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Case No: CO/1716/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 September 2022

Before :

THE HONOURABLE MR JUSTICE MURRAY

- -

Between :

THE KING **(on the application of CHARLES STREET SECURITIES EUROPE LLP)**	**Claimant**
- and -	
THE FINANCIAL OMBUDSMAN SERVICE	**Defendant**
- and -	
DAVID HAROLD REES	**Interested Party**

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- -

Mr Adam Chichester-Clark and **Ms Amelia Walker** (instructed by **CANDEY**) for the **Claimant**
Mr Stephen Kosmin (instructed by **The Financial Ombudsman Service**) for the **Defendant**

Hearing date: 30 November 2021

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down are deemed to be 26 September 2022 at 10:30 am.

Mr Justice Murray :

1. The claimant, Charles Street Securities Europe LLP ("CSSE"), renews its application for permission to apply for judicial review ("the Renewal Application") of a decision dated 12 February 2021 ("the Jurisdiction Decision") made by Ms Nina Walter ("the Ombudsman"), who is an ombudsman of the defendant, the Financial Ombudsman Service ("the FOS"). CSSE renews the application following the refusal of permission by Eyre J after consideration of the application on the papers. In the Jurisdiction Decision, the Ombudsman found that she had jurisdiction to consider a complaint made against CSSE to the FOS by the interested party, Mr David Rees ("the Complaint").

2. By application dated 24 November 2021, CSSE also seek to amend its Statement of Facts and Grounds ("SFG") to include an additional ground of challenge to the Jurisdiction Decision ("the Amendment Application").

3. Having determined that she had jurisdiction, the Ombudsman went on to consider the Complaint, upholding it in her decision of 27 March 2021 ("the Substantive Decision"), which was re-issued with a revision that is not material for present purposes on 17 June 2021.

4. On 14 May 2021, CSSE issued its claim seeking to challenge the Jurisdiction Decision on four grounds and to challenge the Substantive Decision on six grounds.

5. In its Summary Grounds of Resistance dated 8 June 2021 ("SGR"), the FOS invited the court to refuse CSSE's application for permission on all grounds and to award the FOS its costs. In addition to addressing each ground separately, the FOS also argued that the claim was time-barred under CPR r 54.5(1) for CSSE's lack of promptness in filing the claim.

6. On 26 July 2022, CSSE filed its Reply to the SGR.

7. On 7 October 2021, Eyre J refused permission to challenge the Jurisdiction Decision on all four grounds set out in the SFG and refused permission to challenge the Substantive Decision on Grounds 1 and 6 set out in the SFG. He granted permission to challenge the Substantive Decision on Grounds 2 to 5. Eyre J did not consider that the claim was time-barred under CPR r 54.5(1) in relation to the Jurisdiction Decision or the Substantive Decision.

The background

8. CSSE is a limited liability partnership authorised and regulated by the Financial Conduct Authority ("FCA"). It manages a fund and provides equity and debt financing for early stage growth companies and related finance and investment advisory services. It has an appointed representative under section 39 of the Financial Services and Markets Act 2000 ("the FSMA"), namely, CSS Partners LLP ("CSSP"), which carries on business comprising regulated activities for which CSSE has accepted responsibility. CSSE invests as principal and raises money through private placements arranged by CSSP.

9. The FOS is established and operated pursuant to Part XVI of, and Schedule 17 to, the FSMA. It provides an independent and informal complaint resolution procedure for the financial services industry that permits complaints to be made by eligible complainants about the provision of financial services without the necessity of a court hearing.

10. Mr Rees is an individual who formerly owned and ran two hearing aid businesses. He first contacted CSSP in January 2006, by which time he had retired and was in the process of selling his business.

11. The Complaint relates to investment opportunities presented to Mr Rees between 2006 and 2009 by CSSP pursuant to a contract Mr Rees entered into with CSSP on 3 May 2006. It is CSSE's position that all of the investments were specifically identified by CSSP to Mr Rees as high risk versus high reward.

