Neutral Citation Number: [2024] EWHC 3374 (Admin)

Case No: AC-2023-LON-002721

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 December 2024

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- -

Between :

THE KING
on the application of
(1) MARGARET CHONG
(2) MARK FRASER
(3) VICTORIA LEACH **Claimants**

- and -

FINANCIAL SERVICES COMPENSATION SCHEME LIMITED **Defendant**

- -

Rowan Pennington-Benton and **Katharine Bailey**
(instructed by **Anthony Philip James & Co.**) for the **Claimants**
James Strachan KC (instructed by **Bevan Brittan LLP**) for the **Defendant**

Hearing dates: 8-9 October 2024
Further written submissions: 14 & 17 October 2024

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Approved Judgment

This judgment was handed down remotely at 3pm on 31 December 2024
by circulation to the parties by email and by release to the National Archives.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. Margaret Chong, Mark Fraser and Victoria Leach claim that they lost money after being advised by an unregulated adviser to transfer funds from their occupational pension schemes into a SIPP (a self-invested personal pension) provided by Liberty SIPP Limited in order to invest in what proved to be a high-risk fund. In each case, Financial Services Compensation Scheme Limited ('the FSCS') upheld the investor's claim and paid compensation in accordance with its then understanding of the law. A few weeks later, that understanding changed but the FSCS has declined to consider the investors' appeals. By this claim for judicial review, the investors challenge the lawfulness of the FSCS's decisions made on 20 June and 20 July 2023 not to decide their appeals and to treat their compensation claims as closed.

THE FACTS

2. Liberty was regulated by the Financial Conduct Authority but offered its SIPP on an execution-only basis. In each case, the claimant asserted that they were advised by the unregulated company, Avacade Limited. By applications made to the FSCS in May 2020, each of the claimants complained that they were wrongly advised to invest in the high-risk Ethical Forestry Melina Trees fund. By decisions issued in February 2021, the FSCS accepted the claims and paid compensation. It accepted that had Liberty completed adequate due diligence and warned the claimants about the risks, they would not have invested in the fund. Compensation was in each case assessed on the "monies in, monies out" basis so that the original investments were refunded together with any fees incurred. In each case, the FSCS noted that the value of the Ethical Forestry fund was too uncertain to be ascribed any value and that accordingly no deductions were to be made for any underlying value.

3. The compensation payments were as follows:

Claimant	**Decision date**	**Compensation paid**
Mrs Chong	18 February 2021	£24,476.55
Mr Fraser	23 February 2021	£9.673.25
Mrs Leach	10 February 2021	£31,819.31

4. On 1 April 2021, the Court of Appeal handed down judgment in Adams v. Options UK Personal Pensions LLP [2021] EWCA Civ 474 ('Adams'). It found that a regulated SIPP provider that acted on an execution-only basis was liable under s.27 of the Financial Services & Markets Act 2000 ('the Act') for the advice of an unregulated intermediary on an investment by a retail investor in breach of the general prohibition under s.19 of the Act. In such a case, the investment agreement is unenforceable and the SIPP provider is liable to repay the investment and pay compensation for any loss. Further, despite finding that the SIPP provider did not have actual knowledge of the intermediary's contraventions of s.19, the Court of Appeal found that it was not just and equitable to grant relief to the SIPP provider pursuant to s.28(3). As Newey LJ observed, SIPP providers are not barred from

accepting introductions from unregulated sources but s.27 throws the risks of doing so onto the providers.

5. A consequence of the decision in Adams was that the SIPP provider (and so ultimately the FSCS as the fund of last resort) might be liable not just on a monies in, monies out basis but also for any loss caused by transferring the pension out of the original fund. Accordingly, the assessment of compensation required comparison of any lost investment growth that would have been achieved had the unregulated advice not been given.

6. On 15 April 2021, Mrs Chong, Mr Fraser and Mrs Leach lodged appeals against their compensation awards. Although there was some movement on the point in the course of submissions, the claimants' own pleaded case is that the purpose of their appeals is to claim the additional compensation that they believe they are entitled to in light of the Court of Appeal's decision.

7. Following the decision in Adams, the FSCS accepted the need to reassess its approach to compensation in like cases. Although it took a little time to formulate, its approach was driven by the decision in Adams and the principle that compensation should be paid on the basis of the law as understood at the time of assessment. Accordingly, it decided that:

   7.1 new claims together with any claims that were outstanding on 1 April 2021 should be assessed on the basis of the law as understood after Adams; but

   7.2 claims that had already been finally assessed before such date were not to be reopened either proactively or upon an appeal.

8. Over time, the principle that claims that had already been finally assessed before 1 April would not be reopened came to be refined to clarify that the FSCS would consider appeals from earlier decisions which were extant as at 1 April 2021 but that it would not entertain appeals lodged after that date in respect of its earlier compensation decisions.

9. By solicitor's letters dated 20 June and 20 July 2023, the FSCS made clear that it would not decide the claimants' appeals and that their compensation claims were closed.

THE STATUTORY SCHEME

THE SCHEME RULES

10. The FSCS is the scheme manager under s.212 of the Act. By s.213 of the Act, the regulators (being the Financial Conduct Authority and the Prudential Regulation Authority) were required to make rules to establish a compensation scheme for cases where the relevant authorised persons are unable, or likely to be unable, to satisfy claims against them. Section 213(3) requires the scheme to provide for the FSCS to assess and pay compensation in accordance with the scheme. The FSCS is to have the power to impose levies on authorised persons and recognised investment exchanges to meet the cost of the compensation scheme: s.213(4).

11. Put more simply, the FSCS is a fund of last resort funded by the financial services industry that pays compensation for losses caused by insolvent firms.

12. The rules of the scheme may, among other matters, make provision limiting the types of claims that will be entertained (ss.214(1)(f)-(g)); as to the procedure to be followed (s.214(1)(h)); for the making of interim payments before a claim is finally determined (s.214(1)(i)); and limiting the amount payable on a claim (s.214(1)(j)). Further, different provision may be made with respect to different kinds of claim: s.214(2).

13. The rules made by the FCA require the FSCS to administer the scheme in a manner that is procedurally fair and in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms: Compensation Sourcebook, COMP 2.2.1R.

14. In discharging its functions, the FSCS must have regard to the need to ensure efficiency and effectiveness: s.224ZA(1). A similar point is made by the rules which require the FSCS to have regard to the need to use its resources "in the most efficient and economic way in carrying out its functions": COMP 2.2.6R.

15. Given that the FSCS pays compensation for losses caused by firms in default, it is plainly appropriate that wherever possible the FSCS should itself be able to recover the cost of the scheme from such firms rather than adding to the cost borne by the broader industry. The rule at COMP 7.2.1R therefore provides the FSCS with power to make any payment of compensation conditional upon an assignment of the claim while COMP 7.3.8R provides that the FSCS may determine that upon the payment of compensation it shall be immediately and automatically subrogated to the claimant's rights. Further, where the FSCS takes an assignment or is otherwise subrogated to the claim, COMP 7.4.1R imposes a duty on the FSCS "to pursue all and only such recoveries as it considers are likely to be both reasonably possible and cost effective to pursue".

16. There is a right to withdraw offers of compensation at COMP 8.3.1R which provides:

> "The FSCS may withdraw any offer of compensation made to a claimant if the offer is not accepted or if it is not disputed within 90 days of the date on which the offer is made."

17. Compensation payable under the scheme is limited by the rules in chapter 10 of the sourcebook. Further, the rules provide that the FSCS may pay reduced payments in final settlement or interim payments on account where an immediate full payment would not be prudent because of uncertainty as to the amount of the claim (COMP 11.2.4R) or where the claimant has a reasonable prospect of recovery from another party (COMP 11.2.5R).

18. In general, the amount of compensation payable under the scheme is the amount of the overall net claim at the quantification date: COMP 12.2.1AR. COMP 12.4.2R provides:

> "The FSCS may pay compensation for any claim made in connection with protected investment business which is not:

(1) a claim for property held; or

(2) a claim arising from transactions which remain uncompleted at the quantification date;

only to the extent that the FSCS considers that the payment of compensation is essential in order to provide the claimant with fair compensation."

19. The appellate courts have considered the meaning of similarly worded provisions in previous statutory schemes that were also qualified by conditions that the statutory compensation authority considered the payment of compensation to be essential to provide fair compensation:

19.1 In R v. Investors Compensation Scheme Ltd, ex parte Bowden [1996] 1 A.C. 261, Lord Lloyd said that such a provision conferred "a broad discretion to include within the definition of a compensatable claim either the claim as a whole, or those elements of the claim which the management company considers essential in order to provide fair compensation, and to exclude those elements which do not meet that requirement". The exercise of the scheme's discretion could only be challenged on grounds of Wednesbury unreasonableness in accordance with the principles established in Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 K.B. 223.

