The Financial Ombudsman Service: Fair and Reasonable?

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ABSTRACT

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This thesis fills a void of recent research focusing on statistical analysis and review of Financial Ombudsman Service ("FOS") decisions. In settling disputes, the FOS will determine complaints on the basis of what is fair and reasonable in all the circumstances of the case. This means the ombudsman's decision is not constrained by legal precedent, but instead can and does settle complaints taking account of the circumstances of the complaint; regulators' rules, guidance and standards; codes of practice; and, what was considered to have been good industry practice at the time of the event complained about. While these factors can be introduced into the decision-making process by each of the ombudsman, respondent and complainant, it is the ombudsman who exercises discretion over which of these factors are used or rejected when reaching a decision.

The researcher works with regulated firms who fall within the FOS's jurisdiction. A number of these firms have informally voiced disquiet in relation to FOS decisions, which in their opinion, have in recent years seemingly seen an increase in decisions that have rejected legal precedent and have been selective in applying regulators' rules and regulations when reaching their decision. Due to cost and reputation considerations, few of these ombudsman decisions are formally challenged through judicial review. Regulated firms have also raised concerns to the author that the flexibility afforded to the ombudsman in not having to follow legal precedent results in decisions that are potentially weighted in favour of the complainant. In light of these unsubstantiated comments, this research considers objectively whether these firms have a point.

To what extent are factors such as 'hard-law' legal precedent and 'soft law' regulators' rules and regulations considered by the ombudsman when making decisions; and, is the FOS increasingly arriving decisions that depart from, or are selective in applying, hard-law and/or soft-law? If so, are there common themes where this happens and is this indicative of a flawed ombudsman service?

The spine of the research is based on an analysis of 840 FOS decisions in order to examine across banking, insurance and investment-based cases, the type of disputes considered by the ombudsman and the extent to which legal precedent, rules and regulations informed those decisions. While there has been academic commentary through journal articles on the formation of the FOS and subsequent court decisions involving the FOS, there has been little academic research on the role of hard and soft law in the decision process. Nor has there been an analysis of a range of FOS decisions against the criteria used in this research. As a backdrop to the analysis of the FOS decisions, the research also considers the legal status for

why the FOS settles disputes the way it does and compares this with other UK ombudsman schemes.

This research refers to: relevant case law; journal articles; other UK-based ombudsman services; FCA rules and guidance; and, the FOS database of published decisions containing all ombudsman decisions since 2014. The researcher decided not to conclude whether the outcome was fair or unfair – this is because it will be a subjective conclusion on the part of the researcher and ultimately, while one can have a view on the relative merits of the decision, it is the ombudsman's decision which is binding on the parties. Rather, the research has focused on the extent of the reference to hard and soft law; and, particularly in relation to hard law, the extent of potential conflict between legal precedent and ombudsman decisions. This is important because the impact of an adverse decision can mean a firm being required to pay significant redress, with the resultant financial consequences of *inter alia* increased professional indemnity insurance premiums, or in extremis, the financial default of the firm. This in turn has consequences on the regulatory system, particularly where the Financial Services Compensation Scheme has to step in to pay compensation linked to the FOS decisions, resulting in turn increases to regulatory fees and levies on firms. It is also important that the FOS functions fairly for complainants, some of whom will have lost significant sums, often representing all of their life savings.

Based on the analysis of data, the thesis concludes that while the FOS decision-making process is robust and in line with most other ombudsman services, when interpreting regulatory rules and guidance, it is increasingly 'in-filling' gaps within the rules and guidance, meaning the issue rests with lack of detailed narrative from the financial services regulator, the Financial Conduct Authority.

Abbreviations:

ADR	Alternative Dispute Resolution
CCA	Consumer Credit Act 1975
CIDRA	Consumer Insurance (Disclosures and Representations) Act 2012
CPR	Civil Procedure Rules 1998/3132
CTSI	Chartered Trading Standards Institute
D&I	Distress and Inconvenience
FCA	Financial Conduct Authority
FOS	Financial Ombudsman Service
FSA	Financial Services Authority
FSA 1986	Financial Services Act 1986
FSMA	Financial Services and Markets Act 2000
IOB	Insurance Ombudsman Bureau
LA 80	Limitations Act 1980
MIA	Marine Insurance Act 1906
MoU	Memorandum of Understanding
PHSO	Parliamentary and Health Service Ombudsman
SRO	Self-regulating Organisation
TPO	The Pensions Ombudsman

List of tables:

Chapter One: Introduction

1.1 Introduction

Within a speech made on 6 June 2001 by the Financial Ombudsman Service's ("FOS") then Chief Ombudsman, Walter Merricks, he acknowledged the *"unusual nature of the FOS"* as being *"A jurisdiction required by law to be based not on legal rights".*[1] In other words, as an alternative dispute resolution service, the FOS are entirely within their legal rights not to follow case law when making decisions on disputes presented to them. Instead, the ombudsman can decide a dispute based on what he believes to be fair and reasonable in the circumstances of the case and in so doing, may depart from 'legal rights' such as case law. The extent to which the 'unusual nature of the FOS' manifests in practice is explored in this thesis through an analysis of 840 ombudsman decisions.

1.2 Background to the Study

The researcher's interest in this topic was first piqued through professional involvement with FOS decisions involving respondent pension providers. The respondent firms entered into contracts with the complainant based on legal terms and obligations; and, in the respondents' opinion, they also strove to meet their regulatory obligations. However, when arriving at a decision, the ombudsman often seemed to apply a different interpretation as to the respondents' obligations in relation to high-level regulatory principles or rules; and, in so doing, overrode the contractual obligations that bound the parties. Furthermore, in relation to one particular high-level rule – the requirement for firms to act in the best interests of the client - recent case law, which is examined more fully within the research, arrived at a different interpretation to the ombudsman on the application of this rule. In short, the court said the rule only applied to a firm's contractual obligations however, the FOS took a far broader view. Therefore, in relation to the interpretation of high-level regulatory principles and rules, there seemed to be a potential conflict between the legal system and the ombudsman, thereby introducing uncertainty. As the ombudsman typically found against the respondent in these cases, this created frustration and, in some cases adverse financial impact, on the part of regulated firms and a perception that the ombudsman was inclined to favour the complainant, notwithstanding the contractual obligations they had in place with the complainant. Other than specific journal articles and commentary linked to the specific ombudsman decisions or court cases, there seemed to be an absence of a wider analysis of FOS decisions and trends arising to assess whether these decisions were analogous or anomalous.

This led to the researcher's hypothesis that the FOS frequently departs from case law precedent when determining complaints based on what is fair and reasonable in all the circumstances of the case; and, that the flexibility afforded to the FOS in

[1] The speech used to be on the Financial Ombudsman Service website however has been removed or archived in more recent times, however it referred to within case law cited later in this research.

being able to look beyond legal precedent in reaching decisions gave rise to uncertainty for regulated firms falling within the FOS's jurisdiction.

Extending beyond the researcher's narrow field of experience of pension providers, this research therefore provides an objective examination across a range of ombudsman decisions to test this hypothesis. It does do by considering the following questions:

1. How common is it for 'legal rights', case law precedent and regulators' rules and guidance to be considered within ombudsman decisions?
2. Where considered, to what extent to which are these factors followed or departed from within ombudsman decisions?
3. Whether there is a common theme where so departed?
4. In relation to the application of these factors, what are the weaknesses within the decision-making process and what could be improved?

1.3 Why this is important

The FOS was set up pursuant to Part XVI of the Financial Services and Markets Act 2000 (FSMA) and acts as an alternative to the courts in providing an independent and impartial dispute resolution service for consumers and small business who have purchased financial products or used services regulated by the Financial Conduct Authority (FCA). It is financed by a levy on FCA regulated firms. Since its inception in 2001 the number of cases handled by the FOS have seen enormous growth - for the year-ended March 2002 43,330 complaints were referred to the complaints handing teams compared to 321,283 complaints in the year-ended March 2017 (over a seven-fold increase, albeit this is down from the peak of 512,167 in 2013/14 due to PPI claims). The financial awards the FOS can make are significant. When first set up, the maximum FOS award was £100,000 and in 2012, the FCA increased the award limit to £150,000. On 1 April 2019, the award limit saw a significant increase to £350,000 for complaints about acts or omissions by firms after that date. This limit increased to £355,000 on 1 April 2020. This represents an increase in monetary terms of more than double the rate of inflation over that period.[2] Consequently, an adverse decision against a respondent firm can be financially impactful and ultimately expensive on the UK financial services sector; when firms fall into default and resultant consumer redress has to be financed by the Financial Services Compensation Scheme ("FSCS") which is financed by levies on UK-regulated firms[3].

The basis for how the FOS determines a complaint is set out at s.228(2) Financial Services and Markets Act 2000 ("FSMA") which instructs:

[2] Based on the Bank of England indexation calculator, £100,000 in 2001 would equate to £169,138 in 2020, this based on an average inflation rate over that period of 2.8% per annum.

[3] Based on the FSCS Annual Report and Accounts 2020/21 levies of £700m were paid by firms regulated in the UK by the FCA and PRA which supported compensation claims of £584m and management expenses of £81.9m

"A complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case."

This provides a broad remit for the FOS to reach its decisions and may depart from legal precedent when reaching decisions. The empirical extent to which this happens forms the basis for this research. Arguably, the FOS's approach imports material risk into firms falling within the FOS jurisdiction insofar whilst they can to a large extent build legal certainty into their products and services, this can be undermined by the uncertainty of decision based on a "fair and reasonable" test. This was raised by Ibrahim and Johnson in their journal article 'Is FOS above the law?'[4]:

"The ombudsman's discretion to choose to ignore legal precedent and to take into account softer factors when making adjudications means the outcome of adjudications is hard to predict. This, coupled with the difficulty of successfully challenging FOS decisions, is a legitimate concern for all financial institutions."[5]

The courts have also raised similar concerns. In *R (Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service*[6] Jay J, by way of obiter comments, opined:

"By way of postscript, I do have personal concerns about a jurisdiction such as this which occupies an uncertain space outside the common law and statute. The relationship between what is fair and reasonable, and what the law lays down, is not altogether clear."[7]

This research identifies from the sample analysed cases where legal precedent has not been followed and explores the circumstances of these cases. An advantage of basing the research across investment, banking and insurance cases is that observations can be made in relation to the impact of sector-specific legislation such as the Consumer Insurance (Disclosure and Representations) Act 2012 for insurance; and, the Consumer Credit Act 1975 for banking. In particular, the research assesses whether having this additional legislative certainty assists the ombudsman in reaching decisions. By contrast, investment cases – in particular where advisers are involved – are governed mainly by Ibrahim's 'softer factors' such as regulatory rules and guidance. Consequently, it is contended more subjectivity is imported into the ombudsman's decision on the basis that 'advice' of itself can be subjective, coupled with a lack of investment-specific legislation, which is apparent in insurance and banking cases. The research considers this when answering the wider questions.

1.4 Overview of the approach to this research

This section explains the broad approach to this paper.

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[4] Adam Ibrahim and Paula Johnson, 'Is FOS above the law', *Journal of International Banking and Financial Law,* (2008) 8 JIBFL 423, 1-3

[5] Page 2

[6] [2017] EWHC 352 (Admin)

[7] Para 73

In the context of this research, chapter two considers, the role of the FOS; its legislative background; why the FOS makes decisions the way it does; and, how the FOS compares with other UK ombudsman services. While the basic legislative background to the FOS is well documented through prior research and journal articles, the comparison with other ombudsman services is useful in positioning whether the FOS's approach to dispute resolution – in particular the 'fair and reasonable' test – is common, or whether the FOS is an outlier in this approach. Chapter three considers in relation to the FOS decision-making process, the impact of law on the outcomes. In particular this section considers any tension between case law precedent, described as 'hard-law'; and, regulators' rules, guidance and standards, described as 'soft-law'. Chapters two and three are theoretical in their approach and consider academic research and commentary along with case law and legislation. These two chapters provide background to underpin and contextualise the main research which is contained in chapter four. Chapter four is the main spine of this research and examines 840 FOS decisions between 2014 – 2020 to understand some of the factors underpinning the decisions based on real-life data. This date range was chosen on the basis that FOS started publishing on its website all ombudsman decisions in April 2013. Consequently, 2014 was the first full calendar year of decisions. The period of seven years was chosen as a) it brought recent data into the research; and, b) it was a sufficient period over which any trends could be identified. It is this data which is used to answer the research questions. Not only is the baseline data recorded (such as the uphold rates and redress quantum) but in particular the interaction of both hard and soft law in the decisions. This is used to answer the research questions, in particular assessing the usage and impact of hard and/or soft law on the decisions, in particular what Jay J in Aviva described as the *"penumbral space"*[8]. The survey criteria and the rationale are set out within the chapter together with the data and observations. The overall conclusions and summary are set out in chapter five.

There are limitations to this research. The analysis of the 840 ombudsman decisions endeavors to focus on objective and factual criteria – for example, whether case law was considered and followed, or not – rather than opining on whether the outcome was fair, or whether a court would have reached the same conclusions. This is partly because although the ombudsman decisions are quite detailed, supported by a full rationale, in some cases reference is made to prior adjudications or correspondence which is not always replicated in the final decision; hence, it may be that not all the background details are present. Furthermore, is the fact that the ombudsman reaches a decision on what he feels is fair and reasonable based on the circumstances and some of these decisions will be a marginal call one way or the other. This research does not aim to call into question the ombudsman's judgment calls.

A further limitation of the research is that set against the total number of ombudsman decisions, the sample size analysed is small. That said, it is contended

[8] Para 73

that the sample of 840 decisions still provides a reasonable representation of the overall data.

1.5 Prior research and literature

While there is a plethora of journal articles linked to the formation of the FOS and subsequent court cases where the FOS has been a party, there appeared to be less academic research in relation to the FOS's interaction with the law within its decision process.

However, the primary informing and relevant piece of prior academic research is a PhD thesis 'Insurance law and the Financial Ombudsman Service' by Judith Summer[9]. This research considered *inter alia* the relationship between the application of legal precedent and the decisions reached by the FOS and asked the question 'Should the FOS apply the law strictly?'. The focus of the thesis was insurance-based decisions and argued that *"law should be applied to the substance of the disputes that come before the FOS"*[10]. The thesis set out the background to the FOS along with its process for settling disputes (which remains largely unchanged). The main focus of the research however was a review of 108 published decisions taken from the Ombudsman News[11] in relation to disputes about insurance policy interpretations. Summer concluded that *"The main category where FOS cases are decided differently to a court is where the FOS chooses in the interests of fairness to disregard clear policy exclusions where the insurer's actions are not at fault".*[12] The 'fairness interests' identified by Summer tended to be matters concerned with the selling of the policy – Summer argued that improving poor sales practices should be the job of the regulator (then the FSA) rather than the FOS; and, that rather than applying a subjective 'fairness' test to any poor sales practices, instead legal principles such as misrepresentation and estoppel should be relied upon.[13]

Summer's research related to specific insurance related policies and terms, for example analysing how *inter alia* the FOS dealt with curtailment or baggage claims within travel insurance; or, claims under life and personal accident policies. Arguably, the comparison between FOS outcomes and what a court may have decided was easier in Summer's research on the basis that it was undertaken when the Law Commission was consulting on softening the law in relation to consumer disclosure for insurance policies. This means that at the time of Summer's research, there was a higher legislative expectation on disclosure by applicants (consumers) of material facts for insurance purposes.

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[9] Judith Penina Summer, 'Insurance law and the Financial Ombudsman Service', (unpublished doctoral thesis, University of Southampton, 2009)

[10] Summer, p.58 Volume 1

[11] This was a forerunner to all ombudsman decisions being published on the FOS website. This periodical published selected decisions that the FOS thought would be of interest to financial sectors.

[12] Summer, p.82 Volume 1

[13] Summer, section 3.2.2.2, p.81 Volume 1

While this research differs from Summer's insofar it does not attempt to conclude how a court would have settled the cases, it is deemed relevant to Summer's research as, a decade further on, it does include insurance cases within the sample of decisions and these cases have been decided under the legislative regime that was still in consultation at the time of Summer's research. Hence, this research tests the impact of that legislation against Summer's original findings. Furthermore, this thesis has drawn inspiration from Summer in replicating her method of analysing FOS decisions and picks up the mantle from Summer's assertion at section 4.3.6 in relation to future research that *"The FOS plans to publish a more comprehensive journal of cases decided […]. Further academic analysis can be done of that, using this study as a base."*. Until now, there has not been a follow-up analysis as envisaged by Summer. This research in part meets Summer's vision and in so doing provides the opportunity to revisit and test some of Summer's conclusions from 2009. However, this time the analysis is based on the full ombudsman decisions themselves rather than the summaries published within the Ombudsman News.

A particularly useful piece of academic analysis was a 2007 journal article by Iain MacNeil[14] which proved a useful background to the application and development of the 'fair and reasonable' basis within FOS decisions.

The researcher has also examined case law and legislation; other relevant journal articles; various UK-based ombudsman websites and associated terms of engagement; and, the FCA Handbook. Also considered have been the various independent reports commissioned by the FOS since its inception. While not directly relevant to the research questions, they do provide a useful backdrop to some of the challenges faced by the FOS, supported by some useful observations, which have been cited within this research where applicable. The reports are summarised below:

Table 1: Overview of previous independent reviews of the FOS

Date	Report	Author	Purpose/comments
2004	Fair and reasonable: An assessment of the FOS	Elaine Kempson Sharon Collard Nick Moore Personal Finance Research Centre University of Bristol	Set against rapid growth of the FOS, this report focused on the operational aspects of the case-handling process, in particular looking at the FOS outputs in terms of customer and firm interaction. This involved interviews with FOS personnel and focus groups, observing the case handling process and analysis of 72 closed cases. The report concluded that in relation to quality, consistency, process and value that overall, the FOS *"is a thoughtful, well-managed organisation that is doing a good job under difficult circumstances".* [p.39 of the report].
2008	The FOS and mortgage endowment complaints	David Severn	Commissioned by the board of the FOS, this review examines how the FOS responded both strategically and operationally to the surge in complaints about mortgage endowment plans between 2002 and 2007. This related to a specific

[14] Iain MacNeil, 'Consumer Dispute Resolution in the UK Financial Sector: The Experience of the Financial Ombudsman Service' (2007) 1 Law & Fin Mkt Rev 515

			mis selling of an insurance product that was initially identified over time by financial services regulators. In relation to the FOS, this review concluded that in the case of mortgage endowment complaints, the FOS became something of a factory in processing such complaints matched against a standard templated process. This did however assist in the consistency of decisions and underpinned reaffirmed that the FOS was a cheaper and quicker alternative to pursuing such claims through the courts.
2008	Opening up, reaching out and aiming high: An agenda for accessibility and excellence in the FOS	Rt Hon Lord Hunt of Wirrall MBE	This was an independent review scrutinising operational and strategic matters, including accessibility, transparency and funding and jurisdiction. Flowing from this review were 73 specific conclusions which fell within two overriding conclusions that the FOS should become more personalised, responding to the needs of users and stakeholders; and, should set realistic expectations by becoming more predictable in its policy-making and communication.
2012	FOS: Efficient handing of financial services complaints	Amyas Morse, The Comptroller and Auditor General – The National Audit Office	This forward-looking review was commissioned at a point when the FOS was implementing a major change programme in response to rapid growth in demand for the FOS services. Consequently, the focus was operational, looking at improving efficiency, meeting varying demands and best practice for project management. The review concluded that the FOS should develop a better understanding of factors driving costs and efficiencies; and, certain aspects of 'programme management' should be strengthened.
2016	The impact of PPI mis-selling on the FOS	Richard Thomas	This independent review commissioned by the FOS sought to review the impact of the large number of PPI related claims that the FOS dealt with. The review considered the pressures this caused on the FOS operations and made nine, mainly operational recommendations to mitigate future pressures.
2018	Report of the Independent Review of the FOS	Richard Lloyd	The driver for this report was allegations raised in a Channel 4 TV programme – 'Dispatches' – that *inter alia* there were backlogs in processing complaints, widespread workload pressures that were impacting on objective case-handling and that some case-handlers were biased towards certain types of complainants. The report made 22 recommendations that covered areas such as training, staff morale, case-handling procedures, communications and systems. As with many of these reviews, this focused on operational matters.

In summary, while there is a reasonable volume of work that considers specific areas or cases associated with the FOS, Summer remains the prior research that most aligns with this research.

Chapter Two: Background to the FOS

2.1 Introduction

Central to this research is the extent to which the ombudsman considers and departs from 'hard' and 'soft' law. By way of background, this chapter briefly explores the parameters within which the FOS operates as this influences its decision-making process. In essence, the chapter asks, what is the starting point for why the FOS operates the way it does? The chapter sets out a brief background to the FOS covering its legislative genesis, its purpose and operating model. Having established the rationale for the FOS's *modus operandi* this chapter compares the FOS model with other UK based ombudsman schemes. This is to see whether the FOS is analogous or anomalous with other UK-based ombudsman schemes. This aims to place some context around the way the FOS operates as it does, particularly in light of the analysis of ombudsman decisions that follows in chapter four. The structure of this chapter therefore is as follows:

- To briefly consider the role of the FOS and the parameters within which it works.
- To compare the FOS with other UK-based ombudsman services – is it an outlier?

2.2 The role of the FOS and the parameters within which it works

Consumer protection is a statutory objective[15] for the UK financial services regulator, the Financial Conduct Authority ("FCA"). Part of this objective is the requirement for an ombudsman scheme to handle consumer complaints. Consequently, the FOS was created by the Part XVI Financial Services and Markets Act 2000 (FSMA 2000) and is a single ombudsman scheme to replace a number of separate ombudsman schemes that existed before[16]. It is described at s.225(1) as *"a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person".* As such, the scheme provides *"Financial dispute resolution that's fair and impartial"*[17]. Furthermore, at s.228(2) the legislation sets out the basis on which complaints are to be determined by the FOS *"by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case".*

The FOS modus operandi was deliberately modelled on its forerunners as the first FOS Chairman, Andreas Whittam Smith explained:

[15] S.1C Financial Services and Markets Act 2000

[16] These included ombudsman schemes covering Insurance, Banking, Building Societies, Investment and Securities & Futures

[17] FOS website – Home Page banner <https://www.financial-ombudsman.org.uk/> accessed 31 March 2022

"The fact that the Financial Ombudsman Service is being constructed on virtually the same ground as the current ombudsman schemes – with a structure that builds on established strengths and retains the best features – is deliberate. The ombudsman network, which has evolved over the last twenty years as a free, informal alternative to the courts, has become the accepted framework for resolving financial complaints fairly, speedily and independently."[18]

The FOS is an approved 'Alternative Dispute Resolution' ("ADR") entity[19]. As such, the FOS is an integral part of the ADR landscape within the UK and is the largest (in terms of claims handled) private sector ombudsman service[20]. ADR manifests in various forms including mediation, arbitration, adjudication and ombudsman schemes. Within the 2004 White Paper *"Transforming Public Services: Complaints, Redress and Tribunals"* ombudsmen were described as being *"[I]mpartial, independent 'referees' who consider, investigate and resolve complaints about public and private organisations. Their decisions are made on the basis of what is fair and reasonable. They also have a role in influencing good practice in complaints handing".*[21]

This White Paper description confirmed the 'fair and reasonable' concept as being a feature of a typical ombudsman scheme, not just the FOS. This means, as a starting point, in fulfilling its role as an ADR entity the FOS is not bound to follow legal precedent when arriving at a decision. Given the statutory requirement of the FOS to resolve disputes quickly and with minimal formality, a 'fair and reasonable' approach, appears of itself to be a reasonable approach in meeting its ADR responsibility – such an approach facilitates a potentially quick decision to be made without the FOS becoming bogged down in complex case law; and, as a result, the costs (which are ultimately financed by levies on the regulated financial services sector) can in theory be contained. A criticism of this approach is that it can give rise to uncertainty, particularly for regulated firms falling within the FOS jurisdiction, who typically interact with consumers on contractual terms founded in law. As Lord Hunt opined within his 2008 independent review[22] the FOS's challenge involved:

"exercising discretion in its decisions without falling prey to charges of arbitrary or capricious behaviour; adhering to consistent, fair and reasonable principles whilst

[18] Financial Ombudsman Service, First Annual Report 26 February 1999 to 31 March 2000: Laying the foundations, p.2

[19] As defined at reg.4 Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015/542

[20] This is based on a comparison of 2020 annual reports from a selection of ombudsman which showed that Ombudsman Services (covering a range of sectors) resolved 65,593 disputes; the Pensions Ombudsman resolved 3,468 disputes (this figure comprises 2,264 early resolution investigations and 1,204 adjudications); the Housing Ombudsman resolved 15,832 disputes; and, the Legal Ombudsman resolved 6,384 cases. This compared with 296,712 complaints resolved by the FOS.

[21] Para 2.11

[22] Rt Hon Lord Hunt of Wirral MBE, An agenda for Accessibility and Excellence in the Financial Ombudsman Service, (Financial Ombudsman Service, 2008)

always treating every individual case on its individual merits […] operating within the rule of law; and, […] without ever falling into the trap of attempting to usurp or supplant lawmakers, courts or regulators."[23]

This tension is examined in chapter three however, it is clear that not only FSMA requires FOS to settle complaints on a fair and reasonable basis, but wider ADR regulations stipulate this too.

Being a scheme that is subject to legislation in the form of FSMA and ADR regulations, there are regulatory rules and guidance governing the FOS process. These can be found within the DISP section of the FCA Handbook. This includes whether complaint falls within the FOS's jurisdiction[24] and the FOS complaint handling procedures[25]. It should be remembered that DISP 3 sets out the FOS procedures for firms (as opposed to the FOS), as stated in *R (Critchley) v FOS*[26]:

"It was common ground that DISP App. 3 was guidance addressed to firms, not the Ombudsman Service. The Ombudsman was required to have regard to it in deciding what was fair and reasonable as a material consideration of a class expressly identified in DISP 3 paragraph 3.6.4, namely, regulators' guidance and standards, and good industry practice. In considering whether there was evidence which rebutted the presumption, the provisions on evidence in paragraphs 3.5.8 to 3.5.12 of DISP 3 applied. However, he was entitled to depart from it, if he rationally concluded that there were fair and reasonable grounds for doing so."

Critchley confirms that the FOS's approach to dispute resolution will be of no surprise to firms falling within its jurisdiction. The application of the 'fair and reasonable' test is examined in chapter three however, in relation to the FOS procedures, when challenged in the courts, these have tended to be successfully defended (see the table at 3.3). For example, in R (Critchley) *supra* the Claimant sought a judicial review of the FOS's decision to not uphold her complaint about having been mis-sold payment protection insurance ("PPI"). Even though the FOS acknowledged the sale of the PPI to the Claimant was flawed, the ombudsman decided the claimant would have purchased the PPI anyway. In arriving at this conclusion, the Claimant submitted that *inter alia* the ombudsman has misinterpreted DISP 3 *"when there was no evidence to support [the] conclusion"*[27] and that, again in line with DISP 3, the ombudsman *"failed to decide the complaint on an individual basis"*[28]. In dismissing the claim Lang J held that the ombudsman had not misinterpreted DISP 3 insofar that not only had the ombudsman referred to DISP 3 within its decision[29] the ombudsman reached his decision lawfully (per s.228(2) FSMA 2000) in applying what was fair and reasonable in the circumstances

[23] Lord Hunt, p.2
[24] DISP 2
[25] DISP 3
[26] [2019] EWHC 3036 (Admin)
[27] Para 63
[28] Para 65
[29] Para 74

of the case[30], observing the latitude that different ombudsmen may apply in reaching different conclusions on PPI complaints:

"It is a feature of any independent judicial system, including this Court, that different judges may lawfully reach different conclusions, even in similar cases." [31]

As the later analysis of ombudsman decisions will show in chapter four, occasionally the ombudsman arrives at a different conclusion on similar cases, a position which is sometimes cited by (typically) respondents and sometimes by complainants.