12. On 26 May 2015, Mr Rees made the Complaint to the FOS. The essence of the Complaint was that CSSP was at fault for his losses due to the poor performance of various investments he made as a result of investment opportunities presented to him by CSSP. He invested over £640,000 in shares of unlisted companies between 2006 and 2009. He complained that the subsequent performance of the investments demonstrated that they had not met his stated objective of "obtaining a balanced return from income and capital growth, primar[il]y to maximise growth".

13. An ombudsman of the FOS made a final decision upholding the Complaint on 15 February 2018. CSSE challenged this decision by way of a claim for judicial review that was issued in June 2018.

14. On 26 July 2018, the ombudsman's decision was quashed by consent, with the Complaint to be remitted to a new ombudsman for reconsideration.

15. On 20 March 2019, the FOS informed CSSE that it was now taking steps to remit the Complaint.

16. On 14 August 2020, the Ombudsman issued a provisional decision finding that she had jurisdiction to consider the Complaint. On 12 October 2020, CSSE provided a detailed submission to the FOS, with a further detailed response to the FOS on 23 December 2020 dealing with information that had been provided to the FOS by Mr Rees.

17. The Jurisdiction Decision was made by the Ombudsman and issued by the FOS on 12 February 2021. The Jurisdiction Decision expressly incorporates findings made by the Ombudsman in her provisional jurisdiction decision dated 14 August 2020.

18. On 24 February 2021 the FOS issued a provisional substantive decision on the Complaint, to which CSSE responded on 21 March 2021.

19. The Substantive Decision was made by the Ombudsman and issued by the FOS on 27 March 2021. In the Substantive Decision, the Ombudsman:

    i) upheld the Complaint;

ii) made a money award to Mr Rees of up to the statutory cap of £150,000 then applicable under the Financial Ombudsman Scheme, plus interest, in accordance with the calculation of fair compensation set out in the Substantive Decision; and

iii) recommended under section 229(5) of FSMA that if the calculation referred to in (ii) above exceeded the statutory cap, then CSSE should pay Mr Rees the balance plus interest.

20. On 28 March 2021, Mr Rees notified the Ombudsman that he accepted the Substantive Decision, upon which it became binding on CSSE and Mr Rees and final pursuant to section 228(5) of the FSMA.

21. As noted above, on 17 June 2021, the Ombudsman revised the Substantive Decision to correct a "clerical mistake" under the scheme rules made by the FOS under paragraph 14 (and, in particular, paragraph 14(2)(fa)) of Schedule 17 to the FSMA (see also FCA Handbook, DISP 3.6.7(1)R). That revision is not relevant for present purposes.

The Renewal Application

22. By the Renewal Application, CSSE renews its application for permission to apply for judicial review of the Jurisdiction Decision on its Grounds 1, 2 and 3. CSSE has not renewed its application in respect of Ground 4 in which CSSE had alleged procedural unfairness against the FOS in reaching the Jurisdiction Decision. CSSE has also not renewed its application for permission in respect of Grounds 1 and 6 of its challenge to the Substantive Decision, Ground 1 having alleged procedural unfairness and Ground 6 having alleged that the Ombudsman gave inadequate reasons for her decision.

23. The three grounds on which CSSE renews its application for permission in relation to the Jurisdiction Decision are:

i) Ground 1: the Ombudsman's conclusion in the Jurisdiction Decision that Mr Rees was not an intermediate customer under the rule set out in COB 4.1.9 R of the Handbook of the Financial Services Authority ("FSA") as in effect at the relevant time was irrational;

ii) Ground 2: the Ombudsman applied the wrong test in the Jurisdiction Decision when considering whether CSSP had taken "reasonable care" as required by paragraph 1(a) of COB 4.1.9 R; and

iii) Ground 3: the Ombudsman failed in the Jurisdiction Decision to take into account evidence that was material to the criteria set out in paragraph 1 of the guidance set out in COB 4.1.10.1 G of the FSA Handbook as in effect at the relevant time.