19.2 A similar rule in the sourcebook was considered in Emptage v. Financial Services Compensation Scheme Ltd [2013] EWCA Civ 729. Moore-Bick LJ observed, at [10]:

> "This provision provides considerable scope for the [FSCS] to exercise a measure of judgment about the way in which compensation is to be assessed, but its judgment must be exercised in a consistent and principled manner."

APPEALS

20. The rules do not expressly require the FSCS to provide a right of appeal but COMP 2.2.8R provides:

> "The FSCS must put in place and publish procedures which satisfy the minimum requirements of procedural fairness and comply with the European Convention on Humans Rights for the handling of any complaints of maladministration relating to any aspect of the operation of the compensation scheme."

21. While there is no reference to any right of appeal, it will be recalled that the sourcebook refers to the possibility of a compensation payment being "disputed".

22. The decision letters in this case did not refer to the possibility of an appeal but did indicate the possibility of a further review of the FSCS's decision:

22.1 The decision letters indicated by way of a simple timeline the progress of the claims indicating that the final and outstanding stage was "dealing with any issues".

22.2 The letters closed by informing the claimants that if they had any questions about their decisions or their payments, they should contact the FSCS.

22.3 The decisions were explained further in accompanying documents which included the following text:

> "**What if you believe your compensation is wrong, of if you don't understand how we've worked it out?**
>
> Call us as soon as possible on 0800 678 1100 to talk it through.
>
> If you're still unhappy, visit www.fscs.org.uk/complaint to see our complaints policy. To make a complaint, write to us at the address at the top of this letter or email complaints@fscs.org.uk."

23. While the decision letters used the consumer-focused language of talking through questions about the FSCS's decision and complaints, there is a webpage on the FSCS website that uses the language of appeals. The version of the webpage that was live in the spring of 2021 explained:

> "**Have questions about our decision on your claim?**
>
> If you want to discuss the decision we've made on your claim, please call us on 0800 678 1100. We can talk you through our decision and answer any questions you have.
>
> Alternatively, you can reach us via our contact us page. We'll try to get back to you within 5 working days.
>
> **Appealing our decision on your claim**
>
> If you've already discussed your compensation claim decision with us, and you're still unhappy, you can appeal using the 'appeal claim decision' option on our contact us page.
>
> To make sure we consider all available information, please provide any additional evidence when submitting your appeal. It's more likely we'll change our decision if you can supply new evidence that we haven't seen already.
>
> Your appeal will be reviewed by someone who wasn't involved in deciding your original claim.
>
> We'll let you know we've got your appeal within 2 working days and aim to respond within 20 working days. We'll let you know if it might take longer.
>
> **Escalating your appeal**
>
> If you're still unhappy with our decision after an appeal, you can escalate your appeal. To do this, contact our complaints team.
>
> Our complaints team will review your escalated appeal independently of our previous decisions. This is to make sure we've made the right decision in line with our rules and policies.
>
> We'll let you know we've got your escalated appeal within 2 working days and aim to respond within 20 working days. We'll let you know if it might take longer.
>
> **Judicial review**
>
> If you're still unhappy with our decision, even after your escalated appeal, you may be able to challenge our decision in court …"

24. Accordingly, there appear to have been three distinct post-decision stages to the internal procedure in the spring of 2021:

    24.1 Informal discussion: Dissatisfied claimants were first invited to talk through their concerns.

    24.2 Appeal: If the matter was not resolved, claimants were entitled to appeal the decision. Appeals were reviewed by someone who was not involved in the original decision.

    24.3 Escalated appeal: Claimants who remained dissatisfied could ask for their appeals to be escalated to the FSCS's complaints team. Escalated appeals were reviewed independently of the FSCS's previous decisions in the case.

CHANGES IN THE UNDERSTANDING OF THE LAW

25. Where there is a change either in the law or at least in the understanding of the law, a public body responsible for administering a compensation fund affected by the change will have to consider whether and how it should review its earlier decisions. The question of how the court should in turn approach claims for judicial review of such policy decisions was addressed in R (Ali) v. Secretary of State for Justice [2014] EWCA Civ 194, [2014] 1 W.L.R. 3202. The case concerned the statutory scheme established by s.133 of the Criminal Justice Act 1988 for compensating those convicted of a criminal offence where a new or newly discovered fact showed beyond reasonable doubt that there had been a miscarriage of justice. In R (Adams) v. Secretary of State for Justice [2011] UKSC 18, [2012] 1 A.C. 48, the Supreme Court clarified the basis on which a claimant might be entitled to compensation. All that is germane for present purposes is that the decision widened the previous understanding of the scheme.

26. Following the decision of the Supreme Court, the policy adopted by the Secretary of State was to decline to reopen compensation decisions that had already been taken in accordance with the previous understanding of the law unless a request to revisit was made within three months of the original decision or an actual or threatened application for permission to seek judicial review had been delayed by agreement to await the decision of the Supreme Court. In Ali, the Divisional Court rejected a challenge to such policy.

27. In dismissing the appeal in Ali, Maurice Kay LJ cited the earlier decision of Sir John Donaldson MR in R v. Hertfordshire County Council, ex parte Cheung, The Times, 26 March 1986, in which he had considered the lawfulness of a council's policy for reconsideration of earlier student grant decisions following a decision of the House of Lords that had changed the then understanding of the rules in favour of applicants. Maurice Kay LJ observed, at [32], that the starting point is that a public law decision which is not successfully challenged is presumed to be valid and effective unless and until it is set aside by a court of competent jurisdiction. He said, at [34]:

> "The point of principle to be derived from Ex parte Cheung … is that if there is a change in the law, or the law is suddenly 'discovered', the decision-maker may adopt a policy for reconsideration of previous decisions, as long as that policy is lawful."

28. Maurice Kay LJ added that Cheung did not decide that a particular time limit for reconsideration must always be adopted. In Ali, it was said that the Secretary of State's

reasons for adopting the particular policy that he had included "the principle of legal certainty, that good administration requires the decision on compensation to be dealt with within a relatively short period of time (a matter implicit in the statutory scheme, as is to be inferred from the introduction of a statutory time limit of two years for such claims) and the avoidance of detriment to good administration that can arise from old potential claims for compensation being advanced or reopened".

THE FSCS'S POLICY FOLLOWING ADAMS

THE NEW CASE

29. The broad principle adopted by the FSCS that claims that have been finally determined should not be reopened was accepted by Peter Marquand sitting as a Deputy High Court Judge in R (New) v. Financial Services Compensation Scheme Ltd [2021] EWHC 2203 (Admin). Julie New had transferred money into a SIPP. She claimed that she did so on the advice of an unregulated intermediary and purchased high risk investments through her SIPP. Following the insolvency of the SIPP provider, the FSCS paid compensation on the monies in, monies out basis on 9 September 2020. Following the Adams decision, Ms New sought to challenge the September 2020 assessment. In refusing permission to apply for judicial review, the deputy judge said that, in assessing Ms New's case in September 2020, the FSCS had to take into account the information that was then available to it within the context of the statutory scheme. Such information included the first-instance decision in Adams which did not support the broader claim for compensation and which was later reversed by the Court of Appeal in April 2021.

THE JULY 2021 BOARD MEETING

30. At a board meeting on 20 July 2021, the FSCS considered its approach to the Adams case. A paper prepared by its Chief Counsel and Head of Legal advised that the FSCS would "need to strike an appropriate and fair balance between consumer protection and a potentially significant increase to the levy". The paper considered the judgment in Adams, the issues that will arise on s.27 claims, the impact on the levy, and the continuing legal uncertainty arising from the fact that there was a pending application for permission to appeal to the Supreme Court. The paper then presented three options for debate:

    30.1 Option A was to adopt a policy of investigating and paying future s.27 claims. The paper noted that this approach favoured the consumer and would provide some customers with significantly higher compensation and therefore have a corresponding impact on the levy. It would also be likely to have significant effect on operating costs. Option A then added:

> "For SIPP claims for which FSCS has already paid compensation (i.e. for due diligence failings), it is not proposed that FSCS would re-open these to assess them for an additional s.27 liability. FSCS would seek to rely on the 'full and final' nature of our previous payment."

    30.2 Option B was to rely on the FSCS's discretion to decline to investigate s.27 claims as a matter of routine save where the court had already ruled on a particular s.27 case. The paper noted that this approach afforded less emphasis to consumer protection and that its decisions might be subject to challenge.

30.3 Option C was to pay SIPP claims on an interim basis pending the outcome of any further appeal in Adams. Again, it was noted that this approach could be challenged. Option C then added:

> "The Executive Team are not proposing to reopen any SIPP Operator claim to assess s.27 liability (whether proactively or in response to an appeal) where we have already paid compensation on the basis of SIPP Operator due diligence failings, and this payment has been accepted by the customer in full and final settlement."

