be cases where the complaint is pursued not by the eligible complainant but by someone else, including personal representatives of a deceased, or the trustee in bankruptcy of a bankrupt, he has made no express provision as to how the rules are to operate in these bolted-on cases. In particular the drafter has not identified who is to be regarded as "the complainant" for the purposes of the rules in such a case. Is it the deceased or bankrupt who would have been the eligible complainant if still alive or solvent? Or is it the personal representatives or trustee in bankruptcy who in fact pursue the complaint?

147. The answer which emerges very clearly is that it depends on the rule in question. The rules need to be given a purposive interpretation to make them work coherently, and even the most cursory examination of the rules shows that it must sometimes mean one and sometimes the other. Without attempting to be exhaustive, examples of rules where "the complainant" must refer to the deceased or bankrupt include the following:

(1) The definitions of "complaint" for DISP 1.1 and the remainder of DISP respectively (paragraphs 116 and 124 above). As already pointed out, these definitions are drafted on the basis that "the complainant" is the person who is said to have suffered loss, inconvenience or distress, and they expressly contemplate that a complaint may be made by someone else on behalf of such a person: see paragraph 37 of Singh LJ's judgment above.

(2) DISP 2.2.1G(3) (paragraph 123 above). This provides that the scope of the Ombudsman's jurisdiction depends among other things on whether "the complainant is eligible". This is a cross-reference to DISP 2.7 which as we have seen sets down detailed requirements as to both the type of person and the type of relationship which that person must have had to be eligible. Here "the complainant" must mean the deceased or bankrupt. Once Ground 3 of the Respondent's notice has been put on one side as erroneous, it can be seen that the OR does not meet these requirements and is not eligible (see paragraph

129 above). Nor would the personal representatives of a deceased person be eligible as they would not themselves have had the requisite relationship with the respondent firm. So the requirement that "the complainant" be eligible can only be satisfied by asking whether the deceased or bankrupt was or would have been eligible.

(3) Numerous provisions in DISP App 3. This appendix provides detailed rules as to how respondent firms should handle PPI mis-selling complaints. There are frequent references to the complainant where it is clear from the context that they can only refer to the person who was originally sold the PPI contract. Thus, to take some examples, App 3.1.1A E(2) and (3)(b) both refer to a firm concluding or not concluding that "the complainant would not have bought" a PPI contract; App 3.1.2G(2) requires a firm to "determine the way the complainant would have acted" if a breach by the firm had not occurred; App 3.1.3G refers to presumptions which the firm should or may apply about "how the complainant would have acted", including for some breaches a presumption that "the complainant would not have bought" the PPI contract they bought, and for other breaches the option to apply a presumption that "the complainant would have bought" a regular premium PPI contract "instead of [the PPI contract] they bought." In all these cases the complainant must mean the person who originally took out the PPI contract, that is the deceased or bankrupt: see paragraph 39 of Singh LJ's judgment above.

148. But equally there are many references to "the complainant" in DISP where the reference can only be to the person actually pursuing the complaint, that is in the case of death or bankruptcy the personal representatives or trustee in bankruptcy. Examples include the following:

(1) In DISP 1, rules requiring the respondent to deal with "the complainant" such as DISP 1.4.1R(4) which obliges the respondent to explain its assessment of the complaint to the complainant, DISP 1.4.1.R(5) which obliges the respondent to comply with any offer of redress accepted by the complainant, and DISP 1.6.2R which obliges the respondent to send its final response to the complainant within 8 weeks (see paragraph 117 above). In all such cases "the complainant" cannot mean the deceased or the bankrupt, and must mean the personal representatives or trustee who is pursuing the complaint; one cannot send things to a dead person or expect them to accept redress, and it would be nonsensical to send things to the bankrupt or expect him to accept redress when the complaint is being pursued by the OR as trustee in bankruptcy and any redress belongs to him.

(2) Similarly in DISP 3 all the rules which refer to the Ombudsman communicating with the complainant or the parties must refer not to the deceased or bankrupt but to the personal representatives or trustee in bankruptcy. I have set out some examples of these rules in paragraphs 133 to 135 above. One cannot read these as requiring the Ombudsman to give the deceased or bankrupt an opportunity to make representations, or to inform the deceased or bankrupt of his decision on various matters, or to send his determination to them, or to give them an opportunity to accept or reject it, or to make an award in respect of costs they have incurred. In all such cases the rules only make sense if "the complainant" means the person who is actually

pursuing the complaint. That is the person who is entitled to any redress awarded and hence must have a right to decide to accept or reject it, and who alone will have incurred costs in pursuing it. That will be the personal representatives or trustee in bankruptcy.

