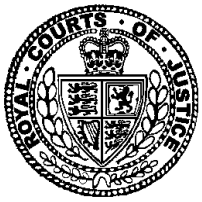

Neutral Citation Number: [2022] EWHC 1355 (Comm)

Case No: CL-2021-000632

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/06/2022

Before :

Stephen Houseman QC
Sitting as a Deputy Judge of the High Court

.....

Between :

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

.....
.....

Javan Herberg QC & Oliver Assersohn (instructed by **Weil, Gotshal & Manges (London) LLP**) for the **Claimant**
Michael Gibbon QC & Maxim Cardew (instructed by the **Legal Services Directorate, Insolvency Service**) for the **Defendant**

Hearing dates: 24, 25 and 26 May 2022
Draft Judgment circulated on 1 June 2022

.....

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

STEPHEN HOUSEMAN QC SITTING AS A JUDGE OF THE HIGH COURT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Monday 06 June 2022 at 12:00.

Mr Stephen Houseman QC sitting as a Deputy Judge of the High Court:

INTRODUCTION

1. By this action under CPR Part 8, the Claimant ("SDFC") seeks declaratory relief against the Defendant ("The Official Receiver" or 'TOR' for short) relating to the time limitation provision governing complaints referred pursuant to the Financial Ombudsman Service ("FOS"). The complaints concern payment protection insurance ('ppi' for short) which was allegedly mis-sold to consumers who since became bankrupt and whose respective estates duly vested in TOR by operation of law. TOR notified a bulk complaint during mid-2019.

2. FOS was created pursuant to Part XVI of the Financial Services and Markets Act 2000 (as originally enacted) ("FSMA"). The relevant limitation regime in the scheme rules is contained in the Dispute Resolution: Complaints Sourcebook ("DISP") which forms part of the FCA Handbook issued by the regulatory authority pursuant to its statutory rule-making powers and responsibilities. DISP is a piece of delegated legislation designed to set out a practical and coherent scheme for the operation of FOS. It is the product of a consultative process undertaken in conjunction with the enactment of the primary legislation. The key rule-making provision is s.226 FSMA.

3. The primary declaration sought by SDFC and the converse declaration sought by TOR in its acknowledgement of service raise an issue of construction as to *whose* actual or constructive awareness of relevant cause for complaint matters for the applicable limb of the limitation regime in DISP 2.8.2R(2)(b). More specifically, the question is whether the "*complainant*" with "*cause for complaint*" in such context is the bankrupt consumer whose eligibility is a precondition to bringing any complaint or TOR in whom such consumer's estate vested by operation of law upon bankruptcy and who is "*authorised by law*" to bring such complaint pursuant to its statutory responsibilities under the Insolvency Act 1986 ("IA86"). Depending on the answer to this threshold issue, and subject to the constraints of CPR Part 8, SDFC seeks further declaratory relief as to the *timing* of relevant actual or constructive awareness on the part of TOR or the relevant class of bankrupt consumers, as the case may be.

4. This action was set down for trial together with Claim No. CL-2021-000400 brought by two former financial institutions against TOR. The claimants in that parallel action sought an identical declaration as sought by SDFC on the primary construction issue summarised above, but no further declarations. That separate action was compromised on confidential terms a few days before trial. The witness evidence filed in that parallel action stands as evidence in the present action; it explains, amongst other things, the high volume of complaints involved in that particular case. I have the benefit of the skeleton argument of leading and junior counsel filed prior to that action being settled. The three skeleton arguments with respective annexures cover over 100 pages in total.

5. This and the settled action are understood to be the first involving a standalone claim for declaratory relief as to the meaning of any part of DISP. The FCA and FOS are aware of the proceedings, but neither has so far intervened. It is common ground that the Court can and ought to grant declaratory relief resolving the primary construction issue. There is no dispute as to the standing of either party or the utility of such relief. SDFC is a "*respondent*" within the applicable statutory rubric. TOR notified the bulk complaints on behalf of bankrupt consumers and would receive any financial redress as

statutory trustee of the relevant bankruptcy estates. The primary dispute is whether TOR is the "*complainant*" for the purposes of the limitation regime. Nothing turns on burden of proof or persuasion in this regard.

6. The primary construction issue arises at the intersection of two distinct statutory regimes: financial services regulation and personal insolvency. It raises questions as to the nature of TOR and its functions as well as the specific property which vests upon appointment. In view of the large number of complaints which may be involved or impacted by such decision, and its location at this specific statutory confluence, I consider the issue to be one of general public importance and will grant permission to appeal, if requested.

RELEVANT BACKGROUND & STATUTORY FRAMEWORK

7. SDFC operates the UK financial services business of The Very Group, a large and well-known multi-brand online retailer offering credit terms to consumer purchasers of its retail goods.

8. TOR is a statutory office created in 1883. Appointments are made by the Secretary of State pursuant to s.399 IA86. TOR is also an officer of the court with certain investigatory powers (s.400). The office is held and its functions discharged by 16 individuals at present. Although not an official title or distinct office, the Senior OR is David Chapman. Mr Chapman has provided four witness statements across both actions. For simplicity and convenience, I refer to TOR as a singular neutral personality.