31. The paper recommended Option C. It advised that there was a sufficient basis for switching to paying SIPP claims involving an unregulated introducer on an interim basis given that the law was still in a state of considerable flux. In the event that the Supreme Court upheld the decision in Adams then the Executive Team noted that Option C would in principle allow the FSCS to pay further compensation. The paper did not, however, recommend an immediate decision as to whether further compensation would in fact be paid. In the event that the decision in Adams was upheld, the paper noted that "the Executive Team would return to the Board with the issue of whether FSCS *should* pay such claims and on what basis".

32. The paper concluded:

> "Overall, it is considered that Option C strikes the right balance between preserving customers' positions and maintaining sufficient flexibility for FSCS to respond dynamically in changing and uncertain circumstances."

33. The paper was considered at the board meeting on 20 July 2021. The relevant board minute provides:

> "The Board noted that FSCS currently paid compensation predominantly in relation to SIPP claims for investment due diligence failings by SIPP operators, but that the type of protected claim emerging from the Adams case could potentially be compensatable by FSCS. Directors took into account the requirement for FSCS to have regard to the need to ensure efficiency and effectiveness in the discharge of its functions and to use its resources efficiently and economically. The Board also acknowledged that FSCS had discretions under the COMP Rules when considering whether to investigate, assess and pay compensation to claimants. In this regard … directors recognised the need to consider striking an appropriate and fair balance between consumer protection and a potentially significant increase to the levy."

34. The board noted that Ms New's claim had been decided since the paper had been prepared. The minute continues:

> "It was confirmed that the court had stated, amongst other things, that FSCS was correct to apply the law as it stood at the time (FSCS's final decision in respect of Mrs New's claim having been issued before the Court of Appeal's decision in Adams). The Board took this principle into account when considering the approach to be taken when assessing the eligibility of s.27 claims against SIPP operators."

35. The board considered the options set out in the paper and approved Option C. The minute explains:

> "This approach would involve paying SIPP claims where an unregulated introducer appeared to have been involved, on an interim basis, pending a decision by the Supreme Court in the Adams case (even where the court had ruled on a particular s.27 case). The Board considered that there was a sufficient basis for FSCS to exercise its discretion to switch to paying relevant claims on an interim basis rather than on the 'full and settlement' basis, and acknowledged that FSCS would be appropriately applying the law as it currently stood. Paying such claims on an interim basis would mean that customers would be no worse-off than under FSCS's current approach to SIPP claims, and would leave the option open to decide to revisit paid claims in the future, depending on the Supreme Court's decision, by assessing whether claims under s.27 were eligible and protected claims, and potentially paying further compensation. The Board agreed that this approach should apply to FSCS's decisions made since 1 April 2021, the date of the judgment in the Adams case, on the basis that claims prior to that date had been subject to FSCS applying the law as it stood at the time (as upheld by the court in the claim brought by Mrs New).
>
> As a more general point, the Board noted that this matter was a further example of a situation where discretions could be exercised by FSCS, so there could be potential to explore the availability of discretions further if, for example, there was any additional background and context that could be given on the types and levels of discretions available."

THE PUBLICATION OF THE 2021 POLICY

36. The FSCS website was updated to explain the Court of Appeal's decision in Adams and the policy adopted by the FSCS. At paragraph 3.3 of the guidance note, the FSCS advised that an application for permission to appeal to the Supreme Court had been made and asserted that until the Supreme Court had decided whether it would hear the appeal, the law was not sufficiently certain for the FSCS to be satisfied that a civil liability is owed by SIPP operators under s.27. It therefore explained that it would be paying relevant claims on an interim basis with reference to the loss suffered by reason of due diligence failings only. The note continued:

> "Given that the High Court and the Court of Appeal took opposing approaches to the application of a s.27 claim to the same set [of] facts, and an appeal remains outstanding to the Supreme Court in the same case FSCS does not consider that it would be acting efficiently, effectively, or economically if it were to invest significant resource now in circumstances where the law as it applies to s.27 claims is currently unsettled. FSCS also notes that taking this approach mitigates the risk of compensation being wrongly paid, and therefore FSCS having to consider taking action to recover compensation."

37. The update explained that the FSCS was closely monitoring legal developments and would update customers further. The FSCS would then consider the Supreme Court's decision (whether refusing permission or upon the substantive appeal) and its implications in the context of the FSCS's powers, discretions and responsibilities. The note continued at paragraph 7.3:

> "FSCS will then write to customers who have received interim payments on account to notify them of FSCS's final decision as to whether it will make a further payment of compensation to customers who can prove an eligible s.27 claim, or whether FSCS will treat the interim payment already made as the full and final settlement of the claim(s) against the SIPP Operator. For those customers who were not eligible for an interim payment in respect of due diligence failures, and may only have a s.27 claim, FSCS will reopen the claim and provide a final decision."

38. Such update was no doubt helpful for those with outstanding claims but did not address the position of those who had already received decisions and payments made in full and final settlement of their claims. Accordingly, there was at that stage no publication of the FSCS's policy of not reopening decisions in response to an appeal where compensation had already been paid in accordance with the law as then understood before 1 April 2021 and accepted by the customer in full and final settlement.

THE JULY 2022 BOARD MEETING

39. On 30 March 2022, the Supreme Court refused permission to appeal. On 19 April 2022, the FSCS formally confirmed that it was reviewing its approach to s.27 claims.

40. At a board meeting on 18 July 2022, the board considered the critical issue of whether, now that the law was clear, it should consider potential liabilities under s.27 or rely upon its discretions to decline to do so. It resolved to decide relevant SIPP claims by considering the potential liabilities of SIPP operators under s.27 and not just due diligence failings. The minute continued:

> "It was agreed that this approach would only apply to claims determined by the FSCS on or after 1 April 2021, the date the Court of Appeal reached its decision in the Adams case (and, therefore, the date that the law was clarified). It was noted that FSCS's right to apply the law as it was understood at the time when deciding claims (e.g. prior to the Court of Appeal's decision on 1 April 2021) had previously received judicial backing in the unsuccessful judicial review of FSCS by Mrs New.
>
> The board also endorsed the proposed treatment of appeals, in that, in order to mitigate against unmeritorious appeals, FSCS would not consider appeals brought by customers whose SIPP claims had been paid on a full and final basis before 1 April 2021, if the appeal was primarily seeking consideration of additional s.27 liability or challenging the quantification method that had been previously accepted when compensation was paid."

THE PUBLICATION OF THE 2022 POLICY

41. In a further guidance note published on the FSCS website on 5 August 2022, the FSCS confirmed that it was reviewing compensation that had been paid on an interim basis since 1 April 2021 and was starting to make final decisions on such claims. This guidance note then gave further information as to the position of claimants who had received compensation before 1 April 2021. Referring to the New case, the note advised:

> "That claim for compensation was decided by FSCS in late 2020. We upheld the claim on the basis of investment due diligence failings by the SIPP operator only. The

> compensation due to the customer was therefore calculated by reference to our approach to investment due diligence claims.
>
> Permission for that claim for judicial review was refused, both on the papers and at an oral reconsideration hearing. In doing so, Peter Marquand (sitting as a Deputy High Court Judge) considered the impact of the Court of Appeal's judgment in Adams, which had overturned the High Court's judgment in so far as s.27 claims are concerned.
>
> The reasons given by the judge for refusing permission to bring the legal challenge included the fact that FSCS had properly had regard to the relevant law at the time it decided the claim for compensation, including the first instance judgment in Adams, which was handed down on 18 May 2020.
>
> This means that s.27 FSMA as a valid basis of claim is relevant for claims decided by FSCS (whether on appeal or not) on or after 01 April 2021. Accordingly, when making its most recent decision, the FSCS Board decided that FSCS should not accept appeals from customers who FSCS had paid compensation to prior to 1 April 2021 in relation to due diligence failings of a SIPP operator, where the primary purpose of the appeal would be to assert additional liability under s.27 FSMA."

42. The publication of this policy clarified that the FSCS would not accept appeals in respect of compensation decisions made before 1 April 2021 where the primary purpose of the appeal was to assert a s.27 claim.

THE POLICY IN RESPECT OF EXTANT APPEALS

43. The FSCS asserts that there is a further limb to its policy that it will consider appeals from compensation decisions made prior to 1 April 2021 which were extant as at that date. In such cases, its policy is to waive its right to rely on the full and final settlement provision in its payment terms and to treat the compensation as having been paid on an interim basis, pending a final decision being issued in respect of the claimant's s.27 claim.

44. Such policy does not derive from any board minutes and was not published on the website. It can, however, be traced to correspondence dating from late 2022.

