Neutral Citation Number: [2014] EWCA Civ 118

Case No: A2/2013/0065(B) & A2/2013/0065

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Cranston
[2012] EWHC 3669 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2014

Before :

LADY JUSTICE ARDEN
LADY JUSTICE BLACK
and
LORD JUSTICE DAVIS

- -

Between :

CLARK & ANR	**Respondents**
- and -	
IN FOCUS ASSET MANAGEMENT & TAX SOLUTIONS LTD	**Appellant**
and	
FINANCIAL OMBUDSMAN SERVICE	**Intervener**

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- -

Mr Alistair Schaff QC and Mr Simon Howarth(instructed by CMS Cameron McKenna LLP) for the Appellant
Mr Clive Wolman (instructed by George Ide LLP) for the Respondents
Mr James Strachan QC (instructed by the Financial Ombudsman Service) for the Intervener

Hearing dates : 22-23 October 2013

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Approved Judgment

Lady Justice Arden :

ISSUE: EFFECT OF AWARD UNDER FINANCIAL OMBUDSMAN SCHEME SET UP TO DEAL WITH CONSUMER COMPLAINTS AGAINST FINANCIAL SERVICE PROVIDERS

1. Parliament has by primary legislation, namely the Financial Services and Markets Act 2000 ("**FSMA**"), set up a dispute resolution scheme called the Financial Ombudsman Service ("the Ombudsman Service") for consumers who have disputes with providers of regulated financial services. This Service determines disputes and may award compensation. If a consumer accepts an award of compensation, the award is binding on the adviser and the complainant, and is final. Parliament gave the financial services regulator (now the Financial Conduct Authority ("the FCA")) power to fix a maximum award of compensation that could be awarded. The scheme is very important to consumers not least because it is free to them: financial advisers against whom complaints are made are liable to pay fees to the Ombudsman Service and those fees largely fund it. But nothing was said in the legislation about consumers taking legal proceedings after accepting an award under the scheme. It is on one view at least consistent with the consumer-facing purpose of the provisions that the consumer should be able to do this. However, there are now conflicting decisions at the level of the High Court as to whether consumers can do this. We must resolve this conflict on this appeal.

2. I shall need to summarise the background to this appeal, the statutory scheme, the ambiguity in FSMA and the conflicting decisions of the High Court. Then I will set out the submissions and my reasons for my conclusions in relation to those submissions. In summary, for the detailed reasons given below, and having been assisted by the able submissions of all parties, I consider that this appeal should be allowed for the following reasons:

    (1) Leaving aside FSMA, acceptance of an award would preclude a complainant from starting legal proceedings to pursue complaints which he had already submitted to the Ombudsman Service, and which the ombudsman had decided, because of the common law doctrine of *res judicata*, which I explain below; and

    (2) The relevant provision of FSMA, section 228(5) FSMA (set out below), does not exclude the operation of the common law doctrine of *res judicata*.

3. Common law doctrines preclude a person who has obtained a decision from one court or tribunal from bringing a claim before another court or tribunal for the same complaint. These rules are referred to as *res judicata* and merger. The parties have argued this case on the basis of both principles. The judge dealt solely with merger.

4. To understand merger, it is necessary to understand the meaning of "a cause of action". It is not a legal construct. The term "cause of action" is used to "describe the various categories of factual situations which entitle[d] one person to obtain from the court a remedy against another" (per Diplock LJ in ***Letang v Cooper*** [1965] 1 QB 232 at 242. A complaint to the ombudsman need not be a cause of action but (as further discussed below) it may involve consideration of an underlying cause of action and

the facts on which a complaint is based may be or include facts constituting a cause of action.

5. Merger explains what happens to a cause of action when a court or tribunal gives judgment. If a court or tribunal gives judgment on a cause of action, it is extinguished. The claimant, if successful, is then able to enforce the judgment, but only the judgment. The effect of merger is that a claimant cannot bring a second set of proceedings to enforce his cause of action even if the first tribunal awarded him less than he was entitled to (see, for example, ***Wright v London General Omnibus Co*** [1877] 2 QBD 271 and ***Republic of India v Indian Steamship Company Ltd* (*The Indian Grace*)** [1998] AC 878). As Mummery LJ held in ***Fraser v HMLAD*** [2006] EWCA Civ 738 at [29], a single cause of action cannot be split into two causes of action.