Given that there are conditions applying to which complaints can be handled by the FOS, the first part of the FOS process is to determine whether a complaint falls within their jurisdiction. Both the complainant and respondent can make representations where the FOS determine initially that the complaint is out of jurisdiction – for example the complaint may not relate to a regulated activity or firm; or, the complaint may relate to activities undertaken outside of the UK; or, the complainant may not be an 'eligible complainant' (perhaps because it may be a large firm, or the complaint may have been made too late). The FOS, or respondent, may also contend that a particular complaint is better suited to be dealt with by an alternative ombudsman scheme – for example a complaint regarding administration of a pension scheme may be better suited to being dealt with by the Pensions Ombudsman[32].

In line with the ADR Regulations, the FOS may dismiss a complaint for a number of reasons including *inter alia* that the subject matter of the complaint has been or is being considered by a comparable ADR entity (for example, the Pensions Ombudsman as previously stated); or, the complaint is *"frivolous or vexatious"*. The terms 'frivolous' and 'vexatious' are not defined within DISP. Reference to Stroud's Judicial Dictionary 10th Ed refers to *R v Mildenhall Magistrates Court*[33]. Here the Court of Appeal considered a judicial review of a magistrate court's decision to reject a claim of statutory nuisance in relation to noise from a motorcycle track. Within his judgment, Lord Bingham considered 'frivolous' to mean an application was *"futile, misconceived, hopeless or academic"*[34]. While s.42 Senior Courts Act 1981 places restrictions on 'vexatious legal proceedings' these are not defined. The definition was considered in relation to a freedom of information request in *Dransfield v The Information Commissioner*[35] where Archer LJ opined that *'it would be better to allow the meaning of the phrase to be winnowed out in cases that arise"* however, in the context of the Freedom of Information Act 2000, it was *"a request that had no reasonable foundation"*[36]. Consequently, in relation to

[30] Para 98
[31] Para 101
[32] Para 10 of the Memorandum of Understanding between TPO and the FOS dated 1 December 2017
[33] [1998] Env LR9,
[34] P.16
[35] [2015] EWCA (Civ) 454
[36] Para 68

the FOS process, it is contended that these definitions are a reasonable read-across in defining 'frivolous' and 'vexatious' at DISP 3.3.4AR.

Unsurprisingly, given its status as an ADR, the FOS may be unable to consider complaints already subject to court proceedings (unless the proceedings have been stayed), or where a court has already decided on the merits on the complaint subject matter.[37]

When resolving complaints, the ombudsman will allow the complainant and respondent to make initial representations on which a provisional assessment, with supporting reasons, is made. Where either party disagrees, further representations can be made and a final determination is reached. Representations are typically made in writing. While the ombudsman is able to convene a hearing *"by any means which the Ombudsman considers in the circumstances"*[38] the reality is that hearings are infrequent. In *R (Garrison Investment Analysis) v FOS*[39] when deciding whether an upheld complaint against the appellant was unreasonable – in this case, the FOS determined that investments had not reflected the investment risk the complainant was prepared to accept – Sullivan J confirmed it was not unusual for there to be no hearing:

"Normally disputes are resolved by the Ombudsman after exchanges of correspondence, and a hearing is not ordered unless the Ombudsman considers that one is required in the interests of fairness."[40]

This view has been affirmed by the European Court of Human Rights in *Heather Moor & Edgecombe Ltd v United Kingdom*[41]. The FOS upheld a complaint of poor advice against Heather Moor in regards to the transfer of benefits from an occupational pension scheme to a personal pension arrangement. Heather Moor claimed that *inter alia* in refusing a request to hold an oral hearing, the FOS had breached article 6 of the European Convention on Human Rights – Right to a fair trial. The court disagreed holding the FOS process *"was neither unreasonable nor procedurally unfair to decide the complaint solely on the basis of a written procedure"* and that in this case the FOS *"reached the view that an oral hearing was not required in order for the proceedings to comply with art.6 of the Convention".*[42]

Within the review of 840 cases from 2014 to 2020 within chapter four, no hearings were formally requested by the ombudsman. (Anecdotally, in a handful of cases, it was clear from the ombudsman decision that the complainant had telephoned the ombudsman to express views about the case, however this was initiated by the complainant rather than the ombudsman.) It is contended that the acceptance of written evidence allows the ombudsman to arrive at a considered decision. Within

[37] The full list of 'Grounds for dismissal' are listed at DISP 3.3.4R and 3.3.4AR
[38] DISP 3.5.5R
[39] [2006] EWHC 2466 (Admin)
[40] Para 5
[41] (2012) 55 EHRR SE50
[42] Para 30

the review sample, where representations were made, the observation was that both parties often provided detailed written representations that were fully considered by the ombudsman. For example, within the FOS decision DRN5702536 (with forms part of the data set of decisions reviewed in chapter four) the respondent's submissions were replicated over four pages within the ombudsman's decision.

The ombudsman can request evidence to assist with the decision-making process. This can be written or oral and can include subject-matter experts[43]. Based on the review of ombudsman decisions in chapter four the use of evidence was most often used in insurance-based cases where an expert opinion has been obtained in relation to a pre-existing condition (often used in travel insurance or veterinary insurance claims); or, telephone recordings of conversations between the respondent and complainant (respondent financial services firms routinely maintain records of telephone conversations with customers). In relation to the evidence gathering, the Kempson report[44] set out the FOS process:

"If the evidence is contradictory, or the two sides of the story do not tally, they make decisions on the basis of what they believe is most likely to have happened on the balance of probability."[45]

Reflecting the 'fair and reasonable' test stated at s.228 FSMA 2000, DISP 3.6.4R confirms that the ombudsman will take into account *"relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, (where appropriate) what [the ombudsman] considers to have been good industry practice at the relevant time".* As will be seen in the later analysis of FOS decisions, the complaint can be rejected or upheld fully, or in part. There are two stages to the decision-making process. Initially, disputes are considered by adjudicators. Only where the parties cannot agree the initial adjudication is the matter referred to the ombudsman for a decision. It is only the ombudsman decisions that are published on the FOS website.

Having reached a decision in favour of the complainant, the FOS may award:

- **Money award:** Reflecting 2.229(3) FSMA 2000, a money award defined at DISP 3.7.2 as being one or more of a *"(1) financial loss (including consequential or prospective loss); or, (2) pain and suffering; or, (3) damage to reputation; or, (4) distress or inconvenience; whether or not a court would award compensation".* The maximum award that can be stipulated is stipulated at DISP 3.7.4R – this has steadily increased from £100,000 for complaints received prior to 1 January 2012 to £355,000 for complaints received on or after 1 April 2020 (for acts or omissions on or after 1 April 2019). As the later data analysis reveals, only a small percentage of cases exceed the maximum award limit. The FOS may recommend that a

[43] DISP 3.5.8R to 3.5.12G details the rules/guidance in relation to evidence
[44] Ibid p.12
[45] P. 14

respondent pays an award in excess of the maximum applicable limit, however the respondent is not obliged to do so.

- **Interest award:** As stipulated by s.404B(7)(b) FSMA 2000, DISP 3.7.8 allows for an interest award to be made – typically, where applied, this is 8% simple interest and is added to money awards in relation to events that may have taken place some time ago.
- **Costs award:** such an award may be made to cover costs reasonably incurred by the complainant in relation to the complaint[46] – an example could be telephone or additional travel costs linked to a travel insurance complaint.
- **Directions:** this is where the ombudsman directs the respondent *"to take such steps in relation to the complaint as the Ombudsman considers just and appropriate (whether or not a court could order those steps to be taken).*[47]

The review of cases for this research revealed that within the sample only money awards (1) and (4) had been made. Interest and costs awards, along with directions, were often included as part of the redress where a complaint was upheld by the ombudsman. DISP 3.7.12R directs respondents to comply with awards or directions. The researcher was unable to locate similar research analysing FOS awards in order to make a comparison. It is contended that the categories of award are uncontentious and would be expected in any form of ADR. The 'fair and reasonable' approach provides the ombudsman with flexibility as to whether an award is made; and, if so, the composition of the award. Consequently, the later analysis of FOS decisions considered the number of 'large' awards (defined in the research criteria as being money awards above £50,000) as well as the number of 'partly-upheld' decisions that may have reduced the money award and, the number of D&I only awards.

2.3 Comparison between the FOS with other UK-based ombudsman services

This section compares the FOS with the UK ombudsman landscape to assess whether it is an analogous ombudsman scheme. Such schemes share a common genesis and purpose. To better understand an ombudsman's purpose one refer to the origin of an ombudsman. The first recorded ombudsman can be traced back to Sweden in 1809, where as part of the Swedish constitution, an additional check on the government's executive power was created through the formation of a Special Parliamentary Commissioner for the Judiciary and the Civil Administration (*Justitieombudsmannaambetet*). A driver for the ombudsman was that government officials were typically employed for life and could only be removed due to legal finding of dereliction of duty. Within his comprehensive history of the Swedish ombudsman system, Stig Jagerskiold[48] outlined the principle that:

[46] DISP 3.7.9R and 3.7.10G
[47] DISP 3.7.11R
[48] Jagerskiold, Stig: The Swedish Ombudsman (University of Pennsylvania Law Review, Vol.109, 1961)

"the Ombudsman should not be bound by as a prosecutor by legalistic rules but should have principal regard for the intentions of officials and the security of the citizenry."[49]

It was in part this ethos that led to the formation of the first UK ombudsman, the Parliamentary Commissioner through the enactment of the Parliamentary Commissioner Act 1967, which at s.5(1) gave the Commissioner the power to *"investigate any action taken by or on behalf of a government department or other authority"*[50] covered by the Act. Since the formation of the Parliamentary Commissioner in 1967, a number of public and private sector ombudsman services have been formed including the FOS in 2001. There are currently 20 UK ombudsman members - these are listed at appendix one. To be categorised as an 'Ombudsman Member', the organisation must meet the general principle of:

"independence of the Ombudsman from those whom the Ombudsman has the power to investigate; effectiveness; fairness; openness and transparency and public accountability"[51]

To place some context around how the FOS fits into the ombudsman landscape, a comparison of the current ombudsman services is covered in appendices two and three. Appendix two lists the type of scheme and their basis for making decisions i.e., whether this is the 'fair and reasonable' approach or different. Appendix three considers some of the ancillary rules of each scheme, for example the use of independent experts; whether the decision is binding; and, whether decisions can be appealed. Common among them and reflective of the original UK ombudsman, is their overriding aim to provide an accessible dispute resolution process, which can resolve complaints efficiently and fairly; and, where a complaint is upheld, to direct the remediation.

The appendices confirm a number of symmetries between the FOS and other UK-based ombudsman schemes. Therefore, at a high-level *prima facie* the FOS overall falls as a typical UK ombudsman scheme, both operationally and, importantly in terms of this research, its "fair and reasonable" approach to settling disputes mirrors other private sector schemes; and, this approach is commensurate with the "proportionate and fair" approach deployed by most, but not all, of the public sector ombudsman schemes. (The public sector exceptions reflect the background and specialist role of the Northern Ireland police; and, the armed-forces ombudsman schemes, where in each case while a fair outcome lies at the heart of the scheme, by necessity other resolution options, whether criminal prosecution or military protocols, are within scope for the Ombudsman to consider.) In relation to

[49] At p.1081

[50] The other authorities include the Criminal Injuries Compensation Scheme (s.11B) and the Victims of Overseas Terrorism Compensation Scheme (s.11C) along with the list of government departments within Schedule 2, which includes *inter alia* the Forestry Commission, the British Museum and the English Tourist Board

[51] Summary of the 'Terms and Rules' of membership taken from the membership page of ombudsmanassociation.org

appealing an ombudsman decision, an additional feature of certain statutory schemes is the option of a judicial review which is only open to challenge the *"lawfulness of a decision or action made by a public body"*[52].

Save for the public sector exceptions noted previously, most ombudsman schemes set out to consider disputes quickly and without being constrained by having to follow legal precedent, instead basing decisions on what is deemed to be fair and reasonable in the circumstances. In this regard, the FOS functions as a typical UK ombudsman scheme. However, it is contended there are two important considerations.

Firstly, when compared to many of the ombudsman schemes, the matters that fall within the FOS's jurisdiction are more complex than most, often with potentially higher redress riding on the outcome. For example, the complexity and quantum liability flowing from a poorly executed house removal or car repair will be low in comparison to alleged negligent investment advice that has cost tens or hundreds of thousands of pounds. Furthermore, membership of many ombudsman schemes is voluntary rather than the statutory application of FOS to regulated firms. Consequently, there is more riding of the application a 'fair and reasonable' basis for decisions than many of its ombudsman counterparts. This is examined more in chapter three.

Secondly, and arguably more fundamentally, is the misalignment between the FOS and the Pensions Ombudsman ("TPO"). The table at appendix two confirms the basis of the TPO's decisions as being *"Proportionate, efficient and consistent with the law"*[53], reflective of s.151 Pension Schemes Act 1993 which states "Any determination or direction of the Pensions Ombudsman shall be enforceable […] as if it were a judgment or order of that court". While not a focus of this paper, this is a significant inconsistency between how the TPO and FOS settle disputes. This is relevant because there can be an overlap between the FOS's and TPO's jurisdiction as both can deal with complaints from FCA regulated pension providers. While only one of either the FOS or TPO can deal with the same complaint, there is the risk of different outcomes for the same complaint, which could be exploited by both a respondent and complainant depending which of the TPO or FOS deal with the dispute. For example, while arguably there is less discretion within the PO as the ombudsman is compelled to find as a court would, there is also no limit to the amount of the award that may be granted. Consequently, a complainant with a strong case and/or high loss may wish to pursue a complaint via the TPO (assuming it falls within the TPO's jurisdiction) rather than the FOS where a limit applies to the money award. Conversely, where the respondent feels the complainant's case is on a weaker legal footing, they may wish to drive the complaint to the more 'adversarial' TPO, rather than a more 'inquisitorial' approach that could be adopted by the FOS, who are not bound to follow legal precedent. Given both the FOS and

[52] Description per the Courts and Tribunals Judiciary website < https://www.judiciary.uk/you-and-the-judiciary/judicial-review/> accessed 8 January 2022

[53] The Aims listed within the Pension Ombudsman's website <https://www.pensions-ombudsman.org.uk/what-we-do> accessed 27 March 2022

TPO deal with disputes in relation to pensions maladministration, which can fall within the regulated financial services sector and therefore within the FOS's jurisdiction, it is contended that the two ombudsmen should be more aligned. As this research has focused on the FOS process, it has not compared FOS and TPO decisions in relation to similar cases, however this research has highlighted the use of 'soft-law' (see chapter three) which would be less likely to feature within a TPO decision. This is not new thinking. In 2019 the Department of Work & Pensions published a review of the PO[54] which concluded:

"[W]e have heard a clear case for addressing the fact that there is a specific area of overlap in jurisdiction, with both the TPO and FOS able to give different decisions, under different rules for cases that involve maladministration of personal pensions. We make initial proposals to build a better evidence base for considering options to resolve this, as a matter of proper public administration and as future legislative priorities allow."[55]

This led to two recommendations that the TPO should collaborate with the FOS to *"reduce the potential for customer confusion and the duplication of efforts"*; and, based on shared data analysis, for both boards to consider whether policy changes are required to *"reduce the scope for jurisdictional overlaps and gaps"*[56].

It is hoped that continued effort is devoted to these two objectives to examine in greater detail the inconsistent approach between these two overlapping ombudsman services.

2.4 Conclusion

When considering the two questions covered by this chapter, namely: i) consideration of the role of the FOS and the parameters within which it works; and, ii) a comparison between the FOS and other UK-based ombudsman services and whether it is an outlier, the following conclusions can be drawn.

In relation to the role of the FOS and the parameters applying:

- The FOS's function and purpose continues that of the previous financial services sector dispute schemes that it replaced. Hence, the overall methodology of dispute resolution is nothing new.
- The FOS does not operate in a vacuum. Instead, the FOS's role and the parameters conform to a combination of legislation (through FSMA), ADR regulations and regulatory rules and guidance. Consequently, the methodology that underpins the decision-making process is a well-documented process that is available, and therefore well known, to the actors who use the FOS.

[54] Department for Work & Pensions, *Corporate report: Tailored Review of the Pensions Ombudsman,* Gov.UK, (27 August 2019)
[55] Foreword of the Report – Hazel Hobbs, Lead Reviewer
[56] Form and function recommendations 1 and 2

- Given the legislative underpinning of the FOS process, legal challenges to the process face a high hurdle.

In relation to how the FOS compares with other UK ombudsman schemes:

- The research confirms that the FOS's approach to dispute resolution is common with the majority of UK ombudsman schemes. Therefore, the basis of its 'fair and reasonable' approach to resolving disputes is analogous with most other ombudsman schemes.
- Accepting there is a similar approach to other ombudsman schemes, the types of disputes handled by the FOS are potentially more challenging in terms of complexity and quantum of financial awards, than other ombudsman schemes. This raises the question of the effectiveness of a 'fair and reasonable' basis for settling disputes – this is explored in chapter three.
- An exception to this is that TPO resolves disputes in the same way a court would, hence is bound by legal precedent. While not the focus of this research, the fact there is a jurisdictional overlap between the FOS and TPO in relation to some products and services there is a risk that each ombudsman could arrive at different conclusions on materially the same complaints.

In summary, the legislation and the FCA's DISP sourcebook set out clear procedures for firms subject to the FOS's jurisdiction; and, potential claimants. In so doing, the FOS process affords the ombudsman latitude and flexibility deciding a complaint whilst remaining within the parameters of the procedures (for example, discretion on whether to allow oral hearings). While the procedure states that in reaching a decision, the ombudsman will take account of *"relevant law and regulations"* (per s.228(2) FSMA 2000 and DISP 3.6.4R) case law has determined this may be departed from. The extent to which the FOS considers and follows or departs from the relevant law and regulations forms the spine of this research. The theoretical background to the impact of law and regulations on FOS decisions is covered in the next chapter, before being reviewed in practice through the analysis of the 840 FOS decisions in chapter four.

Chapter Three: The Impact of Law on FOS decisions

3.1 Introduction

This chapter examines the latitude that the ombudsman has when arriving at a decision to consider, but not necessarily follow, the law. The previous chapter established that, in common with other ombudsman schemes acting as an ADR entity, legislation is clear that the FOS can reach decisions based on what is fair and reasonable, while also recognising that that the types of disputes the FOS deal with are sometimes complex in their nature with high amounts of redress resting on the decision. Therefore, this chapter will:

- In relation to the rules governing the FOS process that requires a 'fair and reasonable' basis for settling disputes, consider the tensions this can create; and,
- Examine the theoretical impact of these tensions in relation to whether 'hard letter law' such as case law; or, 'soft letter law' such as regulations are followed, or not, by the FOS.

This chapter aims to set the backdrop for some of the research criteria when analysing the 840 cases in chapter four.

3.2 The tensions

R (Williams) v FOS[57] considered the ombudsman's duty in reaching a decision. The case involved an ombudsman decision against the appellant adviser who contended the decision had been arrived at unfairly and unreasonably. In particular the appellant claimed the ombudsman ignored the fact that when the (now failed) investment was made, the investment scheme was acknowledged within the industry as a low-risk investment. Irvine J opined at para 26:

"The ombudsman is dealing with complaints, not causes of action. His jurisdiction is inquisitorial not adversarial. There is a wide latitude within which the ombudsman can operate. He can depart from the common law if justified, but must explain the extent to which the reasons for any such departure."

Arguably, this creates tensions. Firstly, when dealing with customers, regulated firms do so on the basis of contractual terms created in line with established law. However, when dealing with a dispute, as highlighted in *Williams*, the FOS may depart from the common law if the ombudsman believes it justifies the 'fair and reasonable' basis of its decision. Moreover, the FOS clearly has a legal basis, both in legislation[58] and through the FCA's rules[59] to exercise discretion. This section will examine, with reference to case law, the extent to which FOS decisions have departed from established common law. This will then be overlaid on the later analysis of the 840 FOS decisions reviewed for this research, which will also

[57] [2008] EWHC 2142 (Admin)
[58] S.228(2) FSMA 2000
[59] DISP 3.6.4R

examine the extent to which the FOS use case law to support their decisions; as well as departing from it. This presents a perception that the FOS can 'have its cake and eat it', choosing on the one hand to follow the law (both legislation and common law) to support decisions; however, when it suits the decision, being able to depart from, in particular, common law[60]. In practice though, s.49(1) Senior Courts Act 1981 provides for any court to have a degree of latitude to depart from common law on the basis that *"wherever there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail".* This raises the prospect that the FOS, in determining cases based on what is fair and reasonable, is in fact employing a hybrid rule of equity. In effect, the courts have a degree of latitude in deciding cases and therefore, the FOS is merely replicating this principle of equitable decision making.

Secondly, is the tension that flows from the FOS decision making process by taking account of *"regulators' rules, guidance and standards"*[61]. Section 6(a) to (d) of FSMA 2000 provides that the FCA's general duties includes, in relation to the Act, making rules and technical standards; preparing and issuing codes; provision of general guidance; and, determining general policy and principles. Furthermore, s.137A specifies further the FCA's rule making powers:

(1) The FCA may make such rules applying to authorised persons—
(a) with respect to the carrying on by them of regulated activities, or
(b) with respect to the carrying on by them of activities which are not regulated activities, as appear to the FCA to be necessary or expedient for the purpose of advancing one or more of its operational objectives.
(2) Rules made under this section are referred to in this Act as the FCA's general rules.
(3) The FCA's general rules may make provision applying to authorised persons even though there is no relationship between the authorised persons to whom the rules will apply and the persons whose interests will be protected by the rules.
(4) The FCA's general rules may contain requirements which take into account, in the case of an authorised person who is a member of a group, any activity of another member of the group.
[...]
(6) The FCA's general rules may not modify, amend or revoke any retained direct EU legislation (except retained direct EU legislation which takes the form of FCA rules).

Consequently, while the FCA Handbook, which contains rules and guidance, is not of itself legislation, it does carry a legal force behind it insofar legislation requires the FCA to produce the rules, which regulated firms are required to follow.

[60] In this context, the term 'common law' is based on the Jowitt's Dictionary of English Law 5th Ed., which describes common law as being *inter alia "the recognition given by the courts to principles, customs and rules of conduct […] which embody the decisions of the judges together with the reasons they assigned for their decisions".*
[61] DISP 3.6.4R(1)(b)

Reinforcing the legal force standing behind the FCA's rules, s.138D(2) FSMA 2000 allows 'Actions for damages' where certain rules are breached:

A contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

This section will therefore examine the challenges faced by the FOS and those subject to its jurisdiction in interpreting and applying FCA rules in relation to dispute resolution, particularly when those rules may be open to a wide interpretation.

When considering these two tensions, for the purposes of this paper, they have been categorised as respectively 'hard-letter law'; and, 'soft-letter law'. This categorisation is based on Jowitt's Dictionary of English Law[62]:

"Rules not having the force of law, such as guidance as to compliance with primary or secondary legislation (such as codes of practice), systems of self-regulation and voluntary codes of practice. Also called soft-letter law and distinguished from hard-letter law in the form of Acts of Parliaments and subordinate legislation. The normal requirement in relation to hard-letter law is compliance; and the normal requirement in relation to soft-letter law is to have regard to it."

As will be examined later in chapter four in relation to FOS decisions, the above definition is not wholly appropriate as arguably the way in which FCA rules can be enforced, whether by regulatory supervision and enforcement; or, through a s.138D right of action, are 'soft-letter laws' with a hard edge. However, for the purposes of this research and for ease of distinction, it is hoped the imperfection of the labels will be excused.

3.3 The impact of hard-letter law on FOS decisions

The ability for the ombudsman to depart from common law was established in *R (IFG Financial Services Ltd) v FOS*[63], an application for a judicial review of a FOS decision against the claimant financial adviser. The FOS held IFG liable for the loss of an investor's funds resulting from the dishonesty of the fund manager. It was common ground that *"the dishonesty of the management of that fund was not, and could not reasonably have been, anticipated [by IFG]"*[64]. Notwithstanding this fact, the FOS adjudicator[65] made a money award against IFG for the whole loss incurred by the fund on the basis that the investment in question was unsuitable for IFG's customers. The claimant asserted that IFG's customers *"as a matter of English law […] were not entitled to recover damages [from IFG] in respect of loss due to that*

[62] 5th Ed.
[63] [2005] EWHC 1153 (Admin)
[64] Para 5
[65] The decision maker prior to a contested decision being referred to an ombudsman for a final decision.

unforeseeable fraud of the investment manager"[66]. The claimant's view was predicated on case law, specifically *South Australia Management Corporation v York Montague*[67] where the House of Lords held that a property valuer was not liable for loss incurred by a lender as a result of a fall in the market as such a loss was unforeseeable. In considering the relevance of the House of Lords case to the FOS decision, Burnton J considered the application of s.228(2) FSMA:

"It is to be noted that it does not require, as it might have done, a complaint to be determined in accordance with the law. The ombudsman is required to determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case. The words "in the opinion of the ombudsman" themselves make it clear that he may be subjective in arriving at his opinion of what is fair and reasonable in all the circumstances of the case. Of course, if his opinion as to what is fair and reasonable in all the circumstances of the case is perverse or irrational, that opinion, and any determination made pursuant to it, is liable to be set aside on conventional judicial review grounds."[68]

In so doing, the court concluded that the FOS decision would stand, on the basis that the ombudsman *"was entitled to depart from the result mandated by the law if he considered that another result provided the result that was fair and reasonable in the circumstances"*[69]. Within her journal article 'Court rules ombudsman not bound by law alone'[70] Joanna Gray opined:

"This decision did not meet with universal approval as many in the financial services industry thought that this widest possible of interpretations to the FOS jurisdiction would encourage vexatious complaints and that it would increase the degree of uncertainty surrounding dealings with retail customers. Firms may be exposed to an extra layer of risk […] beyond literal compliance with the regulations, guidance and widely recognised legal principles, the risk that despite their compliance with all of the above and having planned one's business and ordered one's dealings on that basis the Ombudsman's own interpretation of what is fair and reasonable in terms of appropriate risk and loss bearing as between industry and consumers may still result in an award against them."[71]

Fifteen years on, the analysis of FOS decisions in chapter four considers the extent to which Gray's prophecy of firms being *"exposed to an additional layer of risk"* has manifested in practice. The courts however, through subsequent judicial reviews of ombudsman decisions have merely asserted the principles of the IFG case. For example, *Williams*[72] *supra* confirmed the ability for the ombudsman to depart from common law were justified, although in relation to the ombudsman being able to

[66] Para 39
[67] [1997] AC 191
[68] Para 13
[69] Para 92
[70] Gray J, *Journal of Financial Regulation and Compliance*, 2005; 13, 4; (ProQuest Central)
[71] Page 368
[72] [2008] EWHC 2142 (Admin)

consider industry views (in this case on traded endowment policies) published after the investment in question had been made, Irwin J did obiter flag the risk of ombudsman decisions by *"hindsight"*[73] although this of itself was not sufficient to dislodge the court's decision to reject the judicial review against the ombudsman's decision. The Court of Appeal decision in *R (Heather Moor & Edgecomb) v FOS*[74] considered *inter alia* the extent to which the FOS decision-making process met the broader concept of the Rule of Law[75]. The case involved a FOS decision to uphold a complaint against a financial adviser in relation to the transfer of an occupational pension scheme, which was deemed to be detrimental to the complainant. In relation to the Rule of Law, and in particular the requirements flowing from the expression "prescribed by law" Burnton LJ considered whether the FOS scheme met *"the requirements that flow from this expression"*[76] these being: i) legal rules being seen to be adequate in the circumstances of the case; and, ii) sufficiently precise laws such that the consequences of actions are foreseeable. In recognition of this second point, it was acknowledged by Burnton that, in order to keep pace with changing circumstances, *"many laws are inevitably couched in terms which […] are vague and whose interpretations and application are questions of practice"*[77]. This meant the ombudsman was:

"He is free to depart from the relevant law, but if he does so he should say so in his decision and explain why."[78]

As can be seen in *Williams* and *Heather Moor (supra)* the courts have held firm in asserting the ombudsman's flexibility to depart from the law in reaching decisions, meaning this flexibility of itself is settled law however, there have been murmurs of concern voiced by the court through Irwin J's 'hindsight'; and, Burnton LJ's 'interpretations' comments. These concerns were articulated eloquently by Justice Jay in *Aviva Life & Pensions v FOS*[79] a case involving Aviva's challenge via judicial review of the FOS upholding a complaint that a claim under a policy which included terminal illness benefit, should have been paid. The question was finely poised; it was a matter of fact that the policyholder had displayed symptoms of the degenerative disease for which he claimed, albeit the specific disease had not at that point been fully diagnosed. Aviva claimed the policyholder had made negligent misrepresentations within his policy application. Furthermore, it was common ground that Aviva *"followed relevant law, guidance and practice"* yet notwithstanding this, the court held the ombudsman's enquiry *"may go wider, and may do so because the Ombudsman may decide the insurer did not act fairly and reasonably despite its adherence to sound legal principle, guidance and practice"*[80].

