Neutral Citation Number: [2022] EWHC 2766 (Admin)

Case No: CO/273/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2022

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

- -

Between :

ASSURANT GENERAL INSURANCE LIMITED

Claimant

- and -

FINANCIAL OMBUDSMAN SERVICE

Defendant

MRS JOANNE MANLEY
MISS LYNN EVANS
MS GILLIAN BRADLEY
(Administrator of the estate of the late Mrs Elaine Bradley)
MRS RACHAEL GOODING

Interested Parties

- -
- -

Miss Saima Hanif KC & Mr Theodore Van Sante (instructed by Pinsent Masons LLP) for the **Claimant**
Mr James Strachan KC (instructed by Financial Ombudsman Service) for the **Defendant**

Hearing dates: 11th & 12th October 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 2 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mrs Justice Collins Rice :

Introduction

1. Mrs Joanne Manley, Miss Lynn Evans, the late Mrs Elaine Bradley and Mrs Rachael Gooding used well-known home-shopping catalogues (Freemans, Grattan and Express Gifts, respectively). Each took advantage of the retailer's credit facilities to spread payment for their purchases. And each was also sold a 'payment protection insurance' policy to 'cover' that credit arrangement.

2. They have all complained to the Financial Ombudsman Service that they were mis-sold the PPI. At the time, the retailers were not directly subject to statutory financial services regulation in respect of selling insurance (the position has changed since). However, the PPI policies themselves were provided and underwritten by Assurant General Insurance Ltd. The FOS has decided to accept the individuals' complaints against Assurant, for further consideration.

3. Assurant brings these judicial review proceedings to try to establish that the FOS has no jurisdiction to do so.

The issues

(a) The Ombudsman's jurisdiction

4. The FOS has satisfied itself, in 'final decisions' made in each of the four cases on 26th October 2021, that it has jurisdiction to consider those cases under section 226 of the Financial Services and Markets Act 2000, the statute which sets it up and gives it its functions. The section provides as follows:

> **226. – Compulsory jurisdiction**
>
> (1) A complaint which relates to an act or omission of a person ('the respondent') in carrying on an activity to which compulsory jurisdiction rules apply is to be dealt with under the ombudsman scheme …

5. Those rules are contained in the Financial Conduct Authority's Handbook, in the section dealing with 'Dispute resolution: Complaints' (DISP 2: Jurisdiction of the Financial Ombudsman Service).

6. Here we find the *Rule* (2.3.1R) that confers jurisdiction on the FOS to consider a complaint '*if it relates to an act or omission by*' Assurant. And we find *Guidance* (2.3.3G) that '*complaints about acts or omissions include those in respect of which…* [Assurant] … *is responsible (including business of any ... agent ... for which ...* [Assurant] …*has accepted responsibility*'.

7. FOS says it has jurisdiction because the catalogue retailers were acting as agents for Assurant in selling PPI policies. So their acts and omissions were its acts and omissions. Assurant says that is wrong, and FOS erred in finding there was an agency

relationship between it and the retailers. That is the challenge for which Assurant has been granted permission for judicial review.

(b) The correct approach of the reviewing Court

8. The parties dispute not only the answer to the agency question, but the approach I should take to considering their dispute.

9. Assurant says the question: '*were the retailers acting as its agents?*' is

> a question of precedent fact and/or a question for which there is either a right or a wrong answer, such that it is for the Court to determine.

10. But the FOS says this:

> the Ombudsman finds the facts based on the evidence made available to the Ombudsman (where such fact-finding is subject to review on *Wednesbury* grounds) and the Court decides, on the facts found by the Ombudsman, whether the application of the law to them is correct rather than reasonable.

Analysis

(i) The correct approach of the reviewing court

(a) Introduction

11. In general, a court undertaking Judicial Review of a public authority's decisions will take a different approach to questions of law and questions of fact. If an error of law is alleged, a court must make up its own mind about what the law is, and decide whether there has been an error accordingly. But if an error of fact is alleged, a court will show appropriate deference to the fact-finding functions of the authority (particularly where conferred under statute), and intervene only if it considers the authority's decision to be outside the spectrum of findings reasonably available to it on proper consideration of the materials before it.

12. Where, however, a challenge is made not to a decision in the exercise of an authority's functions, but to a decision about whether it has those functions in the first place – a jurisdictional question, in other words – matters are less simple. If, on a proper analysis, it appears that jurisdiction itself depends on the existence of a matter of fact, then a reviewing court may have to take its own view of whether that fact does or does not exist. It cannot otherwise know what functions, if any, the authority properly has in law. In such cases, and in that sense, jurisdictional questions always engage issues of law.