THE CHALLENGE

45. The claimants challenge the decisions of 20 June and 20 July 2023 not to decide their appeals. The claimants in this case argue that, unlike Ms New, their claims for compensation had not been finally determined in that they had outstanding appeals. In each case they had received a decision but argue that they had validly exercised their right of appeal within a reasonable time of their individual decisions. They do not challenge in these judicial review proceedings the FSCS's February 2021 decisions in their cases, which they accept were made on the basis of the law as then understood. They argue, however, that the FSCS should have applied the new and more generous approach to compensation on determining their appeals.

46. The claimants argue that the FSCS's stated policy in 2021 and 2022 was to consider appeals from decisions made before 1 April 2021 where either (a) the claimant filed an appeal by 1 April 2021 or (b) filed an appeal within a reasonable period of time.

47. The claimants claim to be within such policy. They argue two grounds of challenge:

    47.1 First, they argue that the FSCS's decision to treat their appeals as defunct after two years of silence and after initially accepting their appeals as valid and subject to the FSCS's policy was irrational. Alternatively, they argue that the decision was procedurally unfair and irregular.

    47.2 Secondly, they argue that, having initially committed to considering the claimants' appeals in accordance with the Court of Appeal's decision in Adams, the FSCS did nothing to disabuse the claimants of their legitimate expectations for over two years. They argue that the FSCS's communications gave rise at least to a legitimate expectation of a procedural benefit (namely that their appeals would be dealt with in accordance with the stated policy). Alternatively, they argue that the legitimate expectation was substantive in character.

48. The FSCS argues that compensation was paid in full and final discharge and settlement of the claims and that, the compensation payments not having been returned, there is no basis for reopening the decisions. The FSCS denies the claimants' characterisation of its July 2021 board decision. It argues that the letters of 20 June and 20 July 2023 did no more than reiterate such board decision, as set out in the FSCS's letter to APJ Solicitors dated 3 August 2021, that the claimants had accepted compensation and settled their claims, and that the claimants' did not fall within the scope of the policy which only applied to appeals that were extant as at 1 April 2021. The FSCS therefore argues that the challenge is significantly out of time.

49. The FSCS maintains that its policy meant that all live claims as of 1 April 2021 would be treated alike, and that all claims that had been finally decided by such date were also treated the same. The FSCS responds to the claim that the appellants had appealed in time by suggesting that their complaint is misconceived because they had already been settled and no appeal had been raised by 1 April 2021.

50. The FSCS denies that it had ever accepted that the decisions had been validly appealed. It insists that the claimants simply received pro forma responses. Further, it denies a two-year delay and maintains that the FSCS had confirmed its policy by a letter dated 3 August 2021.

DISCUSSION

51. In order to determine this challenge, it is necessary to consider the following issues:

    51.1 The true nature of the compensation decisions.

    51.2 The operation of the appeal procedure, and in particular the full and final settlement clause and the question of time for appeal.

    51.3 Whether the policy adopted by the FSCS for dealing with appeals from pre-April decisions was lawful.

51.4 Whether this claim is a collateral challenge to the FSCS's policy formulated in 2021 and 2022 or an in-time public-law challenge to decisions made in June and July 2023.

51.5 Whether the FSCS acted in breach of the claimants' legitimate expectations.

COMPENSATION DECISIONS

52. Rowan Pennington-Benton and Katharine Bailey, who appear for the claimants, characterise the offers of compensation in this case as "initial compensation decisions". While they acknowledge the distinction between cases in which compensation is offered on a once and for all basis and those cases in which an interim payment is made on account pending some later assessment, they argue that the scheme of the rules is to make an initial decision as to compensation which, although accompanied by a payment and asserted to be in "full and final payment" of the complaint, remains subject to a right of appeal. They argue that claims are only finally determined when the claimant has either exhausted the appeal process or lost the right to appeal. Accordingly, they assert that since an appeal lodged on 1 April 2021 would not have been out of time in these cases, the proper analysis is that the claimants' *claims* for compensation remained open at that date such that, in accordance with the FSCS's policy they should have been treated as interim payments on account.

53. Further, Mr Pennington-Benton relies on the observation in a letter from Bevan Brittan LLP, the FSCS's solicitors, dated 22 February 2022:

> "For the avoidance of doubt, FSCS considers that an appeal response from CET [the customer escalation team] is the final stage in FSCS' decision-making process."

54. James Strachan KC, who appears for the FSCS, insists that the investors' claims were finally decided when the decision notices were issued.

55. The scheme distinguishes between cases in which interim payments are made on account and cases in which compensation is paid upon the final determination of the claim:

55.1 Section 214(1)(i) provides a power to make rules "for the making of interim payments before a claim is finally determined".

55.2 Such rules are contained in COMP 11.2.4R and 11.2.5R:

a) COMP 11.2.4R provides that where the FSCS considers that "immediate payment in full would not be prudent because of uncertainty as to the amount of the claimant's overall claim, it may decide to pay an appropriate lesser sum in final settlement, or to make payment on account".

b) Further, in the circumstances envisaged in COMP 11.2.5R, the FSCS may decide "to make a payment on account or to pay a lesser sum in final settlement".

56. Since it is common ground that the payments in this case were not made on account by way of interim payments, it follows that the claimants' claims were "finally determined" and the compensation was paid "in final settlement".

57. Such conclusion is supported by consideration of the application forms and decision letters:

57.1 The application form used by the FSCS requires claimants to sign the following declaration:

> "If FSCS finds my claim eligible, sends me a compensation payment, and I do not return that payment as specified in the payment letter, I agree and acknowledge as follows: …
>
> 2. I accept the offer of compensation in full and final discharge and settlement of the obligations of FSCS, under the relevant rules and laws (save that, where compensation is paid on an interim basis, I may become eligible for further compensation in accordance with the relevant rules and laws) …
>
> 3. All my rights against the Firm (or any third party involved in or connected to the Claim) will pass to and be assigned to FSCS absolutely on payment of compensation (or any part of it).
>
> 4. All my rights against any other person (which constitute 'Third Party Claim' as defined in paragraph 13 below) will pass to and be assigned to FSCS absolutely on payment of compensation (or any part of it).
>
> 5. On payment of compensation (or any part of it) I will no longer have the right to make any claim against the Firm or any other person in respect of the Claim or a Third Party Claim, and the right to make any such claims will be vested in FSCS. Any sums that would otherwise be payable to me in respect of the Claim (including any dividend or other payment in a liquidation or compromise with creditors or scheme of arrangement) or a Third Party Claim will be paid instead to FSCS."

57.2 The decisions in this case explained that payments would be made within ten business days directly into the bank accounts nominated by the investors. The accompanying notes reminded the investors of their agreement that upon payment their rights against the firm would be transferred to the FSCS and confirmed:

> "The payment settles your claim for compensation to FSCS about the Firm in full."

58. My conclusion is not affected by the fact that investors can seek a review or raise an appeal in respect of compensation decisions. Further, my conclusion is not affected by the practice of the FSCS to resist judicial review claims against its decisions on the grounds that they are premature unless the investor has completed the appeal process. That is no more than a recognition that the appeal provides the claimant with a suitable alternative remedy which should be exhausted before commencing judicial review proceedings. Properly understood, that was the point being made in the letter of 22 February 2022.

59. Further, such conclusion is also not affected by the fact that in their respective appeals in this case the claimants purported to treat the payments made by the FSCS as interim payments. The payments were not made by way of interim payments on account of the claimants' compensation claims and it was not open to the claimants retrospectively to designate their final compensation payments as interim payments.

APPEALS

60. As acknowledged above, such finality did not mean that there was no scope for challenging the decisions or the assessment of compensation in individual cases.

61. Mr Strachan lays emphasis on the discretionary nature of the scheme. He points to the fact that the statutory scheme did not require an appellate process. That said, the scheme did require the FSCS to put in place and publish a fair procedure for handling complaints of maladministration: COMP 2.2.8R. In the exercise of its discretion, it did so by establishing and publishing an appeal procedure.

62. In its current published appeal policy, the FSCS expressly observes that being able to appeal a decision is a "really important part of a fair claims process". While a similar statement was not published in respect of the policy applicable in 2021, Mr Strachan expressly accepts that the FSCS stands by that statement of principle.

The full and final settlement issue

63. Such appeal procedure was put in place and published notwithstanding the requirement on the application form to acknowledge that if the FSCS sends a claimant a compensation payment and he/she does not return it "as specified in the payment letter", then the claimant acknowledges that the payment was accepted in full and final discharge and settlement of the claim for compensation.

64. The evidence before the court is that such condition does not in fact prevent claimants who do not repay their compensation payments from pursuing an appeal:

    64.1 First, it may be that the FSCS fails generally to give instructions specifying how compensation payments might be returned. Certainly, there is nothing in the compensation decision letters in this case specifying how the money might be returned or providing the FSCS's bank details to facilitate repayment.