149. The conclusion that I draw from this examination of DISP as a whole is that there is no single answer to who "the complainant" is in the rules, and that it depends on the context of the particular rule in question. Every rule which refers to "the complainant" must be interpreted in the light of the purpose of that rule. This is of course exactly what GEN 2.2.1R says (paragraph 112 above).

150. It follows that some of the arguments put forward on this appeal, on both sides, seem to me to be of very little assistance in resolving the interpretation of DISP 2.8.2R(b). Mr Gibbon for example at various points in his argument relied on the fact that the thrust of the relevant provisions of the FSMA 2000 and its delegated legislation is the protection of the consumer, and that a focus on the underlying customer or underlying consumer is threaded through the drafting of DISP. He referred to what the Judge said in his judgment at [16], namely that the purpose of the FOS, as reflected in DISP, is:

> "to provide a consumer-facing, user-friendly, free-of-charge process for seeking redress without recourse to formal legal proceedings."

I have no difficulty with any of that, but I do not regard it as helping to answer the question who "the complainant" is for the purposes of DISP 2.8.2R(2)(b). That to my mind must depend on the purpose of that rule, not on the overall characterisation of DISP as intended to be focused on the underlying consumer. I agree that there is such a focus, and that the complaint that personal representatives bring on behalf of a deceased consumer, or the complaint that the OR brings on behalf of a bankrupt consumer, remains the same complaint as the underlying consumer would have had if alive or solvent, and that in a perfectly understandable sense it can be said that what they are pursuing is the underlying consumer's complaint. But they are pursuing it not for the benefit of the underlying consumer but for the benefit of those interested in the relevant estate (his estate on death or the estate in bankruptcy), and they are the ones who make the decision when and how to pursue the complaint and whether to accept any redress offered. Given that in some provisions of DISP "the complainant" plainly refers to the underlying consumer, but in others it equally plainly refers to the person actually pursuing the complaint, appeal to the general nature of DISP is to my mind of very little help in resolving the question when it comes to DISP 2.8.2R(2)(b).

151. Conversely Mr Herberg placed some reliance on GEN 2.2.9G to the effect that unless the context otherwise requires, an expression that is not italicised bears its natural and ordinary meaning (see paragraph 112 above), so that "the complainant" must be given its natural meaning of the person who complains (in this case the OR) unless the context otherwise requires. Again I find that of little help in resolving the question of who it refers to in DISP 2.8.2R(2)(b). Given that there are many contexts in DISP in which the complainant plainly does not refer to the OR who brings the complaint but to the underlying consumer who became bankrupt, the question whether it does so in this rule is not to be determined by a default appeal to the natural meaning of the words, but, as GEN 2.2.1R requires, by reference to the purpose of the rule.

152. Before turning to that question, there is one other point which can be drawn from the other references to "the complainant" in DISP, which is this. In general, it can be seen that the question whether this refers to the underlying consumer or to the person pursuing the complaint depends on the time that the provision in question is dealing with. Where the relevant provision refers to a person being dissatisfied with financial services provided, or not provided, (as in the definition of "complaint"), or the question is whether the relationship they had with the respondent was such as to satisfy the requirements for being an eligible complainant (as in DISP 2.7.6R), or the question is what they would have done had they not bought the PPI policy (as in App 3), the focus is naturally on the underlying consumer, as the date which the provision is concerned with is that of the original transaction, in the present case the sale of the PPI policy to the consumer. But where the relevant provision is dealing with the handling of complaints by a respondent firm (as in DISP 1) or by the Ombudsman (as in DISP 3), the focus is naturally on the person pursuing the complaint as the provisions are concerned with the current position when the complaints are being processed, and this is by definition after the underlying consumer is either dead or bankrupt and has no interest in pursuing the complaint (except the remote interest that a bankrupt has in a surplus in the estate which is almost entirely theoretical).