24. In refusing permission on Grounds 1, 2 and 3 of the challenge to the Jurisdiction Decision, Eyre J gave the following reasons:

> "Grounds 1 – 3 of the challenge to the Jurisdiction Decision amount to a disagreement with the conclusion that the Claimant

had failed to take reasonable care in determining whether the Interested Party was properly to be seen as an intermediate client. That was very much a factual assessment and the arguments advanced by the Claimant do not disclose a case with a real prospect of success that this conclusion was not open to the Ombudsman."

25. In its Grounds for Renewal filed with the Renewed Application, CSSE said:

> "2. The issue of the IP's eligibility turned on whether he was properly classified as a "professional elective client" at the time of IP's complaint and/or an "intermediate customer" at the time C agreed to communicate investment promotions to him. In either case, IP's classification depended on whether IP had sufficient knowledge/experience to understand the type of investment opportunity communicated to him by C and the degree of risk each carried. On the issue of whether C took reasonable steps to establish IP's knowledge/experience, it is accepted D was required to make a factual assessment into C's conduct. However, her determination had to be made by reference to a correct application of the wording and purpose of the applicable rules and guidance.
>
> **(1) Irrational application of the COB rules and purpose**
>
> 3. The Ombudsman did not find that C's classification of IP as an intermediate customer was incorrect. Nor did D identify the degree of knowledge which IP was required to possess before being classified as intermediate or that IP did not possess such knowledge. In fact, the Ombudsman's findings in her Substantive Decision to the effect that IP sufficiently understood (i) the type of investment opportunities communicated to him by C; and (ii) the high degree of risk that he could suffer a total loss on each investment stage, compel the conclusion that IP was correctly classified as intermediate and C had sufficient information for that purpose. Nonetheless, D found that it had jurisdiction by importing into the rules and guidance a requirement that C assess the size and nature of each of the historic transactions IP had entered into before it could classify him. This was contrary to COB Guidance, which provided that this was merely one of the factors to which a firm may have regard in exercising its discretion to classify a client as intermediate.

> **(2) Application of wrong test in determining the sufficiency of C's assessment**
>
> 4. The test of assessing whether 'reasonable care' has been taken is not whether the D could or would have done something differently. The Ombudsman's conclusions amounted to importing a test of the level of competence and not taking IP's statements at face value, although she herself stated that C was entitled to take IP's statements at face value. There was no good reason to apply further scrutiny to C's statements about his knowledge and experience. The fact that an individual provides further information about their experience at a later stage does not militate against considering their first statements accurate.
>
> **(3) Failure to take into account material evidence**
>
> 5. It was necessary for D's factual assessment of C's approach to take into account relevant facts. Paragraph 89 of the Statement of Facts and Grounds sets out the material facts, which D failed to take into account."

The Jurisdiction Decision

26. In the Jurisdiction Decision the Ombudsman uses the same acronyms for CSSE and CSSP that I have adopted in this judgment, but then says:

> "If I don't consider further specification is required I'll collectively refer to all CSS entities as 'CSS' for ease of reading."

As one reads the Jurisdiction Decision, it is clear that "CSS" is sometimes used to refer to CSSE and sometimes to refer to CSSP. Examples of "CSS" being used in the Jurisdiction Decision to refer to CSSE appear in the last full paragraph on page 1 (beginning "CSS describes …"), the first full paragraph on page 2 (beginning "CSS says when …"), and the second full paragraph on page 2 (beginning "CSS raised several objections …"). There are, however, a number of examples of "CSS" being used to refer to CSSP later in the Jurisdiction Decision, including in excerpts from the Jurisdiction Decision that I quote below.

27. In the Jurisdiction Decision, the Ombudsman dealt with various issues, but the core issue that she had to determine was whether she had jurisdiction to consider and determine the Complaint. This, in turn, depended on whether Mr Rees was an "eligible complainant" under the relevant provisions in DISP 2.7 (*Is the complainant eligible?*) of the FCA Handbook.

28. In the Jurisdiction Decision (at pages 4-5), the Ombudsman summarised her task as follows:

"The issue that is still in dispute is whether Mr Rees is an eligible complainant. … Mr Rees will not be eligible to complain if he was a professional client in relation to CSS at the time of the financial service that is the subject of his complaint (DISP2.7.9R(2)(a)).