    64.2 Secondly, it may be that the decision letters issued by the FSCS do not generally require claimants to repay the compensation payments as a condition of contacting the FSCS to "deal" with any issues or resolve any "questions" that they might have about their decisions or payments. Certainly, the letters in this case indicated that these claimants might contact the FSCS for such purposes without imposing any requirement to repay money first.

    64.3 Thirdly, there is nothing in the FSCS's published appeal policy to indicate any such condition precedent to the pursuit of an appeal.

    64.4 Fourthly, the evidence before the court is that, before allowing an appeal, the practice of the FSCS is to exercise its discretion to consider whether it should waive its right to treat the compensation payment as having been paid in full and final settlement of the claim.

65. I therefore reject the argument that this claim for judicial review is automatically defeated by the claimants' failure to repay their compensation payments. In the event that there were

extant appeals to be considered in this case that might lead to the payment of additional compensation, the FSCS's duty was to consider whether in the exercise of its discretion it should waive its right to rely on the full and final settlement term. In such circumstances, the FSCS would be required to exercise its discretion in a consistent and principled manner.

The time for appeal

66. No time limit was expressly imposed in 2021 upon a claimant who sought to appeal a decision or, being dissatisfied with the appeal decision, who sought to escalate the appeal whether by the rules, the guidance given in the decision letters or the appeals webpage. Notwithstanding the failure to stipulate any time limit, it cannot sensibly be argued that there was no time limit for appealing a compensation decision. Indeed, it is common ground that any appeal was required to be brought within a reasonable time.

67. When formalising its current appeals procedure in February 2024, the FSCS then decided to impose a three-month deadline for lodging an appeal. Such period provides symmetry with both the limitation period of three months in judicial review proceedings and the similar period of 90 days for raising a dispute before the offer of compensation might be withdrawn. Further, it might be observed that its selection of three months at least indicates that, when the FSCS put its mind to the issue in 2024, it then regarded three months to be a reasonable limit. It is not, however, possible to say more than that in the spring of 2021 disappointed claimants were required to lodge their appeals within a reasonable time.

THE LAWFULNESS OF THE POLICY

68. Before embarking on consideration of this issue, it is important to emphasise that the challenge is not to the FSCS's policy but to the decisions made in June and July 2023 in respect of the claimants' appeals. Indeed, the claimants' own case is that the policy required the FSCS to decide their appeals.

69. The FSCS's policy following its board meeting on 20 July 2021 was to defer any decision as to whether as a matter of principle it should pay additional compensation under s.27 until the appeal to the Supreme Court had been determined. Pending clarity in the law, it decided to treat compensation decisions made on or after 1 April 2021 as interim leaving open the possibility that, should the FSCS later decide that additional compensation should be paid under s.27, such cases could be reopened and final compensation payments made. The board further decided that it would not reopen decisions (whether proactively or on appeal) where compensation had already been paid in accordance with the law as understood before 1 April 2021 where such payment had been accepted in full and final settlement. Such policy was apparently absolute irrespective of the grounds of appeal or whether an appeal was extant as at 1 April 2021 or only lodged after that date.

70. At the board meeting on 18 July 2022, the FSCS grappled with the issue that had been deferred in light of the refusal of permission to appeal to the Supreme Court in Adams. The FSCS's revised policy was then to reconsider its decisions made on or after 1 April 2021 in order to determine whether additional compensation should be paid under s.27. Further, it decided not to consider appeals from decisions where compensation had already been paid on a full and final basis before 1 April 2021 if the appeal was primarily seeking consideration

of additional s.27 liability or challenging the quantification method that had been previously accepted when compensation was paid. Such revised policy only applied to appeals raising certain grounds but was otherwise absolute irrespective whether an appeal was extant as at 1 April 2021.

71. By the autumn of 2022, the FSCS was asserting a further policy, namely that it would consider appeals that were extant as at 1 April 2021 from earlier compensation decisions. The effect of this apparently new policy was that the bright line that had been maintained until then was compromised:

    71.1 Previously, there were to be no appeals from compensation decisions that had been made in accordance with the law as understood before 1 April 2021 where the primary purpose was to obtain additional compensation under s.27. Relying heavily on New, that policy had been justified by the fact that the decisions made before 1 April 2021 had been made in accordance with the then understanding of the law.

    71.2 The revised policy that extant appeals should be heard breached that principle and involved allowing claimants to seek additional compensation under s.27 by way of an appeal against a pre-April decision properly made in accordance with the then understanding of the law.

72. Having crossed the Rubicon, what then was the justification for not also allowing other claimants with pre-April decisions to bring in-time appeals? By Bevan Brittan's letter of 20 July 2023, three points were made in rejecting these appeals:

    72.1 First, it was said that the implication that the claimants should have had a further opportunity to submit appeals as a result of the decision in Adams was misconceived since it would amount to the submission of an entirely new claim rather than an appeal.

    72.2 Secondly, it was asserted that the FSCS had made clear on 5 August 2022 that it would not accept new appeals requested after 1 April 2021 where the primary purpose of the appeal was to seek further compensation for a s.27 claim. It was said that any judicial review claim to challenge that decision would be significantly out of time.

    72.3 Thirdly, the FSCS insisted that it was incumbent on claimants to act promptly and to submit any appeal within a reasonable time of the decision letter. It then asserted that given that the claimants had received compensation in February 2021 and had not sought to appeal such decisions up to six weeks later, the FSCS was entitled to treat the decision letters as final.

73. That letter and the firm's letter of 20 July 2023 made clear that these claimants' appeals would not be considered and that their cases were closed. As Bevan Brittan observed, the point of difference was that there were no extant appeals in these cases on 1 April 2021. The reasons for maintaining such distinction are not, however, robust.

    73.1 First, the actual board decisions made no such distinction. While the FSCS developed a policy that it would consider appeals that were extant as at 1 April 2021, such policy was not reflected in either the board minutes or the material published on its website. Further, such policy was inconsistent with the idea that appeals should not be considered from decisions made in accordance with the then understanding of the law.

73.2 Secondly, the FSCS's argument that it was misconceived to suggest that the claimants should have had a further opportunity to submit appeals as a result of the decision in Adams because that would amount to the submission of an entirely new claim rather than an appeal does not hold water. Precisely the same point could be made about appeals lodged before 1 April 2021.

73.3 Thirdly, as to the suggestion that the FSCS was entitled to treat the decisions as final given the failure to lodge an appeal by 1 April:

a) No time limit was expressly imposed in 2021 upon a claimant who sought to appeal a decision or, being dissatisfied with the appeal decision, who sought to escalate the appeal whether by the rules, the guidance given in the decision letter or the appeal webpage.

b) As already identified, the claimants lodged their appeals between about 7 and 9 weeks after they received their decision letters. Although Bevan Brittan's letter of 20 July 2023 argued that the FSCS was entitled to treat its decisions as final after a delay of six weeks, such point is not argued in the Detailed Grounds of Resistance. Further, the time point taken by Mr Strachan is more subtle; namely that the question of what is a reasonable period of time for lodging an appeal which seeks the recalculation of a pre-April 2021 compensation decision on the basis of s.27 is answered by the policy declining to consider appeals lodged after 1 April.

c) While the delay in this case was longer, the suggested blanket policy of not allowing an appeal to be lodged after 1 April cannot possibly be justified on the grounds of delay since such policy would equally apply to a decision issued on 31 March 2021 which was barely read by the time that, on the FSCS's case, the claimant's delay in bringing an appeal would justify its automatic rejection.

74. A better justification was that the line drawn by the FSCS differentiated between all cases that were live at 1 April 2021 (whether because they were awaiting compensation decisions or decisions on appeals that had already been lodged) and other cases where there was no live claim or appeal.

75. The effect of the line drawn by the FSCS can be demonstrated by five hypothetical cases at the outer margins:

75.1 Ms A received a decision in January 2021 and only got around to appealing at the end of March 2021. Assuming her appeal had not been decided by 1 April, her appeal would be treated as extant as at the time of the Adams judgment such that the payment already made to her would be treated as interim; the FSCS would waive its right to regard the payment as full and final settlement; and her claim would be reassessed on the basis of the law as understood after Adams.

75.2 Mr B also received his decision on the same day in January 2021 but was prompt in lodging his appeal such that he had a decision on his appeal on 31 March 2021. His appeal would not be extant and his case would be closed, even though the appeal policy allowed a right to escalate the initial appeal decision.

75.3 Ms C also received her decision on the same day in January 2021 and was even quicker in putting in her appeal such that she had a decision on her appeal a few days earlier and had time to escalate her appeal on 31 March 2021. Her appeal would also be

regarded as extant so that, like Ms A, she would benefit from reconsideration of her case.