[73] Para 44
[74] [2008] EWCA Civ 642
[75] In relation to defining the 'Rule of Law' the Court referred *inter alia* to the principles enunciated in Lord Bingham's lecture of the same name – [2007] CLJ 67.
[76] Para 49
[77] Para 49
[78] Para 49
[79] [2017] EWHC 352 (Admin)
[80] Para 59

In finding against Aviva, it was clear that Jay J had concerns about the legal backdrop against which such decisions were considered:

"By way of postscript, I do have personal concerns about a jurisdiction such as this which occupies an uncertain space outside the common law and statute. The relationship between what is fair and reasonable, and what the law lays down, is not altogether clear. The approach of the Court of Appeal has been to say that a sufficient nexus exists between these two normative categories because (i) the corpus of legal principles and rules is clear, and (ii) the Ombudsman must give clear reasons when she departs from the law. Speaking entirely personally, I am not wholly satisfied that this adequately bridges the gap, or gives sufficient definition to the norms under scrutiny. Who, or what, defines the contours and content of fairness and reasonableness? If the law takes one policy direction, what can rationally survive of a policy which has been eschewed? During the course of oral argument, I suggested that fairness and reasonableness may occupy some sort of penumbral space, by implication contiguous with the much larger body of principles and rules which are visible to all, but I have begun to wonder where this metaphor leads. It might be said that this jurisdiction is penumbral because its shadows cannot be illuminated."[81]

Given this 'penumbral space' it is perhaps surprising that there have not been more judicial reviews of FOS decisions. In her 2009 research, Judith Summer opined *"[The] lack of considering the law makes the FOS vulnerable to attack by judicial review"*[82]. That said, Summer concluded that up to the date of her research (September 2008) there had been 15 judicial reviews of FOS decisions although, save for reference to three of the cases, no further commentary was provided in relation to the outcome of the 15[83]. Unpublished research by the University of Sheffield[84] into judicial reviews of a range of ombudsman cited 22 judicial reviews involving the FOS between 2002 and 2018. Of these, the claimant was successful on six occasions (27%). No further commentary was provided on these specific cases. Therefore, in relation to this research, the table below summarises the judicial reviews in date order since 2014[85] (latest on top):

Table 2: Summary of FOS-related judicial reviews

Case	Comment	Application Granted Y/N?
R (TF Global Markets (UK) Ltd) v FOS [2020] EWHC 3178 (Admin)	The FOS had applied the wrong test when deciding that the claimant had not been allowed to close the trading accounts of certain clients for alleged abusive trading. The claimant's contract terms allowed them to close the accounts.	Yes

[81] Para 73
[82] Section 2.3 [p. 42]
[83] Summer, p.16, footnote no.77
[84] A study into ombudsman judicial review, (Unpublished, University of Sheffield, 2018)
[85] The year 2014 has been selected on the basis this coincides with the sample of decisions that have been analysed for this research, 2014 being the year that the FOS started to publish Ombudsman decisions on their website.

R (Critchley) v FOS [2019] EWHC 3036 (Admin)	Unusually, this judicial review was sought by a complainant whose complaint had been rejected by the FOS. Whilst the FOS agreed that the bank's sales process was deficient, the ombudsman ultimately concluded that the complainant would have still likely bought the policy. The court agreed the FOS was entitled to conclude this.	No
Berkeley Burke SIPP Administration v FOS [2018] EWHC 2878 (Admin)	The FOS were able to apply overarching high-level principles in support of upholding a complaint against the claimant pension provider.	No
R (TenetConnect Services Ltd) v FOS [2018] EWHC 459 (Admin)	The FOS had jurisdiction to hear a complaint in relation to losses stemming from a principal firm's appointed representative (AR), even though the AR had no express or implied authority from the principal firm. It was fair and reasonable for the FOS to direct the principal to pay for the losses incurred by the AR.	No
R (Kelly) v FOS [2017] EWHC 3581 (Admin)	Like Critchley (above) the claimant was an individual whose complaint had not been upheld by the FOS. Here, the judicial review was granted on the basis that the FOS had misunderstood the complaint and consequently the FOS decision was irrational.	Yes
R (Mazarona Properties Ltd) v FOS [2017] EWHC 1135 (Admin)	This too was a judicial review sought by a complainant whose complaint had been rejected by the FOS on the basis that the complaint in this instance fell outside the jurisdiction of the FOS. The court affirmed the complaint fell outside of the FOS's remit.	No
R (Aviva Life & Pensions) v FOS [2017] EWHC 352 (Admin)	Whilst an ombudsman had to consider relevant law when reaching his final decision, he did not have to apply it strictly if in his view a conclusion contrary to the law would be fair and reasonable in all the circumstances. However, clear reasons would have to be given.	No
Full Circle Asset Management v FOS [2017] EWHC 323 (Admin)	The FOS were entitled to consider that a 'medium-risk' portfolio was unsuitable for an investor even though an FCA review had previously accepted the medium-risk category.	No
R (Chancery (UK) LLP) v FOS [2015] EWHC 407 (Admin)	The claimant firm provided taxation advice to a complainant who complained to the FOS who determined the complaint fell within their jurisdiction on the basis that the advice fell as a regulated activity, whereas the claimant contended that as they provided taxation advice, this fell outside the FOS's jurisdiction. The court held the FOS could consider the complaint.	No
Westcott Financial Services v FOS [2014] EWHC 3972 (Admin)	The FOS had been entitled to decline to stay complaints brought against a group of independent financial advisers by their former clients pending the outcome of litigation that, although unconnected, covered the same issues. The ombudsman had to bear in mind the need to determine complaints quickly and had been right not to tie the complainants to the uncertain timescale of litigation over which they had no control.	No
R (Bluefin Insurance) v FOS [2014] EWHC 3413 (Admin)	The FOS had erred in categorising a complainant as an 'eligible complainant' – this was because a director who complained to the FOS did so not as a 'consumer' but rather as someone acting in the course of his trade, business or profession.	Yes

To place the number of cases listed above into some context, the number of Ombudsman resolutions (i.e., where one or other of the complainant or respondent has not accepted the initial adjudicator's decision, meaning the Ombudsman has been called on to provide the final decision) are as follows:

2019/20 – 29,746 cases (out of 295,596 overall resolutions)[86]
2018/19 – 36,954 cases (376,954)

[86] Web. Annual complaints data/Resolutions – by stage 2019/20. Available at <https://www.financial-ombudsman.org.uk/data-insight/annual-complaints-data> (accessed 8 May 2021)

2017/18 – 32,780 cases (400,658)
2016/17 – 38,619 cases (336,381)
2015/16 – 39,872 cases (438,802)
2014/15 – 43,185 cases (448,387)[87]

As can be seen, out of a total of 221,156 cases from 2014 to 2020, only a negligible number have been challenged through the courts. This suggests that the vulnerability described by Summer has not come to fruition. Rather, it is contended that the low number represented by the above list of cases merely reflect an overall acceptance, which may anecdotally be a reluctant acceptance on the part of some regulated firms, that ultimately the FOS can adopt a malleable approach to its decision-making process. These figures also suggest that, again maybe begrudgingly, that (typically respondent firms) accept that the rules that govern the FOS decisions are well-framed and well-tested against established legal standards, meaning that only clear outlier decisions stand any chance of being judicially challenged. Furthermore, within *Heather Moor*[88] Rix LJ referred to the Merricks speech[89] acknowledging the *"unusual nature of the FOS"*. A further quote of interest to Rix LJ from the same speech related to Merrick's observation that the FOS had the opportunity of *"reinventing equity"* through taking account of *"promotional materials and good industry practice, and, if necessary, adopt a modern and fairer approach where it is clear that the law has lagged behind."*[90] The opportunity for ombudsman to not only ignore legal precedent but also take into account soft-letter law, such as 'promotional materials' and 'industry practice' was deemed by Adam Ibrahim in his article 'Is FOS above the law?'[91] to be *"a legitimate concern for all financial institutions"*. The extent to which soft-letter law can be applied by the FOS is examined in the next section.

3.4 The impact of soft-letter law on FOS decisions

In relation to soft-letter law being taken into account by the Ombudsman, DISP 3.6.4R classifies this as: 'regulators' rules, guidance and standards; codes of practice; and, what was considered to be good practice at the time'. It is interesting to note that the position of the apostrophe within the word 'regulators' suggests that more than one regulator's rules can be referred to. As will be seem in the later analysis of Ombudsman decisions, the primary regulatory source is the Financial Conduct Authority (or its predecessor, the Financial Services Authority)[92]. The rules and guidance are primarily found in the FCA Handbook, which is sub-divided into sections including *inter alia* High-level Standards, Business Standards, Regulatory Process and Redress (which includes the DISP: Complaints sourcebook). The legislative force behind the FCA's rule making powers reflected in the FCA

[87] The data for 2014/15 to 2018/19 is taken from the FOS Annual review 2018/19/Data in more depth, available at: https://www.financial-onbudsman.org.uk/files/2242/annual-review-2018-2019-data.pdf (accessed 8 May 2021)
[88] [2008] EWCA Civ 642
[89] Ibid. 1
[90] Para 83
[91] (2008) 8 JIBL 423
[92] The FCA took over responsibility for financial services regulation from the FSA on 1 April 2013.

Handbook has already been outlined at section 3.2 of this chapter. Similar provisions apply to the issuance of guidance at s.139A FSMA 2000 whereby the FCA can issue guidance in relation to a) the FCA rules; b) other functions of the FCA; or, c) any other matter considered desirable to issue guidance on[93]. In relation to guidance within the Handbook (and therefore linked to FCA rules) within the FCA's 'Reader's Guide: An introduction to the Handbook'[94] the FCA describes guidance as:

"[M]ainly used to: explain the implications of other provisions; indicate possible means of compliance; or, recommend a particular course of action or arrangement. Guidance is not binding and need not be followed to achieve compliance with the relevant rule or requirement. However, if a person acts in accordance with general guidance in circumstances contemplated by that guidance, we will treat that person as having complied with the rule or requirement to which that guidance relates."

Unlike most rules, no private right of action under s.138D FSMA 2000 attaches to guidance, confirmed in *Berkeley Burke SIPP Administration v FOS*[95] which concerned the extent to which the FOS had considered and interpreted FCA guidance, and in so doing, had inadvertently created a new FCA 'rule':

"Rules were more important than guidance, in the sense that FSMA provides that a contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of its contravention. There is no equivalent provision in respect of guidance."[96]

Guidance comes in two layers, described here as 'formal' and 'informal' although neither term is defined within FSMA 2000 or elsewhere. Rather, these terms attempt to describe guidance that could be said to fall within the purview of s.139A FSMA 2000 which is regarded to apply to guidance that relates to specific rules – formal guidance; and, other regulatory publications that provide more general 'informal' guidance, which of itself does not link to specific Handbook rules. Examples of formal and informal guidance beyond that specifically contained within the Handbook includes respectively guidance in the form of Finalised Guidance papers[97]; and, Thematic Reviews, where the FCA undertakes a review of a specific sector and publishes the results, often citing good and poor practices it has observed[98]. It is contended the distinction between the two types of guidance is an unnecessary complication which sometimes the FOS or the courts have to

[93] S.139A(1)(a) to (c)
[94] January 2019
[95] [2018] EWHC 2878 (Admin)
[96] Jacobs J, Para 7
[97] By way of example, in 2021 the FCA issued Finalised Guidance on matters such as: the fair treatment of vulnerable clients [FG21/1 which states at para 1.8 it is guidance issued per s.139A FSMA 2000]; how mortgage companies should treat customers during the coronavirus pandemic; and, providing advice on pension transfers [FG21/3].
[98] Examples of Thematic Reviews include: the effectiveness of Independent Governance Committees [TR20/1]; the debt management sector [TR19/1]; and, pricing practices in the household insurance sector [TR18/4].

distinguish between. For example, in *Re Brooklands Trustees Ltd*[99] which involved action by the Secretary of State for Business to disqualify two individuals from being directors due to failing to act with skill, care and diligence, the court considered a series of ombudsman decisions against the firm, which ultimately led to the firm's failure. The ombudsman decision, considered at para 29, contained the following in relation to the guidance:

"I accept that the 'Dear CEO' letter, the 2009 and 2012 reports[100] are not formal 'guidance' whereas the 2013 guidance is[101]. But the fact that the reports and the 'Dear CEO' letter did not constitute formal guidance does not mean their importance should be underestimated. They contain the regulator's thoughts on how regulatory obligations might be met and should be viewed as significant."

In considering the relevance of guidance to the efficient and competent running of a regulated firm, Baister DJ said:

"It seems to me that a director of a company which carries on a business that is a profession or is regulated must have regard to the overarching principles governing his or her profession or the service his or her company is providing and to what is regarded by the relevant regulator as good practice, and that a serious or pervasive failure to do so must be misconduct."[102]

In the event, notwithstanding the directors did not fully act upon the guidance and therefore were incompetent for doing so, this was not deemed to be sufficient to disqualify the defendants from being directors. The *Brooklands* case considered a previous case, *Adams v Options*[103], this being a claim that *inter alia* the defendant had breached the FCA rule COBS 2.1.1(1)R, known as the 'client's best interests rule'[104], this breach in part being due to the defendant not following guidance issued by the FSA/FCA. In relation to the significance of informal guidance, in this case via a thematic review, Dight J opined:

"The Thematic Review cannot properly be described as a set of rules or even guidance and in my judgment cannot give rise to a claim for failing to follow the suggestions which it makes. Nor in my judgment is it a proper aid to statutory construction of the COBS Rules which must be construed in accordance with the usual principles of construction."[105]

[99] [2020] EWHC 3519 (Ch)
[100] These 'reports' published the findings of two 'Thematic Reviews'.
[101] This was published as a 'Finalised Guidance' paper FG13/8.
[102] Para 91
[103] [2020] EWHC 1299 (Ch)
[104] The rule states "A firm must act honestly, fairly and professionally in accordance with the best interests of its client."
[105] At para 162

While part of the case was reversed by the Court of Appeal, this section of the judgment was not considered, deferring instead for another court to consider based on a 'live case'[106].

As can be seen, while considering guidance, the courts have not ultimately seen this as persuasive in finding against the defendant. That said, there is a clear message that guidance, whether formal or informal, should not be dismissed by regulated firms; and furthermore, when the FOS considers a complaint where guidance may be relevant, in adopting a 'fair and reasonable' approach, it is unsurprising that guidance issued by (predominantly) the financial services regulator will be considered. To put this another way, it would be arguably strange if the FOS simply ignored guidance issued by the regulator – after all, why else would the regulator take the time to issue guidance if it were not for a purpose of providing some illumination to the 'penumbral space' described by Jay J (*supra*). To add weight to this contention, this principle is not constrained to the FOS's jurisdiction. In *R (Munjaz) v Ashworth Hospital Trust*[107] which considered whether a hospital had departed from a code of practice pursuant to the Mental Health Act 1983 regarding the seclusion of psychiatric patients, Lord Steyn considered the impact of the code of practice as guidance:

"It is in my view plain that the Code does not have the binding effect which a statutory provision or a statutory instrument would have. It is what it purports to be, guidance and not instruction. […] It is guidance which any hospital should consider with great care, and from which it should depart only if it has cogent reasons for doing so."[108]

In the above case, the House of Lords decided that the hospital had considered the guidance and therefore was able to display reasons for departing from it. However, the case highlights the principle that guidance, whether formal or informal, is issued for a reason and cannot lightly be dismissed. In regard to firms within the FOS's jurisdiction, this means that not only do the FOS rules allow soft law regulations to be considered within the ombudsman's decision, there is legal precedent via Munjaz that underpins the reference to and importance of soft law items such as rules and regulations.

Within the analysis of FOS decisions in chapter four, one of the matters analysed is the number of cases where the high-level rule COBS 2.1.1(1)R – acting in the client's best interests - has been considered.

3.5 Conclusion

When considering the tensions and the impact of 'hard' and 'soft' law on FOS decisions, the following conclusions are reached:

[106] As at the end of January 2022, no such case had been heard by the courts.
[107] [2005] UKHL 58
[108] Para 21

- The ombudsman has wide latitude in reaching his decision, however this is not an anomalous concept; not only do the legislation and rules that underpin the FOS confirm this approach, the principle is similar to that of equity used by the courts.
- When considering disputes, the FOS can take into account both legal precedent – referred to in this research as 'hard-letter law'; and, regulators' rules and regulations referred to in this research as 'soft-letter law'. It is within the discretion of the ombudsman the extent to which these factors are followed or rejected and this creates tensions, particularly in cases where it is apparent that the ombudsman has departed from what is considered to be established legal precedent in favour of a more equitable decision based on the facts of the case – such as in *IFG (supra).*
- The position above is further exacerbated when the courts interpret the application of soft-law differently to how the FOS have seemingly interpreted it, as seen in the Brooklands and Adams *(supra)* which in turn leads to grey areas.
- While it is clear that the FOS has legitimate (through legislation and rules) latitude in their decision-making process, there are concerns within court cases and journal articles, that this creates a 'penumbral space' which creates uncertainty and therefore risk, to firms within the FOS's jurisdiction.
- Notwithstanding this uncertainty, the number of FOS decisions taken to judicial review are low in relation to the number of ombudsman decisions. The prospects of success for the applicant are low with only 3/11 (27%) being successfully granted[109]. These figures suggest that the FOS decision-making process stands up to legal scrutiny, albeit matched against a narrow scope of review; and, that typically, the losing party of a FOS decision is accepting of the decision.

This, and the previous chapter, have established that the FOS shares common ground with other UK-based ombudsman schemes in the way in which operates. Furthermore, in relation to the flexibility afforded to it in settling disputes on a 'fair and reasonable' basis, this is an established principle which is supported by legislation, rules and case law. The extent to which hard and soft letter law is considered in practice by the ombudsman is examined in the next chapter.

[109] The figure of 27% corroborates the University of Sheffield (Ibid p.30) that also stated a 27% claimant success rate.

Chapter four: A survey of FOS decisions

4.1 Introduction

This chapter contains the data that has been used to answer the primary research questions linked to how often hard and soft letter law is considered and departed from by the ombudsman. The data comprises a survey of 840 FOS decisions between 2014-2020.

The chapter firstly explains the rationale for the sample size and the criteria used when reviewing each decision. While the main focus of the analysis was to consider the application of hard and soft letter law, certain ancillary data was also captured when reviewing each case, particularly linked to the quantum and composition of the redress. Given that 840 decisions were reviewed, coupled with the dearth of such detailed analysis since Judith Summer's research, the opportunity was also taken to comment more broadly on the presentation and detail within the ombudsman's decision. While not directly linked to the research question, given the latitude that the ombudsman has in reaching a decision, the researcher wanted to assess the level of detail provided by the ombudsman to explain the decision. This was deemed indirectly relevant on the basis that, as already established, there are few judicial reviews of ombudsman decisions, and one possible reason could be the amount of detail that goes into the decision notice.

The main content of the chapter is devoted to the presentation of the results. For each of the survey criteria, the data is listed followed by the resultant observations. These in turn feed into the conclusions set out in chapter five.

4.2 The sample size

The sample of 840 cases was based on the following:

- Calendar years 2014 to 2020: the FOS commenced publishing decisions on their website from April 2013, however as this was not a full year of data, 2014 was chosen as the commencement date. This also provides seven years of data to look for any emerging trends.
- FOS category: FOS publish decisions categorised under: A) 'Banking, credit and mortgages; B) 'Investment & Pensions'; C) Insurance (excluding PPI); D) Payment protection insurance (PPI); and, E) Claims Management companies ("CMC's"). Categories A, B and C have been selected to provide a cross-section of different decisions. PPI decisions have been excluded on the basis of the large number of cases and also because they do not necessarily meet the criteria outlined below. CMC decisions have been excluded on the basis that such complaints have only been considered by the FOS since April 2019 when CMCs became regulated by the FCA, therefore only falling within the FOS's jurisdiction from that date forward.
- Sample size: 40 decisions per category (A-C) per year (2014-2020) were selected. Where the number decisions of decisions were higher, for example in the Banking category, this meant the sample size represented a

lower percentage of cases. This is illustrated in the tables that follow. For each category and each year, 20 cases were selected from the March and September decisions, these being typically the two months out of four selected (March, June, September and December) that contained the higher number of cases.

Table 3: Investment and pensions ombudsman decisions for the months March, June, September and December – 2014-2020

Item	2014	%	2015	%	2016	%	2017	%	2018	%	2019	%	2020	%
March	394	25	447	27	355	35	246	30	362	35	317	39	251	31
June	423	27	392	23	225	22	197	24	222	21	162	20	157	19
September	452	29	382	23	247	25	184	22	241	23	143	18	218	27
December	299	19	464	27	180	18	193	24	219	21	179	23	199	23
Total	1568	100	1685	100	1007	100	820	100	1044	100	810	100	825	100

Table 4: Insurance (excluding PPI) ombudsman decisions for the months March, June, September and December – 2014-2020

Item	2014	%	2015	%	2016	%	2017	%	2018	%	2019	%	2020	%
March	596	27	520	20	764	35	575	28	734	35	771	35	709	28
June	453	21	557	21	517	23	550	27	411	20	451	21	580	23
September	663	30	766	29	506	23	497	25	470	23	444	20	666	26
December	496	22	777	30	418	19	394	20	449	22	518	24	577	23
Total	2208	100	2620	100	2205	100	2016	100	2064	100	2184	100	2532	100

Table 5: Banking, credit and mortgages ombudsman decisions for the months March, June, September and December – 2014-2020

Item	2014	%	2015	%	2016	%	2017	%	2018	%	2019	%	2020	%
March	1099	30	1159	22	1260	29	1020	26	1083	31	1145	32	1438	31
June	871	23	1416	27	1023	24	1075	28	807	23	878	24	1128	25
September	936	25	1467	28	1132	26	1012	26	819	23	712	20	1035	23
December	827	22	1188	23	892	21	756	20	818	23	891	24	957	21
Total	3733	100	5230	100	4307	100	3863	100	3527	100	3626	100	4558	100

Table 6: Sample size ratio based on a sample of 20 cases per month (March & September)

Month	FOS category	Sample ratio	FOS category	Sample ratio	FOS category	Sample ratio
March 2014	Investment	1:20	Insurance	1:30	Banking	1:55
Sept 2014	Investment	1:23	Insurance	1:33	Banking	1:47
March 2015	Investment	1:22	Insurance	1:26	Banking	1:58
Sept 2015	Investment	1:19	Insurance	1:38	Banking	1:73
March 2016	Investment	1:18	Insurance	1:38	Banking	1:63
Sept 2016	Investment	1:12	Insurance	1:25	Banking	1:57
March 2017	Investment	1:12	Insurance	1:29	Banking	1:51
Sept 2017	Investment	1:9	Insurance	1:25	Banking	1:51
March 2018	Investment	1:18	Insurance	1:37	Banking	1:54
Sept 2018	Investment	1:12	Insurance	1:24	Banking	1:41
March 2019	Investment	1:16	Insurance	1:39	Banking	1:57
Sept 2019	Investment	1:7	Insurance	1:22	Banking	1:36
March 2020	Investment	1:13	Insurance	1:35	Banking	1:72
Sept 2020	Investment	1:11	Insurance	1:33	Banking	1:52
Average ratio	Investment	1:15	Insurance	1:31	Banking	1:55

- Ratio of cases reviewed: As seen above, the sample size (based on 20 cases per month selected) means the higher percentage applies to investment cases – just under 7% (1:15) of decisions reviewed; next is insurance cases at just over 3% (1:31); and least is banking cases at just under 2% (1:55).

It is contended that notwithstanding the range of sample size ratios, the overall sample of 840 cases produced a broad range of decision outcomes from which conclusions could be derived. Furthermore, while the percentage of banking and

insurance decisions reviewed was less, arguably the range of complaints was a little more predictable – for example, insurance decisions tend to be around claims-handling (typically rejection of claims); and, banking decisions tend to be related to service/charges; Consumer Credit Act 1974 cases (whether a purchase made on credit is caught by the protections afforded by the Act); and, whether too much short term, high-cost credit (often referred to as 'pay-day loans') was made available to borrowers. When looking at examples of such cases later, in reaching a decision, it will be seen that in these types of cases, the Ombudsman tends to follow a formulaic approach. Investment cases on the other hand tend to provide a greater range of complaint subject matter and in general terms the more challenging decision-making process. It is also the case that investment cases typically involve higher claims, as outlined in the survey criteria, outlined below.