13. The correct approach of reviewing courts to jurisdictional questions in general, and to FOS's jurisdiction in particular, have been the subject of a number of recent decisions of the courts. What follows is by way of reference to those that were particularly drawn to my attention by the parties.

(b) The caselaw on jurisdictional challenge

14. I start, as invited by Assurant, with the landmark Supreme Court case of R (A) v Croydon LBC *[2009] UKSC 8*, and the much-quoted analysis of Baroness Hale JSC. Local authorities have distinctive decision-making powers and duties in relation to 'children in need', so that is a jurisdictional matter. Whether a child is 'in need' is a complex, multifactorial and evaluative issue. So '*within the limits of fair process and Wednesbury reasonableness there are no clear cut right or wrong answers*' and a reviewing court will defer accordingly to the local authority as the intended final arbiter within the legislative scheme. But whether someone is 'a child' in the first place is a different kind of question. The relevant statutory scheme is entirely for and about children. Someone's date of birth is a wholly objective fact. Ascertaining it may be difficult (and often is, in the case of young asylum seekers with no papers). But the truth of the matter is not something for the reasonable evaluation of the local authority, it is something for a fact-finding exercise by a court, weighing the evidence. It is, jurisdictionally, a 'precedent fact' on which the courts, not the local authority, were the intended final arbiters within the statutory scheme in question.

15. A local authority is not disinterested in the answer to the question of whether someone is a child: onerous practical and resourcing consequences ensue in law if so. The relevant statutory scheme was found in these circumstances to have envisaged a role for the court in ensuring the question is determined by full and impartial judicial process. But in other cases it will always be for a court to decide in the first place whether any jurisdictional challenge before it turns on a factual issue which is (a) within the authority's remit as final arbiter or (b) within the court's own remit to decide as an objective condition precedent to jurisdiction. That decision is, crucially, always governed by the statutory context within which the question arises. It is a question of law, of statutory interpretation.

16. I was then taken to a small group of High Court decisions following Croydon which have had to grapple with this question of law, or statutory interpretation, in the specific context of that part of the Financial Services and Markets Act 2000 (including s.226) which governs the jurisdiction of the FOS.

17. A careful piece of statutory analysis was undertaken by Sales J (as he then was) in R (Bankole) v FOS *[2012] EWHC 3555 (Admin)*. At issue was the correct approach of the reviewing court to the question of whether a complaint had been received within the time limit provided for in the statutory scheme. The Court declined to categorise this as a precedent fact for it to determine itself: it was 'clear' as a matter of statutory interpretation – bearing in mind in particular '*the general objective for a statutory scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person, being the ombudsman*' – that the question was a matter on which the decision of the FOS was final, subject only to review by the High Court on usual judicial review grounds.

18. *Bankole* was considered and distinguished by Wilkie J in R (Bluefin Insurance Services Ltd) v FOS *[2014] EWHC 3413 (Admin)*, a case particularly relied on by Assurant. Here, the issue was how to characterise the question of whether someone was an 'eligible complainant' at the relevant time. That depended in turn on whether they were a 'consumer', that is, acting outside their trade, business or profession, as provided in the DISP section of the FCA Handbook. This time, the statutory interpretation exercise led the Court to conclude that the question *was* a 'precedent fact' issue for it to decide itself, bearing particularly in mind that '*access to the compulsory jurisdiction of FOS,*

with its enhanced benefits or burdens, is determined by reference to limiting conditions stated in objective terms'. Interestingly, the Court *also* proceeded on the alternative basis that since there could be only one right answer to the question of eligibility, if the FOS had got it wrong then it would necessarily have misdirected itself in law, so as to make the issue fully reviewable by the High Court anyway.

19. A thorough review of the authorities on FOS jurisdiction was undertaken by Ouseley J in *R (Chancery (UK) LLP) v FOS [2015] EWHC 407 (Admin)*; I read that carefully, as invited by FOS, and do not seek to replicate it all here. In the case itself, the question to be characterised was rather more technical: it involved considering the meaning of 'collective investment scheme' which, in turn, involved issues about whether there was a distinction between tax advice and investment advice, and whether the participants had 'day to day control'. The conclusion the Court came to was also rather more nuanced. It considered the question to be one of mixed law and fact, and the FOS to have been intended to be the final arbiter of the factual component. In undertaking that exercise in statutory interpretation, the Court had particular regard to a number of aspects of the scheme, including (a) the extent to which FOS's *expertise* was needed in order to come to factual conclusions, (b) that there was overlap between the fact-finding needed to resolve the jurisdictional issue and the consideration of merits issues thereafter and (c) that the FOS's own statutory procedures for determining jurisdiction were a significant part of the context.