9. Upon the making of a bankruptcy order, TOR becomes the first trustee in bankruptcy unless the Court appoints another trustee (s.291A). The bankrupt's estate vests in TOR immediately and automatically upon such appointment, i.e. by operation of law and without any conveyance or assignment or transfer (s.306). Like any trustee in bankruptcy, TOR holds the estate on a statutory purpose trust, but is not a trustee for the purposes of the Trustee Act 1925; it is not an agent of or for the bankrupt individual in any recognised sense; it steps into the shoes of the bankrupt individual, including for the purposes of bringing or defending legal proceedings in its own name and capacity. Such office differs in material ways from that of a liquidator of a corporate entity: see Gabriel v. BPE Solicitors [2015] UKCS 39; [2015] AC 1663 at [9].

10. TOR's paramount function is to "*get in, realise and distribute the bankrupt's estate*" pursuant to s.305(2). The bankrupt's estate, so far as material, consists of "*all property belonging to or vested in the bankrupt at the commencement of the bankruptcy*" (s.283(1)). The concept of "*property*" is defined very widely. It includes "*things in action*" as well as "*every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property*" (s.436(1)). The ostensible circularity of this definition notwithstanding, it is accepted as being the widest possible formulation. It contemplates the present vesting of a future or contingent interest, for example.

11. It is assumed for present purposes that (a) consumers were mis-sold ppi by SDFC in circumstances which qualified each of them as an "*eligible complainant*" for the purposes of making a complaint to and seeking financial redress from SDFC as "*respondent*" in accordance with DISP; (b) the estate of such consumer vested in TOR

by operation of law upon the latter's appointment at bankruptcy; and (c) TOR subsequently notified (to use a neutral term) such complaint to SDFC "*on behalf of*" each bankrupt consumer on or by 29 August 2019. That date was the specific back-stop deadline for ppi mis-selling complaints inserted with two years' notice at DISP 2.8.9R(2)(a), as explained below.

12. As regards (b) above, it is common ground that any right to receive financial redress awarded pursuant to a complaint (a 'right to redress' as shorthand) would fall within the statutory definition of property and thus belong to TOR under statutory trust, not the bankrupt. An issue arises as to whether this entitlement forms part of or at any rate exists in addition to a distinct statutory right to bring a complaint (a 'right to complain' as shorthand) and whether or the extent to which that vests in TOR upon its appointment pursuant to the bankruptcy of an eligible complainant.

13. Section 226 FSMA covers the compulsory jurisdiction with which this case is concerned. (The voluntary jurisdiction is covered by s.227.) Section 226 sets various parameters or conditions for the rules made pursuant to it, i.e. what became DISP. This rule-making power is augmented by Schedule 17 (The Ombudsman Scheme): paragraph 2 imposes a statutory duty on the regulatory authority to make rules for the operation of FOS; paragraph 13 requires that such rules include a time limitation regime.

14. Such rules were made as delegated legislation in the form of DISP contained in the FCA Handbook after a process of consultation and iterative drafting. In its current form, DISP runs to over 230 pages including appendices and schedules. DISP 1 covers fair treatment of complaints. DISP 2 covers the jurisdiction of FOS. DISP 3 covers complaint handling procedures and awards. (DISP 4 and DISP 5 are not material.) DISP App 3 contains specific provisions and procedures for handling of ppi-related complaints, reflecting the magnitude and significance of this source of complaints.

15. Terms appearing in italics in DISP are defined in a separate Glossary within the FCA Handbook. These defined terms are underlined in the provisions set out below, but not in partial phrases quoted in this judgment.

16. The purpose of FOS, as reflected in DISP, is to provide a consumer-facing, user-friendly, free-of-charge process for seeking redress without recourse to formal legal proceedings. One of the key objectives of FSMA, reflected in current s.1C and elsewhere, is consumer protection within the financial services sector. The scheme rules, including limitation, strike a balance between the interests of stakeholders in a way that gives effect to the legislative objectives.

17. As set out in DISP 2.2.1G, the ombudsman's jurisdiction is defined by four main conditions or components, namely: (1) type of activity involved (DISP 2.3; DISP 2.4; DISP 2.5); (2) territorial scope (DISP 2.6); (3) eligibility of the complainant (DISP 2.7); and (4) whether the complaint is referred to FOS in time (DISP 2.8). The construction issue arising at this trial concerns the interplay of (3) and (4) to a large extent.

18. DISP 2.7 is headed "*Is the complainant eligible?*" and provides, so far as material, as follows:

DISP 2.7.1 ***R***

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

DISP 2.7.2 ***R***

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

(Bold emphasis added by me and explained in paragraph 19 below.)