6. *Res judicata* principally means that a court or tribunal has already adjudicated on the matter and precludes a party from bringing another set of proceedings (see generally ***Lemas v Williams*** [2013] EWCA Civ 1433). The doctrine also covers abuse by a litigant of the court's process by bringing a second set of proceedings to pursue new claims which the claimant ought to have brought in the first set of proceedings (this is known as the rule in ***Henderson v Henderson*** (1843) 3 Hare 180; 67 ER 313).

7. The requirements of *res judicata* are different from those of merger. All that is necessary to bring merger into operation is that there should be a judgment on a cause of action. *Res judicata* may apply either because *an issue* has already been decided or because a *cause of action* has already been decided. We are concerned on this appeal with *res judicata* of the latter kind, known as cause of action estoppel.

8. I take as the requirements of cause of action estoppel the summary from ***Spencer Bower and Handley*** on ***Res Judicata*** cited with approval by Lord Clarke (with whom Lords Phillips, Rodger and Collins agreed) in the recent case of ***R(o/a Coke-Wallis) v Institute of Chartered Accountants in England and Wales*** [2011] 2AC146 at [34]:

> "34 In para 1.02 *Spencer Bower & Handley, Res judicata*, 4th ed makes it clear that there are a number of constituent elements in a case based on cause of action estoppel. They are:
>
> "(i) the decision, whether domestic or foreign, was judicial in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal had jurisdiction over the parties and the subject matter; (iv) the decision was— (a) final; (b) on the merits; (v) it determined a question raised in the later litigation; and (vi) the parties are the same or their privies, or the earlier decision was in rem."

9. If the requirements of *res judicata* are fulfilled, they constitute an absolute bar and the court has no discretion to hold that *res judicata* should not apply in any particular case.

10. If the requirements of merger are satisfied, it is unnecessary to see if the requirements of *res judicata* were fulfilled, and vice-versa.

11. There is a powerful two-fold rationale for the doctrines of merger and *res judicata*. The first rationale is "the public interest in finality of litigation rather than the achievement of justice as between the individual litigants" (see per Lord Goff in ***The Indian Grace*** at 415). Mr Clive Wolman, for the respondents, suggests that the public interest in finality arises out of a concern that the public courts and tribunals should not be clogged by repetitious re-hearings and re-determinations of the same disputes. This is clearly a powerful consideration.

12. Second there is the private interest. As Sir Nicolas Browne-Wilkinson V-C put it in ***Arnold v National Westminster Bank plc*** [1983] 3 All ER 977 at 982: "it is unjust for a man to be vexed twice with litigation on the same subject matter".

HOW THE DISPUTE IN THIS CASE AROSE

13. The respondents are Mr and Mrs Barry Clark. The Clarks' case is that they have lost more than £300,000 through negligent investment advice given by the appellant, their former financial adviser. They took their complaint to the Ombudsman Service. The ombudsman, Mr Christopher Tilson, decided that they were entitled to compensation exceeding the then limit of £100,000 now £150,000 that the Ombudsman Service could award. In addition to awarding the Clarks £100,000, he recommended payment of full compensation. The Clarks accepted the award. They did so subject to their right to claim more in court proceedings. The appellant paid the Clarks the sum of £100,000 on about 24 March 2010. The appellant did not, however, pay the full recommended amount.