A professional client is defined in the FSA handbook glossary as a client that is either a per se professional client or an elective professional client in accordance with COBS3 of the Handbook, 'Client Categorisation'. Because COBS 3 did not come into effect until 1 November 2007, there are transitional provisions that attach to COBS3 that apply to existing clients, like Mr Rees, who were classified before 1 November 2007. Those provisions say:

> *TP1.2R:*
>
> *An existing client that was correctly categorised as an intermediate customer immediately before 1 November 2007:*
>
> *is an elective professional client if it was an expert private customer that had been re-classified as an intermediate customer on the basis of its experience and understanding;*
>
> *or is otherwise a per se professional client;*
>
> *unless and to the extent it is given a different categorisation by the firm under COBS 3.*

It follows that Mr Rees will be regarded as an elective professional client, and therefore ineligible to complain to this service, if CSS correctly classified him as an intermediate client in 2006 and if that classification was on the basis of his experience and understanding.

Whether CSS correctly categorised Mr Rees as an intermediate customer will depend on whether it complied with the requirements for client classification that were at that time contained in COB4 of the FSA handbook. More particularly, in order to classify an expert private customer as an intermediate customer, CSS needed to meet the requirements in COB 4.1.9 R, which said:

> *(1) A firm may classify a client who would otherwise be a private customer as an intermediate customer if:*
>
> > *(a) the firm has taken reasonable care to determine that the client has sufficient experience and understanding to be classified as an intermediate customer; and*
> >
> > *(b) the firm:*

> *(i) has given a written warning to the client of the protections under the regulatory system that he will lose;*
>
> *(ii) has given the client sufficient time to consider the implications of being classified as an intermediate customer; and*
>
> *(iii) has obtained the client's written consent, or is otherwise able to demonstrate that informed consent has been given.*
>
> …
>
> In applying COB 4.1.9R, it is appropriate to have regard to the criteria identified in the guidance contained in COB 4.1.10G. … I have carefully checked the wording of COB 4.1.10G as it applied in 2006 and am satisfied that it was drafted in the following terms:
>
> *(1) To take reasonable care to determine that a client has sufficient experience and understanding to be classified as an intermediate customer for the purposes of COB 4.1.9 R (1)(a), the firm should have regard to:*
>
> *(a) the client's knowledge and understanding of the relevant designated investments and markets, and of the risks involved;*
>
> *(b) the length of time the client has been active in these markets, the frequency of dealings and the extent to which he has relied on the advice on investments of the firm;*
>
> *(c) the size and nature of transactions that have been undertaken for the client in these markets;*
>
> *(d) the client's financial standing, which may include an assessment of his net worth or of the value of his portfolio.*
>
> *(2) It is likely that a firm will need to have regard to more than one of these criteria, or to other criteria, before it can be satisfied that a client, who would otherwise be a private customer, is eligible to be classified as an intermediate customer."*

29. The Ombudsman went on (at page 9) to say:

> "… [T]he issue of whether Mr Rees was correctly characterised [by CSSP in 2006] as an intermediate customer is dependent only on whether that categorisation was done in compliance

> with COB4.1.9R. It is not dependent on whether Mr Rees was in fact an intermediate client by reference to his objective characteristics at the time of the assessment."

30. The Ombudsman relied on the decision of the High Court in *Wilson v MF Global UK Ltd* [2011] EWHC 138 (QB) at [24] in support of her view that it was not for her to determine whether Mr Rees had, objectively, satisfied the characteristics of an intermediate client at the relevant time (that is, had the relevant experience and understanding to be an intermediate client) but rather for her to determine whether CSSP had at the relevant time complied with COB 4.1.9 R in reaching the conclusion that Mr Rees was an intermediate customer.

31. The Ombudsman found that CSSP had complied with the procedural requirements set out in paragraph 1(b) of COB 4.1.9 R. The remaining issue, therefore, was whether CSSP took "reasonable care" to determine that Mr Rees had sufficient experience and understanding to be classified as an intermediate customer in May 2006.