DISP 2.7.3 ***R***

An eligible complainant must be a person that is:
(1) a consumer; or
[…]
(4) a trustee of a trust which has a net asset value of less than £5 million at the time the complainant refers the complaint to the respondent…

DISP 2.7.6 ***R***

To be an eligible complainant a person must also have a complaint which arises from matters relevant to one or more of the following relationships with the respondent:
(1) the complainant is (or was) a customer, payment service user or electronic money holder of the respondent;
[…]
(5) the complainant is a person for whose benefit a contract of insurance was taken out or was intended to be taken out with or through the respondent;
(6) the complainant is a person on whom the legal right to benefit from a claim against the respondent under a contract of insurance has been devolved by contract, assignment, subrogation or legislation (save the European Community (Rights against Insurers) Regulations 2002);
[…]

19. I have highlighted in bold above the references to "*on behalf of"* and *"authorised by law*" in DISP 2.7.1R and 2.7.2R. It is common ground for present purposes that TOR has and at the material time had legal capacity to bring the relevant complaints "*on behalf of*" each bankrupt consumer who is or was - subject to a tentative alternative analysis advanced by SDFC - the only "*eligible complainant*" in such context. As a matter of strict analysis, DISP 2.7.2R appears to be concerned with *capacity* as distinct from *eligibility*. The former presupposes the latter. These twin provisions, as further reflected in the definition of "*complaint*" quoted below, accommodate the position and role of other persons in the process of bringing a complaint. The operative or active language in DISP 2.7.1R and 2.7.2R is "*brought by*" and "*may be brought*", respectively. This suggests that any distinct statutory right to complain should be characterised as a right to *bring* a complaint.

20. DISP 2.7.2R is designed to accommodate a range of situations whereby a third party is authorised to bring a complaint on behalf of an (actual/alive or putative/deceased) eligible complainant. It provides for two broad categories or sources of authority: specific authority ("*authorised by the eligible complainant*") and general authority ("*authorised by law*"). The former corresponds to a private mandate classically comprising the relationship of principal and agent; whilst the latter covers situations in which a third party is given legal responsibility by some other mechanism. The only mechanism suggested is statute.

21. The phrase "*authorised by law*" is, therefore and putting it broadly, intended to cover situations in which statute confers a legal responsibility upon someone for the affairs of another person. The paradigm situations are death, incapacity and bankruptcy. This would ordinarily involve a statutory office-holder or vestee with sufficient wherewithal as well as legal responsibility to ascertain the affairs of the (former, in the case of death) eligible complainant. TOR like any other trustee in bankruptcy is authorised by law in this specific sense to bring complaints on behalf of eligible complainants whose estates have vested in it through bankruptcy. This much is common ground for present purposes and apparent on the face of the scheme rules, notwithstanding that the concept of *authority* in such situations is not the same as that involved in a specific private mandate between individuals and does not necessarily resonate with the law of personal insolvency or the position of a trustee in bankruptcy.

22. It is common ground, not least because it flows logically from the common ground rehearsed above, that the phrase "*on behalf of*" in DISP 2.7.1R / 2.7.2R must be capable of meaning more than or something distinct from agency. It is designed also to accommodate the position of a limited class of statutory vestees who are "*authorised by law*" in the specific sense outlined above. The phrase "*on behalf of*" in a statute or statutory instrument is capable of meaning 'in the place of' when required by context: see Plevin v. Paragon Personal Finance Ltd. [2014] UKSC 61; [2014] 1 WLR 4222 at [30].

23. Pursuant to DISP 1.8.1R, a respondent which receives a complaint "*outside the time limits for referral to [FOS]*" (as set out in DISP 2.8) "*may reject the complaint without considering the merits, but must explain this to the complainant in a final response*…" SDFC as respondent seeks to invoke this provision by reference to the limitation regime in DISP 2.8.2R as a preliminary objection to the bulk complaint notified by TOR.

24. DISP 2.8 is headed "*Was the complaint referred to the [FOS] in time?"* and provides, so far as material, as follows:

DISP 2.8.2 R

The Ombudsman cannot consider a complaint if ***the complainant refers it*** *to the Financial Ombudsman Service:*
(1) more than six months after the date on which the respondent ***sent the complainant*** *its final response, redress determination or summary resolution communication; or*
(2) more than:
(a) six years after the event complained of; or (if later)
(b) three years from the date on which ***the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint****;*

unless ***the complainant referred the complaint to*** *the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;*
unless:
(3) in the view of the Ombudsman, the failure to comply with the time limits … was as a result of exceptional circumstances; or
[…]
(5) the respondent has consented to the Ombudsman considering the complaint where the time limits … have expired…

25. I have highlighted in bold above the four instances in which reference is made to "*complainant*" in DISP 2.8.2R. The third of these four references is in issue, namely "*the complainant became aware … that he had cause for complaint*". It is difficult to read "*he*" as relating to anyone other than "*the complainant*" in this phrase. I note that the operative or active language in this rule is "*refers*" / "*referred*" as distinct from "*brought*" in DISP 2.7.1R / 2.7.2R, as observed in paragraph 19 above.

26. DISP 2.8.9R (inserted on 29 August 2017) introduced the back-stop deadline of 29 August 2019 for ppi-related complaints. During the two year period leading to this mandatory deadline the FCA undertook an extensive public information campaign about the deadline and its implications for ppi mis-selling complaints under the statutory ombudsman scheme.