14. On 22 June 2010 the Clarks took the step that they indicated they would take: they started proceedings in the District Registry of the High Court in Chichester, which were transferred to the Chichester County Court, for damages for breach of contract, negligence, breach of fiduciary duty and breach of statutory duty, stating that they would give credit for the sum already awarded. The defendant (the appellant on this appeal) asked the court to make an order dismissing them. HHJ Barratt QC held that the doctrine of merger applied and made such an order. He applied the first High Court decision with which we are concerned, namely the decision of HHJ Pelling QC, sitting as a deputy judge of the High Court of Justice, Chancery Division, in ***Andrews v SBJ Benefit Consultants*** [2011] PNLR 577. However, on appeal, Cranston J held that the Clarks' causes of action did not merge in the ombudsman's award. He disagreed with the decision in ***Andrews***. Accordingly he concluded that HHJ Barratt QC had been wrong to dismiss the proceedings. The appellant now appeals from the order made by Cranston J.

15. This conflict of authority has obvious practical implications for complainants, the Ombudsman Service and the financial services industry.

16. The Clarks have issued a respondents' notice which is now limited to points of law which have to be considered in deciding the appeal, namely (1) the effect of the ombudsman's power, under rules governing the procedure for complaints, to dismiss proceedings where there have been previous court proceedings, and (2) whether the ombudsman is a judicial tribunal. The Clarks have compromised the other issues raised by that notice on partly undisclosed terms. In his oral submissions, Mr Wolman attempted to raise a further ground. We gave him time to consider an

application to amend the notice, but he did not make any application. We are not therefore concerned with further questions.

MORE ABOUT THE OMBUDSMAN SERVICE

17. The Ombudsman Service was set up under the FSMA to provide consumers of financial services with an independent dispute resolution service if they had a dispute with a financial adviser regulated under that Act. It subsumed and replaced some eight ombudsmen schemes, some of which were established by self-regulatory organisations set up pursuant to the Financial Services Act 1986.

18. The rules governing the Ombudsman Service form part of the Handbook issued by the FCA in a section called the Dispute Resolution: Complaints Sourcebook ("**DISP**").

19. The relevant provisions of FSMA start:

> "225(1) This Part provides for a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person.
>
> (2) The scheme is to be administered by a body corporate ("the scheme operator)."

20. The scheme operator, Financial Ombudsman Service Ltd, appoints a panel of persons appearing to it to have appropriate qualifications and experience to be ombudsmen (**FSMA, schedule 17 paragraph 4**). (The word "ombudsman" comes from the Swedish. Modern variations include "ombud" and "ombudsperson".) An ombudsman generally handles complaints, but it is clear that FSMA extends their functions well beyond this to the speedy investigation, mediation and resolution of disputes, requiring financial advisers to take specified steps and the award of compensation. Parliament may well have chosen the term "ombudsman" because that term was used by some of the earlier schemes and because the ombudsman was to investigate matters, which a court or tribunal would rarely do.

21. FSMA gives the Ombudsman Service a (i) voluntary, (ii) compulsory and (iii) consumer credit jurisdiction. This appeal concerns only its compulsory jurisdiction. **DISP 2.7** provides that a complainant must be an "eligible complainant" to make a complaint. **DISP 2.7.3** provides that an eligible complainant must be a consumer, a micro-enterprise, a charity with an annual income of less than £1m or a trust with net assets of less than £1m. A consumer is a "natural person acting for purposes outside his trade, business or profession". A micro-enterprise is a body that has less than ten employees and a turnover or balance sheet of less than €2m. The eligible complainants other than consumers are therefore relatively speaking small entities likely to have the same knowledge or experience as consumers. In the interests of simplicity I will use the term "consumer" to cover all eligible complainants. The defendant to a complaint may be a financial adviser or a provider of financial services, such as banking, insurance or investment services, but I will for simplicity use the term "adviser" to refer to a defendant to a complaint.

22. A key component of the process of the Ombudsman Service is that it he gives each side the chance to put their case in writing. In some cases an adjudicator will carry

out a preliminary investigation and report to the ombudsman before the ombudsman decides whether to proceed. There may or may not be a hearing in front of the ombudsman. He may direct that oral evidence be received and that the parties supply documents to him, but there is no cross-examination of witnesses and there is no formal disclosure of documents between the parties.

