COURT OF APPEAL REVIEWS FOS JURISDICTION ISSUES

REASSURANCES, ASSURANCES OR UNCERTAINTIES?

R (Assurant) v FOS [2023] EWCA Civ 1049

In this case, the Court of Appeal considers and explains a number of first instance authorities (regularly cited in judicial review claims against the FOS) and clarifies the proper approach to be taken in cases where the jurisdiction of the FOS is in issue.

What does Assurant decide, and why does it matter?

The claim concerned the sale of PPI in relation to catalogue shopping. The FOS received complaints from the shoppers that the PPI had been mis-sold. The complaints were made against the insurer (Assurant), but the sales process had been undertaken by the catalogue retailers.

The question whether FOS had jurisdiction to consider the complaint depended on whether the retailers had been acting as the agent of Assurant, so that Assurant was responsible for their conduct. If there were an agency relationship, then the acts of the agents would be the acts of Assurant, so that Assurant would have been "carrying on an activity" within the meaning of section 226(1) of FSMA. See also DISP 2.3.1R and 2.3.3G, the latter of which confirms that the firm carries on an activity where the actual act or omission is that of its agent or appointed representative.

FOS decided that such an agency relationship existed, and accepted jurisdiction. Assurant's claim for judicial review was dismissed by Collins Rice J, essentially on the basis that FOS's conclusion was not reviewable on any of the "conventional" judicial review grounds. In other words, she considered whether the decision was irrational, procedurally unfair, etc. She did not decide for herself the question of law as to whether an agency relationship existed. See [35].

The Court of Appeal had to decide whether the Judge had applied the correct test. It held that she had not; and that she should have decided for herself whether an agency relationship existed.

The Starting Point

The starting point is the question whether the issue relates to the establishment (or otherwise) of an objective fact (or set of facts) going to the jurisdiction of a tribunal or the power of a public authority. If it does, such that the question has a right or wrong answer, then the Court must decide that question for itself.

This distinction is well illustrated by the facts of *R (A) v LB of Croydon* [2009] 1 WLR 2557.

There, the Supreme Court was concerned with section 20(1) of the Children Act 1989, which obliges a local authority to "provide accommodation for any **child** *in need* within their area who appears to them to require accommodation as a result of" certain specified matters. (Bold and italic script has been supplied).

"Child" is defined as a person under the age of 18 years.

The Supreme Court held that there is a distinction between the emboldened and italicised words. Whether a person is a "child" is a question of objective fact to which there is a right or wrong answer. Whether that person is "in need" is an evaluative question depending on the exercise of judgment.

Lady Hale said that:

> *"[26] … The question whether a child is "in need" requires a number of different value judgments… it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and 'Wednesbury unreasonableness' there are no clear cut right or wrong answers.*
>
> *[27] But the question whether a person is a child is a different kind of question. There is a right or a wrong answer. It may be difficult to determine what that answer is… but that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision makers."*

Thus, the distinction is neatly illustrated: the local authority had to be correct in deciding whether A was "a child" but the question whether A was "in need" was a matter on which the Court could only intervene on conventional judicial review grounds[1]. The former question went to the "jurisdictional" type question as to whether the duty could be engaged; the latter question went to what should be done.

The Court of Appeal applied this approach, noting also that there might be questions going to jurisdiction which "are not hard edged and call for evaluation on matters of degree and opinion": the answers to those questions are reviewable only on conventional grounds, even though they go to jurisdiction. See [45], citing the decision of the House of Lords in *R v Monopolies & Mergers Commission* [1993] 1 WLR 23.

The FOS cases

[1] The Court rejected the argument that "child in need" was to be treated as a "composite term of art" so as to take the question of review into the "conventional grounds" territory.

In *R (Bankole) v FOS* [2012] EWHC 3555 (Admin) Sales J held that it is for FOS to determine whether a complaint is brought in time, by applying the relevant DISP rules. Its decision will be reviewable only on conventional grounds.

By contrast, in *R (Bluefin) v FOS* [2015] Bus LR 656, Wilkie J held that the question whether a party was an "eligible complainant" was one of precedent fact, and that it was susceptible of a right or wrong answer. He held that if the FOS had answered incorrectly then the Court was entitled to strike down the decision.

These cases were analysed per Ouseley J in *R (Chancery) v FOS* [2015] EWHC 407. The CA whole heartedly approved this analysis: see [51, 57].

Ouseley J held that Bankole and Bluefin were each correctly decided and could be reconciled. This was on the basis that the former concerned a procedural issue, turning on questions of fact: on what date was the complaint made; was the complaint made within 3 years of the complainant becoming aware that he had cause for complaint[2] etc. The latter concerned a fact going to the root of jurisdiction: was the complainant someone over whose complaint Parliament had intended to give the FOS jurisdiction? See [52].