4.3 The survey criteria

Given the focus of this paper on the extent to which the FOS follow or depart from established legal principles when reaching their decisions, the survey criteria focus on cases where the a 'duty of care' argument has been advanced as part of the complaint or decision process; common law has been departed from; or, where regulatory rules and/or guidance has been included within the decision. Additional factors and observations relating to each decision have been included in order to inform the data analysis. The full criteria parameters are outlined below.

4.3.1 The decision

This records one of three possible decision outcomes, namely whether the complaint has been upheld; partly upheld; or rejected. Given the FOS acts as an alternative dispute resolution service with flexibility as to how to settle disputes fairly and reasonably, the author was particularly interested to observe how often partial redress was considered, whether this be based on contributory negligence or through a money award comprising a distress and inconvenience payment[110].

4.3.2 Distress and inconvenience payments

The survey sought to test how often a 'D&I' payment was awarded. Anecdotally and prior to this research, the view was that such a payment was widely awarded by the FOS. A reason for including this as part of the survey criteria was that the FOS have been criticised for the backlog of cases awaiting either initial adjudication or ombudsman decision. Indeed, during the period of this research[111] the FOS Chief Executive and Chief Ombudsman, Caroline Wayman, stood-down[112]. At the time,

[110] DISP 3.7.2(4)R

[111] April 2019 to September 2021

[112] This was confirmed via a press-release dated 10 March 2021 published the FOS website at: <https://www.financial-ombudsman.org.uk/news-events/caroline-wayman-to-step-down-as-chief-ombudsman-and-chief-executive-at-the-financial-ombudsman-service> accessed on 13 June 2021.

according to an article in Money Marketing[113], the FOS had 158,000 cases outstanding. While not the main focus of this research, it soon became clear that D&I payments were widely used as part of the redress, therefore the author was keen to explore whether, in the case of pure D&I awards, disproportionate time was allocated by the FOS to these types of 'low-value' cases[114]; and, whether some form of 'fast-track' process could alleviate the pressure on caseloads.

4.3.3 Award quantum

The limit applying to FOS awards has increased over the years to the current maximum award of £355,000[115]. For much of the period surveyed, the award limit was £150,000 – this applied to complaints referred to the FOS prior to 1 April 2019. The criterion applied to this section of the research was to note any awards at or above £50,000. This figure was chosen on the basis that it was a significant sum for a respondent to bear, even where professional indemnity insurance ("PII") is in place, on the basis that excess amounts can often be high – anecdotally, £10,000 - £25,000 is not unusual. This is in part based on the researcher's interaction with firms where such excess limits are commonplace; and, a 'Dear CEO' letter issued by the FCA dated 21 January 2020 to financial advisers which stated (in relation to PII) *"Some firms have excesses on claims which are at such a level as to render the cover materially ineffective"*[116]. Consequently, a run of upheld complaints can be financially catastrophic if the excess applies to each individual complaint. Therefore, the research aimed to consider how widespread significant money awards were.

4.3.4 Duty of care

As already established, the FOS is required to consider what is fair and reasonable in the circumstances of the complaint. Judicial review supports the FOS in departing from legal precedents – this is examined more fully in the next criterion. However, the researcher was keen to examine how frequent the general legal concept of a duty of care was raised within the decision process. The reference point for 'duty of care' is *Caparo Industries v Dickman*[117] involving an appeal by a firm of accountants against a judgment that they were liable to shareholders for a negligent misstatement, even though the report containing the statement had not been prepared for the shareholders. The House of Lords upheld the appeal stating the accountants owed no duty to the shareholders or potential investors, in so doing

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[113] Esnerova D, FOS chief quits amid growing complaints backlog, *Money Marketing (online)*, (March 2021, EMAP Publishing, London), published on the Money Marketing website at: <https://www.moneymarketing.co.uk/news/fos-chief-quits-over-growing-complaints-backlog/>

[114] Typically, D&I payments are low hundreds of pounds

[115] For complaints referred on or after 1 April 2020 about acts or omissions by firms on or after 1 April 2019

[116] The link to the Dear CEO letter can be found at: <https://www.fca.org.uk/publication/correspondence/portfolio-strategy-letter-for-financial-advisers.pdf> (Accessed on 23 June 2021)

[117] [1990] 2 AC 605

establishing the three-stage test for a duty of care requiring the presence of three factors:

1. Sufficient proximity of relationship between the parties;
2. The harm arising would be foreseeable; and,
3. The court deciding that it was fair, just and reasonable to impose a duty of care.[118]

While the 'three-stage' test has stood the test of time – it is still good law – the test is not an exact science. In *Michael v Chief Constable of South Wales Police*[119], a case involving the duty of care owed to a victim of domestic abuse. In relation to applicability of the Caparo 'three-stage test' and reference to Lord Bridge's comments, Lord Toulson observed:

"[T]he concepts both of "proximity" and "fairness" were not susceptible of any definition which would make them useful as practical tests, but were little more than labels to attach to features of situations which the law recognised as giving rise to a duty of care."[120]

Highlighting how these terms can be challenging for the courts to apply in practice, in *Manchester Building Society v Grant Thornton*[121] the Supreme Court overturned a Court of Appeal decision in relation to negligent advice from the accountancy firm that caused the building society to incur financial losses. Much of the case centred on whether the accountants had provided advice or information, however once 'advice' was deemed to have been provided, the duty of care principles per Caparo were applied in narrowing liability to foreseeable risks related to the advice provided. In so doing Lord Leggatt[122] considered Lord Bridge's observation in Caparo that:

"It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless".[123]

It was not a straightforward task in the Manchester Building Society case to identify the matter for which the duty of care was owed as this involved complex financial transactions involving interest rate swap contracts as a hedge against borrowing funds to finance mortgage lending.

While many FOS decisions involve two parties, for example complainant A and respondent insurance company B, not all complaints are binary in that A simply

[118] These factors were considered and summarised by Lord Bridge and Lord Roskill; and summarised by Lord Oliver at para 633
[119] [2015] UKSC 2
[120] At para 106
[121] [2021] UKSC 20
[122] At para 78
[123] This reference from Caparo Industries v Dickman *supra* at para 627

complains about a direct negligence of B. It can also be that A alleges loss is as a result of something done by C – for example, fraudulent activity of a fund manager recommended by B (per *R (IFG Financial Services) v FOS supra*); or, that A complains that additional financial loss or inconvenience was incurred due to B's actions – for example, additional costs charged by C due to poor handling of a travel insurance claim.

Therefore, when looking at the decision letter, it was reviewed to see, if either the legal concepts of a duty of care and/or causation has been explicitly considered. This could be because the complainant alleges a duty of care existed and was breached; and/or, because the FOS decide a duty of care was established; and/or, because causation was considered - this could be because the respondent argues the chain of causation has been broken or the ombudsman argues that 'but for' the respondent's actions, the loss would not have occurred. It is accepted that arguably a breach of duty of care lies at the heart of all or most of the FOS decisions on the basis that but for something going wrong, due to a lack of care along the lines of the FCA's Principle "*A firm must conduct its business with due skill, care and diligence"*[124] the complainant would not be complaining. However, sometimes the concept of duty of care/causation is explicitly incorporated into a decision outcome, hence the researcher was interested to see how often this was the case and the ombudsman's conclusion when considered.

4.3.5 Legal precedent

When reviewing the decisions, the research looked to examine the extent to which legal precedent was an explicit factor in the ombudsman's decision. Such instances are typically where the respondent has introduced a particular legal case to justify why a complaint should not be upheld against them. Consequently, where either legislation and/or specific case law forms part of the decision, the context and outcome was reviewed. In terms of the raw data, this simply records whether or not legislation and/or case law has been cited, however additional notes within the data sheet indicate the context, and therefore examples for inclusion in this paper. In particular, the research was interested to record instances where, having been introduced as a consideration, the ombudsman then chose to reject the legal precedent flowing from the case.

4.3.6 Regulatory rules and guidance

Also referred to as 'soft letter' law in chapter three, as regulatory rules and guidance falls within the ombudsman's purview when applying decisions, the researcher wanted to examine how frequently such rules and/or guidance was explicitly referred to (either by the ombudsman, complainant or respondent). From this data it could then be analysed whether or not the rules or guidance had been followed or rejected by the ombudsman. While the raw data simply records reference to rules or guidance (usually the FCA Handbook, however could be

[124] PRIN 2.1.1(2)R

reference to prior regulatory reviews or codes of practice), where reference has been cited additional notes within the data sheet indicate the context, and therefore examples for inclusion in this paper. Any reference to DISP rules has been excluded from the data; often, the ombudsman will refer to DISP rules when setting the approach to the FOS's process for considering complaints. For the purposes of this research, only regulatory rules and guidance in relation to the decision whether to uphold or reject the complaint has been considered.

4.4 The results

This section looks at the results of analysing 840 FOS decisions over the calendar years 2014 to 2020. The high-level data is first shown, followed by observations and examples for each of the criteria reviewed.

4.4.1 Overview

The table below shows the results based on the criteria explained in section 3.

Table 7: Overview of results based on the total sample of 840 FOS decisions reviewed – number of cases and percentage for the all categories and per individual category.

Item	All categories	%	Investment	%	Insurance	%	Banking	%
Fully upheld	230	27%	91	33%	77	27%	62	22%
Partially upheld	70	8%	23	8%	24	9%	23	8%
Not upheld	540	65%	166	59%	179	64%	195	70%
TOTAL	840	100%	280	100%	280	100%	280	100%
(See Note 1)								
D&I award	176	21%	68	24%	66	24%	42	15%
D&I only	84	10%	23	8%	32	11%	29	10%
(See Note 2)								
Award > £50k	20	100%	20	100%	0	0%	0	0%
(See Note 3)								
Duty of care cited	5	100%	4	80%	0	0%	1	20%
(See Note 4)								
Legal precedent	8	100%	7	88%%	0	0%	1	12%
(See Note 5)								
Rules/guidance	20	100%	11	55%	1	5%	8	40%
(See Note 6)								

Notes:

1. The uphold rates are based on the number of cases that have been not upheld; fully upheld; or, partially upheld, each as a percentage of the data size, hence 840 cases for all categories and 280 for each of the investment, insurance and banking categories.
2. The Distress and Inconvenience ("D&I") award records firstly where a D&I formed part of the FOS award; and, secondly of these cases, where the D&I was the sole award. As with (1) above, the percentages are based on the number relative to the whole data universe of 840 decisions and 280 for each of the categories.
3. In relation to the award quantum, this identifies the total number of awards in excess of £50k; and, of that population, how many are present in each of the individual categories.
4. In relation to Duty of Care, this identifies the total number of decisions where duty of care was explicitly referenced within the decision (regardless of outcome); and, of that population, how many are present in each of the individual categories.
5. In relation to Legal Precedent, this identifies the total number of decisions where case law was explicitly referenced within the decision (regardless of outcome and by whom); and, of that population, how many are present in each of the individual categories.

6. In relation to Rules and Guidance, this identifies the total number of decisions where regulatory rules and/or guidance was explicitly referenced within the decision (regardless of outcome and by whom); and, of that population, how many are present in each of the individual categories.

4.4.2 The decision

This section considers the data and observations in relation to the FOS decisions reviewed.

4.4.2.1 Data

The uphold rate across the 840 decisions reviewed was 35%. Unsurprisingly, the decision data is broadly in line with the published data from the FOS who publish complaints data annually. For the 12-months 1 April 2020 to 31 March 2021 the overall uphold rate, excluding PPI, was 40%[125] (31% including PPI). This compares with overall uphold rates (including PPI) of 32% for the 2019/20 data year and 28% for the 2018/19 data year[126]. The FOS-issued data includes uphold rates from both cases settled at the initial adjudication phase, as well as those referred to the ombudsman where at least one of the parties disagrees with the initial adjudication. While not specifically recorded in the research data on the basis this was not included in the original criteria, when reviewing the decisions, it was unusual to see instances of the ombudsman overruling an initial adjudication. Within the review of the 840 decisions, only two instances were noted. Therefore, the correlation between the research data and the FOS data is expected, on the basis that ombudsman decisions typically preserve the initial decision meaning that uphold rates are largely undisturbed by the ombudsman decision.

Within the research date, the largest percentage uphold rate of 41% applies to investment-based complaints, with 33% fully upheld and 8% partially upheld. In comparison, 36% insurance complaints were upheld and 30% of banking cases. The percentage of partially upheld decisions was broadly similar across the three categories.

4.4.2.2 Observations

Decisions are presented clearly and comprehensively; and, tend to follow a broadly consistent format insofar the sections covered include:

- A summary of the complaint.
- The background including the status of the complaint (i.e., who has initially accepted/rejected the initial complaint).
- A summary of the FOS investigator's findings.

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[125] FOS Annual complaints data and insight 2020/21 published on the FOS website at <https://www.financial-ombudsman.org.uk/data-insight/annual-complaints-data> accessed 24 June 2021

[126] Annual complaints data 2019/20 spreadsheet downloaded on 24 June 2021 from the FOS 'Data and insight' section of the website.

- As applicable, the parties' submissions to the FOS in relation to the initial findings.
- The Ombudsman's findings – for more complex cases, this is often itemised dealing with certain facets of the complaint individually. It is in this section where the Ombudsman may consider the applicability of case law and regulatory rules/guidance.
- Whether or not the complaint is upheld and the rationale for this.
- Where a complaint is upheld, what the respondent firm should do to put matters right. In the case of a money award, the basis of how the compensation should be calculated is set out. In some cases, this will include a number of steps; whereas, in other cases, the redress will be restricted to a distress and inconvenience payment.
- A record of the Ombudsman's final decision and the date by which the complainant must accept or reject the decision.

An example of this format, in simple form, is outlined below, which is typical of a straightforward, non-complex ombudsman decision.

DRN9633561:
This is an insurance decision from March 2020 involving a complaint about the handing of a claim under the emergency section of a home insurance policy. Representations were made from both the complainant and the respondent – in this case the respondent had already admitted some liability linked to the handling of the claim, resulting in redress payments being made, however the complainant was looking for more compensation.

The background section set out the sequence of events, involving a broken radiator, from the perspective of both parties. This included the costs of repair and details of what the respondent claims handler had already agreed to pay and why the claimants felt this was not enough. The FOS adjudicator did not uphold the complaint. When considering the complaint, the ombudsman considered photographic evidence as well as considering the timings of the repairs. The ombudsman considered that neither the photographic evidence or the timings of the repairs were sufficient to deviate from the original adjudication and the complaint was not upheld, based on the fact that the steps the respondent had already taken in providing some redress was adequate. The reasons for this decision were clearly set out by the ombudsman. The decision is five pages long.

By contrast, DRN5702536 which is an investment decision involving whether a personal pension provider was liable to the scheme member in relation to a failed investment, extends to 44 pages. This is a complex case involving additional parties, legal precedents raised by the respondent and the extent to which the respondent's actions may have caused the complainant's loss. While the decision format followed the same broad format as referred to previously, here the Ombudsman has devoted sections to particular matters linked to the complaint, for example, the role of the various parties involved; previous

regulatory guidance and reviews; and, various marketing material issued from the various parties that the complainant may have relied on.

In the above examples, while respectively the complainant and respondent will have been disappointed by the ombudsman decision, it is contended that the reasons for the decision will have been clear to the recipients. In both cases, in addition to the submissions from the parties, the ombudsman has taken account of evidence – respectively photographs and documents. Furthermore, the two examples illustrate a proportionate approach to the complexity of the complaint – on the one hand damage caused by a leaking radiator where the claim was around £2,000; and, on the other hand a claim involving multiple parties and the loss of a pension fund worth tens of thousands (the precise amount has not been stipulated in the decision letter).

While the format of how decisions are presented may be consistent, the uphold-rates across the three categories is not, with a higher uphold rate in investment-linked complaints. This is because investment cases tend to be more complex, often examining the respondent's role in detail in relation to how potentially subjective matters such as assessing the complainant's 'attitude to risk'[127]; or, whether, notwithstanding the respondent firm was not directly responsible for the loss, their involvement in a chain of events was sufficient to be held liable. An example of such a decision is outlined below.

DRN3803801:
This is an investment decision from March 2019 involving a complaint about unsuitable advice to transfer pension benefits and then invest these into a high-risk overseas property scheme. The complainant alleged that she did not understand the risk involved in the transaction. The respondent claimed that while it advised that the transfer of pension benefits should proceed, it had no involvement with the subsequent investment in the property scheme; and, furthermore the complainant was an experienced investor with prior property experience. In considering the conflicting opening positions of the respondent and complainant, the ombudsman has stated:

"I would firstly confirm that I do not give [the complainant's] submissions any greater weight than [the respondents]. I consider all the evidence, including the submissions that have been made by both parties to decide what is a fair and reasonable outcome in the circumstances." [128]

The ombudsman concluded that while the complainant did have property development experience in the UK, the complainant would have had less awareness about investing most of their pension fund into an overseas property

[127] This process typically involves the respondent firm asking questions of the customer (now the complainant) to discover the level of risk the customer is prepared to take in relation to a proposed transaction or investment. This will include factors such as the customer's capacity for loss; or, the level of volatility they are prepared to accept.
[128] Page 2 of the decision

venture. The ombudsman also concluded that while the respondent's actions did not directly cause the loss – this was due to alleged fraudulent activity by the developer – through the initial provision of unsuitable advice, the respondent's actions did ultimately result in the loss being suffered.

The above is an example of a complex decision which required the FOS to consider a number of moving parts, including but not restricted to: recollections of the parties (sometimes from a number of years past); subjective matters such as whether or not a complainant's risk profile was properly assessed or what their state of knowledge was in relation to the proposed transaction; and, the role of other parties, some of which are outside the regulatory perimeter. Reflecting the outcome of *R (IFG Financial Services) v FOS*[129] which involved unforeseen fraudulent activities of a fund manager *(supra)* the FOS followed a similar path in the above example when considering the respondent's liability:

"But in assessing fair compensation, I'm not limited to the position a court might take. It may be there has been a break in the "chain of causation". That might mean it wouldn't be fair to say that all of the losses suffered flowed from the unsuitable advice. That will depend on the particular circumstances of the case. No liability will arise for an adviser who has given suitable advice even if fraud later takes place. But the position is different where the consumer wouldn't have been in the investment in the first place without the unsuitable advice. In that situation, it may be fair to assess compensation on our usual basis – aiming to put the consumers in the position they would have been in if they'd been given suitable advice."[130]

As will be examined more in the section below dealing with regulator's rules and guidance, often in investment cases, the ombudsman's decision involves an element of interpretation of rules and guidance – in the above example, the ombudsman concluded that the respondent had not met the FCA's Principles 2 and 6, these being:

Principle 2: Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.

Principle 6: Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly.

"I do not believe that [the respondent] met its obligations under the principles to simply arrange the transfer of pension benefits and administer the investment on an execution only basis. It should have been aware that there were very extensive risks inherent in this which [the complainant] was likely not aware of. To simply process the transaction aware of this information and where it was clear that [the complainant] did not have the wherewithal to likely appreciate all the risks herself

[129] [2005] EWHC 1153 (Admin)
[130] Page 11 of DRN3803801

was not acting in its customer's best interest. I do not believe it could ignore these risks and carry out the transaction on an execution only basis."[131]

When considering and applying some of these more subjective matters, different outcomes can arise in seemingly similar circumstances. In a recent 2021 decision,[132] therefore not included in the data sample above, the FOS rejected a complaint in materially similar circumstances on the basis that while the advice to transfer pension benefits in order to invest in the same property scheme as the previous example, the ombudsman was of the view that notwithstanding the deficient advice, the complainant would have proceeded with the investment in any case. This judgment was in part predicated on the fact the complainant had property experience and therefore was aware of the risks.

The comparison between these two cases highlights the fine margins that the FOS work to in deciding the outcome of the disputes they are investigating. When looking at the two previous examples, it seems the decision hinged on one complainant having had prior exposure to property-related investments; and, the other having had a property-related job. The latter was deemed more definitive that the former in deciding to reject the complaint. Furthermore, the unsuccessful complainant had already placed a small non-refundable deposit to secure access to the (now failed) property scheme.

In the researcher's experience these fine margins can be a source of consternation amongst respondent firms who see similar cases decided differently by the ombudsman. Previous academic commentary has expressed concern about uncertainty in ombudsman decisions, for example MacNeil in his 2007 analysis[133] opined that:

"The discretion permitted by the "fair and reasonable" standard must be balanced by a degree of legal certainty and foreseeability to protect […] from arbitrary decisions. A decision based on a principle or rule that did not make foreseeable the required standard of conduct would be capable of challenge through judicial review"[134]

It is contended that even where there are similarities between cases, the ombudsman adequately states the rationale for why such cases may be decided differently, such as the extent to which a complainant may have proceeded with an investment decision regardless of any shortcomings on the part of the respondent. These fine lines introduce subjectivity and uncertainty which requires careful articulation on the part of the ombudsman in order to explain the rationale for the decision. However, even if a well-crafted rationale for an ombudsman decision is present, it does not obviate the inherent uncertainty of how a dispute may be settled by the FOS. Summer advocated strict application of the law on FOS

[131] Page 10 of the decision
[132] DRN3835068
[133] Ibid p.11
[134] MacNeil, p.520

decisions on the basis that *"an outcome is not predictable if it is dependent on the whim of the FOS [or where it has] changed its approach in a particular area".*[135] Summer's research focused on the insurance sector and predated the introduction of legislation linked to insurance disclosure – the impact of this legislation is evident, and the this is covered next.

Insurance and banking cases are more straightforward, not only because the circumstances are simpler, but also because in a number of cases reviewed legislation was followed. This was particularly so in relation to insurance cases where the Consumer Insurance (Disclosure and Representations) Act 2012 ("CIDRA") was an informing piece of legislation, this legislation implementing an approach to disclosure by consumers already adopted by the FOS. Prior to CIDRA, insurance disclosures were governed by s.18 Marine Insurance Act 1906 ("MIA") which stated:

(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.
(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

This meant there was a high hurdle for a consumer to claim on their insurance where a matter had not been disclosed, albeit innocently or because the insured did not know a fact was material. Notwithstanding s.18 MIA, the FOS took a different, softer approach as outlined in the 2009 Law Commission report *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation*[136] at para 2.51:

"[The FOS] effectively divides misrepresentations into three types:
(1) where the consumer acted reasonably (or "innocently"), the FOS requires that the insurer pays the claim;
(2) where the consumer was careless (variously referred to as "negligent" or "inadvertent"), the FOS will provide a proportionate remedy; and
(3) where the consumer acted deliberately or recklessly, the insurer is entitled to avoid the policy."

CIDRA removed the duty for consumers to disclose every material circumstance; instead, in response to questions asked by the insurer the consumer has a duty *"to take reasonable care not to make a misrepresentation to the insurer"*[137]*.* In the event of a misrepresentation, s.5 CIDRA sets out different categories of misrepresentation, namely:

[135] Section 2.4
[136] LawCom Report 319, December 2009
[137] S.2(2) CIDRA

- Deliberate or reckless: where the consumer knew, but did not care the misrepresentation was untrue, misleading or relevant to the insurer; and,
- Careless: a misrepresentation that is not deliberate or reckless.

It is for the insurer to show which category the misrepresentation is; if deliberate or reckless, the insurer may avoid the policy. Consequently, CIDRA effectively codified the approach adopted by the FOS and which is the approach applied within the data sample. Examples of such decisions are outlined below:

DRN1871541:
This September 2017 decision, involving a claim for fire damage on a rental property, had to first consider whether or not the complainant was a consumer for the purposes of the insurance; the respondent argued that the properties were owned by a limited company and rented as a commercial business enterprise. While the matter was inconclusive, the ombudsman decided:

"But even if I were to accept that Mr S was a commercial customer, I don't think he was sophisticated in matters of insurance. Because of this, I've looked at this case based on the principles of good insurance practice that we apply to individual consumers. I've therefore considered whether Mr S took reasonable care not to make a misrepresentation when taking out the policy, in response to clear questions."[138]

The ombudsman in this case decided that the policy should not be avoided for misrepresentation and that the complaint should be upheld.

Conversely, in DRN-1546319 from September 2020 the complaint was rejected on the basis that the complainant had misrepresented that he was the registered owner of the vehicle subject to the claim. The ombudsman directly cited CIDRA in her decision:

"What I have to decide is whether CIS have acted reasonably in avoiding the policy and declining the claim. An insurer may only avoid a policy in certain circumstances. The [CIDRA] says that in order to do so, they must show first of all that there was a "qualifying misrepresentation". To do that, the insurer must show that they asked a clear question, and that the consumer didn't take reasonable care in answering it. […] And so, I think CIS acted reasonably to decline the claim. Under CIDRA a misrepresentation can be deliberate or reckless or careless. CIS haven't shown that it was deliberate or reckless, and so they have treated it as careless and so they must refund the premiums, as they've agreed"[139]

Similarly, within the banking cases, common disputes included: A) whether or not protection under Consumer Credit Act 1975 ("CCA") in relation to credit card

[138] P.1 of the decision
[139] P.2 of the decision

transactions applied[140]; B) disputes linked to vehicle finance (for example, the quality of repairs or liability for damage on vehicles); C) whether or not fee-based bank accounts had been mis-sold; or, D) more recently, disputes about whether short-term lending had been made responsibly. In the case of (B) and (C) the disputes were typically low value and particularly (C) were decided on the facts and sequence of events related to the case. Conversely, (A) and (D) were able to rely on respectively legislation and regulatory rules and guidance (see later in this section). Examples of such decisions are outlined below.

DRN6936498:
This complaint from September 2016, subject to s.75 CCA, involved the complainant purchasing a car from a garage which he did not realise was damaged until later on. Having taken contradictory evidence from both the complainant and the garage involved, the ombudsman rejected the complaint on the basis:

"While it is useful for the photos showing the damage to have been taken by the main dealer, it would have been helpful if Mr C had arranged for photos to be taken as soon as he discovered the damage and/or as soon as the car was returned to him with, as he says, unsatisfactory repairs by G. Without such photos, I am left with the conflicting evidence of Mr C and G. Because of this, I am not satisfied that Mr C has established, on the balance of probabilities, that there was a breach of contract or misrepresentation by G for which I can hold Santander liable under section 75."[141]

Similarly, DRN2786224 from March 2018 also involved a case rejected by the ombudsman, this time in relation to a refurbished mobile phone, purchased for £150 using a credit card, which stopped working some eleven months later. Subject to s.75 CCA, the respondent bank offered to reimburse £120 plus the cost of repairs, however the complainant wanted the full initial cost reimbursed. The ombudsman decided that the offer was:

"[A] fair and reasonable response to Mr C's section 75 claim. I'm not persuaded that it would be fair or reasonable in these circumstances for it to refund the full cost of the phone to Mr C. And I'm not persuaded that it would be fair or reasonable for it to reimburse him for the additional costs that he's claimed."[142]

Finally, an example of an 'irresponsible lending' case can be found in the March 2020 decision DRN8632702 where the complainant complained that, in advancing eleven separate loans over three years – the maximum being £500 - the respondent lender had lent irresponsibly, due to the fact the complainant

[140] In short, where a consumer uses a credit card to enter into a transaction for the supply of goods or services and they turn out to be sufficiently deficient or defective to give the consumer a cause of action against the supplier, the credit card provider has a duty to reimburse the consumer and can look for indemnification to the supplier of goods or services.
[141] P.2 of the decision
[142] P.2 of the decision

was already paying back previous loans. The ombudsman was able to apply a structure for determining the complaint that was already in place:

"We've set out our general approach to complaints about short-term lending - including all of the relevant rules, guidance and good industry practice - on our website."[143]

In so doing, the ombudsman upheld the complaint in part by deciding that loans 6-11 had been irresponsibly lent.