32. The Ombudsman addressed various objections that CSSE had raised to her analysis and conclusions in the provisional jurisdiction decision dated 14 August 2020. She rejected the submission by CSSE that she was "wrongly imposing 2020 regulatory standards to a classification that happened in 2006". She acknowledged that CSSP had been entitled to accept at face value various statements made by Mr Rees about his experience, even if there was a real possibility that Mr Rees had "deliberately given inaccurate information in order to be able to access the intermediate deals he had been told about by CSS". She did not expect that CSSP was required to go behind Mr Rees's written assurances and check their veracity. Nonetheless, she was of the view (at page 9) that:

> "… even at face value, Mr Rees's statements about his experience were inadequate. They simply, in my view, did not give CSS enough information on which they could reasonably categorise him as an intermediate customer. Further because the information was contradictory to the information given by Mr Rees just two months before, this was a situation where in my view, further scrutiny by CSS was reasonably required."

33. Having considered CSSE's objections, the Ombudsman indicated that the view she had reached in her provisional decision remained unchanged. Mr Rees was not correctly categorised as an intermediate customer by CSSP in 2006 because CSSP had not taken reasonable care in making that determination. Therefore, by virtue of the transitional rule TP1.2 R, Mr Rees did not become an elective professional client, and therefore he was an eligible complainant for purposes of the Financial Ombudsman Scheme.

Submissions

34. In relation to Ground 1, Mr Adam Chichester-Clark, for the CSSE, submitted that there were various "errors and irrationalities" in the Ombudsman's analysis of the rule in COB 4.1.9 R and the guidance in COB 4.1.10 G of the FSA Handbook as the rule and the guidance applied when CSSP classified Mr Rees as an intermediate customer. The Ombudsman treated the criteria in paragraph 1 of the guidance as necessities

rather than potential indicators. She irrationally concluded that CSSP was subject to a requirement that it undertake a forensic investigation of Mr Rees's prior investment history and know "the full extent" of that history.

35. Mr Chichester-Clark submitted that, by misapplying the relevant principles in a number of ways, the Ombudsman set too high a standard for the test that CSSP was required to meet in order to be found to have taken reasonable care.

36. Mr Chichester-Clark also noted that the Ombudsman made a series of findings in her Substantive Decision about Mr Rees's experience and understanding that are only consistent with the conclusion that CSSP had correctly classified Mr Rees as an intermediate customer in 2006. He referred, in particular, to the Ombudsman's findings on page 6 of the Substantive Decision.

37. Mr Chichester-Clark submitted that the Ombudsman was wrong to have concluded that CSSP had no information to meet the criteria in paragraph 1(c) of COB 4.1.10 G. CSSP did have information about the size and nature of transactions Mr Rees had entered into through CSSP, and this formed part of its assessment of his experience and understanding. The Ombudsman failed to explain why CSSP's knowledge of investments made by Mr Rees through CSSP prior to his classification as an intermediate customer (twice in EIS, once in AIM, and twice in private companies) was insufficient to satisfy the criteria in paragraph 1(c). She also failed to indicate what would amount to sufficient information for this purpose.

38. In relation to Ground 2, Mr Chichester-Clark submitted that in the Jurisdiction Decision the Ombudsman failed to apply the following principles set out by Eady J in *Wilson v MF Global UK Ltd* at [28]:

> "28. … [T]he standards of 'reasonable care' in this context, at the material times, did not extend to setting the client, or prospective client, a test or examination to assess his level of knowledge or competence. Nor was there any general understanding that a client's statements of fact about himself or his expertise should be tested or doubted. I see no reason why such statements should not be taken at face value unless and until there is some reason to apply further scrutiny."

39. Mr Chichester-Clark submitted that the following observation of the Ombudsman in the provisional jurisdiction decision demonstrated that she wrongly considered that CSSP should, in effect, have set Mr Rees a test to assess his level of knowledge or competence:

> "Based on the information I have seen I think on balance if they had asked further questions and probed him on his experience and understanding they would have discovered that Mr Rees didn't have the relevant experience and sufficient understanding of unlisted shares and their risks to be classified as an intermediate customer."