27. As will be apparent from the quotations above, the word "*complainant*" is not defined in DISP. The following two definitions in the Glossary are important:

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

    (b) "*complaint*" is materially defined as: *"…any oral or written expression of dissatisfaction … from,* ***or on behalf of****, a person about the provision of, or failure to provide, a financial service … which: (a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and (b) relates to an activity of that respondent, or of any other respondent with whom that respondent has some connection in marketing or providing financial services or products … under the jurisdiction of the [FOS]*"

    (For consistency I have highlighted "*on behalf of*" in bold above.)

28. FOS is intended to operate as a flexible and fair scheme. It uses plain language. The remedial jurisdiction is open-textured: determinations and awards are based on what is "*fair and reasonable*" in all the circumstances; financial redress may be awarded for categories of loss that are not constrained by common law rules as to recovery of damages; non-monetary redress may be awarded in a way that does not correspond to any equivalent remedy in equity or at common law (ss.228-229 FSMA / DISP 3).

29. A complaint under this statutory scheme is not a cause of action. An award is, however, enforceable through the courts (DISP 3.7.13G). An award may have *res judicata* effect in relation to causes of action under English law when accepted by the relevant

complainant (cf. s.228(5) FSMA). This was established by the Court of Appeal in Clark & another v. In Focus Asset Management and Tax Solutions Ltd. [2014] EWCA Civ 118; [2014] 1 WLR 2502 in a case concerning an award by FOS relating to negligent financial advice. FOS was described as involving or discharging a judicial function (see [82]). Whether or not (and how) the doctrine of merger may apply to such statutory awards was left open by the Court of Appeal ([93]). There remains a divergence at first instance as to the applicability of the doctrine of merger in this context: cf. Andrews v. SBJ Benefit Consultants Ltd. [2010] EWHC 2875 (Ch); [2011] Bus LR 1608.

30. The principles of interpretation applicable to DISP are set out in the General Provisions section of the FCA Handbook. In summary: (a) each provision must be interpreted in light of its purpose (GEN 2.2.1R); (b) the purpose of any provision is gathered first and foremost from the words used and its context among other relevant provisions (GEN 2.2.2G); (c) expressions with defined meanings appear in italics (GEN 2.2.6G); and (d) where italics have not been used, unless the context requires or unless otherwise stated an expression bears its natural meaning (subject to the Interpretation Act 1978: see GEN 2.2.11R / 2.2.12G) (GEN 2.2.9G).

31. There is no difference between the parties as to the principles of interpretation applicable to DISP. I was referred to statements in Re Lehman Brothers International (Europe) (No 2) [2010] EWCA Civ 917; [2011] 2 BCLC 184 (and similar statements in the Supreme Court in that case) concerning the proper approach to interpreting Chapter 7 (CASS7) of the FSA's Client Assets Sourcebook. The Court should adopt "*an holistic and iterative approach to interpretation*" and seek to give a set of rules of this kind a "*sensible and practical construction*" (*per* Arden LJ at [57]-[58]); put another way, scheme rules such as DISP should be "*interpreted coherently*" and on the basis they were "*intended to produce a practical and commercially sensible result*" (*per* Lord Neuberger MR at [181]). These statements do not alter the substance of the interpretative guidance set out in DISP, as summarised above.

32. So far as relevant, it appears that the regulatory authority in its rule-making capacity intended to model the limitation regime in DISP 2.8.2R upon section 14A of the Limitation Act 1980. This is evidenced by CP33 (November 1999) (paragraph 6.26); CP49 (May 2000) (paragraph 1.73); and draft scheme rules attached to (for example) CP49-JPS (December 2000). There are obvious similarities in structure and resonant wording, but material differences between the two regimes. I do not set out section 14A in this judgment, as I do not regard any comparison or intended emulation as material to my conclusion. No authority was found dealing with the position of a trustee in bankruptcy under s.14A; cf. Trainer v. Cramer Pelmont (A Firm) [2019] EWHC 2501 (QB); [2020] PNLR 3 in which Walker J. at [187] said that this involved "*novel arguments in an area of developing law*".

33. It suffices to say for present purposes that any limitation regime that sets time running by reference to the actual or constructive knowledge/awareness of the person seeking damages/redress is ordinarily concerned with the responsibility or conscience of such person. This reflects a moral calculus which balances one party's substantive culpability with the other party's procedural responsibility in order to further the policy considerations which underpin limitation as a fundamental feature of a legal system. Whose procedural responsibility and mental state matters depends primarily on the words of the limitation provision itself. As noted above, here it is "*the complainant*" who has the relevant "*cause for complaint*" in DISP 2.8.2R(2)(b).

PRIMARY DECLARATION: DISP 2.8.2R(2)(b)

34. The parties are polarised as to the meaning of "*complainant*" in DISP 2.8.2R(2)(b). The respective arguments are summarised in turn below.

35. SDFC contends that TOR is the "*complainant*" in this specific context because it "*referred the complaint to the respondent*" and on the assumed position it "*had cause for complaint*" by reason of the automatic vesting in it of the relevant statutory right(s) to complain and seek redress through FOS. TOR is the vested right-holder even if it is not itself (nor could be) the "*eligible complainant*" under DISP. The undefined term "*complainant*" is used all four times in DISP 2.8.2R in a functional sense to denote the person who *refers* the relevant complaint with recognised capacity to *bring* such complaint.