In summary, while there still remains a degree of subjectivity for the FOS to apply in banking and insurance cases, arguably it is less than investment cases. The former will often have guiding principles, such as those on responsible lending; or, legislation such as CIDRA where the ombudsman's role is often that of deciding, based on the circumstances, whether a misrepresentation has been and if so, the extent of that misrepresentation. Investment cases are by their nature more complex, possibly with multiple parties and typically larger sums involved, resulting in far more in-depth decisions when compared with the banking and insurance counterparts.

Regardless of the outcome, the decisions were generally comprehensive in detailing the rationale for the decision.

4.4.3 Distress and inconvenience payments

This section considers the data and observations in relation to the distress and inconvenience awards flowing from the cases reviewed.

4.4.3.1 Data

As seen in section 2.2 a payment for distress and inconvenience ("D&I") may be awarded by the FOS. While not a central pillar to this research the researcher was keen to examine how widespread such payments were. Such payments illustrate the range of options that the FOS have at their disposal, ranging from a redress award of up to £355,000 through to a D&I payment of £50; or, both.

The research confirmed that the use of D&I awards is widespread with 58% (176 out of 300) of all upheld cases including a D&I payment. Of the 176 D&I awards, 47% (84 out of 176) were solely D&I awards; or, put another way, 28% of all upheld complaints comprise D&I payments only. The numbers are broadly similar across the investment and bank categories – circa 60% of investment upheld decisions included a D&I award, compared with 65% for insurance decisions. The comparable percentage for banking cases was 49%. The percentage for sole D&I awards was similar across the three categories.

[143] P.1 of the decision

4.4.3.2 Observations

The use of D&I payments is far ranging as can be seen by some of the examples below.

DRN4890053
This case from March 2014 is a typical example of a D&I only redress – here the respondent bank wrongly returned a standing order due to lack of funds. The FOS adjudicator awarded a D&I payment of £100 however the complainant rejected this, claiming they felt a D&I payment of £200 was more appropriate. The ombudsman agreed with the adjudicator and stuck with the original award. This was an example of a case where the error was common ground and the only redress claimed was a D&I payment. A similar example – DRN2480936 from March 2020 – involved a complaint about how the respondent insurance company had handled repairs to a car, specifically the length of time and the poor communication. The respondent insurance company had already offered £50 as a gesture of goodwill and the adjudicator recommended a further £50 should be offered. The complainant still wanted more however this claim was rejected by the ombudsman who agreed the initial adjudication.

"I agree with the investigator that CIS could have done things slightly better. […]. So, I agree that CIS should pay Mr G £50 in compensation for this, in addition to the £50 they have already paid. I see that CIS have agreed to this. I appreciate that the situation was stressful for Mr G, and know that he thinks that this doesn't compensate him as he would like, but it is in line with our other awards for this type of issue and I do think it adequately reflects what CIS did wrong and its impact on him."[144]

DRN2997634 from September 2015 is an example where the complainant has claimed more than simply a D&I payment – in this case the complaint was about the mismanagement of an endowment policy leading to a shortfall in the maturity value. While the main thrust of the complaint was rejected by the adjudicator, they did award a £500 D&I payment in recognition of poor service by the respondent insurance company. The complainant did not agree with the main claim being rejected; and, the respondent insurance company felt the D&I award was too high. The ombudsman agreed with the adjudicator. Similarly, in DRN4432494 from March 2020, the complaint was about a default being applied to the complainant's credit card which they claimed adversely affected their credit score; aside from restating their credit card and removing the default notice, the complainant also sought £20,000 compensation for the damage caused to their business. The ombudsman decided that the credit card default had been applied correctly however decided that the respondent credit card company had provided some incorrect advice which caused confusion and therefore awarded a £200 D&I payment.

[144] P.2 of the decision

"I understand Mr B says he took no notice of the default notice that was sent, but the implications of non-payment, I think, were clearly stated in it, so that should have prompted Mr B to query the conflicting information he'd received. He didn't do so. I think it was fair and reasonable of NewDay to close his account, despite the incorrect information he was given in December. I do however think that Mr B should be given some compensation for the distress he was caused, and I think £200 is a reasonable amount."[145]

As mentioned in 4.3.2 the FOS has been under pressure to cope with its workloads, with backlogs of cases being cited. Accepting that within the previous section it has been demonstrated that a proportionate approach is taken to producing the decisions – with straightforward cases often dealt with in 3-4 pages – it is contended that there is still a thorough process that the ombudsman needs to go through of reviewing the facts of the case in order to arrive at a decision. While this is the correct approach – all complaints should be dealt with fairly and consistently – it is contended there is an option to consider pure 'D&I' cases (where the D&I payment is the only award recommended) slightly differently. It has already been stated that very rarely does an ombudsman change the initial adjudication therefore if a pure D&I adjudication is challenged it is contended that a fast-track system could be considered. This might be determined by *inter alia:*

A. Whether there is a realistic prospect of other limbs of the claim being overturned – for example, it may be the complainant is seeking far greater redress than merely the D&I payment, however this limb may be frivolous - DRN4432494 above being an example of this, where the £20,000 claim was not considered by the FOS.
B. Having a pre-set scale of D&I awards. Currently, the FOS award D&I payments as they see fit, based on the circumstances of the case. It is contended that this is an arbitrary and subjective approach to measure in money terms the level of distress and inconvenience experienced by a complainant. For example, did the respondent insurance company in DRN2997634 above (£500 D&I award) cause more than twice the distress and inconvenience than the insurance company in DRN4432494 (£200 D&I award); and, why did the ombudsman feel that in DRN4890053 the D&I award should be doubled from £100 to £200 – there was no explanation provided.
C. Where D&I is the only limb of the claim - DRN2480936 above is an example – it is explained to the complainant and respondent that where a D&I award is made based on the fixed scale suggested at B, the prospect of the decision being overruled is low. In essence, this would underline the fact that such a decision is likely to be final and as such may dissuade challenges to these decisions, consequently saving ombudsman time. It is further contended that such an approach would not compromise either the FCA rules within FSMA 2000 – ss 225; or, Schedule 3 'Requirements that a competent authority must be satisfied that the body meets' of the ADR Regulations –

[145] P.3-4 of the decision

the requirements listed include *inter alia* access to the ADR (para 2), expertise independence and impartiality (para 3), conflicts of interest (para 4), transparency (para 5), effectiveness (para 6) and fairness (paras 7-10); or the DISP rules.

In relation to the pre-set award scale proposed at (B) the FOS already work to an informal scale of D&I awards as outlined in their 'Understanding compensation' page of the FOS website, where the following examples are listed:

- *Moderate (less than £500): A customer had to contact you repeatedly to get something quite basic sorted out. For example, their address wasn't updated when it should have been, or paperwork containing their personal information was shared with a third party by mistake. This may have caused the customer frustration and inconvenience.*
- *Substantial (£500 to £2,000): Mistakes made by your business led to a county court judgement being incorrectly registered against your customer, which meant their mortgage application was rejected. This might have caused them considerable embarrassment, upset and inconvenience.*
- *Severe (£2,000 to £5,000): You underpaid your customer's pension for a significant amount of time, meaning they experienced reduced living standards. This is likely to have caused considerable long-term distress and embarrassment.*
- *Extreme (£5,000 or more): Your customer made plans to sell their home and relocate for work and your business decided to withdraw their mortgage offer. But you didn't tell them until it was too late to change their plans, when there was an opportunity to tell them sooner. Given the significant changes they were making personally and professionally, this would have had an extreme and long-term impact on the customer.*[146]

Within the review sample, most D&I awards fell within the 'Moderate' range. When making a D&I award, the descriptions/scale above was not referred to by the ombudsman within the decision. It is contended that this scale, or something similar, could be more readily and formally adopted based on the typical D&I awards made; and, rather than ranges as per the above scale, set amounts are stipulated, for example, a 'moderate' award could be fixed at £250, with fixed amounts for the other categories. While it is accepted that there is a still a degree of subjectivity as to which category of D&I award applies, the use of examples (as above) will make it easier for the FOS to apply the circumstances to the D&I award category.

4.4.4 Award quantum

[146] *Understanding compensation (last updated 13th October 2020)* available at <https://www.financial-ombudsman.org.uk/businesses/resolving-complaint/understanding-compensation> (accessed; 25 July 2021)

This section considers the data and observations in relation to higher monetary awards – here defined as monetary awards of £50,000 or more - within the cases reviewed. As not all decisions include the quantum, only those cases where the award was clearly at this level were included.

4.4.4.1 Data

Out of the 300 upheld cases, 20 (6.7%) cases contained a money award of £50,000 or more; and, all of these were found within the Investment category.

4.4.4.2 Observations

As stated in section 4.3.3 for much of the period reviewed the award limit was £150,000. The FCA proposed an increase to £350,000 for acts or omissions by firms on or after 1 April 2019. The rationale for this hike in the award limit was covered within the FCA's proposal process including Consultation Paper 18/31 and Policy Statement 19/8. Within PS19/8 the FCA estimated that there were around 500 *"high value complaints"*[147] these defined as being complaints with a potential claim of greater than £150,000 (the then limit). The proposals met with resistance from regulated firms (and therefore subject in the main to the compulsory jurisdiction) as summarised by the FCA:

"Most responses on the £350,000 limit proposals came from personal investment firms (PIFs), particularly small independent financial advisers (IFAs), and insurers providing professional indemnity insurance (PII) to these firms. These respondents did not support any increase to the ombudsman service's limit, mainly due to the potential impact on the PII market."[148]

Furthermore, the FCA noted that a common objection related to the application by the FOS of the 'fair and reasonable' test rather than following legal precedent:

"We note respondents' view that the ombudsman service's 'fair and reasonable' standard creates significantly more uncertainty than if the service were to only apply the law. While many respondents made this point, none provided specific evidence of actual complaints, or types of complaints, where this had been the case."[149]

The latter point is examined more fully at section 4.4.6 onwards, however the number of £50,000+ awards was initially deemed to be surprisingly low. However, perhaps it should not be a surprise. Within the FCA's proposals to increase the FOS limit to £350,000 the FCA initially estimated that there were around 2,000 'high value' complaints each year. This figure was originally based on FOS data which stated that for the period between 2013/14 and 2017/18 the average FOS uphold rate was 43% and that the average annual number of complaints resolved was 391,947. The FCA concluded that just over 1% of upheld complaints were likely to

[147] At para 1.28
[148] At para 1.24
[149] At para 1.39

be high-value complaints using their definition[150]. As mentioned previously, within the follow-up Policy Statement the FCA downgraded their estimate from 2,000 high value cases per annum to 500. No explanation was provided by the FCA within PS19/8 for the revised figures. The FCA did acknowledge however that one of the challenges they faced was the *"significant proportion of upheld complaints with money awards [with] unknown compensation values […] because the ombudsman's decision specified the basis or formula for the calculation of compensation, rather than the actual amount"*[151]. The author faced similar challenges.

Even based on the FCA's higher estimate of 2,000 high-value cases per annum, this is only 1.2% (2,000 cases/(391,947 cases p.a. x 0.43 uphold rate)). This review data suggested 6.7% cases equal or greater than £50,000; while a higher percentage than the FCA's higher estimate, the difference is contended to be attributable to:

I. The lower starting point - £50,000 versus £150,000;
II. As this review data only dealt with published decisions, meaning those challenged by one or either of the respondent or complainant, it is perhaps reasonable to expect that higher value cases are more likely to be challenged.

While limited conclusions can be drawn in relation to the post-2019 acts and omissions that attract the higher FOS limit, this data sample does seem to accord with the FCA's assertion that higher value cases do seem to be in minority, meaning the financial sector's fears about a deluge of large claims seems unfounded.

As an aside, and linked to the previous section dealing with D&I awards, of the 20 £50,000+ cases, 13 (65%) also contained a D&I award. It is clear that the quantum of the money award does not impact on the ombudsman's decision to also make a D&I award.

4.4.5 Duty of care

This section considers the data and observations in relation to cases where the concept of a duty of care has been specifically cited by either the respondent and/or complainant.

4.4.5.1 Data

Explicit reference to duty of care was only found in five cases, therefore less than 1% of the sample. Of these five cases, four were within the 'Investment' category of complaints; and, one was within the 'Banking' category. Of the five cases, two were upheld, both these within the Investment category.

[150] The FCA's analysis is contained within CP18/31 at paras 2.16 to 2.21
[151] At para 2.18 of CP18/31

4.4.5.2 Observations

This was a surprising set of data on the basis that the researcher's expectation was that a higher number of cases would specifically cite 'duty of care' as a strand of the complaint. This expectation was based on a) anecdotal evidence where the researcher has seen duty of care raised as limb of complaint previously (often by claims management companies); b) arguably, the concept of applying a duty of care reflects certain of the FSA/FCA principles of acting in clients' bests interests and treating customers fairly (both examined more fully in section 4.4.7); and, c) a hypothesis that a lack of duty of care lies at the heart of most complaints. A summary of the five cases is provided below.

DRN1164432:
This case from September 2014 involved a respondent bank who refused to refund money taken from the complainant company's bank account fraudulently by an employee. The employee was prosecuted however only a small amount of the stolen money was recovered so the company complained to the bank seeking a refund of the stolen monies, which the bank rejected. The FOS upheld the complaint; in its representations to the ombudsman the respondent argued that the complainant had breached its duty of care to a) store the chequebook safely (it had been stored in the back of a works van); b) prevent the forgery; and, c) notify the bank upon discovery of the forged cheques. The ombudsman's response was *"…there are no duties of care to consider here, only contractual duties. The bank has not pointed to any contractual provisions requiring compliance with these duties of care."*[152]

In DRN9097656 from March 2016, involving a failed investment of a pension fund, the respondent adviser raised the issue of causation and foreseeability, arguing that the pension trustees owed a duty of care to the complainant which was breached when they allowed the investment; and, that it was not foreseeable that the complainant was going to invest all of their pension fund (as opposed to a smaller portion). The ombudsman rejected both these arguments. On the matter of causation, the ombudsman opined:

"Even if [the respondent] is right about the obligation on the SIPP [pension] trustees, I don't see that that the chain of causation relating to their advice and the consequences of it was broken. If [the respondent] feel that other parties may be also be liable for the losses suffered, then that's a matter for them. Mr R contracted with [the respondent]. Because of [the respondent's] regulated advice he transferred into the SIPP and invested in [the failed investment].[153]

In relation to foreseeability, this was rejected on the basis that the ombudsman decided there was sufficient evidence that the respondent was possessed of knowledge about the size of the investment.

[152] P.1 of the decision
[153] P.6 of the decision

The aforementioned complaints were upheld, however the three that were rejected by the FOS follow. In DRN5062653, a banking case from September 2016, the married couple complainants complained that the respondent bank breached its duty of care to them by facilitating their entry into a tax scheme via an unsecured loan. The ombudsman disagreed on the basis that the bank merely facilitated the loan – it did not provide advice on the tax scheme, as summarised:

"While the loan agreement does refer to the tax scheme, I don't agree that this means the bank was endorsing the scheme or effectively 'co-branding' with the scheme in such a way to give rise to a wider duty of care to Mr and Mrs K. Nor have I seen evidence of a commercial relationship between NatWest and the scheme operators to suggest a conflict of interest or obligation to provide advice existed."[154]

In DRN3076994 from March 2018, involving a complaint about advice relating to a number of unregulated investments that had failed. In this case, it was the ombudsman who introduced the concept of a duty of care when explaining why the complaint was to be rejected.

"S4's duty to recommend suitable investments to Mr P, or to any customer, and to describe the associated risks, is akin to a duty of care. A duty of care isn't absolute. It's a duty to take reasonable care. The duty will be breached if S4 doesn't take reasonable steps to recommend suitable investments or describe risks. What is reasonable depends on the circumstances, but importantly it means that Mr P is assumed to have the abilities that a reasonable person in his shoes would have. This means that if S4 did enough, for example, to describe risks to a reasonable person who has Mr P's qualities, it will have done enough even if Mr P says he personally didn't understand the risks."[155]

In the above case, the ombudsman concluded that the respondent had taken reasonable care in providing advice. The final 'duty of care' is DRN0670431 from September 2019, also involving a failed investment within a group of complainants' pension funds. Here, the solicitor acting for the complainant alleges a breach of duty of care by the investment adviser. When considering this, the ombudsman took the following approach:

"[The complainant's] solicitor has suggested that I need only decide whether Meese and Associates acted negligently. But I am required to decide what is fair and reasonable in the circumstances. And I am satisfied that to do that here I must not only consider what Meese and Associates should have done, but also what impact those actions would likely have had. So that brings me back to what in my view is the key question – had Meese and Associates given advice, or refused to act, what would have happened? In other words, what is the impact of Meese and Associates failure to give advice, or to refuse to act?"[156]

[154] P.2 of the decision
[155] P.3 of the decision
[156] P.13 of the decision

In this case, the ombudsman decided that the complainant would have invested anyway and therefore was not liable for the loss.

Accepting that ultimately there was a very low sample of cases where the concept of 'duty of care' formed part of the decision, it is interesting to note that in only one case was the concept of duty of care raised by the ombudsman, and here to support the rationale for rejecting the complaint. Where duty of care has been considered by the ombudsman it is contended that the legal principles – as laid out in section 4.3.4 - have been followed. The FOS have followed the chain of causation in DRN9097656 and have not been deflected by the respondent's argument that the pension trustee was responsible – this follows the principle enunciated in *IFG (supra)*. In effect, notwithstanding the pension trustee's potential culpability (which was out of scope of the ombudsman's decision in DRN9097656), but for the poor advice in the first place the loss would not have occurred. This applied the principles enunciated in *Barnett v Chelsea and Kensington Hospital Committee*[157] involving a claim of negligence by a deceased's widow which alleged 'but for' the negligence of the doctor her husband would not have died. In this case, it was held that due to having ingested arsenic the deceased would have died no matter the standard of the treatment, hence the claim of negligence against the hospital was dismissed.

Further evidence of the FOS following legal principles regarding duty of care and causation can be found in DRN0670431 where the ombudsman arguably followed the precedent of *Calvert v William Hill Credit*[158] where the Court of Appeal held that, notwithstanding the bookmaker's breach in failing to adequately restrict a gambler's activities, the gambler's losses would have occurred anyway based on the balance of probabilities he would have gambled elsewhere, as enunciated by May P:

"The claimant's claim does not fail, in our judgment, because his continued gambling with the defendants was his own deliberate act breaking a chain of causation; but because the scope of the defendants' duty of care did not extend to prevent him from gambling, and because the quantification of his loss cannot ignore other gambling losses which the claimant would probably have sustained but for their breach of duty."[159]

In DRN0670431 the ombudsman concluded that the complainant was intent on investing on the doomed investment regardless of the respondent's advice. Within the aforementioned two examples, while the researcher has referred to case law from which the legal principles were arguably drawn by the ombudsman, the cases themselves were not cited. This is unsurprising on the part of the ombudsman given his role as an alternative to the court – there is no reason for legal precedent to be used to support an ombudsman's decision, especially as the ombudsman considers

[157] [1969] 1 QB 428
[158] [2008] EWCA Civ 1427
[159] Para 48

merely what is fair and reasonable in the circumstances of the case. The extent to which legal precedent is introduced into decisions – whether by the ombudsman, or more likely the respondent in defence of a complaint – is considered in the next section.

Overall however, the concluding observation of the application of 'duty of care' in FOS decisions is that such application is low; and, has been sensibly used in the cases where applied. There is one further indirect observation within DRN1164432; here, the ombudsman concluded that the respondent's contractual obligations overrode any suggestion of duty of care (used as a respondent's defence in this case, asserting that the complainant failed in their duty of care). This 'contractual' argument becomes relevant later within section 4.4.7 when considering 'Regulatory rules and guidance' where arguably a counter-argument to this is made by the FOS.

4.4.6 Legal precedent

This section considers the data and observations in relation to cases where legal precedent, usually through case law, has been specifically cited by either the FOS; respondent; and/or; complainant. This was also referred to in 3.1 as 'hard letter' law.

4.4.6.1 Data

Specific reference to legal precedent established within case law was found in eight cases, just under 1% of the sample. Seven of the decisions were within the 'Investment' category of complaints, all of which were upheld; and, one was a banking decision which was not upheld. Four of the investment cases where specific case law was referred to were also large quantum cases, hence it is perhaps unsurprising that the respondents would proffer robust defences that also called on case law. In four decisions where case law has been cited by the respondent, the ombudsman chose not to follow the suggested case law precedent. The table below outlines the eight decisions:

Table 8: Ombudsman decisions that have cited case law, whether followed or not.

DRN ref:	Case	Comment	Precedent followed Y/N?
3305732	*Boylan & Boylan v Barclays*	An investment case from March 2014, involving a poorly performing investment fund which the complainant said was too high risk. *Inter alia* the respondent claimed that the complaint had been made out of time when applying DISP 2.8.2(2)(b)[160]. It was in relation to this argument that the county court case of Boylan was cited. The author has not been able to locate this judgment on Westlaw, LexisLibrary, British and Irish Legal Information Institute (Bailii.org), Judicary.uk or Google-search. The ombudsman has not recited the facts of the case, other than to say:	No

[160] This states the ombudsman cannot consider a complaint where it is referred to the FOS more than three years from the date the complainant became aware (or ought reasonably to have become aware) that they had cause for complaint.

		"I have carefully considered the case law […] but it does not change my view."[161]	
3988191	*Martin v Britannia Life* [2000] Lloyd's Rep PN 412 [1999] 12 WLUK 726	An investment case from March 2017 involving a complaint about unsuitable advice in relation to transferring a pension fund which was subsequently invested into an unregulated investment that failed. The respondent said its advice was restricted to the transfer of the pension, not the subsequent investment. In this case, it is the ombudsman who has cited the case law, here in relation to upholding the complaint on the basis that the respondent could not provide advice on one element without considering the wider context, this based on the following extract from the judgment: *"[A]dvice as to the "merits" of buying or surrendering an "investment" cannot be sensibly be treated as confined to a consideration of the advantages or disadvantages of a particular "investment" as a product, without reference to the wider financial context in which the advice is tendered"*[162]	Yes
4621665	*Rocker v Full Circle Asset Management* [2017] EWHC 2999 QB	An investment case from September 2018 where the complaint related to unsuitable investment advice, particularly that the investments were too high risk compared to the level of investment risk they were prepared to take. The initial FOS adjudication found in favour of the complainant; in response, the respondent cited the Rocker case which also involved litigation linked to an underperforming investment portfolio. While the claim of negligent investment management was successful, the amount of loss was limited by the court to diminution in the value of the investment, rather than the opportunity loss claimed. *"In my judgment, this additional claim for opportunity loss is misconceived. The object of an award of damages for breach of contract and/or breach of duty is to put the claimant in the position he would have been in had the contract been performed and/or had the breach of duty not occurred."*[163] The respondent in this decision argued that gains made elsewhere in the portfolio should be offset against the losses – in the respondent's view, this followed the principles enunciated in the Rocker case. The ombudsman disagreed; without specifically referencing Rocker, the ombudsman stated: *"MMFS don't accept this approach. They say my decision must and can only compensate Mr W for "loss or damage suffered by the complainant"; and this is what I intend the loss calculation will do in relation to the unsuitable investments. MMFS continue to think a calculation should look at the whole portfolio. I don't agree that's the right approach here. I think the calculation will, reasonably allow an assessment of how the relevant portion of Mr W's portfolio would have performed had it been suitably invested."*[164]	No
4851505	*Office of Fair-Trading v Abbey*	A banking case from March 2018 where the complainant, who complained about high bank charges levied by the	Yes

[161] P.3 of the decision
[162] Parker J at para 5.2.5
[163] Morris J at para 310
[164] P.16 of the decision

	National [2009] UKSC 6	respondent bank, cited an unnamed Supreme Court case and a County Court case where bank charges had been refunded. The charge in this case was £15 for rejecting a direct debit of £2.95 for insufficient funds. While not named, it is believed the Supreme Court case referred to was a high-profile judgment that considered whether certain banking charges linked to overdrafts fell within the OFT's remit to challenge these aa being unfair. The Supreme Court held that the charges were contractual and therefore fell outside of the Unfair Terms in Consumer Contracts Regulations 1999 (SI 2083). *"I have formed the conclusion that the Relevant Charges are, as the Banks submit, charges that they require their customers to agree to pay as part of the price or remuneration for the package of services that they agree to supply in exchange."*[165] Within the FOS decision, the ombudsman referred to the adjudicator's initial decision: *"[The adjudicator] explained that the 2009 Supreme Court decision meant that charges couldn't be challenged on the grounds that they're unfair or too high. He also explained that the County Court decision doesn't set a precedent. Finally, our adjudicator said that our service reviewed each case impartially."*[166] In this case, the ombudsman followed the Supreme Court's ruling in rejecting the complaint: *"[The complainant] says that even if the charge has been applied in line with the terms and conditions, it's unfair because it is disproportionate to the amount of the unpaid direct debit. We don't normally look at the fairness of the level of fees charged by financial institutions on accounts. This is because the Supreme Court has said that the amount of any fees can't be challenged only because a customer thinks they are too high."*[167]	
5370939	*British Bankers Association v FSA* [2011] EWHC 999 (Admin)	An investment case from September 2019 where, following the failure of an unregulated investment, the complainant said a FCA-regulated pension scheme administrator should not have accepted his application for a self-invested personal pension through which the investment was made. The complainant alleged that the respondent pension administrator should have undertaken more extensive due diligence on the introducer of the investment. In this case, the ombudsman used the BBA case in support of the application of FCA Principles (Principle 2 – Skill, care and diligence; Principle 3 – Management and control; and, Principle 6 – Treating customers fairly). The BBA case was a judicial review linked to the FSA's stance on Payment Protection Insurance ("PPI") complaints/redress where the FSA referred to its Principles within its policy statement. The BBA argued *inter alia* that the FSA were treating high level principles as giving rise to obligations to customers whereas FSMA 2000 specifically stated that Principles did not give	Yes

[165] Lord Phillips at para 89
[166] P.1 of the decision
[167] P.2 of the decision

		rise to actions for damages[168]. In referring to a 'breach' of the Principles by the respondent as part of his decision to uphold the complaint, the ombudsman cited the BBA case, specifically: *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."*[169] And: *"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level Principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."*[170]	
2430050	*Frederick v Positive Solutions* [2018] EWCA Civ 431	An investment case from September 2019 which involved a claim of unsuitable advice. The respondent argued that when providing advice on the failed investment, the adviser was on acting on the respondent's behalf, rather was acting independently. In support of this argument the respondent cited Frederick where the appellant claimed that Positive Solutions was vicariously liable for fraudulent actions perpetrated by an adviser who was an agent of the firm. The Court of Appeal however found that the adviser had been engaged in a *"recognisably independent business"*[171]. Based on the facts of the complaint however, the ombudsman was *"satisfied here that [the adviser] was not engaged in a recognisably independent business of his own. As mentioned, I think he was acting for [the respondent]"*[172].	No
5702536	*Heather Moor & Edgecombe v FOS* [2008] Bus LR 1486; and, *Denning v Greenhalgh* [2017] EWHC 143 QB; and, *Quinn v IG Index* [2018] EWHC 2478	In this investment case from March 2020 the complainant complained that a regulated personal pension provider should not have allowed him to transfer his pension fund into a self-invested personal pension and then make an investment into an unregulated investment that subsequently failed. The respondent cited the three cases opposite in support of why the complaint should not be upheld:	Yes and No

[168] At the time of the judgment the relevant section of FSMA was s.150(2) – this was changed in January 2013 to s.138D(3) FSMA which stated that where FCA (formerly FSA) rules stipulated there was not a right to action for a breach. This is confirmed within the FCA Handbook at PRIN 3.4.4R which states *"A contravention of the rules in PRIN does not give rise to a right of action by a private person under section 138D of the Act (and each of those rules is specified under section 138D(3) of the Act as a provision giving rise to no such right of action)."*

[169] Ouseley J at para 162

[170] Ouseley J at para 77

[171] Flaux LJ at para 74

[172] P.14 of the decision

	British Bankers Association v FSA [2011] EWHC 999 (Admin) *Berkeley Burke Sipp Administration v FOS* [2018] EWHC 2878	*"The investigator hadn't properly set out the legal obligations of a SIPP operator. The case of Heather Moor & Edgecombe v Financial Ombudsman Service [2008] Bus LR 1486 established that, if the Ombudsman Service departs from the relevant law, it must state that it is doing so and explain why. The investigator failed to identify what the relevant law required of [the respondent] at the relevant time"* *"The case of Denning v Greenhalgh [2017] EWHC 143 (QB) illustrated that [the respondent's] obligations as an execution only SIPP operator did not extend to advising on the decision to transfer. In the Denning case, it was held that a second advice firm was not responsible for alerting the complainant to defective advice given by a previous adviser because of the scope of the retainer between the second adviser and the complainant. Similarly, any liability [the respondent] has should be strictly limited to that which arises from the operation and administration of the SIPP and not the investment decisions made by [the complainant]."* *"[The respondent] acknowledged that 2.1.1R of the Conduct of Business Sourcebook (COBS) required [the respondent] to act honestly, fairly and professionally and this applied - but said that it did so only in the provision of the contracted service, which here was an execution-only service. Referencing the case of Quinn v IG Index [2018] EWHC 2478 (Ch), [the respondent] said the duty did not require [the respondent] to go beyond its contractual remit in making extensive enquiries about investments and/or reject certain investments after applying an unspecified yardstick of unsuitable/detrimental quality"*[173]. In response the ombudsman considered each of the cases cited by the respondent; in relation to *Heather Moor & Edgecombe* the ombudsman made clear he was aware of the need to provide reasons for the decision, including where the law is departed from. In relation to the Quinn case, the ombudsman decided the circumstances were different between the two cases: *"I've considered the Quinn v IG Index case that [the respondent] has referred to in connection with COBS 2.1.1R. That case was in relation to a very different factual situation to this one. It was about whether a spread betting operator had treated its customer fairly by allowing him to make a number of trades that he was subsequently unhappy with. The Court held that IG had fulfilled its duty to act in its client's best interests (COBS 2.1.1R) by complying with the COBS 10 duty to assess whether the service/product was appropriate for the client. But COBS 10 isn't applicable here as I don't think the investment in Ethical Forestry met the requirements of being a "Financial Instrument" at the time. And, in the circumstances of this complaint, I don't think [the respondent's] duty to act in its client's best interests can be said to be met simply by accepting business and instructions without further enquiry. I think it was required to do more as I'll explain in detail below [in the decision]"*[174].	