40. Mr Chichester-Clark also submitted that the Ombudsman's suggestion that CSSP should have applied further scrutiny to Mr Rees's statement of fact about his experience, given the inconsistency between what he had said in January 2006 and what he said in May 2006, failed to take into account CSSP's explanation (based on long experience) for this inconsistency and the fact that CSSP was in a better position than the Ombudsman to judge any such inconsistency.

41. In relation to Ground 3, Mr Chichester-Clark submitted that the Ombudsman irrationally failed to take into account evidence that was material to the criteria set out in paragraph 1 of the guidance in COB 4.1.10 G, including Mr Rees's investment history to date through CSSP.

42. Mr Stephen Kosmin, for the FOS, began his submissions by referring the court to the judgment of Ouseley J in *R (Chancery (UK) LLP) v The Financial Ombudsman Service* [2015] EWHC 407 (Admin), which, he submitted, clarified the proper approach to be taken by the High Court to a judicial review claim challenging a jurisdiction decision of an ombudsman.

43. In *Chancery (UK) LLP*, Ouseley J distinguished between findings of fact, which are to be made by the ombudsman, subject to traditional grounds of challenge in judicial review claims such as irrationality, and jurisdictional questions of law, which are to be determined on the basis of the facts found by the ombudsman. Ouseley J held at [70]-[71]:

> "70. … Given that the FOS provides an informal but specialist dispute resolution, with its own rules, it is my view that Parliament cannot have intended that the High Court should act as the primary fact finder on jurisdiction issues, especially since those issues will often overlap with merits issues, as they do here. Two bodies would otherwise be involved in considering the same issues, but on potentially different evidence. ... So I consider that the FOS must be the fact finder and that its fact finding is reviewable only on traditional grounds.
>
> 71. But I do not think that the same applies to its application of the law to the facts. Of course, on any view, the FOS must direct itself correctly on the law, as to the meaning of words and phrases, and as to the defining characteristics which must be present for a phrase to apply. The FOS should expect that a reviewing Court would regard its assessment of the way in which the law, correctly understood, applied to the facts, as at least persuasive. But that is not the complete answer. If the Court is persuaded that on the facts found by the FOS, the correctly understood law had been applied wrongly, the Court must rule that the FOS had no jurisdiction. Otherwise, the intention of Parliament that only those who met certain conditions or that only certain activities fell within its jurisdiction

> would be undermined. There can only be one right answer as to whether the complainant was eligible … ."

44. In relation to Ground 1, Mr Kosmin submitted that it was a thinly-veiled challenge to the merits of the Ombudsman's conclusion on jurisdiction. As recognised in *Chancery (UK) LLP*, this is not appropriate for judicial review proceedings. The court should not substitute itself as the primary fact-finder in relation to jurisdiction.

45. In relation to Ground 2, Mr Kosmin submitted that no proper basis for a public law challenge to the Jurisdiction Decision has been identified by CSSE. The criticism that the Ombudsman articulated the wrong test fails on a proper reading of the Jurisdiction Decision.

46. In relation to Ground 3, Mr Kosmin submitted that CSSE was wrong to say that the Ombudsman had not addressed the evidence referred to by CSSE in the SFG in relation to that ground. Again, he submitted, no proper public law challenge has been identified.

Discussion

47. At this stage, the test in relation to each renewed ground of the challenge to the Jurisdiction Decision is whether it is arguable, in the sense that it has a realistic (that is, more than fanciful) prospect of success. The court should also be satisfied that there is no discretionary bar to a remedy such as delay or an alternative remedy.

48. In my view, none of the renewed grounds is arguable. As Eyre J noted in his observations, Grounds 1, 2 and 3 amount to a challenge to the Ombudsman's factual assessment. The Ombudsman's factual assessment, as the basis for her jurisdictional decision, was a matter for her (within the usual broad limits), as noted by Ouseley J in *Chancery (UK) LLP*. In my view, the alleged irrationalities and errors that CSSE claims to have identified in her reasoning rely on a strained reading of the Jurisdiction Decision.