36. TOR contends that it cannot be the "*complainant*" in this (or any other) context for the simple reason that it is not and could not be the "*eligible complainant*". The "*complainant*" whose awareness matters for limitation purposes is the bankrupt consumer. TOR is "*authorised by law*" to bring and refer the relevant complaint "*on behalf of*" the bankrupt consumer in respect of whose estate it acts as trustee and who themselves (therefore) "*referred the complaint to the respondent*" as a matter of pure legal analysis or imputation. TOR's awareness is immaterial: it is neither principal (eligible complainant) nor agent (whose knowledge falls to be attributed to such principal). TOR performs the administrative function of referring the complaint and receiving any financial redress pursuant to DISP.

37. Neither side contends for a position whereby the "*complainant*" whose awareness matters for the purposes of DISP 2.8.2R(2)(b) could be *either or both* of the bankrupt and/or TOR in any given case. (As an aside and by way of contrast, s.14A(5) of the Limitation Act 1980 contains disjunctive language to cover the position of assignors or predecessors as well as the claimant with title to sue.) Both sides say that the relevant complainant has a fixed meaning and must be a single legal personality, one way or the other. The construction issue was contested on the working assumption that TOR would have acquired actual or constructive awareness of the relevant cause for complaint *prior to* the bankrupt consumer doing so, although this need not be the case and remains unknown in any particular instance.

38. The answer to this binary construction issue is not self-evident. There is some artificiality in each side's analysis due to the ostensible need to 'split' certain concepts. On SDFC's construction, it is necessary to differentiate between "*complainant*" and "*eligible complainant*" in a particular context but not others; whilst on TOR's construction it is or may be necessary to differentiate between the statutory right to complain - retained by the bankrupt as "*eligible complainant*", it is said - from any (right to) financial redress pursuant to such complaint which, it is accepted, vests in TOR.

39. I am satisfied, however, that whatever artificiality may be involved in SDFC's construction at first blush, it is the distinctly preferable and therefore correct meaning of DISP 2.8.2R(2)(b). The statutory framework itself contemplates that a complaint may be *brought by* someone other than the eligible complainant; and, indeed, that there may be *no* eligible complainant at all where that person has died. Any definitional

'split' based on or by reference to legal personality on this side of the complaint is both intentional and necessary for the scheme to work in practice.

40. An illustration of this feature can be found in ss.226 & 228 FSMA. Parliament must have intended scheme rules to allow for complaints to be made on behalf of deceased or incapacitated or bankrupt consumers: nobody is suggesting that DISP is *ultra vires* in so far as this is permitted or accommodated. Section 226(2)(a) requires that "*the complainant is eligible and wishes to have the complaint dealt with under the scheme*". Subsections (5) and (6) provide for what happens, respectively, if "*the complainant notifies the ombudsman that he accepts the determination*" or "*the complainant has not notified the ombudsman of his acceptance or rejection of the determination*" by a specified date. It must be the case that "*complainant*" can mean someone other than the person whose eligibility is a jurisdictional requirement in accordance with s.226(6), i.e. the "*eligible complainant*" as defined in DISP 2.7. In the case of death or incapacity or bankruptcy, someone other than the eligible complainant will invariably decide whether to bring and pursue a complaint or whether to accept or reject an award further to such complaint. The eligible complainant either does not exist or is unable as a matter of fact or legal capacity to make such decisions in these situations.

41. This position is replicated in DISP. The term "*complainant*" is not defined. It could have been, just as "*person*" and "*complaint*" are defined. This suggests an intention to use the term flexibly and contextually throughout the scheme rules. Conversely and perhaps somewhat unhelpfully, the defined term "*eligible complainant*" is used to refer to someone who may *never* bring a complaint or have one brought on their behalf under DISP; it imposes the jurisdictional condition of eligibility as regards any *complaint* that is brought.

42. In accordance with the rules of interpretation applicable to DISP, as summarised in paragraph 30 above, the relevant provision falls to be construed in light of its purpose and, unless the context requires otherwise, non-defined terms bear their natural meaning. The three surrounding uses of "*complainant*" in DISP 2.8.2R suggest a functional connotation, i.e. the person who refers the complaint or who receives a response to it. This need not be the eligible complainant, it may be someone else who is duly authorised to bring the complaint on their behalf. This functional connotation accords with the ordinary meaning of "*complainant*" as defined in the Oxford English Dictionary: "*one who enters a legal complaint against another*" / "*one who complains, a complainer*".

43. The key phrase "*the complainant became aware … that he had cause for complaint*" in DISP 2.8.2R(2)(b) should be construed in this immediate linguistic context in order to give a coherent meaning to the provision. There are other uses of "*complainant*" elsewhere in DISP that appear to bear this functional connotation in context, as distinct from the formal or jurisdictional concept of "*eligible complainant*" - although in other places (for example, in the definition of "*complaint*" and in DISP 2.8.8G dealing with the application of DISP 2.8.2R(2)(b) to ppi-related complaints) they are assumed to be the same person. I do not rehearse the examples and counter-examples. Context is sovereign.