[173] All three passages set out over pages 7-8 of the FOS decision

[174] P.13 of the decision

		In relation to Denning the ombudsman said: *"I agree that [the respondent's] obligations as an execution only SIPP operator did not extend to advising on the decision to transfer. It was not retained by [the complainant] to provide advice. But the fact that [the respondent] itself wasn't required to give advice does not mean that it didn't have to meet its own distinct regulatory obligations by thinking carefully about the business it was accepting […] there were certain regulatory duties that [the respondent] had to meet irrespective of the existence or otherwise of a specific retainer to this effect with [the complainant].* Furthermore, for the same reasons as 5370939 above, the ombudsman cited the BBA case in support of his use of Principles to support upholding the complaint. In addition, in relation to Principle 2 – Skill, care and diligence – the ombudsman cited the Berkeley Burke case: *"Under [section 228 FSMA], it is for the Ombudsman to decide what is fair and reasonable in all the circumstances of the case. Here, [the ombudsman who issued the decision in the case that was the subject of judicial review] paid regard (as DISP 3.6.4R requires him to do) to the relevant regulators' rules, namely Principles 2 and 6. The decision as to how those Principles apply "in all the circumstances of the case" must be a matter for him"* Consequently, within this case, the ombudsman decided to not follow some case law, yet relied on other cases to support its decision to uphold the complaint.	
7289772	*Freeman & Lockyer v Buckhurst Properties* (1964) 2 QB 480; and, *Martin v Britannia Life* [1999] EWHC 852 (Ch); and, *Tenetconnect Services v FOS* [2018] EWHC 459 (Admin); and, *British Bankers Association v FSA* [2001] EWHC 999 (Admin) *WM Morrison Supermarkets v Various Claimants* [2020] UKSC 12	This investment case from September 2020 involved multiple parties and the respondent, on adviser based in Portugal, argued that other parties were responsible for the losses flowing from a series of failed investments. One of these parties ("F") was purported to be an agent of the respondent, something they denied. In deciding whether F was the respondent's agent the ombudsman *inter alia* considered the 'Law of Agency' and 'Apparent (or Ostensible) Authority'[175] and referenced definitions of these from both Bowstead & Reynolds on Agency (21st Ed) and the Freeman & Lockyer case. They decided F was an agent and therefore the complaint against the respondent could be considered. The respondent submitted as part of its argument the 'Morrisons' case where the Supreme Court held that appellant employer was not vicariously liable for an employee's dishonest misuse of data. The ombudsman however rejected this argument on the basis that the respondent had claimed from the outset that F was not its agent: *"[I]t seems to be accepting something which it has previously argued against i.e. that Mr F was its agent, I don't find the facts and circumstances of the particular Supreme Court judgement it quotes to be telling in the matter I'm considering"[176].* The ombudsman then considered the Martin and Tentconnect cases to support the following argument:	Yes

[175] Pages 10-12 of the FOS decision
[176] P.20 of the decision

		"But, even if [the respondent] didn't give its actual authority for Mr F to conduct these matters (and only intended him to be carrying on pension business), there's well established case law that if there's one act that was authorised by the principal, we may be able to look at other acts linked to it."[177] The Martin case supported the same argument as decision 3988191 above; the Tenetconnect case, which followed the judgment in Martin, concerned whether the FOS could hold the Principal firm liable for fraudulent activity by one of its appointed representatives. The court decided it could: *"In my judgment, the same analysis which persuaded the Ombudsman and me that the activities were so closely linked that they amounted to "regulated" activities, impels the conclusion that they come within s.39(3). […] The fact that Dhanda's [the appointed representative] acts were fraudulent does not take them outside the scope of statute. Fraud in the course of giving "regulated" advice comes within s.39(3), for the reasons given in Ovcharenko, but with added force precisely because it concerns fraud."*[178] Finally, as covered above, the ombudsman used the BBA case as justification as to why he could consider whether the respondent had breached the FCA's Principles (2, 3 and 6): *"So, the Principles are relevant and form part of the regulatory framework that existed at the relevant time. They provide the overarching framework for regulation and must always be complied with by regulated firms like [the respondent]. As such, I need to have regard to them in deciding this case."* [179]	

4.4.6.2 Observations

An initial hypothesis of the researcher was that by not following legal precedent the FOS was potentially reaching unfair conclusions against (in particular) respondent firms. It was a surprise therefore that within the sample of 840 decisions, only eight – less than 1% - specifically quoted case law. Based on anecdotal evidence in dealing with respondents and/or their legal advisers that case law was often included either at the initiation of the respondent or the FOS, the researcher expected a higher number. A further surprise was that case law was only cited by the respondent in four cases. This is perhaps in recognition by the respondent that the FOS is not bound to follow legal precedent, this of itself established as a legal precedent in *Heather Moor (supra)* which confirmed the ombudsman was *"free to depart from the relevant law"*[180]; Lord Rix further confirmed the ombudsman was:

[177] P.21 of the decision
[178] Ousely J at para 64
[179] P.23 of the FOS decision
[180] Rix LJ at para 49

"[D]ealing with complaints, and not legal causes of action, within a particular regulatory setting. Rather, he is obliged ("will") to take relevant law, among other defined matters, into account."[181]

When comparing the data in this section with Summer's research, the results are perhaps less of a surprise. While Summer advocated the FOS applying the law to decisions, Summer's research concluded that the FOS mentioned little case law and rarely followed legal precedent[182]. There is a difference between Summer's research and this insofar that Summer's research focused on insurance cases and predated the legislation on insurance related disclosure whereas this research also looked at the banking and investment sectors.

It was observed in chapter three that there had been surprisingly few (eleven) judicial reviews since 2014 of which the majority (eight) were unsuccessful challenges to the FOS decisions. Consequently, it appears that case law and the FOS rarely cross and suggests therefore that the majority of FOS decisions simply consider the facts of the case. Given the FOS role as an alternative dispute resolution service and an alternative to court, it is contended that the vast majority of complainants and respondents enter the service on this basis, rather than treating it as a legal process to be argued based on legal precedent established through case law.

Where the FOS have introduced case law it is to reinforce an overarching point, rather than to say in this specific case X happened and the circumstances are materially similar here, hence X should also apply to this complaint. For example, in DRN4851505 (the sole Banking case) the FOS cited the OFT v Abbey National case to highlight that the complainant did not have a case and therefore the complaint could not be upheld. Unlike certain of the other cases cited, this case was a wide-ranging case as it went to the heart of clarifying Government policy on unfair contract terms linked to the personal banking sector. In DRN7289772, the ombudsman used case law to explain his interpretation and application of law of agency – again, it is contended that the use of case law in this decision is to illustrate a specific overarching point of how agency works, which then reinforces other matters considered by the ombudsman specific to the case. Elsewhere, the FOS have used case law, such as the British Bankers Association case to underpin why, in this example, Principles can be considered as a factor for the ombudsman to consider when applying all that is fair and reasonable to the decision.

Conversely, and admittedly based on a small sample of four decisions, it is contended that respondents tend to apply the outcome X flowing from a specific case to support the notion that X should also apply to the FOS decision as the facts of the complaint are materially similar to the case. For example, in DRN4621665 and DRN2430050 the respondent sought to apply the outcome of the *Rocker* and *Frederick* cases respectively to what they argued were similar circumstances to the

[181] At para 80

[182] Representative of conclusions 13 and 14 at page 212

complaint. This approach has proved to be an unsuccessful approach – both in terms of the initial inclusion within the respondent's argument – all four instances where cases were cited by the respondent failed to influence the ombudsman's decision; and, where the respondent has subsequently challenged the FOS decision via judicial review.

A further observation is that the introduction of case law to the decision process is a recent phenomenon with the majority of decisions involving legal precedent occurring in the latter half of the review period – seven of the eight cases are from 2017 onwards. The reasons for this are arguably a) case law develops over time (seven of the cases cited also post-date 2017); and, b) the stakes are higher. To expand the second point, the cases often involve larger claims of financial loss and, based on the author's experience, frequently form part of a number of similar claims (sometimes as part of a multiple complaints raised by claims management companies ("CMCs")). Furthermore, if a respondent's professional indemnity cover is limited, either through exclusions of cover; limited cover; and/or, high excess amounts, the impact of a complaint being upheld can be financially catastrophic to the respondent. Therefore, respondents will seek legal support to defend the complaint and will make a fulsome defence, including case law, to make their point. However, as demonstrated by the figures, this approach as a percentage of all FOS decisions remains negligible at less than 2% in the final three years of the review sample[183] although if the percentage is applied solely to investment cases, the percentage increases to 5% (two decisions out of the annual sample of 40). All of the cases reviewed in this section were subject to the £150,000 award limit. Although large awards (greater than £50,000) were found to be in the minority – see section 4.4.4 - with the FOS determination limit having risen significantly since April 2019, it is speculated that case law may be relied on more in the coming years, particularly where the claim for financial loss is high and the stakes are therefore higher. That said, from this limited analysis, the citing of case law [hard letter law] in order to influence the ombudsman seems a blunt instrument. Furthermore, the FOS has a further tool of 'soft letter' law which is increasingly applied as will be examined in the next section.

4.4.7 Regulatory rules and guidance

This section considers the data and observations in relation to cases where regulatory rules and guidance, usually issued by the FSA/FCA, has been specifically cited by either the FOS; respondent; and/or; complainant. This was also referred to in 3.2 as 'soft letter' law.

4.4.7.1 Data

While arguably FCA rules and regulations are implicit within most FOS decisions (on the basis that all respondents are regulated by the FCA), explicit reference to regulatory rules and guidance was found in 20 cases, therefore 2.4% of the overall

[183] For the years 2018, 2019 and 2020 two decisions cited case law out of the annual sample size of 120 per year, which equates to 1.7% of total decisions.

sample. Of these 20 cases, eleven were within the 'Investment' category of complaints; eight were within the 'Banking' category; and, one was within the 'Insurance' category. Of the 20 cases, 16 were upheld, two were partly upheld and in only two banking cases were the complaints rejected. In terms of fully or partly upheld cases, the use of soft letter law therefore stands at 6% (18 out of 300 cases); or, if applied to investment decisions only, the percentage increases to 9.6% (eleven out of 114 partly/fully upheld decisions). Four of the 20 cases also cited legal precedent/hard letter law (as per 4.3.6 above).

4.4.7.2 Observations

Unsurprisingly, given that respondents are FCA-regulated, the rules and regulations referenced within the decisions are FCA rules and guidance, usually sourced from the FCA Handbook. Below is a sample of decisions and the FCA rules or guidance applied.

DRN5534364:
This banking case from September 2015 is a rare example where it is the complainant who has cited the rules and regulations, this in relation to a payday loan lender – the complainant said he should have been told that taking a payday loan would negatively impact his credit rating. In so doing, the complainant cited an unreferenced part of the FCA's consumer credit sourcebook ("CONC") which stated that in relation to disclosure to a consumer, a lender should be:

"accurate and, in particular, should not emphasise any potential benefits of a product or service without also giving a fair and prominent indication of any relevant risks"

The ombudsman disagreed, concluding that the respondent lender had published sufficient information on its website meaning the complainant was not misled.

CONC was cited by the FOS in a number of other banking (short-term credit/payday lender) cases, particularly in relation to CONC rules that meant lenders were supposed to assess the sustainability of the loan, as was the case in DRN3690797 (September 2017) – here the complainant said that the lender gave him loans that he could not afford to repay. The ombudsman considered CONC, stating:

"[The FCA's] regulations for lenders are set out in its consumer credit sourcebook (generally referred to as "CONC"). These regulations – in CONC 5.3.1(2) - require lenders to take "reasonable steps to assess the customer's ability to meet repayments under a regulated credit agreement in a sustainable manner without the customer incurring financial difficulties or experiencing significant adverse consequences." CONC 5.3.1(7) defines 'sustainable' as being able to make repayments without undue difficulty. And explains that this means borrowers

should be able to make their repayments on time and out of their income and savings without having to borrow to meet these repayments."[184]

Materially the same circumstances and ombudsman commentary in relation to CONC were present in DRN2849009 (March 2019) and DRN2057931 (September 2019). In the latter case the ombudsman not only cited CONC but also cited:

- The FCA's Principles for Business – in particular PRIN 2.1.1R(6) – *A firm must pay due regard to the interests of its customers and treat them fairly.*
- Additional CONC rules to the two cited previously.
- The FCA's 'Dear CEO' letter (an open letter from the FCA to the Chief Executive Officers of 'High-Cost Lenders') – this was dated 6 March 2019 and in short articulated the FCA's view that consumer harm could arise through *"a high volume of relending, which may be symptomatic of unsustainable lending patterns"* and inadequate affordability checks by lenders leading to unaffordable loans.[185]
- An earlier FCA 'Dear CEO' letter dated 15 October 2018 to High-Cost Lenders which illustrated examples of FOS determinations in relation to unaffordable lending; and, reiterated previous regulatory concerns [from 2014] in relation to sustainable lending.[186]

The above examples relate to lending-based rules, particularly relevant to short-term (payday) lending. However, the third of the examples cited goes beyond specific rules and additionally cites high-level rules and guidance through the FCA's Principles and 'Dear CEO' letters. The FOS's use of high-level rules and guidance can also be seen in the following examples.

In an investment case from March 2016 – DRN9097656 – the complaint related to unsuitable advice to invest in an offshore property development that subsequently failed. The respondent adviser stated the complainant invested beyond the limit of its advice and in any event, the complainant was determined to invest in the property no matter what the advice would have been. The FOS upheld the complaint in part based on the 'high-level' rule – COBS 2.1.1(1)R which requires regulated firms to act *"honestly, fairly and professionally in accordance with the best interests of its client"* [also referred to by the FCA as the 'client's best interest rule']. In applying this rule to the respondent, the ombudsman said:

"This is an independent duty on the firm. It can't simply say that the customer had already decided what he wanted to do, so it simply carried out his wishes regardless of whether it was in [the complainant's] best interests. I'm also mindful

[184] Pages 2-3 of the initial determination extract incorporated within the ombudsman's decision

[185] The link to the Dear CEO letter can be found at: <https://www.fca.org.uk/publication/correspondence/portfolio-letter-firms-high-cost-lending.pdf>

[186] A link to the Dear CEO letter can be found at: <https://www.fca.org.uk/publication/correspondence/dear-ceo-affordability-high-cost-short-term-credit-loans.pdf>

of the principles of business and in particular principles 1 (integrity), 2 (due skill, care and diligence), 6 (customers interests) and 9 (reasonable care). [The complainant] said that he was expecting advice from [the respondent] about the suitability of the entire arrangement. And that if it wasn't suitable for him – to say so."[187]

(Materially similar circumstances applied to DRN6678329 (September 2020) although here the FCA's Principles were not referred to, only COBS 10 (specific advice-related rules) and COBS 2.1.1R).

As seen above and within the following examples, the FCA's high-level Principles often accompany the 'client's best interests rule' [COBS 2.1.1(1)R.

- DRN5370939 (September 2019) and DRN5702536 (March 2019) (both covered earlier in 4.4.6.1 (Table 8)) - in upholding complaints that a pension provider acted unfairly in accepting the complainant's application to invest his pension fund into an investment that subsequently failed, the ombudsman cites Principles 2 (Skill, care and diligence), 3 (Management and control) and 6 (Customers' interests); and, COBS 2.1.1(1)R.
- DRN7289772 (September 2020) – also covered at 4.4.6.1 Table 8 – involved a complaint about unsuitable advice where multiple references to the FCA's rules and guidance have been made including *inter alia* the FCA's Perimeter Guidance Manual ("PERG")[188]; Principles 2, 3 and 6; COBS 2.1.1(1)R; and, a checklist for 'pension switching' issued by the then FSA in 2009.

Within the data for this section, only one insurance case was found to have cited rules and guidance, this being DRN5586464 from March 2019. Here, the complaint was about misleading information within a 'key facts' document which resulted in the complainant investing in a property investment scheme that failed. In upholding the complaint, the ombudsman included reference to the FCA's Principle 7 which says *"A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading".*

Within the above examples, it is clear that the rules and guidance followed is typically that issued by the FSA/FCA. In relation to this source of rules and guidance, as discussed at 3.2, rules and guidance followed by the FOS can be broken down into four distinct categories:

1. Specific rules;
2. High-level rules;
3. Formal guidance; and,

[187] P.4 of the decision

[188] PERG provides guidance as to what sorts of activities and investments fall within the FCA's regulatory perimeter.

4. Informal guidance.

Specific rules are FCA/FSA Handbook rules that have a specific application to a product or the way in which a process has to be done. The obvious example from the data above is the application of CONC, this being a 'specialist sourcebook' applying to firms engaged in *"credit-related regulated activities"*[189] which was referred to in seven of the 20 cases. Specific Conduct of Business (COBS) sourcebook rules, which relate to most investment and long-term insurance business, were also cited by the FOS from the in eight cases. Examples of specific rules include:

- DRN9097656 (March 2016) and DRN7289772 (September 2020) which cited COBS 9.2.1 – this rule applies to a firm's obligations in assessing suitability.
- DRN3803801 (March 2019) which cited COBS 19.1 which contains rules specific to advising on transfers of pension benefits.
- DRN6678329 and DRN2558738 (both September 2020) cited COBS 10 which contains rules on assessing (consumer) appropriateness by firms that arrange or deal in higher risk or speculative products.

It is contended that respondent firms can have little argument where the FOS cite specific rules relevant to the specific activity or product that is the subject of complaint. Within the decisions reviewed, where the ombudsman was of the opinion that a specific rule had not been met, this rationale was explained. Furthermore, none of these rules are excluded from a private right of action as conferred by s.138D FSMA 2000. It is further contended therefore that if the ombudsman feels such a specific rule has been breached, which could give rise to civil action through the courts, it is fair and reasonable for the ombudsman to consider, given the specificity and relevance to the complaint.

Arguably, the contentious issue is the ombudsman's use of high-level rules, specifically COBS 2.1.1 – the client's bests interests rule (as covered in the data analysis above). While this rule falls within the FCA's Conduct of Business sourcebook, which forms part of the 'Business Standards' section of the FCA's Handbook, it is contended that the intent of this rules mirrors the FCA (and FSA before) Principle 6 – Customers' interests: A firm must pay due regard to the interests of its customers and treat them fairly. The Principles (PRIN 2.1.1) are contained within the 'High Level Standards' section of the FCA Handbook. Despite the Principles falling as 'rules' PRIN 3.4.4R confirms that:

"A contravention of the rules in PRIN does not give rise to a right of action by a private person under section 138D of the Act (and each of those rules is specified under section 138D(3) of the Act as a provision giving rise to no such right of action)."

[189] CONC 1.1.1(1) – "credit-related activities" are defined by the FCA as *inter alia* lending, credit broking and certain activities related to debt.

It has already been proposed that the ombudsman referencing specific FSA/FCA rules within decisions is entirely reasonable. Furthermore, while the researcher is not questioning whether the FOS can take account of regulatory rules, as it is clear from prior narrative there are no such constraints in what the ombudsman can consider, it is more a question of when and how high-level rules are applied. It is contended that an 'actionable' high-level rule, which replicates a non-actionable rule/Principle, can be and is used by the ombudsman to cover a broad spectrum of scenarios. It is accepted that within the data-sample sole use of COBS 2.1.1 and/or Principles to support a FOS decision was low – merely the three cases identified earlier (DRN5370939, DRN5702536 and DRN7289772). That said, unlike specific rules which apply to specific activities (such as consumer lending or assessing suitability) the use of a high-level rule such as COBS 2.1.1 is more nuanced as arguably it refers to a firm's overall behaviour in fulfilling its obligations to its client. In dealing with its client the firm must act *"honestly, fairly and professionally"*.

In applying COBS 2.1.1, this raises questions of whether and to what extent the rule has been breached by the respondent. For example:

1. Has the firm acted dishonestly?
2. Has the firm acted unfairly?
3. Has the firm acted unprofessionally?
4. Given that the rule applies to the regulated activity undertaken by the firm, does this therefore apply to ancillary services provided by the firm that arguably fall outwith its regulatory permissions?
5. Expanding on (4), does this rule merely apply to the firm's contractual obligations to the client, or does is have a broader application?

In applying COBS 2.1.1 to the three decisions mentioned previously, the FOS have not specifically stated that the respondent firms acted dishonestly, unfairly or unprofessionally, rather in two cases – DRN5370939 and DRN5702536 – taken as a whole the COBS 2.1.1 obligations were not met insofar the respondent pension provider should have undertaken more due diligence than it did before allowing an investment to be purchased with the member's pension fund; and furthermore, should have refused to facilitate the purchase. In both cases, the ombudsman set out in detail the rationale for his decision and within the latter case acknowledged that a court may have arrived at a different decision:

"I note also that the [investment] is currently subject to a criminal investigation by the SFO. On this basis, a court might not require [the respondent] to compensate [the complainant] – notwithstanding its failings. But FSMA requires me to award "fair compensation" and I'm therefore not limited to the position a court might take. And my remit it is to make a decision based on what I think is fair and reasonable in all the circumstances of the case. I consider that [the respondent] failed to put a stop to the transactions when it should have done so, taking into account its regulatory obligations."[190]

[190] P.41 of the FOS decision

The 'regulatory obligations' referred to by the ombudsman reflected a number of actions the respondent could have taken, which the ombudsman concluded in the aggregate, meant the 'client's bests interests' were not met. In both cases, the complainant had lost money through failed investments, so there was a strong case that taken as an overall process, the complainant's interests had not been met. However, as also mentioned in the FOS decision cited above, in each case there were other parties involved, albeit in some cases unregulated entities and therefore outside the FOS's jurisdiction. Consequently, in returning to the five questions above, as a general principle, when applying a high-level rule such as COBS 2.1.1 should the FOS simply apply this to the contractual role, subject to terms and conditions, the respondent has agreed to perform for the client; or, is the FOS justified as a general point of principle to apply high-level rules more broadly? It is accepted that this is a rhetorical question insofar there is nothing to prevent the FOS from applying any high-level rule in any way it pleases as longs as the rationale is not irrational, thus leaving the decision susceptible to a judicial review. Instead, this is a question of considering the challenges of this, particularly for regulated firms; and, whether there is a risk of 'regulation creep' through the reach of COBS 2.1.1 being spread wider than the regulated firm's expectations.