75.4 Mr D only received his decision on 31 March 2021 and did not have time even to absorb the decision letter by the following day such that he did not appeal until 2 April 2021. His appeal would not have been extant as at 1 April and, despite the fact that any appeal would plainly have been in time, his case would be regarded as closed.

75.5 Ms E received her decision on 1 April 2021. Although she failed ever to appeal, her compensation payment would be treated as if it had been made on an interim basis and her case would be reconsidered.

76. The first two women's appeals would be considered under the policy while the third woman's payment would be automatically treated as interim and her case reconsidered. All three might be entitled to further compensation under s.27. The two men's appeals would be rejected and their cases treated as closed.

77. The principle to be taken from the caselaw is that the FSCS was entitled to adopt a bright-line policy as to how it would deal with appeals from decisions taken before 1 April. Such policy might properly further the statutory objective of ensuring that the FSCS administers the scheme efficiently and economically. The bright line adopted in this case was of course harsher than in Ali where the Secretary of State accepted appeals within three months of the original decision whether lodged before or after the clarification of the law by the Supreme Court. Accordingly, in Ali everyone got three months to consider whether to appeal.

78. In view of the fact that this case does not directly challenge the policy and my conclusions on the collateral challenge issue, it is not necessary to reach a concluded view on the issue of lawfulness. Notwithstanding the fact that the rules repose considerable discretion in the FSCS to manage the scheme and therefore to determine the proper approach to pre-April cases following the clarification of the law, I have reservations about the FSCS's policy in respect of appeals from pre-April decisions:

78.1 The nature of any bright-line rule is that there will be winners and losers, and yet such policy might nevertheless be lawful provided that it is rational. Here it was rational to take 1 April 2021 as a line in the sand and not to have a proactive policy of reopening pre-April decisions made in accordance with the then understanding of the law.

78.2 Appeals were, however, an important part of the scheme. It was rational to consider appeals that were extant as at 1 April 2021. Given the FSCS's policy of deciding cases – whether initially or on appeal – in accordance with the law as then understood, that meant that those with extant appeals could benefit from the Adams decision.

78.3 Having decided to consider extant appeals, I am troubled by the policy of restricting the timely exercise of appeal rights to those who had not yet launched their appeals by the end of March 2021. Such policy was arbitrary in that, as demonstrated above, it curtailed appeal rights even by those who had only just received their decision letters.

THE COLLATERAL CHALLENGE ISSUE

Legal principles

79. Time points may of course be addressed at the permission stage. Here, permission was granted on the papers and Lang J did not directly address the question of whether the claim had been brought promptly and in any event within three months. That is not surprising since she was dealing with the question of permission to apply for judicial review of decisions made in June and July 2023. The more subtle point that now arises is whether the court should refuse relief because the claim is in substance an out-of-time challenge to the board's earlier decisions.

80. In R v. Commissioner for Local Administration, ex parte Field [2000] C.O.D. 58, the Local Government Ombudsman had rejected a complaint in December 1996 on the basis that he lacked jurisdiction. Mr Field made further representations asking the ombudsman to reconsider the matter in March 1997 and November 1998. On the latter occasion, Mr Field sent an extract from counsel's opinion and argued that the ombudsman retained a discretion in the matter. The ombudsman noted the opinion and explained that it was contradicted by his own legal advice from leading counsel. He therefore maintained his decision. By a claim for judicial review, Mr Field sought to challenge the refusal of his complaint in the December 1998 letter. Rejecting the claim and concluding that grounds for judicial review first arose in December 1996 or, at the latest, May 1997, Keene J observed:

> "One does not overcome the problems created by [what is now r.54.5] by writing a fresh letter to the decision-maker and thereby obtaining a reply which one then seeks to characterise as a fresh decision. That would render that provision in the Rules wholly ineffective."

81. To like effect, Laws J (as he then was) observed in R v. Secretary of State for Trade & Industry, ex parte Greenpeace Ltd [1998] Env. L.R. 415, at p.424, that earlier authorities:

> "... exemplify a common principle whose nature is not dependent upon an appeal to the rules relating to delay. It is that a judicial review applicant must move against the substantive act or decision which is the real basis of his complaint. If after that act has been done he takes no steps but merely waits until something consequential and dependent upon it takes place and then challenges that, he runs the risk of being put out of court for being too late."

The judge added:

> "The court in its discretion, whether so directed by rules of court or not, will impose a strict discipline in proceedings before it. It is marked by an insistence that applicants identify the real substance of their complaint and then act promptly so as to ensure that the proper business of Government and the reasonable interests of third parties are not overborne or unjustly prejudiced by litigation brought in circumstances where the point in question could have been exposed and adjudicated without unacceptable damage."

82. Sir Clive Lewis considered this issue in Judicial Remedies in Public Law (6th Ed.) at para. 9-021:

> "The claimant should challenge the decision which brings about the legal situation of which complaint is made. There are occasions when a claimant does not challenge that decision but waits until some consequential or ancillary decision is taken and then challenges that later decision on the ground that the earlier decision is unlawful. If the substance of the dispute relates to the lawfulness of that earlier decision and if it is that earlier decision which is, in reality, determinative of the legal position and the later decision does not, in fact, produce any change in the legal position, then the courts may well rule that the time-limit runs from that earlier decision. Similarly, where a decision has been taken, a claimant cannot avoid the application of the time-limits in relation to a challenge to that decision by writing a fresh letter to the decision-maker and obtaining a reply and then characterising that reply as a fresh decision. The position may be different if the decision-maker actually does reconsider the decision and reaches a fresh decision."

83. The question therefore is whether the real substance of this claim is the decisions in the letters of June and July 2023 or whether such letters simply reiterated an earlier decision which brought about the legal situation of which complaint is made.

The board decisions

84. I have already considered the development of the FSCS's policy. Its policy in respect of the treatment of appeals from pre-April decisions can be summarised as follows:

    84.1 From 20 July 2021: Following the board meeting on 20 July 2021, it was the FSCS's policy not to reopen pre-April 2021 compensation decisions (whether proactively or in response to an appeal) where it had already paid compensation on the basis of due diligence failings and such payment had been accepted in full and final settlement. Such policy appeared to be absolute.

    84.2 From 18 July 2022: The policy was refined at the board meeting on 18 July 2022 such that the FSCS would not consider appeals brought in respect of compensation that had been paid on a full and final basis before 1 April 2021 where the appeal was primarily seeking consideration of additional liability under s.27 or challenging the quantification method that had been used. Such revised policy introduced a qualification.

    84.3 From late 2022: While not traceable to any board decision, it appears that by 26 October 2022 at the latest, the FSCS had further refined its policy to consider appeals that were extant as at 1 April 2021.

The correspondence

85. APJ acted for many hundreds of clients who had submitted claims and appeals to the FSCS. It is therefore important to differentiate between:

    85.1 generic correspondence with APJ which advised the firm as to the FSCS's policy and approach;

    85.2 correspondence with APJ in respect of these claimants' appeals; and

    85.3 correspondence with APJ about the firm's other clients.

86. While the parties may properly rely on the generic correspondence and that written in respect of these claimants' cases, solicitors are not at liberty simply to share other clients' private papers with all of their clients who might be affected by an issue raised in the correspondence. There is no evidence before the court that these claimants had actual knowledge of the matters explained in the correspondence in respect of other clients' cases and they are not to be fixed with constructive knowledge simply by reason of the fact that they shared the same solicitors.

87. Against that general observation, I turn to the letters relied on:

87.1 3 August 2021:

a) On 19 July 2021, APJ wrote to Bevan Brittan about a group of 207 clients. The clients were set out by a schedule to the letter and did not include the three claimants.

b) Bevan Brittan replied on 3 August 2021. Accordingly, the letter of 3 August was not written to APJ in respect of these claimants' cases. Furthermore, Bevan Brittan's letter makes clear that the FSCS's decisions in these 207 cases were made after the Court of Appeal handed down the Adams judgment on 1 April 2021. Accordingly, the letter was not even written in respect of clients who had received pre-April decisions.

c) Although irrelevant to the 207 clients, Bevan Brittan's letter included a section at paragraphs 5.26-5.27 about the position of claims that had been decided before 1 April 2021. The FSCS again relied on the New case and asserted:

> "FSCS considers that its decisions in respect of s.27 Claims, in similar circumstances to those raised in New, were clearly lawful and any challenge to those decisions pursued now would be both without merit and out of time. For the avoidance of doubt, FSCS does not waive its right to rely on claimants having accepted its offers of compensation in full and final settlement, and in discharge of FSCS' statutory function, in respect of any decision taken before 1 April 2021."

d) Had that been successfully communicated to these claimants, I observe that they were not in fact in the same factual position as Ms New in that she did not have an extant right of appeal on 1 April 2021. It is not in any event the whole picture in that it is now clear that the FSCS does waive its right to rely on the full and final settlement clause where claimants had an extant appeal on 1 April 2021.

