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Case No: CO/2258/2021  
CO/4200/2022

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 28/03/2022

**Before :**

**MR JUSTICE SWEETING**

**Between :**

**THE QUEEN on the application of PORTAL  
FINANCIAL SERVICES LLP (FORMERLY  
KNOWN AS 'PORTAFINA LLP')**

**Claimant**

**- and -**

**FINANCIAL OMBUDSMAN SERVICE LIMITED**

**Defendant**

**- and -**

**MR ROBERT GAULT & 15 ORS**

**Interested  
Parties**

**- and -**

**THE QUEEN on the application of PORTAL  
FINANCIAL SERVICES LLP (FORMERLY  
KNOWN AS 'PORTAFINA LLP')**

**Claimant**

**- and -**

**FINANCIAL OMBUDSMAN SERVICE LIMITED**

**Defendant**

**- and -**

**MR MARK SIMMS & 10 ORS**

**Interested  
Parties**

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**Thomas Samuels (instructed by DWF LLP) for the Claimant**  
**Stephen Kosmin and Leo Davidson (instructed by Financial Ombudsman Service) for the**  
**Defendant**

Hearing dates: Wednesday 9 March 2022

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## **Approved Judgment**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 28<sup>th</sup> March 2022.

**Mr Justice Sweeting:**

**Introduction and Background**

1. This is a renewed application for permission to apply for Judicial Review of 16 decisions of the Financial Ombudsman Service (“FOS”) taken by two Ombudsmen, Hannah Wise and Lorna Goulding, in relation to advice provided by the Claimant (“Portal” referred to as “Portafina” in the decisions) to each of the Interested Parties. The Decisions were published by FOS and accepted by the Interested Parties on dates between 30 March and 3 June 2021. Once a final decision is accepted by a complainant it becomes binding on both parties and enforceable by way of proceedings in the County Court.
2. Permission was refused by May J. on the papers by order dated 9 December 2021. There were originally four grounds of challenge. Only grounds 2-4 have been renewed.
3. The parties have agreed that the hearing should be used to determine permission in a separate claim brought by the Claimant in respect of another 11 decisions involving other individuals (“the Additional Claim”). The grounds of challenge are materially the same.
4. The Defendant questioned whether it was appropriate to include in the application and thus seek to challenge a large number of fact-specific decisions. The arguments advanced at the hearing were however thematic and illustrated by reference to example decisions, chiefly the decision in Mr Gault’s case. In view of my conclusions there is little purpose in considering the procedural propriety of the Claimant’s approach any further.
5. The test is whether there is an arguable ground for judicial review which has a realistic prospect of success; see *Sharma v Brown-Antoine* [2006] UKPC 57, [2007] 1 WLR 780. Although counsel elaborated on the substance of their arguments the question at this stage is whether the challenge can properly be mounted not whether it would in fact succeed.
6. Portal is regulated by the Financial Conduct Authority. It has permissions to advise on pensions transfers and opt-outs. Each of the Interested Parties was introduced to Portal by a third-party advisory firm, Cherish Wealth Management Limited (“Cherish”) during 2014/15. Cherish was the Appointed Representative of Shah Wealth Management Limited (“Shah”) pursuant to section 39 of the Financial Services and Markets Act 2000 (“FSMA”). Shah was a financial advisory firm authorised by the Financial Conduct Authority, although its permissions did not extend to advice on pension transfers.
7. The purpose of the introduction was for Portal to advise on the suitability for Cherish’s clients of a transfer away from their existing pension arrangements under one or more occupational or personal pension schemes into a self-invested personal pension (“SIPP”). Portal’s pension transfer advice was confirmed to the Client in writing in the form of a ‘suitability report.’ The intention was that Cherish would then provide further advice on the investments to be held within the SIPP wrapper. Cherish did so in all but one of the transfers which are the subject of the decisions.