Case law has considered the application of COBS 2.1.1. DRN5702536 *supra* mentioned *Quinn v IG Index*[191] (see also Table 8) where the claimant took action against alleging the defendant spread betting firm breached its statutory duty under COBS 2.1.1R and COBS 10.2.1R in allowing the claimant to place spread bets which led to losses. The first of the rules (COBS 2.1.1R), as already examined, is a high-level rule; and, the second of the rules – 'COBS 10.2.1R Assessing appropriateness' – is deemed to be a specific rule that states *inter alia* that a firm must, prior to providing certain activities, determine whether a client has the necessary experience and knowledge in relation to those activities. The claim failed. In relation to assessing appropriateness, the court decided this specific rule had been met at the outset and did not need to the be revisited[192]. The court also considered the scope of COBS 2.1.1 and, in deciding this leg of the claim also failed, Pelling J stated:

"Notwithstanding the wide language used, in my judgment the obligation imposed by COBS 2.1.1R […] does not impose on an authorised person carrying on designated investment business the duty of preventing a retail client from engaging in an execution only transaction, or execution only transactions, of a class that it has assessed is appropriate for the client concerned. To construe the provision as having such an effect would be to construe it as imposing a duty massively in excess of that which has been recognised at common law and massively in excess of what is the appropriate degree of protection identified in [FSMA]."[193]

[191] [2018] EWHC 2478 Ch
[192] Summarised at para 80 of the judgment however not replicated for the purposes of this thesis
[193] At para 88

As seen in Table 8 above, the FOS considered and rejected this argument in relation to DRN5702536 on the basis the applicability of COBS 2.1.1 was related to how the specific COBS 10 rule was applied by the regulated firm. In DRN5702536 there was no other specific FCA rule cited by the FOS hence arguably a broader application was applied to the overall conduct of the respondent, rather than how it applied a specific rule. In other words, the FOS did not have to justify a COBS 2.1.1 breach through stating a specific FCA rule elsewhere has also been breached, instead simply looked at the overall actions of the firm. Case law has considered the circumstances in which COBS 2.1.1 of itself can be breached. In *Adams v Options Sipp*[194] Dight J considered *inter alia* whether the claimant had a s.138D FSMA claim in relation to a breach of COBS 2.1.1 where, in similar circumstances to DRN5702536, the claimant alleged the defendant pension provider should have prevented him from investing his pension funds into a deficient investment. In relation to the COBS 2.1.1. claim Dight J concluded that the contractual terms were an overriding factor:

"It is, to my mind, obvious that this [the contract] is the correct starting point because it is common ground that not every COBS obligation [...] applies to every authorised firm or every regulated activity. Nor was any provision drawn to my attention at trial to demonstrate that, so far as the COBS duties which I am considering are concerned, the regulatory regime is intended to take precedence over the contractual terms or, insofar as material, that the contractual relationship(s), duties and obligations between the claimant and the defendant are unenforceable."[195]

It should be noted that other elements of this case were successfully appealed by the claimant[196] however the COBS 2.1.1 claim failed on the basis that the claimant was *"seeking to advance a case radically different to that found in his pleadings"*[197]. The court also opined in relation to the COBS 2.2.1 claim that:

"I would add that Mr Adams might anyway have struggled to overcome the Judge's finding that any breach of duty was not causative of loss."[198]

Within his journal article "Interpretation of FCA rules and guidance: the contract triumphs"[199] Kushal Ghandi opined:

"This is yet another decision from the English courts which emphasises the high threshold parties will need to cross in order to succeed in claims against financial institutions. The English courts continue to place significant reliance on the contractual relationship between parties and are not easily persuaded to impose

[194] [2020] EWHC 1229 Ch
[195] At para 150
[196] *Adams v Options SIPP* [2021] EWCA Civ 474
[197] Newey LJ at para 125
[198] Newey LJ at para 126
[199] Comp. & Risk 2020, 9(4), 10-13

duties and obligations by reference to the regulatory framework, particularly where these could be inconsistent with the factual context."[200]

When considering the different approach to COBS 2.1.1 between the FOS and the courts, Kirk QC and Samuels opined in their journal article "Cause for concern"[201]:

"From a lawyer's perspective, the contrast between the FOS approach and the potential complexity of its workload has a number of potential consequences […] it undermines a highly regulated financial services sector. If a firm's legal obligations are one thing, but potential liabilities in the event of FOS complaints are another, risk becomes very difficult to assess."

Consequently, regulated firms subject to the FOS's jurisdiction are arguably left in a challenging position of having to consider the extent to which a COBS 2.1.1 argument could be advanced against their firm, notwithstanding the fact they have performed their contractual obligations to their client in line with the agreed terms and conditions (assuming that the terms and conditions are of themselves not manifestly unreasonable). In effect the firm is having to consider obligations to the client that extends beyond the contractual obligations to whether ultimately the client's best interests have been served. While it is accepted that fair treatment of customers is a fundamental and arguably obvious principle that should apply to all (not just regulated) firms, the question in relation to the FOS is how far that obligation extends. In the Adams case, the pension provider was contractually obligated to administer Adams' pension scheme. Linked to this, the firm made Adams aware of the risks of the investment yet he invested anyway. The court took this into account when rejecting the COBS claim. However, in reaching a settlement in favour of claimant against the same pension provider whose complaint was materially similar to Adams[202], while the court case was referred to in submissions to the FOS, the ombudsman nonetheless found in the complainant's favour. In summary, the ombudsman concluded:

"Taking all of the above into consideration – individually and cumulatively – I think in the circumstances it is fair and reasonable for me to conclude that [the respondent] should not have accepted Mr S's application from [the business introducer] in the first place and certainly should have terminated the transaction before completion. […] I say this having given careful consideration to the Adams v Carey judgment but also bearing in mind that my role is to reach a decision that is fair and reasonable in the circumstances of the case having taken account of all relevant considerations."[203]

It is interesting to note that within the above decision, save for addressing some of comments flowing from the Adams case, the ombudsman did not specifically cite COBS 2.1.1 within his decision. It is speculated that given the specific relevance to

[200] P.13
[201] [2020] 170 NLJ 7899, p13
[202] DRN5472159 published 26 February 2021
[203] P.80 of the decision

COBS 2.1.1 within the Adams case, the ombudsman focused on other specific factual matters rather than categorising these under the COBS 2.1.1 banner. That said, reference to COBS 2.1.1 by the FOS is seemingly increasing as the table below shows:

Table 9: Ombudsman 'Investment and pensions' decisions based on the search term "COBS 2.1.1"

	2014	2015	2016	2017	2018	2019	2020	2021*
Upheld	0	1	27	21	3	28	90	89
Rejected	0	0	2	2	4	8	30	26
Total	0	1	29	23	7	36	120	115

*For the search period 1 January 2021 to 10 October 2021 (date of the search).

The above table is based on searching FOS decisions for each of the years stated using "COBS 2.1.1" as the keyword. It is important to state that while the search facility is reasonably good on the 'Ombudsman decisions' database, not all the individual decisions have been verified to confirm that specifically COBS 2.1.1 was referred to. Rather, 12 cases have been selected – see table below – in order to verify a sample of these cases. 'Investment' cases have only been selected as this has been the main focus of the commentary in this section. Accepting therefore that the figures may not be totally precise, they do nonetheless confirm the hypothesis that the use of COBS by the ombudsman has increased significantly in the past two years, meaning this is potentially significant to regulated firms.

Table 10: Sample review of Ombudsman 'Investment and pensions' decisions based on the search term "COBS 2.1.1" (per table 9). Here, 12 cases representing a 10% sample were reviewed based on 'Relevance'.

DRN Ref:	COBS 2.1.1 mentioned? Y/N	Upheld? Y/N	Comments
2920144	Yes	No	COBS 2.1.1 raised by claimant along with FCA Principles 2, 6 and 7 in relation to share-dealing service offered by the respondent bank.
8404696	Yes	Yes	COBS 2.1.1 and Principles 2, 3 and 6 raised by the ombudsman in relation to poor investment advice.
2676991	Yes	No	COBS 2.1.1 and Principles 2 and 6 raised by the ombudsman in relation to poor service from a peer-to-peer lending platform.
0659907	Yes	No	COBS 2.1.1 and Principles 2, 6 and 7 raised by the ombudsman in relation to poor service and misleading information from a peer-to-peer lending platform.
4810909	No	Yes	Other parts of the COBS rules were cited in regard to a mis-sold investment scheme.
4325114	Yes	Part	COBS 2.1.1 plus other parts of COBS raised by the FOS in partly upholding this complaint in relation to poor service provided by an adviser.
2845317	Yes	No	COBS 2.1.1 and Principles 2, 6 and 7 raised by the ombudsman in relation to poor service and misleading information from a peer-to-peer lending platform.
7222924	No	Yes	Other parts of the COBS rules, including COBS 2.1.2 (restricting liability or duty) and Principles 1, 2, 6, 7 and 9 were cited by the ombudsman in regard to poor financial advice provided by the respondent.
3996071	No	Part	Other parts of COBS specific to the complaint were cited by the ombudsman in relation to part upholding this complaint in relation to poor service provided by a fund manager.

2385302	No	Yes	Another COBS rule was cited in regard to poor financial advice.
5271382	Yes	Yes	COBS 2.1.1 raised by the ombudsman in relation to upholding a complaint about poor communication about fees from a pension provider.
6602955	No	Yes	Another COBS rule was cited in regard to poor financial advice.

Table 11: Sample review of Ombudsman 'Investment and pensions' decisions based on the search term "COBS 2.1.1" (per table 9). Here, 12 cases representing a 10% sample were reviewed based on 'Date'.

DRN Ref:	**COBS 2.1.1 mentioned? Y/N**	**Upheld? Y/N**	**Comments**
3043435	No	Yes	Other parts of the COBS rules, including COBS 2.1.2 (restricting liability or duty) and Principles 1, 2, 6, 7 and 9 were cited by the ombudsman in regard to poor financial advice provided by the respondent.
8476350	No	Yes	Materially the same circumstances as the above case.
7923087	Yes	No	COBS 2.1.1 and Principles 2, 6 and 7 raised by the ombudsman in relation to misleading information from a peer-to-peer lending platform.
5853140	Yes	No	COBS 2.1.1 and Principles 2, 6 and 7 raised by the ombudsman in relation to poor service and misleading information from a peer-to-peer lending platform.
2709899	Yes	No	The ombudsman decided that the respondent had met the standard applied by COBS 2.1.1 in providing advice to the complainant.
4358151	Yes	Yes	COBS 2.1.1 raised by the ombudsman in upholding this complaint in relation to poor advice provided by an adviser.
2747815	Yes	Yes	COBS 2.1.1 plus other parts of COBS raised by the FOS in partly upholding this complaint in relation to poor advice provided by an adviser.
0142184	No	Yes	Other parts of the COBS rules, including COBS 2.1.2 (restricting liability or duty) and Principles 1, 2, 6, 7 and 9 were cited by the ombudsman in regard to poor financial advice provided by the respondent.
6585822	Yes	Yes	COBS 2.1.1 raised by the ombudsman in upholding this complaint in relation to poor advice provided by an adviser.
8379580	Yes	No	COBS 2.1.1 and Principles 2, 6 and 7 raised by the ombudsman in relation to misleading information from a peer-to-peer lending platform.
2520350	No	Yes	Another COBS rule was cited in regard to poor financial advice.
7673790	No	Yes	Another COBS rule was cited in regard to poor financial advice.

Note: The above analysis seeks to verify the accuracy of the FOS search function when searching the term "COBS 2.1.1". When searching by 'Relevance' 7/12 (58%) of decisions expressly referenced COBS 2.1.1; and, when searching by 'Date' the figure was 8/12 (67%). The disparity is likely due to a higher proportion of relevant cases being at the front of the search under 'Relevance' – when selecting the sample, every tenth case was selected. Notwithstanding the fact that, in relation to the citation of COBS 2.1.1 within the decision, the figures in Table 11 are accurate to a range of 58-67% it is contended that there is nonetheless an increasing trend in the use of COBS 2.1.1.

The above data anecdotally suggests that the use by the ombudsman of 'high-level' rules such as COBS 2.1.1 is becoming more prevalent, particularly since 2019. It is speculated that the increase in the use of COBS 2.1.1 is due to:

1. Within the Adams case, the FCA, as intervenor, made representations which included their view on the applicability of COBS 2.1.1. In relation to the interaction between COBS 2.1.1 and the firm's contractual obligations to the customer, the FCA's representations confirmed their view that where there was an inconsistency between COBS 2.1.1R and contractual obligations, COBS prevailed, as confirmed in para 144 of the judgment.
2. While the original Adams judgment was not given until May 2020, the case was heard in March 2018. The researcher is aware that the FCA representations dated 20 March 2018 became widely available within both certain sectors of FCA regulated firms; and, companies such as claims management companies who were acting on behalf of respondents. Anecdotally, COBS claims based on the FCA representations were then widely advanced.

It is contended that the current use of a high-level rule such as COBS 2.1.1 creates a potential conflict between how a regulated firm has previously applied COBS 2.1.1 and how the FOS apply the same rule. The former will have looked at the extent to which it has acted honestly, fairly and professionally in relation to what it has contracted to do for its customer; and, the FOS have looked more broadly than simply the contractual arrangements. This leads to, as Jay J described *(supra)* a 'penumbral space', in part because any attempts to define what is meant by acting in the 'client's best interests' are inconsistent based on the FOS interpretation, the FCA's representations in Adams and the Court's rejection of the FCA's argument.

It is argued there needs to be some definitive guidelines from the regulator (as creator of the rule) as to what the expectations are. Where clarification exists, it is far easier for all parties – firms, customers (as complainants) and the FOS – to apply the rule, without having to fill in the gaps. An example of such clarity being provided is the clarification, through a Law Commission review[204] and subsequent legislation change, of insurance-based pre-contract disclosure and misrepresentation. Here, in relation to customers potentially misrepresenting themselves on insurance applications, there was a mismatch between the harder line imposed by the Marine Insurance Act 1906, in particular s.18 which required *inter alia* the assured to disclose *"every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him"*. This gave the insurer a broad range of circumstances on which non-disclosure could allow the contract to be avoided. The Law Commission argument ran that often consumers, who were not well versed in what could be a 'material circumstance', could in all innocence make a mistake in their pre-contract disclosure, which could result in the contract being avoided. The Law Commission addressed rebalancing the law in order to distinguish between mistakes in disclosure that were: (1) reasonable; (2) careless; and, (3) deliberate or reckless, misrepresentations[205]. These categories were based

[204] Law Commission, *Consumer Insurance Law: Pre-contract disclosure and misrepresentation* (LawCom 319, 2009)
[205] Outlined more fully at para 1.4 of the LawCom summary

on the approach the FOS was already taking in relation to settling disputes between the Insurer and the Insured, as stated within the LawCom summary:

"These ideas are not new. They reflect the approach already taken by the Financial Ombudsman Service (FOS) and generally accepted good practice within the industry. Our proposed reforms would, however, make the law simpler and clearer, allowing both insurer and insured to know their rights and obligations. Insurers would therefore be less likely to turn down claims unfairly, and consumers would have greater confidence in the insurance industry."[206]

The LawCom report concluded that updated legislation was required in order to provide an environment that was *"clear, straightforward and fair"*[207]. The report identified problems in relation to the FOS's involvement with such disputes, which included:

1. Consumers were only able to obtain justice from the FOS, not the courts, on the basis that the court would be compelled to follow the 1906 Act. Given that the FOS, at the time, was limited to a £100,000 award, this meant larger claims would not be met.[208]
2. The rules applying to non-disclosure and misrepresentation were confusing which led to some claims being unfairly rejected by the FOS or consumers not realising they could challenge a rejected claim by their insurance provider.[209]
3. The present system, as seen in part within (1) and (2), imposed inappropriate rules on the FOS, the FSA and the courts. In essence, the LawCom opined that the FOS was forced to act as policy-maker rather than an adjudicator.[210]

Flowing from these proposals was the Consumer Insurance (Disclosure and Representations) Act 2012 which carved out separate legislation for consumer contracts. This legislation defined, amongst other matters, deliberate or reckless; and, careless misrepresentations. As examined in section 4.4.2.2 it is contended that this enhanced clarity, while not obviating all disputes, has led to simpler resolutions without the FOS having to revert to high-level FCA rules and principles.

It is proposed that there are similarities between the FOS's historical interpretation of insurance disclosure and the FOS's interpretation of high-level rules such as COBS 2.1.1. As with insurance disclosure, it appears that a claimant may have a different outcome between the FOS and a court (although it is accepted that the FOS award limits are higher now meaning less cases are likely to revert to the courts). And, given the inconsistent view on COBS 2.1.1 between the courts and the

[206] Para 1.5
[207] Para 1.21
[208] Para 1.21(1)
[209] Para 1.21(2)
[210] Para 1.21(4)

FOS, arguably the FOS is acting as policy-maker in interpreting 'acting in the client's bests interest'.

While the researcher is not advocating specific legislation to address this, the FCA can play a role in setting clear expectations. During the period that this thesis was being written (April 2020 to March 2022), the FCA issued a Consultation Paper[211] that proposed the FCA's expectations in this regard. Included within the FCA's proposals was the setting of a new 'Consumer Principle'. Two alternative forms of words are set out in the consultation, of which one will be chosen based on the responses:

- Option 1: 'A firm must act to deliver good outcomes for retail clients'
- Option 2: 'A firm must act in the best interests of retail clients'[212]

Option 2 bears a close resemblance to COBS 2.1.1. The FCA acknowledges that a 'best interests' duty already exists at COBS 2.1.1 (and ICOBS 2.5.1 for Insurance companies) and comments at para 3.21 that:

"By using this language in the Consumer Principle we would extend this expectation, giving it [best interests duty] greater prominence in the Handbook, and bringing greater consistency to our expectations for the conduct of firms in retail markets."

To assist with bringing greater consistency and clarity, whichever Consumer Duty principle is chosen will be supported by a set of 'Cross-cutting Rules' and 'Outcomes' which would set *"clear expectations for firms' cultures and behaviours"*[213]. The proposed cross-cutting rules (so called as they would apply expectations to all areas of a firm's conduct) include taking reasonable steps to:

- Avoid causing foreseeable harm;
- Enable customers to pursue their financial objectives; and,
- Act in good faith toward customers.[214]

As the above are high-level rules, these are proposed to be supported by a suite of rules and guidance that covers the desired customer outcomes. These include communications (to the customer) by the firm; the design of products and services; the provision of customer service; and, the extent to which the firm's products and services represent fair pricing and value.

A further Consumer Duty consultation was issued in December 2021[215] which confirmed that the FCA had settled the words of Option 1 for the Consumer Duty Principle. This means that arguably the 'client's best interests' rule at COBS 2.1.1

[211] CP21/13: A new Consumer Duty – May 2021
[212] Para 3.12 of the consultation
[213] Para 1.12 of the consultation
[214] Para 3.2 of the consultation which provides an overview to the framework of the proposals
[215] Consultation Paper CP21/36: A new Consumer Duty – Feedback to CP21/13 and further consultation

could still be applied by the FOS and its meaning still left open to interpretation. However, such is the importance given to the Consumer Duty Principle, it is hoped that notwithstanding the Principle's wording does not replicate the 'client's best interests' rule, the deliverance of 'good outcomes' as enunciated within Option 1 will by default mean that clients' bests interests are also met. Within the consultation, the FCA have proposed significant guidance for firms, this being issued under s.139A FSMA 2000 which gives power to the FCA to issue guidance. As such, this will fall as 'formal' guidance that the FOS will be able to take into account. Therefore, this guidance will act as a useful 'infill' to what constitutes good or poor practice in relation to adherence to this high-level Principle. In so doing, it is contended that this guidance will go some way to filling the void which currently exists and will provide clarity to all parties involved with the FOS process. Furthermore, within the consultation, in response to concerns expressed to the initial proposals that the FOS could take a different and/or wider interpretation to the Consumer Duty than the FCA, the regulator has stated:

"We work closely with the Financial Ombudsman to ensure that, where complaints have potentially wider implications, the Financial Ombudsman is aware of our expectations of firms. This cooperation will be important in the case of the Consumer Duty. This is because outcome-based regulation inevitably requires judgment (by firms, by us and by the Financial Ombudsman) and the rules and guidance cannot and should not exhaustively define what firms should do in each instance. [..] We and the Financial Ombudsman also intend to work together closely on issues identified through the Financial Ombudsman's casework role where the Consumer Duty may be particularly relevant, and which may help inform future understanding and guidance for firms. Through this approach, we aim to ensure a consistent view on the interpretation of the Consumer Duty while respecting the different roles of the FCA and the Financial Ombudsman."[216]

It is contended that this consultation offers an opportunity to set clear, or clearer than currently, expectations for both regulated firms and the FOS when applying the high-level concept of a firm acting in the client's best interests and therefore this development is cautiously welcomed as it potentially goes some way to filling a void and codifying expectations in the same way that the development in insurance disclosure did, albeit in this case via 'soft-law' rather than specific 'hard-law' legislation. The fact it is one rather than the other matters not. It is the guidance that assists all parties in the dispute resolution process, whether this be in the form of legislation such as the Consumer Insurance (Disclosure and Representations) Act 2012 and the Consumer Credit Act 1975; or, specific FCA Handbook rules such as CONC or specific elements of COBS. That said, subjectivity will remain in many dispute resolutions, particularly in complex cases where there maybe multiple parties and moving parts, however any additional rules and guidance from the regulator will provide hopefully, clearer direction.

[216] Paras 1.32 to 1.34 of CP21/36

Chapter Five: Conclusions

5.1 Introduction

This section has been subdivided into matters which are broadly positive or neutral; and, those which identify possible flaws in the FOS process. Where applicable, it also links back to Judith Summer's prior research. The chapter concludes with a brief summary and a suggested future research agenda.

5.2 Positive or neutral matters

The following items are those which are broadly positive or neutral.

5.2.1 The FOS is aligned with most UK ombudsman services

The FOS's approach to dispute resolution in determining complaints on what is deemed 'fair and reasonable' mirrors that of most UK-based ombudsman insofar that when compared with 19 ombudsman services, all adopt this approach save for the Pensions Ombudsman, who follows legal precedent. This means the FOS can be viewed as a 'typical' ombudsman service. That said, the one exception is the ombudsman service that most closely reflects the type of complaints dealt with by the FOS (this is covered more fully later).

5.2.2 A professional approach

The way in which the FOS operates as a dispute resolution service is set out clearly within FSMA and the FCA's DISP Sourcebook. The number of complaints it handles is testimony to the fact that *prima facie* the FOS is an accessible ADR. This should not be disrupted. Notwithstanding that one or other of the respondent or complainant may disagree with the outcome, the range of FOS decisions reviewed for this paper demonstrated a professional, thorough and where appropriate, a sensitive approach to the handling of the dispute with typically a detailed rationale for the decision, even in the rare instances where legal precedent has not been followed. This accords with Summer's research which concluded that the FOS was *"a sensible, effective alternative dispute resolution service"*[217].

5.2.3 Rarely legally challenged

Where challenged by a judicial review, the process deployed by the FOS has tended to stand up to legal scrutiny and has reinforced the fact that the ombudsman can depart from legal precedent when deciding a case based on what is fair and reasonable taking the facts of the case into account. Within the period under review (2014-2020) there had been eleven judicial reviews challenging FOS decisions, which was a surprisingly low figure, given that 221,156 initial FOS adjudications have been referred to an ombudsman. It is contended that this is reflective of both i) an understanding by the party against whom a decision has

[217] Section 4.1 conclusion 1

been made that the FOS is on a firm legal footing given the wide remit of using what is fair and reasonable factors in arriving at the decision; and, ii) typically within respondent firms, in light of (i) firms and/or their insurers are often reluctant to devote both financial and human resource, and possible reputation damage, in relation to fighting a decision in the courts. This conclusion also accords with Summer's own findings of a relatively low number of judicial reviews – her research suggested 15 as at 2008.[218]

5.2.4 Widespread use of D&I payments

While not the primary focus of the research, the data analysis concluded that over a quarter (28%) of upheld complaints comprised solely distress and inconvenience payments. These are often relatively low value awards. While a useful tool in settling a dispute, it does arguably mean that a lot of FOS resource is devoted to arriving at these types of decisions. Presuming the 28% figure is representative of the wider FOS adjudications, then the number of solely D&I awards is potentially significant. For example, within the 2019/20 FOS annual report, 262,712 complaints were resolved with an uphold rate of 32% (94,947 cases). If 28% of these were solely D&I awards this equates to 26,585 cases[219]. There are of course different ways of measuring the cost to the FOS of handling these complaints, however within the 2019/20 Annual Report, a unit cost of £920 is cited, this being the total running costs divided by the number of resolved complaints[220]. Using this amount suggests a cost to FOS of over £24m in processing these 'D&I only' cases. It has been suggested at 4.4.3.2, as an ancillary observation, that a 'fast-track' approach could be considered in relation to complaints that are more likely than not, to result in a D&I payment only. This is not to downplay the importance of such disputes, rather to consider some of the practical challenges the FOS currently faces in relation to backlogs and limited resources.

5.2.5 Legal precedent tends not to feature in FOS decisions

At the heart of this research was the hypothesis that the ombudsman's ability to depart from legal precedent was widely applied and consequently there was a risk that (typically) the respondent was at a disadvantage when defending a complaint. However, the data analysis showed that legal precedent in the form of case law was rarely cited by any of the parties involved in the process. In the few cases where case law was cited, it was not followed where the respondent cited the case, but was used in a handful of cases by the FOS in support of their decision. This was a surprising conclusion as the author expected more widespread reference to case law, especially by the respondent. Notwithstanding the later comments regarding the overlap between the FOS and TPO, it is contended that (in particular) respondent firms understand the 'inquisitorial' approach adopted by the FOS and that firms also understand that typically the ombudsman's view is unlikely to be swayed by prior case law. Summer's research also concluded that case law rarely

[218] Ibid p.30
[219] P.18 of the report
[220] P.50 of the report

featured in FOS decisions[221]. That said, this research data identified that the inclusion of case law, by either party, is a relatively new phenomenon with most cases being cited within decisions from 2017 onwards. It will be interesting to observe whether case law will be cited more frequently, linked to the increasing monetary award limits as arguably the stakes involved with an adverse FOS decision are becoming higher. This could form the basis for future research (section 5.5 in this chapter).

5.3 Matters reflecting potential flaws in the FOS process

The following items are matters which the author has concluded are flaws within the FOS process:

5.3.1 Misalignment with the Pensions Ombudsman

While not a focus of this paper, it is observed that there is an inconsistency between how the TPO and FOS settle disputes. This is relevant because there can be an overlap between the FOS's and TPO's jurisdiction as both can deal with complaints from FCA regulated pension providers. While only one of either the FOS or TPO can deal with the same complaint, there is the risk of different outcomes for the same complaint, which could be exploited by both a respondent and complainant depending which of the TPO or FOS deal with the dispute. For example, while arguably there is less discretion within the PO as the ombudsman is compelled to find as a court would, there is also no limit to the amount of the award that may be granted. Consequently, a complainant with a strong case and/or high loss may wish to pursue a complaint via the TPO (assuming it falls within the TPO's jurisdiction) rather than the FOS where a limit applies to the money award. Conversely, where the respondent feels the complainant's case is on a weaker legal footing, they may wish to drive the complaint to the more 'adversarial' TPO, rather than a more 'inquisitorial' approach that could be adopted by the FOS, who are not bound to follow legal precedent. Given both the FOS and TPO deal with disputes in relation to pensions maladministration, which can fall within the regulated financial services sector and therefore within the FOS's jurisdiction, it is contended that the two ombudsmen should be more aligned. As this research has focused on the FOS process, it has not compared FOS and TPO decisions in relation to similar cases, however this research has highlighted the use of 'soft-law' (see below) which would be less likely to feature within a TPO decision. This is not new thinking. In 2019 the Department of Work & Pensions published a review of the PO[222] which concluded:

"[W]e have heard a clear case for addressing the fact that there is a specific area of overlap in jurisdiction, with both the TPO and FOS able to give different decisions, under different rules for cases that involve maladministration of personal pensions. We make initial proposals to build a better evidence base for considering options to

[221] Section 4.1 conclusions 13 and 14

[222] Department for Work & Pensions, *Corporate report: Tailored Review of the Pensions Ombudsman,* Gov.UK, (27 August 2019)

resolve this, as a matter of proper public administration and as future legislative priorities allow."[223]

This led to two recommendations that the TPO should collaborate with the FOS to *"reduce the potential for customer confusion and the duplication of efforts"*; and, based on shared data analysis, for both boards to consider whether policy changes are required to *"reduce the scope for jurisdictional overlaps and gaps"*[224].

