
Judicial Review and the Financial Ombudsman Service's Jurisdiction: Guidance from the Court of Appeal

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In *R. (on the application of Assurant General Insurance Ltd v Financial Ombudsman Service and oths)* [2023] EWCA Civ 1049 the Court of Appeal considered the proper approach of the Court in judicial reviews of the Ombudsman's jurisdictional decisions. Regulated persons may now find it more fruitful to find an error of law to challenge, such as FOS's interpretation of a contract, than attempting to judicially review its findings of fact.

Facts and the High Court Decision

1. Assurant General Insurance Limited ("**Assurant**") underwrote Payment Protection Insurance ("**PPI**") policies sold by retailers to four customers, who were second to fifth Respondents to the judicial review. The customers complained to the Financial Ombudsman Service ("**FOS**") that they were missold the PPI by the various retailers. At the time of the sale of the PPI policies the retailers were not subject to statutory financial services regulation in respect of selling insurance. This meant that FOS did not have jurisdiction over any complaint against the retailers.
2. However, on interpreting certain contracts between the retailers and Assurant, as well as the PPI policy itself which appeared to refer to a (now unavailable) 'master policy', FOS decided the retailers were Assurant's agent. Assurant were

therefore responsible for the retailers' acts and omissions (DISP 2.3.3G), and FOS had jurisdiction against it on the complaints.

3. Assurant applied for judicial review of FOS's jurisdictional decision that the retailers were its agent.
4. At first instance, Mrs Justice Collins Rice decided that whether a relationship of agency exists is a "*a mixed question of fact and law*", and that here "*a further question of mixed law and fact arises – the correct interpretation of the contract.*" (see [34] of the Court of Appeal's decision). She decided that the standard of review was normal judicial review principles, relevantly procedural fairness, rationality of fact-finding, and error of law, and applying those principles found no fault with FOS's decision.

Appeal and Result

5. The question on appeal was whether the High Court had applied the correct standard of review. Assurant contended that whether there was an agency relationship was a question of "precedent fact" (i.e. a fact that must be established in order for the FOS to have jurisdiction over the complaint). On well-established principles, the Administrative Court can make findings on "precedent facts" itself. That a fact goes to the jurisdiction of a decision-maker alone is not sufficient to permit a *de novo* review as a "precedent fact". However, Assurant argued the Court should undertake such an exercise with the issue of the agency relationship between Assurant and retailers, particularly because this in turn depended on the correct construction of the agreements between the retailers and Assurant, which was a question of law reviewable by the Court in any event.
6. The Court of Appeal, Lord Justice Singh giving the leading judgment, agreed with Assurant to an extent. He noted that:

- a. *“generally speaking, issues of fact are for the Ombudsman to determine, subject to judicial review on conventional grounds such as irrationality or procedural unfairness. This is true even of facts which go to the Ombudsman’s jurisdiction, i.e. “jurisdictional facts”. The mere fact that a fact is a jurisdictional fact does not automatically render it a precedent fact” (at [39]);*
 - b. *“ultimately the issue is one which turns on the correct interpretation of the statute which confers the jurisdiction on the relevant public body” (at [40]), and;*
 - c. *“many questions are not "hard-edged" and call for evaluation on matters of degree and opinion” (which may be for the primary decision-maker and subject to review only on conventional public law grounds) (at [45]).*
7. The Court of Appeal also stressed that *“it is not the function of this judgment to set out a comprehensive treatise on the subject of jurisdictional facts, either generally or specifically in relation to the FOS” (at [46]),* and approved the sentiments in *R. (Chancery (UK) LLP) v Financial Ombudsman Service [2015] EWHC 407 (Admin)* that it is a matter of statutory construction as to how the Court will review whether the FOS has jurisdiction:

“what decisions are challengeable only on traditional judicial review grounds and what decisions require a different approach, whether one in which the court decides the law, finds the facts and applies the law to the facts, deciding whether the FOS[s] decision was simply right or wrong and considering new evidence if it wishes, or one in which the court decides the meaning of the words at issue, and the FOS finds the facts and applies the correct meaning in law to them as a matter of its own reasonable judgment, or one in which the court decides, on the facts found by the FOS, whether the application of the law to them is correct

rather than reasonable. Of course, the fact finding is subject to review on traditional grounds.” (per Ousley J in *Chancery (UK) LLP* at [66]).

8. However, its conclusion as to the question in Assurant's case was clear that:
 - a. questions of fact are primarily for the Ombudsman to determine, subject only to judicial review on conventional public law grounds (at [57] and [60]);
 - b. questions of law will be determined by the Court itself (at [58] and [60]).
9. Assurant succeeded in their appeal in a narrow sense, however, because the High Court failed to appreciate that construction of a contract is a question of law. As such, the High Court applied the wrong standard of review – it should have interpreted the contract for itself. In this case, there was no relevant dispute of fact and the question of whether or not there was an agency relationship between Assurant and the retailer turned on the true construction of the relevant contracts. It therefore fell to the Court of Appeal to construe the relevant contracts and thus answer the question whether there was a relationship of agency between the retailers and Assurant for itself.
10. Unfortunately for Assurant, the Court of Appeal decided that on a true construction of the contracts there was a relationship of agency between Assurant and the retailers. FOS was therefore correct in deciding it had jurisdiction.

Conclusion and wider context

11. Although there remains scope to argue that certain facts are “precedent facts” in the financial regulatory sphere (see for example *R. (Bluefin Insurance Services Limited) v FOS* [2014] EWHC 3414 (Admin) cited at [48] of the Court of Appeal's decision), it appears that judicial review of FOS jurisdictional decisions on the basis

that a precedent fact has not been established will remain relatively rare (as already indicated in *Chancery (UK) LLP and R. (TenetConnect Services Ltd) v Financial Ombudsman Service* [2018] EWHC 459 (Admin)).

12. That said, notwithstanding the warning at [46] that “*the issue of law that arises in this particular case is a relatively narrow one*”, this judgment can also be seen as an invitation to regulated persons to ‘find the question of law.’ In particular, judicial review of interpretations of contracts by FOS which in turn taint a jurisdictional decision may be a more fruitful approach than attempting to challenge findings of fact directly, although proposed challenges would still face the hurdle of demonstrating an arguable error of law in the FOS’s decision on jurisdiction to obtain permission to bring such a challenge. Though Assurant did not succeed, this route has been shown to be legitimate.

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