87.2 22 February 2022:

a) Bevan Brittan's letter of 22 February 2022 appeared to be written generically and not in response to any particular group of clients. Indeed, both the claimants and the FSCS relied on the letter in their statements of case.

b) The letter noted that APJ had been chasing appeal decisions and summarised the board's July 2021 decision:

> "By way of reminder, FSCS' Board decided on 20 July 2021 that where it has already paid compensation to your clients due to being satisfied that they had an eligible claim under FSCS' rules, which arose from a SIPP Operator's investment due diligence failings, FSCS will waive its right to rely on your clients' acceptance of that compensation in full and final settlement. This will apply in circumstances where your clients may also

> have a potential s.27 Claim (i.e. where an unauthorised introducer has been involved in the relevant transactions which caused your clients to suffer a loss)."

c) After referring to the uncertainty pending the outcome of the further appeal to the Supreme Court, the FSCS explained that in the meantime it would treat compensation already paid in such circumstances as an interim payment on account. The letter continued:

> "For the avoidance of doubt, FSCS considers that an appeal response from CET [the customer escalation team] is the final stage in FSCS' decision-making process. Where CET has already responded to an appeal before 1 April 2021, i.e. the date on which the Court of Appeal's judgment in the Adams case was handed down, FSCS considers that those decisions are final and no further decision will be issued. The reasons for this were set out in our letter dated 3 August 2021, and is consistent with the High Court's decision in R (New) v. FSCS [2021] EWHC 2203 (Admin)."

As already noted, the claimants rely on this passage to support their argument that there is no final decision until the internal appeal rights have been exhausted. Regardless of that point, this passage only explained the policy that in cases where a claimant had a final appeal decision before 1 April that there would be no further decision.

87.3 11 August 2022:

a) The FSCS relies on Bevan Brittan's letter of 11 August 2022. Again, it appeared to be written generically.

b) The letter explained that the board had decided to consider s.27 claims and continued:

> "Accordingly, where FSCS has paid compensation on an interim basis, or agreed to waive its right to rely on compensation payments accepted since 1 April 2021 as being in full and final settlement and in discharge of its functions, FSCS will now complete its assessment of those s.27 Claims and issue final decisions to claimants. This is consistent with the previous decision of FSCS' Board which we communicated to you on 3 August 2021."

c) The letter did not expressly deal with the position of those who had received compensation payments and had lodged timely appeals whether before or after the Adams judgment was handed down on 1 April 2021.

87.4 13 September 2022:

a) The FSCS relies on Bevan Brittan's letter dated 13 September 2022 which was written in response to APJ's letter dated 23 August 2022. By its letter, APJ had sought clarification as to the board decision made on 18 July 2022 and published on the FSCS website on 5 August. APJ argued that the law was uncertain from 29 September 2020 when the Court of Appeal's civil appeals tracker service showed that the High Court's decision Adams was to be appealed. Further, it observed that the appeal had been listed for 2 March 2021. APJ cited the case of Mr Hood, a claimant who had received his compensation decision on 18

March 2021 which the FSCS later accepted should be treated as interim. It argued that the correct decision had been taken in the Hood case and that the FSCS should review all compensation decisions made between September 2020 and 31 Match 2021.

b) Bevan Brittan's letter of 13 September 2022 rejected the suggestion that the law had been unsettled from 29 September 2020 and explained:

> "c. Further, FSCS' assessment of s.27 Claims prior to 1 April 2021, based on the approach taken in the High Court in Adams, was considered and endorsed by the court in New. The points made in your letter dated 23 August 2022 do not set out any arguable grounds why our client would be required to take a different approach now.
>
> d. In any event, we wrote to you on 3 August 2021 explaining the decision taken by our client's Board on 20 July 2021, including that: (i) it would unilaterally waive its right to rely on compensation payments as having been accepted on or after 1 April 2021 in full and final settlement; and (ii) compensation paid for final decisions issued before 1 April 2021 remained final and would not be re-opened.
>
> e. You did not seek to challenge the cut-off date applied by our client (1 April 2021), until your recent letter dated 23 August 2022. This is despite your client having previously brought a challenge to our client's decision to make interim compensation payments, on exactly the same grounds you now advance in your letter, in the Fortt proceedings. As you know, your client's claim in Fortt was dismissed by the court on both substantive and procedural grounds given your client's delay in bringing the claim. Clearly, any further Judicial Review challenge to our client's decision dated 20 July 2021 would now be even further out of time and, in light of the court's decision in Fortt, we suggest would amount to an abuse of process.
>
> For the avoidance of doubt, FSCS does **not** agree to waive its right to rely on compensation payments received prior to 1 April 2021 as having been accepted in full and final settlement and discharge of our client's functions. Our client reserves the right to bring this letter to the attention of the court on the question of costs should your client(s) decide to bring legal proceedings for the reasons set out in your letter."

c) While referencing the decision in Mr Hood's case, this correspondence was generic to APJ's clients – like these claimants – who received compensation decisions between 29 September and 31 March 2022. It made clear that final decisions taken before 31 March would not be reopened.

87.5 26 October 2022:

a) The FSCS relies on Bevan Brittan's letter of 26 October 2022. That letter was written in response to APJ's letter of 12 October 2022 which focused more closely on appeals from pre-April decisions. APJ explained that it sought "clarity on decisions issued prior to 1st April 2021 where the claimants have already

engaged the FSCS appeal process against the decision." It identified that the FSCS treated Mr Hood's March 2021 decision as interim on the basis that the law had changed before the FSCS had determined his appeal. APJ sought assurance that the FSCS would follow its approach in the Hood case.

b) By its reply, Bevan Brittan confirmed that Mr Hood had appealed on 19 March 2021 such that his appeal was extant as at 1 April. Referring to his particular case, the FSCS asserted that any challenge to the original compensation decision was both out of time and without merit (presumably because it would have been a decision reached in accordance with the then understanding of the law and Mr Hood in any event had a suitable alternative remedy) and that any other challenge was premature because the FSCS had not completed its post-decision review process. It then added:

> "For the avoidance of doubt, we confirm that the above remains FSCS' position, including in respect of other claims that have the same circumstances as that of Mr Hood (i.e. where there was an open appeal that had been requested but not completed as at 1 April 2021)."

c) While Bevan Brittan's letter specifically addressed Mr Hood's position, it was written in response to a generic enquiry as to the position of other clients who had engaged the appeal process against a pre-April decision. Further, the passage quoted above addressed the position of other potential claimants and made clear that the line drawn was as to whether there was an open appeal at 1 April 2021.

88. Thereafter, APJ pressed the cases of its other clients who it asserted had extant appeals at 1 April 2021:

88.1 By its letter dated 9 March 2023, APJ asserted that the firm had about 200 such clients and that the firm would provide particulars by way of a schedule.

88.2 A schedule of 167 claimants who, APJ asserted, had extant appeals at 1 April 2021 was provided under cover of the firm's letter dated 3 April 2023. The schedule did not include these claimants' cases.

88.3 By its letter dated 24 April 2023, APJ pressed for an update on "all s.27 claims and extant appeals as of 1st April 2021".

89. Bevan Brittan wrote to APJ on 24 May 2023. The letter was expressly written in response to a proposed claim for judicial review by another client. It was not, therefore, written to APJ in respect of these claimants' appeals. By the letter, Bevan Brittan complained:

> "We are also growing concerned with the apparent pattern of you persistently submitting repeated correspondence to FSCS, in an attempt to persuade it to re-open claims which you are aware are closed, with no extant appeal outstanding, and in many cases after a significant delay. You have then repeatedly sought to challenge FSCS' refusals to re-open those closed claims. We have also seen a number of cases in which you have asserted that an appeal was requested by your clients before 1 April 2021 where FSCS has no record of receiving any such appeal. When requested to provide evidence to substantiate your purported appeal requests having been submitted, you have in many cases been unable to do so. We consider that your approach in these matters appears to be no more than an attempt to obtain replies from FSCS which

> you can subsequently characterise as fresh decisions to be the target of Judicial Review proceedings. Such conduct is clearly an abuse of process and has repeatedly been discouraged by the courts."

90. The client threatening to bring judicial review proceedings had appealed the compensation decision in his case before 1 April 2021. Bevan Brittan's response letter asserted the policy in respect of extant appeals. Although irrelevant to the client threatening judicial review proceedings, Bevan Brittan then explained:

> "However, FSCS has been clear throughout – including in our letter to you dated 3 August 2021 – that claims that were finally decided before 1 April 2021, either because: (i) a decision had been issued at the final stage of FSCS' post-decision review procedure by that date; or (ii) no appeal against a decision issued before that date was requested within a reasonable time, would remain closed and would not be re-opened by FSCS. This is because those decisions were made lawfully by FSCS having regard to all relevant considerations at the material time."