49. It is not a fair reading of the Jurisdiction Decision that the Ombudsman took the view that CSSP *must* have had regard to *all* of the criteria specified in paragraph 1 of COB 4.1.10 G or that she was requiring that CSSP should have investigated "the full extent" of Mr Rees's investment history. In fact, she made it clear (at page 8) that she accepted that:

> "… a business is not required to have regard to all of the criteria in COB 4.1.10G(1) in order to demonstrate reasonable are in assessing the client's classification."

50. Although CSSP lays great emphasis in its grounds on the Ombudsman's use of the words "full extent", that phrase appears only once in the Jurisdiction Decision, in the following passage (on page 8):

> "As I said in my provisional decision and in light of the additional information Mr Rees provided, it is likely Mr Rees had some exposure to, and understanding of, non-standard

> markets. Although, the *full extent* of that, including the size and nature of the transactions was unknown to CSS in May 2006. I acknowledge also that he was a successful businessman and that he had, prior to May 2006, already invested in early stage growth companies through CSS. This is all information that was known to CSS prior to the client classification in 2006, and it was entitled to take that into account in making its categorisation." (emphasis added)

51. In this passage the Ombudsman is referring to what CSSP did not know (namely, the "full extent") rather than what it was *required* to know. Bearing in mind that an ombudsman's decision is not expected to be read and analysed as though it were a statute and is a product of a process that is intended to be less formal than judicial proceedings, and having regard to the whole of the Jurisdiction Decision, I do not think it is a fair reading of the Ombudsman's use of the term in this passage to extrapolate from that use that she was imposing a higher standard on CSSP than the test she had accurately described elsewhere in the Jurisdiction Decision.

52. The Ombudsman accepted that a client might initially give less information to a firm and then, on a later occasion, give more information as a relationship developed, and she accepted therefore that this was not necessarily something that required further investigation. She gave reasons that were open to her for concluding that, in the specific circumstances of this case, the change of information should have led to further inquiry by CSSP. That does not mean that she was, contrary to *MF Global UK Limited* at [28], requiring that CSSP set Mr Rees a test.

53. I am not persuaded that the Ombudsman misunderstood the relevant test or was imposing too high a standard. Nor do I accept that in the way she approached the question, the Ombudsman extended CSSP's obligations beyond the requirement to exercise reasonable care in making the determination. It was simply her factual assessment that the information that CSSP had at the time was not sufficient, without more, to demonstrate that it had taken reasonable care in classifying Mr Rees as an intermediate customer. She considered that there were reasons, in his case, why there should have been further inquiry. The Ombudsman was not required, in reaching her decision, to specify in detail the extent of that further inquiry. If further inquiry was necessary, then that necessarily meant that CSSP would have to ask further questions about appropriate matters. That did not mean "setting a test", and it did not mean that CSSP would have to satisfy *all* the specified criteria and investigate the *full extent* of a person's investment history.

54. A fair reading of the Jurisdiction Decision shows that the Ombudsman had regard to all of the evidence submitted by the each of the parties, including following the provisional jurisdiction decision, prior to her making and issuing the Jurisdiction Decision. How she assessed and gave weight to that evidence was, of course, within the usual broad limits, a matter for her.

55. In relation to the alleged inconsistency with the Substantive Decision, in my view the Ombudsman was there engaged in a different exercise, namely, having to determine what was fair and reasonable in the circumstances of the Complaint. The fact that she was satisfied, for purposes of that determination, that Mr Rees had sufficient experience and knowledge to understand what sort of investment opportunities CSSP

was recommending to him and that these were all high-risk investments into unlisted companies does not mean that CSSP took reasonable care when it assessed Mr Rees in May 2006 for purposes of classifying Mr Rees under COB 4.1.9 R.

56. For these reasons, in my view, none of the renewed grounds of challenge to the Jurisdiction Decision is arguable.

The Amendment Application

57. Turning finally to the Amendment Application, CSSE says that, while preparing for the renewal hearing before me, it identified a further ground, which it has designated "Ground A", to address a substantive issue relating to the Jurisdiction Decision. Ground A is set out in CSSE's proposed amended SFG at paragraph 79 and is, in essence, that the Ombudsman applied the wrong test in deciding whether Mr Rees was an eligible complainant.