23. The ombudsman determines the complaint "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case" (**FSMA**, **section 228(2)**; **DISP 3.6.1**). He can, therefore, ignore technicalities in the law or a lack of evidence or award compensation which would not have been recovered at law if he thinks that is the right course. On the other hand he may in any particular case conclude that it would be wrong to depart from the legal position. **DISP 3.6.4R** fleshes out the process by requiring the ombudsman, when considering what is fair and reasonable, to take into account the law, regulatory requirements rules, codes of practice and so on.

24. The power to decide a dispute according to what is fair and reasonable is not *carte blanche.* As Stanley Burnton J (as he then was) held in ***R(IFG) v Financial Ombudsman Service*** [2006] 1 BCLC 534, [13], the court may set aside the ombudsman's decision if it is perverse or irrational.

25. At the end of the process the ombudsman issues an award. **Section 229** expressly gives the ombudsman the power to award "compensation". The compensation may not exceed the limit specified by rules made (now) by the FCA "but the ombudsman may, if he considers that fair compensation requires payment of a larger amount, recommend that the respondent pay the complainant the balance" (**section 229(5)**).

26. An award that involves the payment of a sum of money can be enforced as a county court judgment (**section 229(8)(b)**, s**chedule 17, paragraph 16**). So a money award, if accepted, leads to the creation of a legal right, namely the right to receive the sum awarded and this right is enforceable as if it were a judgment of the court.

27. A defining feature of the Ombudsman Service is that a complainant can choose not only whether to submit his complaint to it in the first place but also whether to accept the decision of the Ombudsman, but if he accepts the determination within the time limit, it is final and binding on both parties. This follows from **section 228**, which provides:

> "(5) If the complainant notifies the ombudsman that he accepts the determination, it is binding on the respondent and the complainant and final.
>
> (6) If, by the specified date, the complainant has not notified the ombudsman of his acceptance or rejection of the determination he is to be treated as having rejected it.
>
> (6A) But the complainant is not to be treated as having rejected the determination by virtue of subsection (6) if—

> (a) the complainant notifies the ombudsman after the specified date of the complainant's acceptance of the determination,
>
> (b) the complainant has not previously notified the ombudsman of the complainant's rejection of the determination, and
>
> (c) the ombudsman is satisfied that such conditions as may be prescribed by rules made by the scheme operator for the purposes of this section are satisfied…."

28. The ombudsman may award the complainant his costs, but he cannot make any order for costs against the complainant (**section 230**).

OMBUDSMAN SERVICE'S SUBMISSIONS

29. The Ombudsman Service, for whom Mr James Strachan QC appears, adopts a neutral approach to the issues to be determined on this appeal but has helpfully provided a skeleton argument on a number of matters. The judge did not have the benefit of this intervention.

30. Mr Strachan submits that complaints and causes of action may often be identical or overlap on the facts, and that consideration of a complaint will often involve consideration of the underlying cause of action. He emphasises that even so under DISP 3.6.4R the ombudsman is bound to consider the law (see above). He states that a complaint is likely to overlap with a cause of action or be very similar to it.

31. Importantly, Mr Strachan explains that there are a number of rules in DISP which confer power to deal with complaints when the courts might not be able to do so because *res judicata* applies.

32. Mr Strachan informs us that **DISP 3.3.4R(6)** appears to contemplate that the ombudsman can consider a second complaint about the same matter if new evidence comes to light, since it confers a discretion on the ombudsman to dismiss (or, it follows, not to dismiss) a complaint where it has been previously considered by the Ombudsman Service unless material fresh evidence comes to light. However, he submits that this has to be read as subject to section 228(5) so if the complainant had accepted an award, this power to consider a complaint a second time could not be exercised in his favour.

33. I would interpose at this stage that that submission must be right since the rule making power cannot be interpreted as empowering the FCA to make rules which conflict with the statute. But, if it were not right, it would confer a power which was not available to a court in legal proceedings since *res judicata* constitutes an absolute bar.

34. **DISP 3.3.4R(8)** also enables the ombudsman to consider a complaint which has already been considered by the court, since it provides that an ombudsman may (not must) dismiss a complaint if the complaint has been the subject of court proceedings and the court has given a decision on the merits. However, Mr Strachan informs us

that the Ombudsman Service has no record of any case in which this power has been exercised in favour of allowing the complaint to proceed to an award. On the contrary he states that it is anticipated that the ombudsman would dismiss it.