Application to DISP 2.8.2R

153. The next task is to identify the purpose of the time-limits in DISP 2.8.2R. I repeat the relevant text of the rule here for the sake of convenience:

> "The *Ombudsman* cannot consider a *complaint* if the complainant refers it to the *Financial Ombudsman Service*:
>
> (1) more than six *months* after the date on which the *respondent* sent the complainant its *final response*, *redress determination* or *summary resolution communication*; or
>
> (2) more than:
>
> (a) six years after the event complained of; or (if later)
>
> (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;
>
> unless the complainant referred the *complaint* to the *respondent* or to the *Ombudsman* within that period and has a written acknowledgment or some other record of the *complaint* having been received…"

We received little in the way of submissions expressly directed at this question, although for the reasons I have given it seems to me to be fundamental to resolving the question of construction. Unless you know what DISP 2.8.2R is designed to do, you cannot sensibly approach the question whether "the complainant" in DSP 2.8.2R(2)(b) means the bankrupt customer or the OR.

154. But I do not regard the question (that is, what the purpose of the rule is) as difficult to answer. There are in fact three time-limits in the rule, but the first one (that a complainant has 6 months from receipt of the response from the respondent) can be ignored as it does not apply here where the claims have not yet been considered by the respondent. The other two are (a) 6 years after the event complained of, and (b) if later, 3 years from the date when the complainant became aware, or ought reasonably to have become aware, that he had cause for complaint. These can usefully be called the primary and secondary time-limits so long as it is understood that this is not to rank them in order of significance: in the case of PPI mis-selling where consumers very often did not understand at the time the deficiencies in the selling process (or even what they had bought), the secondary period is likely in the vast majority of cases to be of more significance.

155. The resemblance to the ordinary limitation periods for claims in negligence where there is also a primary period of 6 years (under s. 2 of the Limitation Act 1980 ("LA 1980")) and a secondary period of 3 years from the date of the claimant's actual or constructive knowledge (under s. 14A LA 1980) is striking. We have in fact been shown evidence that this is not a coincidence, but even without this material (which is of doubtful admissibility) it would have been a reasonable assumption that the general structure was modelled on the LA 1980 provisions and was designed to do the same thing in general terms.

156. What then is the purpose of having these two time-limits? The purpose of an ordinary limitation period is to prevent stale claims from being litigated, the period of 6 years being fixed as a generally reasonable period to bring a claim. This explains the primary period. But as is well-known that could and did lead to some claimants who had suffered latent injury or damage finding that they had lost their rights to sue before they even knew, or could reasonably be expected to know, that they had been injured or suffered loss. Provision was therefore made, first in ss. 11 and 14 LA 1980 (applicable to claims for personal injury) and subsequently in s. 14A LA 1980 (applicable to other claims in negligence), for the claimant to have 3 years from his date of knowledge to bring a claim. The purpose of this is obvious. It was to remedy the injustice of a claimant's claim being time-barred before they knew, or could reasonably be expected to know, that they had a claim. On the other hand the selection of a (relatively short) 3 year time period shows that another purpose was to provide that once they did, or should, have that knowledge they should get on with the claim and bring proceedings reasonably promptly. Precisely the same in my view applies to the secondary time-limit in DISP 2.8.2R(2)(b). The purpose of the rule is to prevent a complainant from losing the right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware.

157. With that purpose in mind, it is now possible to consider whose awareness is relevant for the purposes of this time-limit. I find it helpful to do this by reference to different factual scenarios, as follows:

(A) The consumer while still alive and solvent becomes aware that he has cause for complaint. 3 years elapses without his bringing a complaint. He later dies or is made bankrupt.

(B) The consumer while still alive and solvent becomes aware that he has cause for complaint. Less than 3 years later, at a stage when he has not brought a complaint, he dies or becomes bankrupt.

(C) The consumer while still alive and solvent neither becomes aware nor ought reasonably to have become aware that he has cause for complaint. He then dies or becomes bankrupt.

158. It was I think common ground that in scenario (A) the complaint is time-barred, and the fact that the consumer later dies or becomes bankrupt does not enable his personal representatives or the OR as his trustee in bankruptcy to bring a complaint. That must be the position, as it would be nonsensical to suppose that if the consumer himself is time-barred before his death or bankruptcy, nevertheless his personal representatives or trustee could bring a claim. On general principles one would never expect them to be given a second chance to bring a claim that is already time-barred, or to be in a better position than the deceased or bankrupt was, and there is nothing in DISP to suggest otherwise.

159. It should be noted however what this means. It means that for the purposes of DISP 2.8.2R(2)(b) "the date on which the complainant becomes aware …" refers to the date when the consumer (being alive and solvent and thus the person who has the right to bring the claim) becomes aware. In other words time starts running from the date of his awareness. The concept of time starting running is a familiar one under the LA 1980, but is also expressly recognised in DISP. Thus for example DISP 2.8.6G, which is concerned with mortgage endowment complaints, provides that receipt by the complainant of a letter which states that there is a risk (as opposed to a high risk) that the policy would not produce a large enough sum:

> "is not, itself, sufficient to cause the three year period in DISP 2.8.2R (2) to start to run."