44. In the case of death, the eligible complainant no longer exists, as acknowledged by the words in parentheses in DISP 2.7.2R. Their awareness cannot, therefore, be decisive for the purposes of DISP 2.8.2R(2)(b). The "*complainant*" whose awareness matters

would be the executor who is not (by definition) the eligible complainant. The scheme rules were designed to accommodate such flexibility and operate in a practical way.

45. The "*complainant*" whose awareness matters in the context of limitation is, therefore, the person who refers the relevant complaint with requisite capacity and who (therefore) has the relevant cause for complaint as the vested holder of the statutory right or rights relating to such complaint and any ensuing award. In the scenario posited for present purposes, that is TOR and not the bankrupt consumer - even if the latter's actual or constructive awareness may have pre-dated that of the former in any particular instance.

46. Turning to the position of TOR, it seems to me that whatever statutory rights exist in relation to bringing a complaint and obtaining redress through FOS they each constitute property as so widely defined in s.436(1) IA86. The entirety of such entitlement vests in TOR by operation of law upon its appointment. Whether this is a single composite right or two (or more) distinct rights does not ultimately matter: the same characterisation applies on either analysis, in my judgment. The statutory right (or each of them, if distinct) is a "*thing in actio*n" and/or an "*interest … incidental to property"*, namely the underlying ppi policy.

47. In Re Rae [1995] BCC 102, Warner J. held that a non-enforceable public law legitimate expectation on the part of a bankrupt vessel-owner as to the grant of a renewed fishing licence by the minister under the relevant statutory regime constituted an "*interest … arising out of, or incidental to, property*" (i.e. his vessels) within the meaning of s.436. An "*interest*" need not be enforceable in a court of law, so long as it is "*marketable and so capable of being turned into money*" (see p.113D-F). I take the word "*marketable*" to denote a characteristic that enables or facilitates the economic convertibility of the interest.

48. In Ward v. Official Receiver [2012] BPIR, District Judge Khan sitting in the Manchester County Court concluded that an award for ppi mis-selling made by the FOS and paid by the respondent (Halifax plc) to TOR as Mr Ward's trustee in bankruptcy formed part of his estate and so could not be paid out to Mr Ward. The payment was made two years after Mr Ward was discharged from bankruptcy, after Mr Ward had brought the complaint himself during his bankruptcy. The "*right to complain to [the] Financial Ombudsman*" and the "*right to receive payment [as] a consequence*" both vested in TOR upon Mr Ward's bankruptcy. Such right (or rights, if separate) constituted an "*interest*" (see [13]) or "*thing(s) in action*" (see [14]) as defined in s.436. The Insolvency Service reported the (then recent) decision in Ward in their ORS Bulletin in July 2012, suggesting that they too regarded it as representing the correct legal position. Quite apart from that, I agree with the analysis in Ward.

49. I regard it as undesirable to separate the right to bring a complaint from the right to receive any consequent redress. This is the kind of "*atomistic*" approach that Mr Gibbon QC, appearing for TOR, cautioned against when analysing the insolvency position in this context. Splitting at this level ignores the instrumentality of the former in the latter and the intrinsic connection between the complaint and any consequent redress pursuant to the statutory scheme. The fact that a complainant has an independent choice between accepting and rejecting an award (s.228(5)(6): see paragraph 40 above) does not justify such split any more than it justifies identifying yet further sub-atomic rights (i.e. the right to accept or reject an award) within this analysis. As a matter of substance and common sense, there is a single or composite statutory

right to bring a complaint seeking redress - or, to phrase it back-to-front, a right to redress pursuant to bringing a complaint.

50. TOR's analysis involves such split in order to resist the characterisation of any 'right to complain' as property which vests upon its appointment, whilst accepting (as it must) that the 'right to redress' is property which so vests. If the latter is property, being (at least) an "*interest*" which is "*contingent*" and "*incidental to*" the relevant ppi policy, it is difficult to see why the former is not also or more so. It is present rather than contingent, no less incidental to the ppi policy and, by definition, a pre-requisite to obtaining such redress. The statutory right to complain, even if juridically distinct from any contingent interest in the financial redress awarded pursuant to such complaint, is an "*interest … arising out of, or incidental to*" the relevant ppi policy, in my judgment. The position is even clearer when the statutory right is seen as a composite one, i.e. to seek redress by bringing the complaint.

51. The relevant statutory right is also, in my judgment, a "*thing in action*". This phrase corresponds to *chose in action* and covers all personal rights of property which can only be claimed or enforced by action as distinct from taking manual or physical possession: see *Halsbury's Laws of England* (Volume 13); Colonial Bank v. Whinney (1886) 11 App Cas 436 at 440 (HL). It is broader than a cause of action and does not require "*action*" in the sense of legal action in court proceedings. A statutory right to complain and seek redress through an ombudsman scheme is a unit of intangible property with a realisable value which is, in principle, capable of assignment or alienation or extinction through consensual compromise.