35. **DISP 3.3.4R(9)** deals with the case where there are pending court proceedings. The ombudsman may again dismiss the complaint to the Ombudsman Service unless the court proceedings are stayed to enable the complaint to proceed under the scheme.

36. Mr Strachan also submits that the ombudsman does not determine the rights of the parties, or causes of action, but he will consider the same subject matter and he resolves that dispute albeit by a different set of principles from those a court would use.

37. Mr Strachan submits that merger or *res judicata* can apply only if there does not have to be an exact identity between the cause of action and the award.

38. The witness statement of Ms Caroline Wayman, Principal Ombudsman and Legal Director of the Ombudsman Service, attests to the occurrence of complaints involving claims to compensation in excess of the limit. We are told that in a one year period the Service recorded 87 complaints which could involve such compensation.

39. The Ombudsman Service accepts that, if *res judicata* applies, the rule in *Henderson v Henderson* may also apply (depending on the circumstances).

40. Mr Strachan contends that the Ombudsman Service is a "judicial tribunal" for the purposes of the doctrine of *res judicata.*

STARTING POINT: THE AMBIGUITY IN SECTION 228(5) OF FSMA AND THE CONFLICTING HIGH COURT DECISIONS

41. The meaning of the words "binding on the respondent and the complainant and final" in section 228(5) of FSMA is ambiguous. As Mr Strachan points out, section 228(5) does not expressly address whether or not an award precludes legal proceedings. Leaving aside any common law rules, the words "final" and "binding" may mean no more than that, where the complainant has accepted the determination, the financial adviser is bound to pay and the claimant is bound to accept the amount awarded, and that there is no right of appeal from the ombudsman's award.

42. Although Mr Wolman did not take this point, it might be said that the court is bound to resolve this ambiguity in favour of the Clarks because it interferes with their freedom to bring legal proceedings, following an award, and that this right is sufficient to exclude any common law rule. I have, however, considered this point and concluded that it would not be a violation of the respondents' right of access to the court under article 6 of the European Convention on Human Rights ("the Convention") for the court to apply applicable rules on *res judicata* and merger. The Convention right of access to a court can be restricted where the restriction (1) is prescribed by law, (2) serves a legitimate aim and (3) is proportionate. As to (1), the rules derive from the common law (Mr Wolman makes a separate point in this context about legal certainty which I shall deal with below). As to (2), the restriction in the present case serves the strong public policy that there should be finality in litigation and that a defendant should not have to face the same claims twice. As to (3), the

restriction is proportionate in the present case because, even if *res judicata* applies, the complainant has the right to refuse to accept the award and he is free to start court proceedings. So, his right of access to a court is not destroyed. In any event, if *res judicata* is applicable, it is by reason of the same set of rules as apply to all other disputes which are judicially determined within the meaning of the doctrine.

43. The Clarks contend that the effect of section 228(5) is no more than that acceptance of an award marks the end of the process before the ombudsman. Section 228(5) on their case does not prevent them from starting legal proceedings. (Of course, an award may be set aside by the courts in judicial review proceedings if it was, for example, perverse. However, that does not undermine the Clarks' contention because section 228(5) can only refer to an award which complies with public law principles). The Clarks' interpretation would undoubtedly be correct if either (1) the common law doctrines that preclude a complainant from taking court proceedings (i.e. *res judicata* and merger) are excluded by the context in FSMA, or (2) the requirements of those doctrines are not met. The conflicting decisions in the High Court took a different approach on both points.

44. In ***Andrews***, HHJ Pelling QC applied the common law rules of merger. At [36] – [38] of his judgment, HHJ Pelling QC held that the doctrine of merger applied to the decision of the ombudsman and accordingly the consumer could not bring court proceedings to pursue the same causes of action. He gave three reasons. First, this court in ***R(Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service*** [2008] Bus LR 1486 had proceeded on the basis that the ombudsman was a court or tribunal for the purposes of article 6 (right to a fair trial) of the Convention. Second, the procedure for complaints bore all the hallmarks of a court or tribunal. Third, the ombudsman was still a court or tribunal even if he did not have to apply legal principles. Any perverse or irrational decision could be set aside by judicial review.