20. Ouseley J took a similar approach in *R (Tenetconnect Services Ltd) v FOS [2018] EWHC 459*. The question here was relatively complex also: it involved considering the connection between, and the authorisation by agreement of, advice about the purchase of property and the provision of a loan on the one hand, and advice about selling regulated investments on the other – and about what fell within the scope of the complaint made. The Court found the interpretation of the complaint to have been intended by the statutory scheme to be a matter for FOS's final decision. Like *Bankole*, the speedy and informal nature of the Ombudsman scheme was a weighty consideration. The analysis of the transactions was also a mixed question of fact and law; the FOS was engaged on an exercise of interpreting these transactions in the context of commercial realities and '*the law governing the Ombudsman's jurisdiction could not force facts into unrealistic compartmentalisation without undermining its purpose and effectiveness*'.

(c) Consideration

21. I do not find conflict or tension in the authorities on the correct approach of a reviewing court to a challenge to a decision of FOS to assume jurisdiction. The reviewing court must always identify its own role through an exercise of statutory interpretation. That involves considering the nature of the *particular* question before it, in its proper context in the statutory scheme as a whole.

22. Sometimes, as in *Bluefin*, the right interpretation of the question might be that a threshold test of the eligibility of the complainant turns on a fact so fundamental to the way the whole scheme works, so distinct from merits issues, so straightforwardly objective and untechnical, and so binary as to its presence/absence or truth/falsity, that Parliament must have intended reviewing courts, and not FOS, to be the ultimate fact-finder. Sometimes, as in *Chancery* and *Tenetconnect*, the right interpretation is the opposite – that a jurisdictional question is so difficult to split cleanly into law and fact

or into fact and evaluation, so hard to separate from merits consideration, and so technical, that the scheme would not work properly unless the reviewing court deferred to FOS fact-finding subject only to ordinary judicial review controls. Different aspects of the statutory scheme may be more or less relevant, depending on the question, but the factors that the FOS is intended to be quick, cheap and informal, and that is a specialist and expert body, are common themes.

23. So I do not draw from *Chancery* any *general rule* to the effect that facts going to its jurisdiction are always for the FOS '*within the limits of fair process and Wednesbury reasonableness*'. It depends on analysing the question at stake. But I do take from *Chancery* a particular point about the statutory scheme governing the proper approach of a reviewing court to FOS jurisdiction which seems to me of general application. That concerns the *process* by which FOS initially resolves its factual jurisdictional questions.

24. This is set out in DISP3.2 of the FCA Handbook. The FOS has to take a distinctively iterative approach to determination of its jurisdiction. It must form a preliminary view about its jurisdiction, and, if a respondent alleges that a complaint is out of jurisdiction, the FOS must give both parties an opportunity to make representations before it decides. It then issues a 'final' reasoned decision. That was the process followed in the present case; Assurant objected to the FOS's preliminary indication of jurisdiction, and correspondence ensued which included full, developed submissions on jurisdiction. The FOS then issued final decisions addressing those submissions and giving reasons for disagreeing with them. It is those decisions which are challenged in these judicial review proceedings.

25. But the important point noted in *Chancery* is this, at [75]:

> However, although it is for the FOS to consider jurisdiction at the outset, if it decides that it has jurisdiction where that is contested, it may need to keep the question of jurisdiction open throughout the course of the decision-making process. The issue may not be closed by the final jurisdiction decision. New evidence and issues will have to be considered. The facts are not agreed; … [and have] yet to be explored fully. It may go to jurisdiction as well as merits. … jurisdiction is not closed here, and in the light of what I have said, it should not be closed generally. Where jurisdiction has been and continues to be disputed, the FOS must consider any evidence and argument which goes to [its] jurisdiction, until the conclusion of the case, and [it] should identify that in [its] decision.

26. A prematurity point was raised on this basis by the FOS in *Chancery*. The Court noted that it was akin to an alternative remedy or non-exhaustion of remedies argument and continued, at [79]:

> There is, it seems to me, much sense in adopting this course… Where the issues of jurisdiction and merits overlap, that should be the normal approach. Indeed, that should be the case unless there is a clear cut issue of law, not dependent on disputed facts, raised in the jurisdiction decision which would be determinative of the claim. It avoids issues being considered twice, and

> incompletely the first time. What I have said about the approach to jurisdiction is strongly supportive of that approach.