Note that whilst in a sense both cases concerned jurisdiction, the approach (consistent, it is submitted, with the Croydon case) was to determine whether the issue had a right or wrong answer (eligibility or not?) or whether it depended on evaluative judgments partly involving the facts.

Ouseley J also made a number of important statements of principle which, as we have seen, have now obtained the approval of the Court of Appeal:

(1) FOS cannot be "master of the limits of its own jurisdiction, right or wrong" (Chancery [66])
(2) "It is a matter of statutory construction as to how the limits of its jurisdiction are resolved" [Chancery [66])
(3) FOS is the primary fact finder, subject to conventional judicial review (Chancery at [70])
(4) FOS "must direct itself correctly on the law, as to the meaning of words and phrases, and as to the defining characteristics which must be present for a phrase to apply" (Chancery at [71])
(5) "If the Court is persuaded that on the facts found by the FOS, the correctly understood law had been applied wrongly, the court must rule that the FOS had no jurisdiction" [Chancery at [71]).

[2] Which requires determination of when the complainant should have been aware of cause for complaint and when the complaint was made.

(6) So, generally speaking, it is for the FOS to find the facts: but in so far as the facts give rise to a legal question, the FOS has to get the correct answer, having adopted a correct view of the law and applied it faithfully to the facts found.

Importantly, in Assurant the FOS conceded that the "question of the correct construction of a document, such as[3] a contract, is, on well established principle, a question of law. It is therefore a question for the court itself to determine" [58], this concession being endorsed as correct at [60].

Potential Application of Assurant

It is submitted, therefore, that the following approach is required of the FOS in the following illustrative examples:

(1) In a case where the issue is whether an appointed representative is acting within the scope of the written permission provided by its principal, pursuant to section 39 FSMA, then:
   (i) The FOS decides, as a matter of fact, what the AR did or omitted to do.
   (ii) Those factual findings are reviewable only on conventional grounds.
   (iii) The FOS must then decide whether what the AR did fell within the scope of the permission given.
   (iv) That question, given that it involves the construction of a document or documents, is a question to which the FOS must get the answer correct, and the Court will interfere if it does not.

(2) Varying the facts of example (1), suppose an issue arose as to the documents relevant (in fact) to the scope of the permission. This can happen, for example, if there is a dispute as to whether a change in the scope of permission was properly communicated to the appointed representative by the principal. In that case, it is submitted that this question would be a question of fact for FOS to determine, and reviewable only on conventional grounds. See Assurant at [60]. The same applies if a question arises as to terms to be implied into a contract.

(3) On the other hand, it is submitted that if the terms of the document granting permission were agreed, or determined as a matter of fact by the FOS, any question as to whether a term was a restriction on what was to be done, or merely how it should be done (see *Anderson v Sense* [2019] EWCA Civ 1395) would be a question of law to which there is a

[3] But, therefore, not limited to a contract.

right or wrong answer, and the Court could substitute the correct answer if the FOS fell into error on the point.

(4) Where there is an issue as to the nature of a particular transaction or transactions which goes to jurisdiction, the FOS will find the facts (subject to conventional grounds for review) but it is for the Court to rule on the legal nature of the transaction(s): especially since that question will usually involve construing the contracts concerned. See *R (London Capital Group) v FOS* [2013] EWHC 2425 (Leggatt J) where this issue arose.

(5) It is submitted that, similarly, if there were an issue going to jurisdiction as to whether a particular investment was a UCIS (e.g. if the appointed representative agreement had expressly prohibited the conduct of UCIS business), then:

(i) FOS would find the facts concerning what "arrangements" had been communicated by the operator of the scheme to the investors, and those findings would be reviewable only on conventional grounds; but

(ii) The question whether those facts fitted into the definition of a UCIS would be a "right or wrong" answer in which the Court could substitute the correct answer, if the FOS got it wrong.

It is further submitted that the emphasis placed by the Court of Appeal on the need for FOS to have an accurate understanding of the law, in appropriate circumstances, is helpful. As is well-known, the FOS must have regard to (although it need not follow) the law when making its decisions. It seems clear that the FOS cannot discharge that duty if it has regard to its own perception of the law, which is wrong.

Again, it is necessary to consider this issue in a nuanced manner. If the law is uncertain, the FOS could not be criticised for adopting, say, a reasonable interpretation of conflicting authority. But if FOS were, in relation to a question of the scope of duty of care, to "have regard to" the information/advice distinction derived from SAAMCo without regard to the disapproval of that distinction in subsequent Supreme Court decisions, it is submitted that this would be a ground for judicial review.

Conclusions

Assurant provides some helpful clarity (albeit it is disappointing that the CA declined to give a "comprehensive treatise" on the position of the FOS: [46]). The various first instance authorities have

been explained and to a large extent reconciled. However, it is thought that the decision is by no means the last word on FOS judicial review claims; particularly if nuances appear in the correct approach to the examples (which are not exhaustive) considered in the previous section of this Note.

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