91. While the letter of 24 May 2023 did not concern these claimants, APJ responded by email both in respect of the individual client who had threatened the judicial review claim and on behalf of 167 others. By email sent on 25 May 2023, Bevan Brittan confirmed that the FSCS would treat compensation claims as still open upon receipt of evidence that satisfies it that an appeal was in fact requested before 1 April 2021.

92. By emails sent on 6 and 8 June 2023, APJ asserted that in fact it had 187 clients with extant appeals at 1 April 2021. These clients included the claimants in these proceedings. Bevan Brittan responded on 20 June 2023 pointing out that one case had been repeated such that it appeared that there were in fact 186 clients who were said to have extant appeals. On behalf of the FSCS, Bevan Brittan provisionally identified 177 claims where an appeal had been requested but not determined prior to 1 April 2021. The firm advised in respect of those 177 cases that the compensation paid for due diligence failings should be treated as having been paid on an interim basis; that the FSCS waived its right to rely on receipt of compensation as being in full and final settlement; and that the FSCS would issue final decisions taking into account their s.27 claims and any further compensation that might be payable.

93. Bevan Brittan correctly asserted, however, that Mrs Chong, Mr Fraser and Mrs Leach only lodged their appeals on 15 April 2021 such that their appeals were not extant as at 1 April. The letter confirmed that these claims were therefore closed.

Conclusions

94. In my judgment, the decision that was determinative of these claimants' legal position was the policy of only considering appeals from pre-April compensation decisions that primarily sought consideration of additional s.27 liability or challenged the quantification method that had been previously accepted when compensation was paid in the event that they had been lodged by 1 April 2021. Properly understood, the letters of 20 June and 20 July 2023 simply confirmed the application of such existing policy to these claimants' cases. I therefore accept

Mr Strachan's argument that this claim is a collateral challenge to a policy that was formulated and communicated to the claimants by no later than 26 October 2022.

95. Accordingly, the decisions under challenge were not themselves determinative of the claimants' rights but were the application of existing policy to these claimants' cases. Rule 54.5 required that any challenge to that policy had to be brought promptly and in any event within three months after the grounds to make the claim first arose. No doubt recognising that there are no proper grounds now for allowing a very substantial extension of time, the claimants do not plead a direct challenge to the policy. In such circumstances, it would be an abuse of process to allow this claim to operate as an out-of-time collateral challenge to the underlying policy.

96. It is, nevertheless, necessary to consider further the case based on the alleged breach of the claimants' legitimate expectations.

LEGITIMATE EXPECTATIONS

Legal principles

97. Even where a claimant does not have strictly enforceable rights, it might be argued that a public body has acted so as to create a legitimate expectation which is itself enforceable so as to confer a substantive or procedural benefit. The following legal principles apply in such a case:

    97.1 A legitimate expectation will only arise where there is a proof of a representation that is "clear, unambiguous and devoid of relevant qualification": R (Bancoult) v. Secretary of State for Foreign & Commonwealth Affairs (No. 2) [2008] UKHL 61, [2009] A.C. 453, at [60]; R v. Inland Revenue Commissioners, ex parte MFK Underwriting Agencies Ltd [1990] 1 W.L.R. 1545 (QB), at p.1569.

    97.2 The question of whether a representation is clear, unambiguous and devoid of relevant qualification is to be answered by considering how on a fair reading of the representation it would have been reasonably understood by those to whom it was made: Paponette v. The Attorney General of Trinidad & Tobago [2010] UKPC 32, [2012] 1 A.C. 1, at [30]; R (Association of British Civilian Internees: Far East Region) v. Secretary of State for Defence [2003] EWCA Civ 73, [2003] Q.B. 1397, at [56].

    97.3 Proof of detrimental reliance is not essential, although the presence or absence of detrimental reliance is a relevant consideration in deciding whether the adoption of the policy said to be in conflict with the representation would amount to an abuse of power and whether it might be justified in the public interest: Bancoult, at [60]. Where the claimant seeks to establish detrimental reliance, he or she must prove that: Paponette, at [37].

    97.4 The court must then consider whether the public body was entitled to frustrate the legitimate expectation. The principle that good administration requires public bodies to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply be objectively justified as a proportionate measure in the circumstances: Paponette, at [38]; Nadarajah v. Secretary of State for the Home Department [2005] EWCA Civ 1363, at [68].

97.5 The onus is on the public body to justify the policy that conflicts with the promise: Paponette, at [37]. Where the public body decides not to give effect to a legitimate expectation, it must articulate its reasons so that their propriety may be tested by the court: R (Bibi) v. London Borough of Newham [2001] EWCA Civ 607, [2002] 1 W.L.R. 237, at [59]. Where the public body chooses not to place evidence before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power: Paponette, at [38].

97.6 In R v. North & East Devon Health Authority, ex parte Coughlan [2001] Q.B. 213, Lord Woolf MR said, at [57]:

> "Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

97.7 Further, where a public body is considering whether to act inconsistently with a representation that it has made and which has given rise to a legitimate expectation, good administration and elementary fairness demand that it takes into account the fact that the proposed act will amount to a breach of the promise: Paponette, at [45]-[46]; Bibi, at [49] & [51].

The argument

98. Here, the claimants argue that the FSCS initially accepted their appeals and stated in terms that the appeals were being considered in accordance with the Court of Appeal's decision in Adams, i.e. on the basis that claims for s.27 compensation could be considered. Having made that commitment, they claim that the FSCS then did nothing for over two years either to decide the appeals or disabuse the claimants of their continued legitimate expectation that their appeals, including their s.27 claims, would be decided. The claimants argue that they relied on the comfort provided by the FSCS and gave up other potential avenues of redress, including making this claim for judicial review two years earlier. The claimants plead that the FSCS's communications gave rise to a legitimate expectation to at least a procedural benefit (namely that their appeals would be dealt with in accordance with the stated policy). Alternatively, they argue that the benefit was substantive in character. Either way, they argue that it binds the FSCS unless it can justify its volte face on proportional grounds of public interest. Mr Pennington-Benton submits that the letters of 28 April 2021 were promises to apply the new law following the Court of Appeal's decision in Adams.

99. The FSCS responds that the appeals were dealt with in accordance with its stated policy and that there is no basis for suggesting that there was any clear, unequivocal and unqualified promise that the claimants' cases would be dealt with other than in accordance with such policy.

Conclusions

100. The post-decision review team at the FSCS wrote to acknowledge receipt of the appeals on 19 April 2021. Each letter said that the team would carry out a review and aim to respond within 5 days or write to explain why such timescale could not be met. In my judgment, these initial response letters were no more than holding letters that acknowledged receipt of the appeals. Such letters made no relevant representations.

101. By contrast, the team's update letters of 28 April 2021 displayed a greater understanding of the issues raised. These letters explained:

> "We are considering the issues raised in your appeal. We are doing so in light of the judgment handed down by the Court of Appeal in Adams v. Options. We will respond as soon as we are able to."

102. Following the Supreme Court's decision to refuse permission to appeal, the claimants' solicitors sought updates in July 2022. The FSCS's customer service team replied in respect of Mrs Leach's case on 29 July 2022 indicating that it could not provide a timeframe for final decisions on s.27 claims and referring her to the dedicated page on the FSCS's website for updates on its approach to s.27 claims. On 9 August 2022, the customer escalation team responded to a further request for an update by again referring Mrs Leach to the FSCS's website for its latest update on s.27 claims.

103. On a fair reading, this correspondence would have been reasonably understood by the claimants to have made a clear and unambiguous representation that the issues raised in their appeals would be considered in light of the recent decision in Adams, but not that any particular outcome would be achieved or that the FSCS had committed to reopening its earlier compensation decisions in these cases. Further, the letters did not make any representation that the appeals would be considered outwith the FSCS's policy for dealing with appeals from pre-April decisions. Indeed, in Mrs Leach's case, she was expressly advised to monitor the dedicated webpage for updates.

104. So understood, there was no breach. The board inevitably took a little time to formulate its policy for dealing with its previous decisions made in accordance with its then understanding of the law. Meanwhile holding responses that walked the middle course of neither promising any particular outcome nor rejecting appeals were sent. The promise made was that these matters would be considered. Once formulated, the FSCS then applied its policy to these claimants' appeals. That, in my judgment, involved a consideration of the issues raised (namely the fact that these were appeals seeking to reopen the claimants' pre-April compensation payments in light of the Adams decision), and application of the FSCS's policy in respect of appeals raising s.27 claims following Adams.

OUTCOME

105. For these reasons, I dismiss these claims for judicial review.