The Court, however, considered that in the case before it, having heard argument, there were *some* jurisdictional issues it could and should deal with, and proceeded to do so.

27. No prematurity point was urged in these terms before me. But the distinctively iterative approach to jurisdiction required of FOS in the scheme, and developed in *Chancery*, remains in my view an important consideration for a reviewing court considering its own role. It is of particular relevance to cases in which the test question is one of mixed (and not easily separable) law and fact, where jurisdictional and merits considerations shade into each other, and where the fact-finding requires a measure of expertly-informed evaluation.

(d) Application to the present case

28. The test question in the present case is: *were the catalogue retailers acting as the agents of Assurant in selling PPI to the complainants?* Assurant says that is a question of fact for me to consider – a jurisdictional precedent fact – and FOS say it is the sort of question where its own fact-finding should be regarded as final, limiting a reviewing court to ordinary public law controls.

29. I remind myself that the proper classification of the test question is a matter of statutory interpretation. So I have regard to the statutory purpose of the Ombudsman scheme as providing a quick, cheap and informal means of deciding on complaints. I have regard to its role as an objective and expert adjudicator. And I have regard to what the scheme itself says about its internal processes for determining jurisdiction.

30. Following the guidance of the authorities on statutory interpretation on issues of FOS jurisdiction, the analytical tools at my disposal include considering how far the test question is (a) fundamental to the whole purpose of the scheme and its statutory boundaries; (b) one of 'pure, objective' fact (like the truth of someone's age) or alternatively one of mixed fact/law or fact/evaluation; (c) one in which jurisdictional and merits issues overlap; and (d) one where the particular knowledge and insight of an expert tribunal is helpful for resolving it.

31. Taking these points in turn, whether the retailers were agents of Assurant is undoubtedly a determinative jurisdictional question. The answer decides whether Assurant is a proper respondent and whether the complainants have any prospect of further investigation of the merits of their complaint. But I do not regard it as quite in the same category as questions such as whether a complainant was eligible to complain, or did so in time. Those are simple preliminary threshold tests about *who* the whole scheme is for. The agency question is one about whether the particular activities complained of were, in effect, the acts or omissions of Assurant or not. It is rather more complicated.

32. Assurant says it is, nevertheless, a question of pure, objective fact, and one to which there is a binary right or wrong answer. It may be a difficult question to answer evidentially – just as age assessment can be difficult – but it is, nevertheless, it says, of that nature. Care is needed here, however. Just because there may be a single right answer to a question does not mean that it is a question of pure fact at all, much less

that it is a question of precedent fact. That is not the logic of the authorities. A right/wrong answer does not necessarily demonstrate a true/false cornerstone fact. I have to start with the question, not the answers.

33. Whether a relationship of agency exists or not is in my view best characterised as a mixed question of fact and law. It requires the application of the relevant law and principles of agency to the facts of a particular case, and may be multifactorial and complex. And where, in a disputed agency case, the relationship between the parties is governed by a contract, a further question of mixed law and fact arises – the correct interpretation of the contract. That requires the application of the law of contractual interpretation to the language and business context of the contract, and may be multifactorial and evaluative. These are the strata of the jurisdictional question in the present case. It is a complex question in which law and fact, fact and evaluation, interpenetrate.

34. It also seems to me to be a question where there is considerable potential overlap between jurisdictional and merits issues. The ultimate merits question the FOS would need to consider in a case like this is whether the PPI policies were mis-sold. That would turn on factual matters to do with the individual complainants, their personal and financial situation, and what they were and were not told. But it would also turn on the legal obligations of both the retailers and Assurant under the contract between them, the balance of responsibilities that represented, and the facts of how the contract had been performed. The potential for overlap is plain. The interpretation of the contract and the contractual duties of and between the parties is key to both.

35. Finally, I consider it to be a question in which the objectivity, impartiality and expertise of the decision-maker, as provided for in the statutory scheme, has a significant part to play. The decision properly requires interpretation of the contract in the context of the commercial realities, business norms and regulatory framework within which it was entered into. It requires familiarity with the wider context of FSMA regulation, which in turn informs that interpretation.

36. The iterative nature of the process to which FOS is already constrained by the statutory scheme in its consideration of jurisdictional matters is important. In cases like this, where jurisdiction and merits issues materially overlap, and jurisdiction is disputed, it must keep its jurisdiction under active review. That is the solution Parliament has provided for dealing with complex jurisdictional questions such as the present one. It does not envisage the intrusion of the court, as a tribunal of fact, part way through that process. To do so would be entirely contrary to the scheme and purpose of the Ombudsman's functions.