160. The significance of this point for present purposes is that at the date that time starts running, it cannot be known whether the consumer will die or become bankrupt within the next 3 years. Suppose a consumer is mis-sold a policy in 2000. In 2005 he becomes aware he has cause for complaint. He is at that date alive and solvent. Does time start running? It is common ground that it does. If you ask in 2006 if time has started running, the answer will be "Yes". The answer cannot be "That depends on future events". Either it has started running or not, and here it has. You can't retrospectively say, if the consumer dies or becomes bankrupt in 2007, that time did not start running in 2005 after all.

161. That brings me to scenario (B). It seems to me inevitably to follow from scenario (A) that in this case too time has started running when the consumer became aware. Suppose the consumer became aware in 2005 and dies or becomes bankrupt 2 years later in 2007; just as in scenario (A) his personal representatives or trustee in bankruptcy step into his shoes and inherit the position he was in. Since he had one year left to bring the complaint, so do they. That was accepted by Mr Gibbon, albeit that he did so because on his case the relevant awareness is always that of the underlying consumer.

162. When it was put to Mr Herberg he initially accepted it as well, on the basis that the OR takes what he inherits from the person whose rights vest in him. I think he was right in that for the reasons I have given. He later suggested that if necessary he would accept that the OR has a further 3 years after he himself became aware. But that would mean that time had started running in 2005, and then started again some time after 2007 when the OR became aware. I do not see anything in DISP which supports the suggestion that time could start running again in this way. In general once time has started to run for the purposes of limitation or time-bar it continues to do so unless there is provision for it to be interrupted or to start again.

163. Once however one has reached this conclusion on scenario (B), it becomes impossible to maintain the declaration that the Judge was persuaded to make. The declaration made by the Judge was as follows:

> "To the extent that the Defendant [the OR] as trustee in bankruptcy brings a complaint in relation to the mis-selling of payment protection insurance held by a bankrupt, the relevant awareness for the purpose of DISP 2.8.2R(2)(b) of the FCA Handbook is that of the Defendant not that of the bankrupt."

Suppose the case when the consumer becomes aware in 2005 and becomes bankrupt in 2007. In 2008 the OR as his trustee becomes aware that the consumer did have cause for complaint, and in 2010 the OR brings a complaint. Is it in time? This is scenario (B) and in my judgment it is not, because time started running in 2005 and expired in 2008. But on the Judge's declaration as it stands it would be in time. This is because "[the OR] as trustee in bankruptcy [has brought] a complaint in relation to the mis-selling of [PPI] held by a bankrupt". Hence on the wording of the declaration the relevant awareness is that of the OR not that of the bankrupt. On the facts postulated, the OR's awareness was in 2008, and the complaint brought in 2010 would therefore be in time. The fact that the bankrupt became aware in 2005 would be ignored as irrelevant.

164. Mr Herberg sought to suggest that somehow the bankrupt's awareness could count as the OR's awareness in such a case, but I found this impossible to follow and I do not see how it works. There is no coherent sense in which it can be said that the OR became aware in 2005, long before the bankruptcy started. And there is certainly nothing in the Judge's declaration that would support it.

165. It is for this reason that I agree with Singh and Carr LJJ that the Judge's declaration must be set aside. It is too simplistic to say that whenever the OR brings a claim for the mis-selling of PPI to a bankrupt it is his awareness that counts to the exclusion of that of the bankrupt. Indeed on the literal wording of the declaration, it would appear to allow the OR to bring a claim even in scenario (A). Suppose a case in which the bankrupt became aware in 2005 and then was made bankrupt in 2009 without having brought a complaint. The OR becomes aware that the bankrupt had cause for complaint shortly after appointment and brings a complaint in 2010. On the literal wording of the declaration that is in time because it is only his awareness that counts, and he only became aware in 2009. That cannot be right, but shows the danger of making a general declaration of law in the abstract without any underlying facts: see paragraph 108 of Carr LJ's judgment above.