8. Portal undertook due diligence in relation to Cherish and was assured that Cherish did not recommend or promote unregulated collective investment schemes (“UCIS”).
9. Without Portal’s knowledge all but one of the Interested Parties was advised to invest a portion of their pension pot in high-risk UCIS and have suffered loss as a result. Both Shah and Cherish commenced winding up on 5 July 2016. The Interested Parties made complaints to FOS in relation to the transfer advice given by Portal.
10. In summary FOS found against Portal on the grounds that:
  - i) Portal was not entitled to divorce giving advice on the suitability of the pension transfer from considering the suitability of the underlying investments or to rely on Cherish doing so in the circumstances of the working arrangements put in place.
  - ii) Portal accordingly failed in its primary duty to properly advise on the suitability of the transfer.
  - iii) Although Cherish “may also have separately caused” some of the Client’s losses, Portal should nonetheless be responsible for 100% of the loss.
11. Section 228(2) of FSMA requires that decisions by the Ombudsman should, in the opinion of the Ombudsman, be “fair and reasonable in all the circumstances of the case”. This involves a subjective exercise by the Ombudsman; see *R (IFG Financial Services Ltd) v Financial Ombudsman Service* [2005] EWHC 1153 (Admin), at paragraph 13 per Stanley Burnton J.
12. An Ombudsman is required by DISP 3.6.4R of the ‘Dispute Resolution’ section of the FCA Handbook to take into account law and regulations, regulators’ codes, guidance and standards, codes of practice; and (where appropriate) what she considers to have been good industry practice at the relevant time.

## **Ground 2**

13. The Claimant’s submission is that the Ombudsmen acted irrationally in concluding that industry “Alerts” circulated by the Financial Services Authority (now the FCA) in 2013 and 2014 represented “good industry practice” in relation to the Claimant’s business model and/or that there was an error of law in failing to apply principles to the specific context in which Portal was advising.
14. Both Alerts relate to pension transfers. The 2014 Alert includes, by way of example, the following:

*Where a financial adviser recommends a SIPP knowing that the customer will transfer or switch from a current pension arrangement to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the customer. If the underlying investment is not suitable for the customer, then the overall advice is not suitable. If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer or switch at all as it will not be able to assess suitability of the transaction as a whole.’*

15. The Ombudsmen concluded that the Alerts were an indicator both of good industry practice and the application of the overarching “Principles of Businesses” and the “Conduct of Business Sourcebook” (“COBS”) section of the FCA Handbook. The Ombudsmen pointed out that the 2014 Alert is not confined to circumstances where an unregulated introducer is involved. The Alerts themselves referred to Principles 1, 2 and 6 which are wide in their scope and application. The Ombudsmen decided, applying these principles, that it was not acceptable for Portal to rely only on the broad categories of investment set out in the initial information provided by Cherish and that it was not fair and reasonable for Portal to rely on another regulated firm or person (see COBS 2.4.6R(2) and COBS 2.4.8G to the extent they applied) where it had been given no information about the proposed investments. A separate and fully informed exercise by Portal was required for the purpose of pension transfer advice; see the decision in Mr Gault’s case:

*“I don’t agree with Portafina. It is clear that Firm C and Portafina had come to an agreement about their working relationship. Firm C did not have the required regulatory authorisations to give pension transfer advice whereas Portafina did, and an agreement to work together for pension-release clients came about. Portafina has stressed it had never before agreed to work with another authorised firm, as the processes and controls required to set up the relationship would be disproportionate to the level of business it might bring about. However, an exception was made for Firm C, as it had proposed to send significant levels of business to Portafina (two to three cases a month for a year).*

*In those circumstances it seems to me that Portafina needed to do more to ensure that the two firms worked together to give suitable pension transfer advice to clients. Aside from the initial due diligence checks carried out in 2013 at the outset of the relationship, I have not seen any evidence that further checks were made by Portafina to satisfy itself that the pension transfer advice it was giving to clients was aligned with the investment advice they were receiving from firm C. The need to do so was, as I say, a necessary part of the suitability assessment carried out by Portafina on a case by case basis for individual clients. But it was also, in my view, a reasonable due diligence requirement brought about by the ongoing relationship itself, so that any patterns of unsuitable or unaligned advice could be identified and addressed.”*

16. This was a clear example of the Ombudsmen applying rules and principles and does not disclose any error of law.
17. The Claimant’s assertion that the approach of the Ombudsmen was wrong in law or irrational because Portal was being asked “to underwrite advice provided by a different regulated advisor” is not arguable. The Ombudsmen found Portal to be in breach of its own obligations; see the decision in Mr Gault’s case:

*“This doesn’t mean that I’m holding Portafina responsible for the failings of another regulated firm, as it has said in its submissions. I’ve focused on Portafina’s own responsibilities as the business involved with the capacity to ‘unlock’ the funds held in Mr G’s OPS. There’s no dispute that Portafina gave that advice and that it incorrectly thought it could limit its advice to the transfer without seeking information about the investments Firm C intended and eventually arranged for Mr G.”*

18. The issue is whether the decisions were unlawful, not whether it is possible to disagree with the application of the principles to the facts. As Jacobs J. observed in *Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service Ltd* [2019] Bus LR 437