37. The FOS in deciding the question of agency is doing something distinctively different from a local authority working out someone's age. It is a complex, multifactorial and evaluative exercise in applying law to facts. And, importantly, in accepting jurisdiction it is doing so on a provisional basis which must be kept under active review. My conclusion in all these circumstances is that the jurisdictional question in the present case is one in which it is plain that Parliament intended the scheme to operate so that the agency question should properly be regarded as a matter for the FOS to decide, subject only to a reviewing court's duty to constrain it to the usual public law demands - procedural fairness, rationality in fact-finding, and the avoidance of error of law.

(ii) The Ombudsman's decisions

38. I take Assurant's challenge in the present case, therefore, to be that the FOS decision to accept jurisdiction was 'wrong' in the traditional JR sense: irrational, or wrong in law (procedural unfairness is not alleged). It says that in concluding the contract gave rise to an agency relationship, the FOS misapplied the law and failed properly to construe the agreements.

(a) Legal framework

39. The parties directed me to the outline of the decided law on agency summarised in the opening chapter of the textbook *Bowstead and Reynolds on Agency*. In pithy summary:

> Agency is a fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act, or so acts pursuant to the manifestation.

40. It is a voluntary relationship, and cannot be imposed unintentionally or unilaterally. It is a relationship which may arise expressly or impliedly, but it is a matter of substance, not label. So '*where there is evidence of a conferral of authority to alter a principal's legal relations, the normal incidents of agency are, prima facie, likely to apply even if the parties' contract expressly disavows one being the 'agent' of the other*'. By contrast, '*the mere use of a label such as agent or 'manager' may not attract the incidents of agency if there is no authority to alter the other's legal position conferred*'; in such cases, '*the court should not impose an agency analysis upon a relationship which may better be analysed in other terms – UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH [2017] EWCA Civ 1567*'. In other words, authority to alter legal relations is central, and whether it has been conferred must be judged objectively.

41. There are other typical features of agency. Its fiduciary quality requires there to be no conflict of interests; principal and agent may be '*commercially related but not commercially adverse*', so any profit by the agent must be disclosed to and agreed by the principal. The duties of an agent are typically of a due diligence or best endeavours nature, rather than requiring the achievement of specific outcomes. The payment of commission is a typical feature. And a measure of control by the principal over the agent is typical – an agent has a duty to obey relevant instructions within the relationship. The absence of these typical features may point away from finding a relationship to be one of agency; but the presence of them is not determinative of it.

42. Agency is distinguished from distributorship – the situation where a retailer buys from a wholesaler or manufacturer and then sells on under separate contracts in circumstances where the commercial risk of the retail activity is fully borne by the retailer.

43. The broad outlines of the law on contractual interpretation are not controversial in this case, and the parties direct me to the guidance set out in *Wood v Capita Insurance Services [2017] UKSC 24* at [8]-[13] and [41]. A contract must be construed as a whole

and in context, and '*the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement*'. The court will consider the quality of the drafting, the extent to which it has or has not been freely negotiated and/or professionally drafted, and in case of doubt or ambiguity will take into account which construction is more consistent with business common sense. It is not, however, the function of the court to improve the parties' bargain.

(b) The decisions under challenge

44. All four decisions are under challenge. Each decision is between 14 and 17 pages long. In each case, the FOS found the relevant catalogue retailer to be the agent of Assurant in selling PPI. That was based almost entirely on construction of the contract governing the relationship in each case.

45. The four contracts themselves are very similar, although not identical. They were prepared by Assurant and subject to a process of negotiation. They are relatively short – around eight or nine pages of large typesetting – and comprise some twenty clauses, with a small number of brief schedules setting out the technical insurance details and remuneration figures. None of them contains an express clause stating unambiguously in terms that the relationship either is, or is not, one of principal and agent.

46. There was (and is) some dispute about the precise scope of the contracts – some have detailed consumer terms and conditions annexed to them, and others make reference to separate documents as being the source of equivalent terms. But it is not suggested that either the original decision-maker, or I, ought to proceed on the basis that anything materially turns on the differences between the contractual documentation, or the corresponding differences between the four decisions.

47. The decisions refer to little in the way of external aids to construction of the contract. Little factual evidence outside the contracts was referenced as having been available to the decision-maker. They do, however, take into account documentation provided by Assurant, consisting of (a) some pre-contractual correspondence, (b) some other contracts they had entered into, by way of contrast, which had clear agency clauses and (c) some unreported County Court litigation over another contract which had been held not to create agency.