166. That leaves scenario (C). Here I agree with Mr Herberg. If time has not already started running by the date of death or bankruptcy (because the underlying consumer neither did nor should have become aware before then) then the question whether it starts running thereafter is to be determined in my judgment by reference to the awareness of the personal representatives or trustee in bankruptcy. They are the ones who then have the ability to bring the complaint; they are the ones who stand to benefit (for their respective estates) from doing so; and they are the ones who in practice decide whether and when to bring the complaint. In my view it runs wholly contrary to the purpose of DISP 2.8.2R(2)(b) to suggest that even if they do become fully aware that the deceased or bankrupt had cause for complaint, nevertheless the 3 year period does not start running and they are under no obligation to get on with the complaint.

167. Mr Gibbon's interpretation would lead to what I regard as absurd outcomes. This is particularly stark in the case of death. If the deceased had not (and ought not to have) become aware during his lifetime that he had cause for complaint, Mr Gibbon's interpretation would mean that his personal representatives would never be under any time limit at all, as the deceased could never become aware after dying, however much the personal representatives were aware of the cause for complaint and however tardy they were about bringing it. That would be directly inimical to the evident purpose of DISP 2.8.2R(2)(b).

168. But his interpretation is not much better in the case of bankruptcy. If the bankrupt had not (and ought not to have) become aware before becoming bankrupt, it would mean that the time limit for the OR to bring the complaint would depend not on when he was aware, but on when the bankrupt becomes aware. This would be likely to cause injustice both ways. On the one hand the OR could delay bringing a complaint for many years or even decades provided only that the bankrupt (who in practical terms would have no interest in the question) did not become aware. That seems unfair to the respondent and contrary to the purpose of the rule. On the other hand one can envisage a case where the bankrupt did become aware but failed to notify the OR and the OR remained ignorant of the position. Mr Gibbon's interpretation would mean that time started running against the OR even though he knew nothing about it. That again seems flatly contrary to the purpose of the rule.

169. In my judgment therefore the true position is this:

(1) Time starts running if the underlying consumer, while alive and not bankrupt, becomes or ought to become aware that he has cause for complaint. In such a case "the complainant" in DISP 2.8.2R(2)(b) means the underlying consumer.

(2) If time starts running under (1), it continues to run as against not only the consumer but if he dies or becomes bankrupt against his personal representatives or trustee in bankruptcy, so that they are barred when he would have been barred.

(3) If time does not start running under (1) and the underlying consumer dies or becomes bankrupt before he becomes (or ought to have become) aware that he has cause for complaint, time starts running when his personal representatives or trustee in bankruptcy become, or ought to become, aware that the deceased

or bankrupt consumer had cause for complaint. In such a case "the complainant" in DISP 2.8.2R(2)(b) refers to the personal representatives or trustee in bankruptcy as the case may be.

170. A simpler way of expressing this is to say that the person whose awareness is relevant for the purposes of DISP 2.8.2R(2)(b) is the person who for the time being has both the right to bring a complaint and an interest in doing so. So long as the consumer is alive and solvent that is him; if he dies or becomes bankrupt without time starting to run, it is his personal representatives or trustee in bankruptcy. That is why the simple binary question posed to the Judge was in my view the wrong question and led him to give the wrong answer.

171. It may be noted that this interpretation is consonant with the point I referred to earlier that the question of who "the complainant" refers to in any particular provision depends on the date which the rule in question requires one to consider (paragraph 152 above). Since the relevant date for the purposes of DISP 2.8.2R(2)(b) is the date when the complainant first became aware, in my view the complainant means the person who has the right to complain and interest in complaining at any putative date.

Conclusion

172. I would for these reasons set aside the declaration made by the Judge which in my view goes too far. But I would not substitute any alternative declaration. I would not substitute that suggested by Mr Gibbon because I think it is wrong. And Mr Herberg did not ask for any alternative form of declaration in the event that we set aside the Judge's declaration.

173. I have reached these views without having to consider any of the questions that were argued on the vesting of the bankrupt's estate under the 1986 Act. Since Mr Gibbon accepts – indeed it is the foundation of the complaints that the OR has brought – that the OR can pursue complaints on behalf of bankrupts under DISP 2.7.2R, I do not think it matters whether technically what vests in the OR under the 1986 Act is the right to bring the complaint or merely the right to any redress awarded. Insofar as it does matter I am content to agree with the views expressed by Singh LJ at paragraph 56 above.

174. I also agree with him on the Respondent's notice points. I have already said that I agree that the OR is not, as contended in Ground 3 of the Respondent's notice, an eligible complainant. On Grounds 1 and 2 (admissibility and ultra vires) I agree with Singh LJ for the reasons given by him at paragraphs 78ff and 88ff respectively.