52. The decision in Clark (above) as to the potential *res judicata* effect of an ombudsman award, once accepted by the complainant, fortifies this characterisation irrespective of whether the doctrine of merger applies to related causes of action. The doctrine of *res judicata* operates on the substance of a cause of action, not form or remedy. As a matter of empirical notoriety, complaints about ppi mis-selling contain much of the juridical brickwork comprising pleaded claims for damages involving misrepresentation (see Ward at [14]) or statutory causes of action under the Consumer Credit Act 1984 (see Plevin) or actionable violations of financial services standards of conduct (s.138D FSMA). Statutory complaints of this kind are analogues if not facsimiles of causes of action at law.

53. The well-established common law exception for claims personal to the bankrupt as an individual is not engaged in this context. Such argument was rejected in Ward at [15]-[17] and not advanced by TOR in the present case. For the position more generally relating to (proceeds of) insurance policies held by bankrupts, see Cork v. Rawlins [2001] EWCA Civ 197; [2001] Ch. 792. The fact that the bankrupt alone fulfils the eligibility criteria in DISP 2.7.3R (e.g. "*consumer*") and DISP 2.7.6R (e.g. "*customer … of the respondent*") does not mean that the statutory right to complain is personal to the bankrupt as an individual. It means that the statutory right exists or may exist in the first place, such that it can vest in TOR upon appointment. Eligibility is a pre-condition to the creation of the statutory right. It is a requirement for the existence of such property at the time it vests in TOR.

54. TOR becomes the right-holder as a matter of legal title and economic reality - subject to its statutory duties and powers qua trustee - by stepping into the shoes of the eligible complainant, even if not satisfying the eligibility requirements on an independent basis.

If an analogy is needed, see In re Landau (A Bankrupt) [1998] Ch 223 in which a trustee in bankruptcy claimed under a pension annuity notwithstanding the fact that he was not an "*annuitant*" within the relevant scheme rules nor an assignee. The position here is stronger because the scheme rules expressly confer upon a statutory vestee such as TOR its own legal capacity to bring a complaint so long as "*authorised by law*" to do so.

55. Once it is appreciated that the relevant statutory right vests in TOR by operation of law, a limitation regime concerned with TOR's awareness, rather than that of the bankrupt, makes sense by reference to the underlying rationale of such provision, as discussed above. It is not mere happenstance, as suggested by TOR, that the relevant complaint is *in fact* referred by TOR. It is the inevitable consequence of the operation of the law of personal insolvency in this jurisdiction, which (so far as relevant) existed materially in its current form at the time of enactment of FSMA and the publication of DISP pursuant to FSMA. DISP was designed to accommodate such legal system.

56. After such divestment occurs, the bankrupt has no right or interest in any putative complaint or redress; and, therefore, no longer has "*cause for complaint*" within the meaning of DISP 2.8.2R(2)(b). It makes sense and accords with intrinsic fairness that their awareness thereupon ceases to matter for the purposes of this limitation provision. The important objective of consumer protection which infuses the legislative scheme does not alter the position. This strong legislative policy is priced into the limitation provision itself and this in turn helps to fulfil "*the valuable social function of efficient dispute resolution*" which also underpins FOS: see Clark (above) at [45]. The objective of consumer protection cannot keep the spotlight on the consumer for limitation purposes after their entire substantive interest has been divested by operation of law.

57. It is common ground that TOR is not an agent of any kind for the bankrupt individual. On the assumption that TOR cannot be the "*eligible complainant*" - as to which, see paragraphs 62 and 63 below - it must follow that TOR is "*authorised by law*" to bring a complaint "*on behalf of*" such eligible complainant in order to satisfy the access/standing requirement in DISP 2.7.2R. TOR is "*authorised by law*" to take such step "*on behalf of*" the bankrupt consumer through the vesting of such statutory right upon appointment, consistent with my analysis above as to the proper characterisation and destination of the relevant statutory right.

58. TOR is not "*authorised by law*" without this being the case. The only authorisation that matters for DISP 2.7.2R is one conferring capacity to *bring* a complaint, as made clear by the first eight words of that rule (see paragraph 19 above). There is no provision of IA86 which confers any free-standing authority or power upon TOR to take such step. The statutory responsibility to "*get in*" and "*realise*" the bankrupt's estate does not operate independently from the vesting of such estate. TOR's contrary analysis presupposes some statutory authority on the part of TOR to *bring a complaint* on behalf of the bankrupt consumer qua eligible complainant in the absence of such statutory right to complain itself being vested in TOR. The notion that the bankrupt retains such statutory right, whilst TOR is vested with a separate right to receive or contingent interest in any redress pursuant to such complaint, is conceptually and commercially repugnant. The argument that TOR has statutory *authority* to bring a complaint absent any statutory *right* to do so only serves to highlight the artificiality of a sub-atomic split, as addressed and rejected above.

59. The position may be different in cases of genuine agency, i.e. where someone is "*authorised by the eligible complainant*" to bring a complaint on their behalf as contemplated by DISP 2.7.2R. In that situation, the person who refers the complaint can be said to be the "*complainant*" in a functional sense, but they may not themselves have "*cause for complaint*" as required by DISP 2.8.2R(2)(b). That said, under general principles of attribution between agent and principal, the same result would ordinarily arise as to awareness for the purposes of this provision. I say no more about that distinct situation.