48. The FOS decisions appear on their face to be a notably painstaking exercise in setting out the issue to be decided, summarising the preceding procedural steps and Assurant's submissions made in the course of them, setting out the relevant law (of agency), construing the contracts both as a whole and at clause by clause level, addressing Assurant's position on a point by point basis, and coming to a fully reasoned conclusion. The present challenge is not to the structural adequacy of the decisions, but that they are wrong – they misapply the law, misread the contracts, and misunderstand the relationship between Assurant and the retailers.

49. The decisions also proceed on the basis of an understanding about the bare commercial bones of the relationship which, reduced to its simplest form, is not controversial. Assurant made a PPI policy available to the catalogue firms for retail sale to individuals, and underwrote them once sold. The system operated by cover being extended to each purchasing consumer under one composite policy. The retailers were rewarded with commission and profit share.

50. The core of each decision is a conclusion that the retailers were thereby authorised to alter Assurant's legal relations:

> [The retailer] prepared marketing materials and advertisements, for [Assurant]'s approval, and used those to market the PPI to customers in accordance with the marketing plan agreed by [Assurant]. The arrangement as a whole operated in a manner that meant that [the retailer] would market and sell the policy in a manner that met with Assurant's approval, and then bind Assurant to the contract with the consumer by adding their name to the master policy and taking their premium.

That, according to the decisions, was the quintessence of agency.

51. The remainder of each decision addresses the detail of the contract terms. Assurant had pointed to a number of features of the individual clauses which it said, singly and together, were inconsistent with agency and indicated an altogether different legal relationship: a principal-to-principal arrangement more like distributorship by which the retailers autonomously acquired a wholesale product and underwriting services, and sold that product to the public on their own account, ancillary to their catalogue offer. The decisions consider the clauses in question, singly and together, and disagree that they are inconsistent with agency or point to another conclusion. The decisions also cite a number of clauses as positively reinforcing the agency conclusion.

52. The other contract clauses *principally* relied on by the FOS as pointing to agency included the following:

    i) *Exclusivity* – All four contacts preclude the retailers from promoting or selling through their catalogues any insurance product of a similar type to Assurant's PPI policies. They also prevent the retailers initiating or assisting in the termination or replacement of the policies by consumers. So FOS took into account that this was a 'sole dealership' arrangement, limiting the retailers to selling only Assurant's PPI. FOS said that pointed away from the retailers being autonomous principals, and towards an agency relationship: Assurant stepping into a new marketplace through the agency of the retailers.

    ii) *Service provision* – The retailers are contractually bound to market the PPI to consumers; collect the premiums and remit them to Assurant; levy the requisite taxes; print and provide insurance certificates for customers; process cancellations and refunds; report claims to Assurant within specified times; train those of their employees involved in administering the PPI; and perform such other administrative activities as may be mutually agreed from time to time. FOS concluded this all added up to a non-autonomous role in the *administration* of the insurance *on behalf of* Assurant. It says the collection and remittance of, and accounting for, premiums and taxes in particular had a clear fiduciary dimension to it. And it is reinforced in this view by the extent of contractual control provided for.

    iii) *Control* – The first contractual duty of the retailers was to market the policies to consumers *in accordance with a marketing programme agreed to* by Assurant. (One variant of the contract terms provides for such agreement not be

unreasonably withheld, but FOS notes that that does not displace the requirement for agreement.) The retailers had to ensure that all brochures, marketing materials and advertisements were approved by Assurant before being printed. (This clause contains a drafting wrinkle in referring to documents 'under the insurance'; Assurant says that reflects its interest in ensuring the documents accurately described the insurance, but FOS says that is hard to square with the reference to marketing materials.) Taxes were to be levied in accordance with government requirements *communicated in writing* by Assurant to the retailers. The insurance certificates were to be provided *in accordance with Assurant's guidelines and policies*. Training materials and processes were to be developed, provided and presented by the retailers *as mutually agreed*. And *all* of the retailers' contractual duties were to be performed *in accordance with Assurant's guidelines, manuals and written instructions from time to time*. The retailers were under a duty to make available for Assurant's inspection *all records pertaining to* the PPI. FOS considered all this contractually to provide for a high level of both strategic and day-to-day control to be available to Assurant, and to point for that reason clearly to a non-autonomous agency arrangement. But Assurant says that an even higher level of control would have been provided for had agency been intended, and that in practice it was, and had always been intended to be, a more arm's length relationship than FOS understood.