58. CSSE says that Ground A arises out of substantially the same facts as the grounds originally pleaded in the SFG in relation to the Jurisdiction Decision. In its application notice for the Amendment Application, CSSE explained that the need for this amendment arose late in the proceedings because it is a nuanced point of law that arose as a result of CSSE's review of the Jurisdiction Decision and the relevant authorities ahead of the renewal hearing. That review made it clear that there is no authority dealing with the test to be applied in relation to cases falling with TPR1.2 R for purposes of determining what is meant by the words "correctly categorised as an intermediate customer".

59. CSSE noted in its application notice for the Amendment Application that the authorities relied on by the Ombudsman for her approach in the Jurisdiction Decision, namely*, Wilson v MF Global UK Ltd* and *Spreadex Ltd v Sekhon* [2008] EWHC 1136 (Ch), were not concerned with challenges to a decision of the Ombudsman but rather were breach of statutory duty/negligence/breach of contract cases involving individuals and companies. It was therefore important for the court to review whether the Ombudsman erred in her approach to the test to determine whether Mr Rees was an eligible complainant.

60. By Ground A, CSSE is asking the court to consider whether the appropriate test for determining whether an existing client was "correctly categorised" for purposes of TP1.2 R is an objective or a subjective test. Mr Chichester-Clark submitted that the Ombudsman ought to have considered whether that required her to determine that CSSP took reasonable care or required her to determine that, objectively speaking, CSSP reached the correct conclusion in relation to Mr Rees's experience and understanding.

61. Mr Chichester-Clark submitted, in other words, that it is arguable that the Ombudsman should have undertaken an objective assessment of whether CSSP's determination had, in fact, been correct. Based on her conclusions in the Substantive Decision, she appears to have been satisfied that CSSP's determination of Mr Rees to be an intermediate customer was, objectively speaking, correct. Mr Chichester-Clark noted that TP1.2 R merely requires the relevant client to have been "correctly" categorised. It does not refer back to COB 4.1.9 R or state that the firm must have exercised reasonable care in its classification.

62. In response to the Amendment Application, Mr Kosmin's principal submission was that this late application to amend the SFG, over six months after the claim was issued, fails to satisfy the principles applicable to determination of a late application for permission to amend a pleading, as summarised, for example, by the Court of Appeal in *Nesbit Law Group LLP v Acasta European Insurance Company Ltd* [2018] EWCA Civ 268 at [41]-[45]. In particular, at [41], the Court of Appeal referred to there being "a heavy burden" on the applicant to justify the lateness of the application, having regard to the overriding objective and the balance of injustice as between the parties (and other litigants, to the extent the amendment is permitted), including the need for finality in litigation.

63. Mr Kosmin submitted, in brief, that no sufficient reason has been put forward as to why Ground A was not included in the original SFG. He noted that CSSE admits that it arises out of the facts known to it at the time it filed the SFG. CSSE had ample time to plead this ground, and its lack of promptness in doing so is unreasonable. Its only reason for doing so at this late stage appears to be, in effect, that it has only just thought of this ground, having failed to do so over many months. Mr Kosmin also considered that there would be prejudice to the FOS and Mr Rees if this late amendment were allowed.

64. My view is that the late amendment should not be allowed. I agree with Mr Kosmin that CSSE has failed to put forward a reason for seeking to make this amendment to the SFG at this late stage that is sufficient to overcome the heavy burden referred to in *Nesbit Law Group*.

65. I also do not consider the ground arguable. The Ombudsman was entitled to proceed on the basis that Mr Rees was correctly categorised as an intermediate customer if he was categorised in accordance with the requirements applicable at the relevant time, namely, those in COB 4.1.9 R having regard to the guidance in COB 4.1.10 G.

Conclusion

66. The Renewal Application is refused in relation to each of Grounds 1, 2 and 3 of the challenge to the Jurisdiction Decision. The Amendment Application is also refused.