60. I reach the conclusion above without specific resort to the drafting history of DISP or prior utterances as to its intended meaning and effect, as pressed on behalf of SDFC at trial (see paragraph 32 above). The limitation regime which became DISP 2.8.2R is avowedly modelled on section 14A of the Limitation Act 1980, albeit without certain features and framed in much simpler language. What matters is the proper meaning of the words used in DISP 2.8.2R(2)(b) construed in context and to give effect to their purpose.

61. SDFC ran a further argument of purposive construction based upon avoiding a conclusion that DISP 2.8.2R is *ultra vires* the rule-making power conferred by s.226(2)(a) FSMA. I was not persuaded by this argument or its necessity. As noted in paragraph 40 above, references to "*complainant*" in s.226 involve flexibility and functionality in order to accommodate (for example) the death, incapacity or bankruptcy of the "*eligible*" person. The same flexibility and functionality finds adequate expression in DISP.

62. I deal finally with the alternative case advanced by SDFC at trial, albeit without emphasis or prominence, to the effect that TOR or any trustee in bankruptcy is the - or, more accurately, an - "*eligible complainant*" for present purposes. This is said to be so to the extent that (i) TOR is "*a trustee of a trust which has a net asset value of less than £5 million at the time the complainant refers the complaint to the respondent*" (DISP 2.7.3R(4)) and (ii) TOR has a complaint "*which arises from matters relevant to*" a relationship with SDFC in that TOR "*is a person on whom the legal right to benefit from a claim against the respondent under a contract of insurance has been devolved by … legislation*", namely the vesting provisions of IA86 (DISP 2.7.6R(6)). (I do not see how TOR could satisfy the description in DISP 2.7.6R(5), so far as also suggested.)

63. In circumstances where the eligible complainant's bankruptcy is contemplated and accommodated within DISP 2, as discussed above, it seems unlikely that trustees in bankruptcy would *also* be conferred an original status and standing in this way. Further, if correct it would mean that there are *two* eligible complainants whose actual or constructive awareness could matter for the purposes of DISP 2.8.2R(2)(b) and no obvious mechanism for choosing between or aggregating them or their respective causes for complaint. In light of my conclusion above, it is not necessary to decide this alternative case save to observe that it seems unduly technical and does not sit well with a coherent and practical interpretation of the scheme rules.

DECLARATIONS AS TO ACTUAL OR CONSTRUCTIVE AWARENESS

64. As noted above, SDFC seeks further declaratory relief as to the *timing* of actual or constructive awareness of relevant cause for complaint on the part of TOR or bankrupt consumers, depending on the outcome of the primary construction issue. The Part 8

claim form states as follows: "*The Court is not asked to address factual issues, nor does the claim give rise to any dispute of fact.*"

65. The second limb of this additional declaratory relief was not advanced in oral submissions at trial. SDFC did, however, pursue the first limb on the basis that its construction of DISP 2.8.2R(2)(b) is upheld. The claimants in the parallel action did not seek either additional declaration or anything similar: they averred in their claim form and supporting evidence that the Court could not determine disputed matters of fact under CPR Part 8.

66. Having read the evidence filed in relation to this aspect of the case, including the witness statement of Mr Chapman, and in light of my indication that the primary construction issue is suitable for appellate attention, I do not consider it appropriate to grant any declaratory relief of the kind sought under this heading. There may well be force in some of SDFC's generic criticisms of TOR in terms of non-compliance with its own Technical Manual or other internal information-gathering protocols which may have resulted in a failure to gather sufficient information promptly from bankrupt consumers. An issue arises as to whether and how compliance with such protocols equates with or supplies constructive awareness for the purposes of DISP 2.8.2R(2)(b).

67. SDFC has the burden of establishing actual or constructive awareness of relevant cause for complaint more than three years before the date of referral in mid-2019. This inevitably involves questions of fact and inference which it is not appropriate to determine under CPR Part 8 or declare in a wholesale manner as sought. This will involve a more granular inquiry assisted by appropriate disclosure and interrogation of what took place during the relevant period(s). A bulk complaint is not answered by a bulk declaration of this kind.

68. The sensible way of dealing with this aspect of the complaints jurisdiction is through FOS by whatever procedural mechanisms (e.g. sample or test cases, collective preliminary issues) are felt appropriate and with whatever assistance from the High Court that FOS or interested parties may be able to seek at the appropriate stage. As a matter of sensible procedural management and/or equitable remedial discretion, I decline to grant any declaratory relief as to the timing of TOR's actual or constructive awareness of relevant cause for complaint for the purposes of DISP 2.8.2R(2)(b).

DISPOSITION

69. For the reasons set out above:

(1) I will grant the declaration sought by SDFC on the primary construction issue to the effect that the "*complainant*" whose actual or constructive awareness is relevant in DISP 2.8.2R(2)(b) is TOR.

(2) I decline to grant any further declaratory relief.

(3) I will grant permission to appeal in respect of (1) above, if sought by TOR.

(4) I will deal with matters consequential on the handing down of this judgment, including costs reflecting (1) and (2) above.

70. I repeat my gratitude and admiration for the conspicuous quality of analysis and presentation as well as the efficient and courteous conduct of this trial.