iv) *Remuneration* – FOS put weight on the contract providing for Assurant to pay commission to the retailers for selling the PPI, being typical of an agency arrangement. Assurant says however that the profit-share dimension of the remuneration package is atypical, if not positively inconsistent with agency.

v) *Role identification* – The contracts require the retailers to comply with the Association of British Insurers' Code of Practice for the selling of insurance. FOS places weight on two aspects of this. The first is that the ABI Code itself requires all insurance retailers to identify themselves to prospective customers as either a) an employee of an insurance company, b) an agent of one insurance company, c) an agent of between two and six insurance companies or d) an independent intermediary seeking to act on behalf of the prospective policyholder. No other alternative is contemplated. FOS says the only conceivable role for the retailers in that matrix is b). It also points out that in one of the contracts, the clause binding the retailer to the ABI Code requires it to inform Assurant of any changes to its status 'as agent' (Assurant points out that the other contracts do not have this provision, and says the clause itself is ambiguous).

Assurant by contrast points to a clause towards the end of a list in the 'Miscellaneous' section of the contract terms which reads:

> <u>No partnership.</u> Nothing in this Agreement shall constitute a partnership between [Assurant] and [the retailer] and neither shall have authority or power to bind the other or to contract in the name of or create liability against the other in any way or for any purpose save as expressly authorised in this agreement.

Assurant says this is effectively an express exclusion of the possibility of an agency relationship: or rather that consent to agency could be given only expressly, had not been given expressly, and therefore could not arise impliedly by the sorts of routes of construction on which FOS has relied throughout. FOS takes a different view of this provision as a matter of contractual construction: that this is a provision about partnership, not agency at all, and both in the wrong place and too ambiguous for a clause which would otherwise be fundamental to and definitive of the parties' legal relationship if it had meant to exclude agency. It says in any event the express authorisations and duties in the main body of the contract do add up to an (implied) agency relationship; and even if this could possibly be described as an 'agency exclusion' provision it would not, on the authorities, be effective as such in all the circumstances anyway.

(c) Consideration

53. I remind myself that the question for me is whether these decisions disclose error of law or irrationality on the facts.

54. The decisions contain little in the way of pure fact-finding, other than by identifying the documentation governing the parties' legal relationship. It is not materially disputed that they addressed themselves to relevant sources of the law of agency. The challenge is that the law was misapplied to the contracts, and the conclusion of agency was not properly open to the decision-maker by reference to the law and the contract terms.

55. I start with the big picture. The contracts were professionally prepared agreements between substantial commercial enterprises freely entered into in order to determine their legal relationship, and to their mutual financial benefit. They were prepared by Assurant - the insurance expert and provider and underwriter of the insurance product. They were concluded after professionally-informed negotiation with the catalogue firms – the retail experts with established market penetration and a valuable customer database. And they did indeed promise to be mutually financially beneficial. Assurant gained access to a substantial and established retail market, trusted catalogue brands and the marketing expertise of the retailers, with a view to volume sales of PPI to consumers, from which it expected to profit. The retailers were to be rewarded with commission on sales and a share in Assurant's profits from the sales. That was the commercial essence of the matter. I see no sign that FOS erred in its understanding of it.

56. I turn then to the FOS core finding that the retailers were authorised to alter Assurant's legal relations with third parties. That is, on the face of it, the clear logic, indeed the whole substance, of the matter. The retailers extended Assurant's policy to their customers. The customers were thereby individually insured by Assurant, on consumer terms and conditions issued by Assurant. Individual claims would be made against and determined by Assurant. The policy was underwritten by Assurant. So the retailers were authorised to place customers into an insurer/insured legal relationship with, and binding on, Assurant. No error appears in that starting point.

57. The next step was FOS's conclusion that that feature – contractual authorisation for the retailers to affect Assurant's legal relationship with individual customers – was the essence and hallmark of agency. The FOS decisions do not say it is conclusive, but they do put it in a central position. That is in accordance with *Bowstead & Reynold*'s

'pithy summary'. The authorities warn about the difficulties of inferring an agency relationship where no such authorisation exists; but where it does, those particular difficulties disappear. There is more to consider, but agency is at least a legitimate starting point.

58. Assurant's challenge gains it first purchase by potentially taking issue with the component of the 'pithy summary' requiring that Assurant consented to the retailer acting '*on its behalf*' in altering its legal relations with the customers. The challenge is that the retailers were acting on their own behalf all along. Of course the fact that the retailers freely entered into these contracts, that they made commercial sense for both parties, and that both parties stood to benefit, does not preclude an analysis that the retailer were altering Assurant's legal relations with third parties *on its behalf*. Those features will usually if not always be present in agency relationships.