*“...there is an important distinction between (i) construction of the rules (which is a matter for the Court), and (ii) the application of those rules to the facts of the case, which is a matter for the decision-maker. This distinction can be seen in the decision of Ouseley J. in R v Financial Ombudsman Service ex p Norwich and Peterborough Building Society [2002] EWHC 2379, to which both BBSAL and FOS referred. In that case, the Court was concerned with the decision of the Building Society Ombudsman under a statutory scheme which provided for determination of complaints to be "made by reference to what is, in the adjudicator's opinion, fair in all the circumstances of the case". Ouseley J. at paragraphs [72] – [73] drew a distinction between issues as to the construction of the Banking Code, which were matters for the Court, and issues as to the application of the Code to the circumstances of the case. He said that the Ombudsman was to be afforded "considerable leeway in the application of the Code to the circumstances which he finds". Ouseley J went on to say at paragraphs [77] – [78] (consistent with later authority) that:*

*[77] ... The very concept of "unfairness" is very wide, and permits reasonable people to disagree. But its very width serves as a caution against over-active judicial intervention in the approach adopted by the Ombudsman, in the criteria which he develops or in the application of those criteria or of the concept of unfairness to the circumstances of the case.*

*[78] It is only if the Ombudsman has committed such errors of reasoning as to deprive his decision of logic that it can be said to be legally irrational. The Court should be very wary of reaching such a conclusion. Its own views as to what would be fair are not to be substituted for the Ombudsman's views when what is at issue is a question of the substantive merits of a decision as to unfairness"*

19. The argument that there are wider issues of public importance is essentially parasitic on Ground 2. However, the Ombudsmen did not disagree with the principles relied on by Portal but only with their application to the facts; see the decision in Mr Gault's case:

*“These rules essentially mean that a firm can rely on information provided to it by another regulated firm, where it is reasonable to do so. The rule is stated to apply to situations where a firm is required by a handbook rule to obtain the information in question from another person. Portafina says it was therefore entitled to rely on information given to it by Firm C at the outset of their relationship in which Firm C confirmed it would not recommend or otherwise promote UCIS and that it would instead invest in risk-graded cash, equities and bonds. Whilst I note that COBS 2.4.6R(2) is unlikely to apply in these circumstances (as we are not concerned with a situation in which Portafina was required by a handbook rule as such to obtain the information it received from Firm C), I nonetheless agree with Portafina that, in the absence of any evidence to the contrary, it was entitled to take that information from Firm C at face value. It was reasonably entitled to rely on that statement, as far as it went.*

*The difficulty for Portafina is that the statement did not tell it anything meaningful about the intended investment proposition for Mr G. No information at all regarding the proposed investments for Mr G was passed on to Portafina by Firm C. Instead, Portafina chose to rely on a general statement, given two years previously, that said recommendations of broad categories of investments, with potentially broad gradings of risk, might or might not be made in a given case and that UCIS would not be recommended. I don't think that was a reasonable basis on which Portafina should have assessed the suitability of the pension transfer for Mr G."*

20. This does not give rise to any important industry-wide issue as to the relationship between advisers or the ability of firms to rely on the actions of other regulated firms or to limit the scope of their liabilities.

### **Ground 3**

21. This relates to 7 only of the Interested Parties where advice was given in relation to a transfer out of defined benefit schemes. The Claimant's case is that the Ombudsmen failed to take account of the "reasonable assumptions" that Portal was entitled to make under COBS 19.1.2R, which required Portal to:

*"compare the benefits likely (on reasonable assumptions) to be paid on a defined benefits pension scheme with the benefits afforded by a personal pension scheme... before it advises a retail client to transfer out of a defined benefits pension scheme."*

22. Further it is said that the Ombudsmen elevated guidance in the form of COBS 19.1.6G (which states that "*a firm should start by assuming that a transfer... will not be suitable*") over the primary rule allowing reasonable assumptions as to benefit to be made and then substituted their own views as to what those assumptions ought to have been.
23. The decisions give fully reasoned grounds for the conclusion that advice to leave the defined benefit schemes was not suitable because those receiving the advice would, irrespective of investment in UCISs, have been better off remaining within them. It is clear that the Ombudsmen did consider whether an adequate comparative exercise had been carried out as required by COBS 19.1.2R and took into account the contemporaneous material. The argument is essentially based on disagreement with the conclusions reached on what is described as an "overly narrow approach" but it is not arguable that the decisions themselves were unlawful.