It is hoped that continued effort is devoted to these two objectives to examine in greater detail the inconsistent approach between these two overlapping ombudsman services.

5.3.2 Use of soft-law

The FOS can and does frequently use 'soft-law' when arriving at its decisions. This includes referencing both formal regulatory rules and guidance, such as the FCA's Handbook rules and guidance, along with thematic reviews and other regulatory informal guidance. Allied to this is the ombudsman's reference to high-level regulatory rules, such as the 'acting in the client's best interests' rule and the FCA's eleven Principles, albeit it tends to be a core three Principles that are most often referred to, namely: i) acting with skill, care and diligence; ii) deploying proper management and control; and, iii) treating customers fairly.

MacNeil made the point in his academic analysis[225] that the regulator *"makes regulatory rules and the determination of complaints is undertaken by the FOS on an independent basis"*[226]. This is true and this research does not suggest this independence should be overruled; rather, that the regulator could assist the FOS process by attaching more detail for firms and consumers, and therefore the FOS, as to what the FCA envisages in practice for some of the more high-level principles, rules and guidance. Summer's research concluded likewise:

"The FOS has effectively taken on the role of policing ICOBS [the insurance-based Conduct of Business Handbook] and other Statements of Practice and making awards for maladministration. That is the role of the regulators and the practice should be changed so that they do this instead. Whilst the FOS continues to do this, the regulators will not."[227]

A decade further on from Summer's research, this has not changed, particularly in relation to high-level rules. Often, the FOS decision uses a breach of one or more of these high-level rules in order to support its decision and this rationale form a significant argument within the decision. Use of 'soft-law' rules and guidance is used more widely than 'hard-law' legal precedent; and, this is arguably more

[223] Foreword of the Report – Hazel Hobbs, Lead Reviewer
[224] Form and function recommendations 1 and 2
[225] Ibid p.5
[226] P.520
[227] Section 4.1 conclusion 27

challenging for all parties within the process. This is because case law will contain a specific set of circumstances supported by a detailed rationale on why the court has decided the way it has. There may be some difficulty in applying that specific case to a FOS complaint, as the circumstances of the case/complaint are likely not to be identical. In other words, it may be a case of trying to insert a pentagonal peg into a square hole, but at least one knows what the shapes look like. However, when it comes to interpreting and applying high-level FCA rules and principles, it is often the case that other than the words that comprise the high-level rule or principle, there is little background detail or guidance as to what that rule or principle looks like in practice. This is particularly so in regards to the high-level COBS 2.1.1 'client's best interests' rule examined in section 4.4.7.2.

MacNeil made the point in his academic analysis[228] that the regulator *"makes regulatory rules and the determination of complaints is undertaken by the FOS on an independent basis"*[229]. This is true and this research does not suggest this independence should be overruled; rather, that the regulator could assist the FOS process by attaching more detail for firms and consumers, and therefore the FOS, as to what the FCA envisages in practice for some of the more high-level principles, rules and guidance. Summer's research concluded likewise:

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The data analysis for 2014-2020 suggested that the use of this by the ombudsman was increasing at the end of the period under review – this prompted some ancillary data analysis which appears to confirm this. While the FOS is perfectly at liberty to revert to such rules within its decisions, this provides a challenge to respondent firms as firms prefer certainty in relation to how rules may impact on their business and what sort of behaviour or practice is likely to result in a breach. It is contended that this also provides a challenge to the FOS. This is because, in the absence of more detailed guidance around some of the high-level rules such as the 'client's best interests' rule from the FCA, the FOS are left to infill the gaps when deciding whether or not the rule has been breached. This potentially leads to differing interpretations between (usually) the respondent and the FOS as to the obligations under the rule; and, subjectivity on the part of the ombudsman in deciding whether a breach has occurred. The fact that citation by the ombudsman of the FCA's high-level rules and Principles has seemingly increased signals potentially ongoing challenges for firms in interpreting and applying the rules, particularly in the absence of clear guidance from the regulator. This means that contentious decisions may remain, at least in the short term. As mentioned within section 4.4.7.2, clarity of regulatory expectations assists the dispute resolution

[228] Ibid p.5
[229] P.520
[230] Section 4.1 conclusion 27

process – the legislation in relation to consumer declarations within insurance contracts was cited as an example of there being a well-defined piece of legislation that supports the decision-making process.

As also covered within section 4.4.7.2, during the course of writing this paper, the FCA has issued two consultation papers proposing a new Consumer Duty Principle which is predicated on delivering good customer outcomes. To support this new Principle specific guidance is proposed for firms which sets out in more detail the FCA's expectations and how firms can meet the expectations. It is contended that when the new Principle, along with the FCA Handbook amendments and supplementary guidance takes effect (projected for April 2023) not only will this provide some clarity for firms but also for the FOS, meaning less regulatory infilling by the FOS as is currently the case. The FCA have undertaken to cooperate with the FOS in regards to ensuring that a consistent approach is taken to the FCA's expectations. This is welcomed and while undoubtedly there will still be room for some subjective interpretation – after all, such matters are rarely absolutely and wholly prescribed – it is hoped that the additional FCA guidance will mean that particularly respondent regulated firms and the FOS will be more aligned on what the expectations are, meaning that deviations from Consumer Duty Principle will be easier to identify, rather than the FOS having to interoperate whether or not a respondent has acted in the client's best interests. As previously mentioned, the 'client's best interests' rule will still apply after the introduction of the Consumer Duty Principle, however it is hoped that the FOS will conclude that adhering to the principles and rules underpinning the Consumer Duty will also mean that firms are acting in the client's best interests.

5.4 Summary

The FOS is the UK's largest ombudsman service and deals with a large number of often complex and emotive disputes; complainants will have often lost large sums of money whereas adverse FOS decisions can be catastrophic for respondent firms. The disputes are often subjective, particularly where there is an element of professional advice which is being questioned – advice by its nature will vary depending on the source; and/or, there may be multiple parties involved where is may be difficult to discern the role played each. Notwithstanding these factors, and accepting that there is often going to be at least one dissenting party to the decision, the decisions themselves are thorough and professional.

The hypothesis of this paper was that while accepting the FOS was not compelled to follow legal precedent established through case law, the FOS frequently overrode case law; and, that this lead to uncertainty. In fact, case law is rarely features in the ombudsman decisions; instead, 'soft-law' through the interpretation and application of FCA rules and guidance more frequently applies, this being an increasing trend. The research therefore followed this tangent.

While the FOS is entitled to include these factors when making its decision, it often does so by filling in gaps within the FCA's rules and guidance. This places an unfair burden on the FOS and leads to uncertainty among regulated firms subject to the

FOS's jurisdiction. This is a weakness in the FOS process. The introduction of a new Consumer Duty obligation on regulated firms may assist in providing greater clarity for both respondent firms and the FOS. There is a responsibility on the FOS to ensure their interpretation of the new Principle is consistent with the FCA's intent.

Summer's research ultimately concluded that, in relation to insurance, the FOS should apply the law strictly. This research reaches a different conclusion. The FOS overall functions well as an ADR entity and to change to a legal basis for decisions would undermine the ADR function as being an alternative to court. In Summer's case, the research predated the consumer insurance declaration legislation which has closed some of the gaps that the FOS was previously infilling, reflected in Summer's research. This research suggests these gaps were less apparent in banking and insurance cases reviewed. This proves that the more detail regulated firms have in relation to expectations of them, whether this be hard-letter law in the form of legislation; or, soft-letter law in the form of detailed regulatory rules and guidance, the more consistent and less contentious the FOS decisions become. It is hoped that the Consumer Duty obligations will have a beneficial impact on the FOS process in the same way that insurance legislation has in the past.

5.5 Future research

As the award limits have increased significantly over the past few years the financial stakes are higher. This research noted a small trend towards case law being introduced into the decision-making process and future academic study could further track this trend. This research proposed that the latitude and subjectivity in FOS decisions is enhanced through the ombudsman having to interpret high-level regulatory principles, rules and guidance – in effect, having to infill gaps left by the FCA in explaining their own interpretation on the application by firms of these. This may in part be addressed by the introduction of the Consumer Duty obligations on regulated firms and, in much the same way that this research considered the impact of the insurance disclosure legislation, future research could consider the impact on the Consumer Duty obligations on FOS decisions. Finally, chapter two considered briefly the potential misalignment between the approaches of the Pensions Ombudsman and the FOS – this has not been the focus of this research however, could be considered as a future research topic.

Appendix one: Description of Ombudsman Members

All the descriptions below are taken from the Ombudsman Association 'Find a member' webpage.

Housing Ombudsman Service:
Deals with complaints from people who receive a direct service from registered social landlords in England, and certain other landlords who are members of the scheme including bodies who take over the management of homes transferred from local authorities. Some private landlords are members of the scheme. The Ombudsman can also consider other disputes involving a member landlord whether or not there is evidence of maladministration, provided they are about the management of the complainant's home.

Local Government and Social Care Ombudsman:
The Local Government and Social Care Ombudsman looks at complaints about councils and some other authorities and organisations, including education admissions appeal panels and adult social care providers (such as care homes and home care providers). It is a free service. Our job is to investigate complaints in a fair and independent way - we do not take sides. By law, some kinds of complaint cannot be considered. Examples are personnel complaints and complaints about the internal running of schools.

Independent Adjudicator for Higher Education:
Reviews decisions made by higher education institutions (HEIs) in relation to students. The scheme became statutory on 1 January 2005 and all HEIs in England and Wales are required to participate. The Office does not review complaints about admissions or matters of academic judgement. Students must first exhaust the HEI's internal complaints procedures.

Legal Ombudsman:
Deals with service complaints about lawyers, and has replaced the previous complaints organisations for the legal profession, including the Legal Complaints Service (for solicitors), the Complaints Commissioner for the Bar Standards Board (for barristers) and the former Legal Services Ombudsman.

Waterways Ombudsman:
Considers complaints of maladministration or unfairness against the Canal and River Trust, once its internal complaints procedure has been completed. The Ombudsman cannot investigate complaints about personnel matters, or matters which have been, or are being, considered by a court. There is a time limit for bringing complaints.

Property Ombudsman:
Scheme deals with consumer complaints against estate agents, lettings agents, commercial property agents, residential leasehold management agents, international property agents, valuers and auctioneers, buying agents, buying

companies, surveyors and other property professionals who are members of the scheme. Approximately 95% of estate agents and 80% of letting agents operating in the UK are members of the Scheme and follow TPO's Codes of Practice.

Rail Ombudsman:
The Rail Ombudsman is an independent, not-for-profit organisation. We offer a free, expert service to help sort out unresolved customer complaints about service providers within the rail industry. We also support the rail industry to raise standards and improve services for customers.

Northern Ireland Public Services Ombudsman:
Broadly covers the same areas as the Parliamentary, Local Government and Health Service Ombudsmen do in Britain. Additional powers include investigation of personnel complaints, and legal recourse by the complainant for damages in local government and health service complaints.

Police Ombudsman for Northern Ireland:
The Police Ombudsman's Office provides independent, impartial investigation of complaints about the police in Northern Ireland. We look at evidence to decide whether police officers have acted properly or not. We also investigate complaints about some, but not all, civilian employees of the police. This includes those performing custody and escort duties. Our decisions are made entirely independently of the police, government and complainants.

Property Ombudsman: Scotland:
Scheme deals with consumer complaints against estate agents, lettings agents, commercial property agents, residential leasehold management agents, international property agents, valuers and auctioneers, buying agents, buying companies, surveyors and other property professionals who are members of the scheme in Scotland. All members abide by the TPO Scotland Codes of Practice.

Scottish Public Services Ombudsman:
Provides a 'one-stop-shop' for individuals making complaints about organisations providing public services in Scotland. We deal with complaints about councils, housing associations, the National Health Service, the Scottish Executive and its agencies and departments, colleges and universities and most Scottish public authorities. Complaints can be made directly to us. You can visit our office, call or text us, write to us, or fill out our online complaint form. Our service is independent, impartial and free.

Financial Ombudsman Service:
Has been set up by law as a single port of call for consumers with complaints against financial firms. It covers most areas of personal finance, from insurance and pension complaints to bank accounts and investments.

Furniture Ombudsman:

The Furniture Ombudsman, operated by the Dispute Resolution Ombudsman Ltd, is an independent not-for-profit organisation which helps to raise standards and resolve disputes between consumers and retailers. The service was established in 1992 with the support of government and many of the UK's largest retailers are registered with it. Their jurisdiction extends to disputes arising out of goods and services purchased in approximately 4,500 retail outlets and via the internet. A Standards Board comprising of individuals from Trading Standards, Citizens Advice and the retail sector help to preserve its effectiveness, independence and impartiality. Many of The Furniture Ombudsman's dispute resolution staff are legally and professionally qualified and its work is recognised by the European Commission, Trading Standards and Citizens Advice.

Ombudsman Services:
Ombudsman Services is a not-for-profit organisation that provides an independent dispute resolution covering the communications and energy sectors in the UK.

Parliamentary and Health Service Ombudsman:
Independently investigates complaints about unfair or improper actions or poor services by UK government departments and their agencies in the UK, and the NHS in England. The Ombudsman aims to put things right where possible and share lessons learned to improve public services. A free service open to everyone.

Removals Industry Ombudsman Scheme:
Provides an independent complaint resolution procedure for customers of removal companies. All companies which are members of the National Guild of Removers and Storers have joined the Scheme, which is free to complainants. Both domestic and commercial removals are covered. The Ombudsman Scheme is accessible after conciliation by the trade association has been exhausted.

Service Complaints Ombudsman for the Armed Forces:
The role of the Service Complaints Ombudsman is to provide independent and impartial scrutiny of the handling of Service complaints made by members of the UK Armed Forces. The Ombudsman is the successor to the Service Complaints Commissioner for the Armed Forces.

The Motor Ombudsman:
The Motor Ombudsman is the automotive dispute resolution body. Fully-impartial, it is the first ombudsman to be focused solely on the automotive sector, and self-regulates the UK's motor industry through its comprehensive Chartered Trading Standards Institute (CTSI) - approved Codes of Practice. Thousands of businesses, including vehicle manufacturers, warranty product providers, franchised dealers and independent garages, are accredited to one or more of the Codes, which drive even higher standards of work and service, and give consumers added protection, peace of mind and trust during the vehicle purchase and ownership experience.

The Pensions Ombudsman:

Considers complaints of maladministration by, and disputes of fact or law with, trustees, managers, employers and administrators in relation to pension schemes. Schemes can be "occupational" (i.e., established by an employer), or "personal" (set up by an individual for themselves), and his jurisdiction includes "stakeholder" pensions. In some circumstances he can investigate complaints made by trustees, managers or employers against similar bodies.

Public Services Ombudsman for Wales:
Looks into complaints about public services in Wales. The bodies the Ombudsman can look into include: local government (county/county borough councils and community councils); the National Health Service (including GPs); the National Assembly for Wales and housing associations. He also investigates complaints that local authority councillors have broken their authority's code of conduct. The Ombudsman is independent and unbiased. The service is free of charge.

Appendix two: Comparison of UK-based ombudsman schemes

Ombudsman services fall into three distinct categories of establishment:[231]

1. Voluntary schemes: usually established by trade associations, perhaps to reinforce good practice within a particular trade or service, these ombudsman services have no legal powers and companies subject to the scheme are not obliged to abide by the ombudsman decisions (albeit there may be a sector code of practice that places an obligation to do so). These are private sector schemes.
2. Compulsory schemes: commercial businesses within the trade or service covered by the scheme have to be a member of the scheme and are required to abide by the ombudsman decisions, usually subject to the constitution of the particular trade association; if not, the trade association member could be sanctioned or expelled. Again, these are private sector schemes.
3. Statutory scheme: here, the scheme is established by statute, for example the original UK ombudsman service, the PHSO, being established by the Parliamentary Commissioners Act 1967; or, the FOS being established by Part XVI Financial Services and Markets Act 2000 (FSMA 2000). In the latter case, authorised financial services firms are legally compelled to submit to the FOS, whose decisions are binding. Statutory ombudsman schemes can be found in both the private and public sectors.

Ombudsman	Private or Public Sector	Statutory, Compulsory or Voluntary	Basis of decision	Notes
Financial Ombudsman Service	***Private***	***Statutory***	***"Fair and reasonable in all the circumstances of the case" – per s.228 FSMA 2000***	***See note 1***
The Pensions Ombudsman	Private	Statutory	"Proportionate, efficient and consistent with the law" – Aims, reflective of s.151 Pension Schemes Act 1993 which states *"Any determination or direction of the Pensions Ombudsman shall be enforceable […] as if it were a judgment or order of that court"*.	See note 2
Housing Ombudsman	Private	Compulsory & Voluntary	Fair in all the circumstances of the case – para 43 of the scheme rules	See note 3
Legal Ombudsman	Private	Statutory	Fair and reasonable in all the circumstances of the case – para 5.36 of the scheme rules, reflective of s.137(1) Legal Services Act 2007	See note 4
Waterways Ombudsman	Private	Compulsory	Fair and reasonable in all the circumstances of the case –	See note 5

[231] Cabinet Office: Ombudsman Schemes – Guidance for Departments, at para 10, which in turn reflects and references the British and Irish Ombudsman Association "Methods of Establishment"

			para 20(c)(iii) of the scheme rules	
Property Ombudsman	Private	Voluntary	Fair and reasonable in all the circumstances of the case – clause 27 of the scheme terms of reference	See note 6
Property Ombudsman Scotland	Private	Voluntary	Fair and reasonable in all the circumstances of the case – clause 27 of the scheme terms of reference	See note 7
Rail Ombudsman	Private	Voluntary	Fair and reasonable – Consumer Guide	See note 8
Furniture Ombudsman	Private	Voluntary	Fair and reasonable – Annual Review 2019 and FAQs on the website	See note 9
Ombudsman Services	Private	Compulsory & Voluntary	Fair and reasonable in all the circumstances of the case – clause 9.9(b) of the scheme terms of reference	See note 10
Removals Industry Ombudsman Scheme	Private	Voluntary	Fair and reasonable – Ombudsman website	See note 11
The Motor Ombudsman	Private	Voluntary	Fair and reasonable based on the relevant code of practice and any relevant law – Dispute Resolution FAQs on the website.	See note 12
Local Government & Social Care Ombudsman	Public	Statutory	Fair and reasonable, subject to a four-test discretionary stage which considers i) injustice; ii) fault; iii) Remedy; and, iv) Public Interest.	See note 13
Independent Adjudicator for Higher Education	Public	Compulsory & Voluntary	Whether the higher education provider (HEP) properly applied its regulations and followed procedures, and whether the HEP's decision was reasonable – para 13.4 scheme rules	See note 14
Northern Ireland Public Services Ombudsman	Public	Statutory	Proportionate, appropriate and fair – section 4 of the "Principles of Good Complaint Handling".	See note 15
Scottish Public Services Ombudsman	Public	Statutory	"A full, objective and proportionate response" – para 36 Model Complaints Handling Procedures	See note 16
Public Services Ombudsman for Wales	Public	Statutory	"Remedies should be fair, reasonable and proportionate to the injustice or hardship suffered" – section 4 Principles for Remedy.	See note 17
Police Ombudsman for Northern Ireland	Public	Statutory	The Police (Northern Ireland) Act 1998 allows for a wide range of investigative powers including informal resolution through to the recommendation to the Director of Public Prosecutions of criminal charges.	See note 18

Parliamentary and Health Service Ombudsman	Public	Statutory	Fairly and proportionately – Principles of Good Complaint Handing.	See note 19
Service Complaints Ombudsman for the Armed Forces	Public	Statutory	This scheme assesses whether a Service complaint decision was reasonable, fair, proportionate and justified – SCOAF website.	See note 20

Note 1: The FOS function is examined in more detail in chapter 2

Note 2: The contrast between the basis of decisions of The Pensions Ombudsman and the FOS is examined in more detail in chapter 2

Note 3: The Housing Ombudsman is approved by the Secretary of State for responsibility for housing under s.51 of the Housing Act 1996 and requires 'social landlords' as described by s.51(2) HA 1996 (broadly, local councils or private landlords providing social housing). For this category, the scheme is compulsory; and, for other landlords, the scheme is voluntary.

Note 4: The scheme was established by the Legal Services Act 2007 and covers "authorised persons" as defined by s.129 LSA 2007 which includes *inter alia* barristers, solicitors, chartered legal executives, notaries and licensed conveyancers.

Note 5: The ombudsman considers complaints of injustice suffered by a complainant that arises from maladministration or unfair treatment by the Canal and River Trust.

Note 6: The Property Ombudsman covers property agents (estate agents and letting agents).

Note 7: The Property Ombudsman Scotland is a separate legal entity to provide codes of practice for properties subject to Scottish legislation. The codes of practice allow for referrals to be made to The Property Ombudsman, as above.

Note 8: The Rail Ombudsman is a relatively new ombudsman scheme, launched on 26 November 2018 to deal with complaints about train companies and rail service providers. Unlike many of the other ombudsman schemes reviewed, there is no published scheme rules or terms of reference.

Note 9: This scheme was set up in 1992 by the Office of Fair Trading as an ADR service to resolve disputes between consumers and traders in the retail, furniture and home improvement sector.

Note 10: This scheme is approved by both Ofgem (government regulator for the UK Gas and Electricity markets) and Ofcom (the communications services regulator) to be the ombudsman service for the energy and communications sectors respectively. The scheme also covers sectors such as the supply of goods and services (The Consumer Ombudsman) and Copyright Licensing. There are overarching Terms of Reference for the scheme, with additional ToRs relevant to specific sectors covered by the scheme, which *inter alia* stipulates eligibility of membership and maximum award limits. For energy suppliers, membership is compulsory and the maximum award is £10,000; compared to the Consumer Ombudsman where membership is voluntary and the maximum award limit is £25,000.

Note 11: The scheme covers the removals industry and specifically members of the National Guild of Removers (NGR). Members of the NGR are obliged to join the scheme, however membership of the NGR is not compulsory. Consequently, this scheme has been marked as 'voluntary'. There are no published scheme rules or terms of reference.

Note 12: This scheme covers car sales, servicing and repairs and warranties. Membership is voluntary through accreditation to the scheme which supplies Codes of Practice for each area.

Note 13: The scheme has been established by the Local Government Act 1974, with Part III covering complaints about local government administration and Part IIIA covering complaints about government funded social care. The Regulatory Reform (Collaboration etc between Ombudsmen) Order 2007 made amendments to the Parliamentary Commissioners Act 1967, the Health Service Commissioners Act 1993 and the Local Government Act 1974 to enable the Local Government & Social care Ombudsman to work jointly with the PHSO where matters being complained about overlap.

Note 14: Higher education providers automatically become a member of the scheme if they are a "qualifying institution" as defined by s.11 Higher Education Act 2004, broadly universities, colleges, schools or other higher education institutions. A body falling outside the s.11 definition may join the scheme on a voluntary basis.

Note 15: The scheme, which covers public services delivered in Northern Ireland, was established through the Public Services Ombudsman Act (Northern Ireland) 2016. Part 3 of the Act sets out the "Complaints Handling Procedure", including at s.34(1) the obligation for the Ombudsman to *"publish a statement of principles concerning complaint handing procedures"*.

Note 16: The scheme, which covers public services delivered in Scotland, was established through the Scottish Public Services Ombudsman Act 2002. At s.16B of the Act the Ombudsman has an obligation to publish "Model complaints handling procedures" for the listed authorities, which are published on the SPSO's website.

Note 17: The scheme, which covers public services delivered in Wales, was established through the Public Services Ombudsman (Wales) Act 2005. The original procedures in the 2005 Act have been replaced by procedures stipulated in the Public Services Ombudsman (Wales) Act 2019. At s.37 of the 2019 Act the Ombudsman has an obligation to publish "Model complaints handling procedures" for the listed authorities. As at June 2020, these were not yet published on the 'ombudsman.wales' website, which instead still showed "Principles for Remedy" [March 2008].

Note 18: The scheme was established by s.51 Police (Northern Ireland) Act 1998.

Note 19: This scheme combines the Parliamentary Commissioner and Health Service Commissioner, created by the Parliamentary Commissioner Act 1967 and the Health Service Commissioners Act 1993 respectively.

Note 20: The ombudsman was created by s.1 Armed Forces (Service Complaints and Financial Assistance) Act 2015.

Appendix three: Comparison of the dispute resolution approach

Ombudsman	Competent Authority (or supervisory function)	Independent expert input?	Binding on the respondent?	Judicial Review of ombudsman decision?
Financial Ombudsman Service	*Financial Conduct Authority*	*Yes (occasionally)*	*Yes*	*Yes*
The Pensions Ombudsman	The Secretary of State – Note 1	No	Yes	No, however decisions can be appealed via the Courts.
Housing Ombudsman	The Secretary of State – Note 2	No	Yes [Para 9(a) of the Scheme	Yes
Legal Ombudsman	Ministry of Justice	No	Yes	Yes
Waterways Ombudsman	Chartered Trading Standards Institute ("CTSI")	Yes	Yes - £100k limit, unless compliance might result in the Trustees breaching legal obligations as charitable trustees	No
Property Ombudsman	CTSI	No	Yes clause 39 ToR - £25k limit	No
Rail Ombudsman	CTSI	No	Yes	No
Furniture Ombudsman	CTSI	Yes – see 3.8 rules of membership	Yes	No
Ombudsman Services	CTSI	Yes – 9.4 Terms of Reference	Yes – see 10.12 Terms of Reference (Energy sector £10k award limit)	No
Removals Industry Ombudsman Scheme	CTSI	No	Yes	No
The Motor Ombudsman	CTSI	No	Yes	No
Local Government & Social Care Ombudsman	Public scheme – reports to the Commission who lays before Parliament per s.34S Local Government Act 1974	No	Yes	Yes
Independent Adjudicator for Higher Education	CTSI	No	Yes	Yes
Northern Ireland Public Services Ombudsman	Public scheme – reports to the Northern Ireland Assembly per s.46 Public Services Ombudsman Act (Northern Ireland) 2016	No	Yes	Yes
Scottish Public Services Ombudsman	Public scheme – reports to the Scottish parliament per s.1	No	Yes	Yes

	Scottish Public Services Ombudsman Act 2002			
Public Services Ombudsman for Wales	Public scheme – reports to the Welsh Parliament per Schedule 1 para.15 Public Services Ombudsman Wales) Act 2019	No	Yes	Yes
Police Ombudsman for Northern Ireland	Public scheme – reports to the Secretary of State for Justice per s.61(2A) Police (Northern Ireland) Act 1998	No (although initial appeals against decisions are considered by an independent assessor)	Yes	Yes
Parliamentary and Health Service Ombudsman	Public scheme – reports to Parliament subject to the Parliamentary Commissioner Act 1967 and the Health Service Commissioners Act 1993	No	Yes	Yes
Service Complaints Ombudsman for the Armed Forces	Public scheme – reports to the Secretary of State for Defence per the Armed Forces (Service Complaints and Financial Assistance) Act 2015	No	No	Yes

Note 1: Per reg. 8(4)(a) ADR Regulations
Note 2: s.51(1) Housing Act 1996

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