59. Assurant was both the contracting party expert in insurance and in the regulatory context in which it was sold, and also the principal drafter of the contracts. FOS may have taken that into contextual account in reflecting on the extent to which any textual ambiguity about the contractual balance of the risk of insurance mis-selling ought to be resolved in Assurant's favour. It certainly took into account that there were other contexts in which Assurant's contracts with retailers had put agency on an express footing, or conversely had been found not to import an agency relationship, but it distinguished them on the facts. I find no error here. These were all matters to which FOS was entitled to have regard and I cannot see that it did so defectively.

60. In any event, FOS concluded there was no material degree of ambiguity in the contracts. It concluded that the essential component, and all of the other key signifiers, of agency were present; and nothing inconsistent with it, or materially indicative against it. In reaching this conclusion FOS relied on the patent ability of the retailers to alter Assurant's legal relations with individuals by creating new insurer/insured relationships on which individuals could bring claims against Assurant; and that the retailers had no *insurance* contract of their own with consumers, only *sales* contracts. It relied on the retailers' exclusive tie to Assurant. It relied on the fact that the retailers' principal contractual duty to Assurant was to market its PPI policy, and on the extent to which they were providing administrative (including fiduciary) services to Assurant in doing so. It took into account that the retailers had not bought or committed to quantity sales; their duties went no further than 'best endeavours' marketing. It took into account the high level of control over the retailers' activities to which Assurant was entitled (whether or not it chose to – or indeed failed to – exercise that entitlement). It took into account that the remuneration package comprised commission on sales (typical of agency) and a share in Assurant's profits from the deal (not inconsistent with agency because fully disclosed, assented to, and indeed an expressly agreed contract term). It took into account that agency was not a headline express term, but that nor was it a headline excluded term, and that such express indications as there were either way were not conclusive; and, importantly, that in any event the question was one of substance not label *even if there had been unambiguous express provision either way*.

61. None of this appears to me to disclose any error of law (the law of agency or of contractual interpretation), or public law irrationality, either on the face of the decisions under challenge or in the light of the parties' fully developed legal submissions before me. FOS's interpretation of the contracts is undoubtedly supported by the language and

structure of the contracts and by the business and regulatory context within which they were drafted and agreed, for the reasons set out in the original decisions and more.

62. Assurant may have raised a case that FOS's interpretation was not the only possible, or even the only potentially reasonable, interpretation. Its case in essence was that Assurant was a mere underwriter, that it was the retailers who had 'obtained' and 'held' a policy in relation to which they acted autonomously in extending cover to their customers; and that in doing so they were at most 'distributors' for Assurant and not agents. That may be a statable interpretation, and Miss Hanif KC could not have done more to put it at its highest before me. But Assurant did not come close to persuading FOS that that was the *better*, more obvious or more natural interpretation of the language and effect of the contract in its commercial context, for all the reasons it gave after careful and detailed consideration. I cannot find fault with that conclusion. Much less does Assurant come close to persuading me now that *no other* interpretation was properly open to FOS at all.

63. Neither equality of bargaining power nor mutual profitability is to be equated with a principal-to-principal relationship. Nor can much headway be made by arguments that if agency had been intended – or conversely if some other relationship had been intended – the contracts would have said so in terms, or at least more clearly. A court will not improve the parties' contract, and labelling is never conclusive of agency anyway. It is the substance of the relationship, viewed objectively and through the lens of business common sense and within the statutory context to which the exercise is relevant, which is determinative.

64. The parties to the contracts in this case each brought something different, and commercially valuable, to the relationship. One provided what was intended to be a profitable insurance product. The other provided volume sales by marketing and retailing it to catalogue home-shoppers. FOS's conclusion was that the retailers were authorised by and accountable to Assurant as its agents in PPI selling; that they acted as Assurant's agents – on its behalf, under its control, and for the rewards it provided – in doing so; and that the contractual terms understood in their relevant context do not support Assurant's contrary contention that its interests and responsibilities ended with making the product available to the retailers and underwriting it. Determining disputed (implied) agency is multifactorial, fact-sensitive and evaluative. FOS's conclusion was both entirely rational on the materials and in the factual context before the decision-maker, and the product of legal analysis with which the authorities are fully aligned and with which I cannot find fault.

Decision

65. In all of these circumstances, I find no basis for disturbing the four 'final decisions' on jurisdiction challenged in these proceedings. Judgment on the claim will be entered for the Defendant.