### **Ground 4**

24. This ground challenges the decisions that Portal should be 100% liable to the interested parties.
25. In short, the argument is that this would not be the outcome at common law, and that the Ombudsmen were required to consider the law and give reasons for departing from it and have not done so. The observations of Stanley Burnton J. at paragraph 49 of R v

*(Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service Ltd* [2008] Bus LR 1486 were relied on:

*“The ombudsman is required by DISP rule 3.8.1 to take into account the relevant law, regulations, regulators’ rules and guidance and standards, relevant codes of practice and, where appropriate, what he considers to have been good industry practice at the relevant time. He is free to depart from the relevant law, but if he does so he should say so in his decision and explain why. The other matters referred to in this rule are matters that a court would take into account in determining whether a professional financial adviser had been guilty of negligence or breach of his contract with his client. Again, if the ombudsman is to find an advisor liable to his client notwithstanding his compliance with all those matters, the ombudsman would have to so state in his decision and explain why, in such circumstances, assuming it to be possible, he came to the conclusion that it was fair and reasonable to hold the adviser liable. In these circumstances I consider that the rules applied by the ombudsman are sufficiently predictable. All the matters listed in DISP rule 3.8.1 are formulated or ascertainable with sufficient precision. So far as guiding the conduct of financial advisors are concerned, provided that they comply with “the relevant law, regulations, regulators’ rules and guidance and standards, relevant codes of practice and, where appropriate . . . good industry practice”, they can be assured that they will not be liable to their client in the absence of some exceptional factor requiring a different decision.”*

26. This paragraph of the judgment is concerned with whether an advisor who had complied with both law and good practice could on a fair and reasonable basis be found liable to his client. The court went on to consider the well-known Bolam/Bolitho test in relation to professional negligence. The answer to the question of whether the Ombudsman could depart from relevant law in this context is in fact in the affirmative subject to the Ombudsman explaining why. This is consistent with the obligation to “take into account” relevant law.
27. It would be a surprising conclusion that where an Ombudsman has found the advisor to be liable and is considering redress, she is required to conduct an exercise to determine how damages might be apportioned in a notional civil action involving other parties. The “fair and reasonable” test under section 228(2) FSMA is not the same as a “fair and reasonable allocation of the risk of the loss that has occurred” (*Manchester Building Society v Grant Thornton LLP* [2021] 3 WLR 81 at §201). The submission is further complicated by the implicit argument, on behalf of the Claimant, that the availability of Financial Services Compensation Scheme awards was material and should not have been discounted.
28. In any event the Ombudsmen did give reasons in their final decisions, starting with factual causation, and fully considered the points made by Portal in relation to loss; see the decision in Mr Gault’s case:

*“I think it’s important to point out that I’m not saying Portafina is wholly responsible for the losses simply because Firm S and Firm C are now in liquidation. My starting point as to causation is that Portafina gave unsuitable advice and it is responsible for the losses Mr G suffered in transferring to the SIPP and investing as he did. That isn’t, to my mind, wrong in law or irrational but reflects the facts of the case and my view of the fair and reasonable position. Portafina could’ve prevented the transfer and the investments. Instead it facilitated them, having given unsuitable advice to Mr G that he*

*should transfer. Mr G hasn't complained about Firm C or Firm S and in light of their liquidation, there would be little point in him doing so. He has complained about Portafina and because of what I have said, it is, in my view, fair and reasonable that Portafina should account to him for the full extent of his losses."*

### **The Additional Claim**

29. The Additional Claim does not give rise to any additional legal or factual issues from those considered above.

### **Conclusions**

30. Under section 225(1) of FSMA complaints are to be resolved "*quickly and with minimum formality*". The Ombudsman system is intended to provide an independent and informal complaint resolution procedure which avoids consumers having to resort to the courts. Ombudsmen have to reach decisions which are fair and reasonable in the circumstances. There is nothing to suggest that they did not do so here.
31. For the reasons given above the decisions of the Ombudsmen were lawful, within their powers and not open to arguable challenge by way of judicial review. The applications for permission are refused.
32. The costs of the Acknowledgement of Service and Summary Grounds were summarily assessed by May J. Her order stands and there is no basis to depart from the usual practice that a defendant will not recover from a claimant the costs of attending the renewal hearing.
33. The Defendant seeks an order for the payment of its costs of filing the Acknowledgment of Service and Summary Grounds in the Additional Claim, as set out in its Statement of Costs (see *Mount Cook Land Limited v Westminster City Council* [2004] 2 P&CR 405; *R (Ewing) v Office of the Deputy Prime Minister* [2006] 1 WLR 1260). The Additional Claim was essentially a repeat of the grounds and arguments advanced in the claim first issued and elicited the same response. In those circumstances I have reduced the sum recoverable to £3,300 (from £4,169) which is about 50% of the costs awarded in relation to the initial claim.