45. As on so many issues, "…context is everything" (per Lord Steyn in ***R(Daly) v Home Secretary*** [2001] 2 AC 532 at [28]). In the impressive juridical discussion in the judgment in ***Andrews***, there is no discussion of the *purpose* of the relevant legislation. In any question of statutory interpretation, the court is concerned to ascertain the intention of Parliament. This is to be drawn primarily from the language that Parliament has used but that language can only properly be understood by understanding its context. The language used is not simply to be understood in abstraction. On the present appeal, we are concerned with legislation to help private investors resolve disputes with their advisers. There are two relevant consequences of the reduction in public expenditure seen in recent times for these investors: first, there is no public funding for these disputes and they are very costly, second, individuals from many walks of society must now increasingly rely on their own savings for their income and welfare when they have retired and when they are less able to look after themselves. The role of financial advisers is thus now more important, and they are needed by a wider group of people than before. An efficient system of resolving disputes, like tort law, is likely to raise standards among the industry. The intention of Parliament must, therefore, be seen as directed to alleviating the needs of investors in these circumstances and meeting the valuable social function of efficient dispute resolution.

46. By contrast with ***Andrews***, the judge in the present case looked at the legislation more holistically.

47. First, he considered that the function of the ombudsman was to deal with complaints and not causes of action. On that point, the judge cited paragraph 80 of the judgment of Rix LJ in ***Heather Moor***, where Rix LJ held that:

> "[80] …He [the Ombudsman] is, after all, dealing 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."

48. The judge then concluded that the doctrine of merger "has no purchase" in the context of the Ombudsman Service (judgment, [25]). The fact that the case had proceeded on the basis that the ombudsman was a court or tribunal for the purposes of article 6 did not mean that he was a court or tribunal for the purposes of merger. In the judge's judgment, it followed that ***Andrews*** was wrongly decided and therefore HHJ Barratt QC was wrong to rely on it.

49. The most important paragraphs of the judgment of the judge are [29] to [30]. where he held:

> "[29**]** In my view the correct approach is to consider the Ombudsman scheme as a whole. The statutory aims, as outlined earlier, are to provide a scheme for the summary and informal resolution of disputes. As was confirmed in *Heather Moor* the Ombudsman need not apply the law in reaching a fair and reasonable disposal of a complaint. The Ombudsman's procedure is designed to be expeditious. Complainants may accept or reject the Ombudsman's determination, but if they take the former course the award is binding on the parties and final. It is widely accepted that the scheme has been remarkably successful in resolving the complaints of clients against those offering financial services. If the Ombudsman's award, even though accepted, does not lead to the end of proceedings in any one case, that would not undermine the statutory aims. The scheme would still yield a final outcome in cases where there was no prospect of the Complainant receiving more than £100,000 in compensation. There would be no point in a Complainant contemplating legal action in that situation. With amounts beyond that the Ombudsman's non-binding recommendation for the Respondent to under s 229(5) might well encourage the parties to compromise without recourse to the courts. It seems to me that for a Complainant to use an award of £100,000 to finance the legal costs of bringing court proceedings for a greater amount is not inconsistent with the statutory aims. As to Mr Howarth's point, in my view the term "final" simply means the end of the Ombudsman's process. Overall, the statutory scheme in the 2000 Act is, in my view, neutral as to how the issue arising in *Andrews*, and indeed this case, is to be resolved.
>
> [30] In my respectful view the judge in *Andrews* was wrong to regard the doctrine of merger as applying to the determinations

> of the Ombudsman. The judge below should not have regarded that decision as determinative of the outcome of the Appellants' claim. Because he considered *Andrews* as binding, he considered a number of other arguments the Appellants advanced. Since the issues were freely canvassed before me it seems sensible to express my conclusions about them. Thus what follows proceeds on the basis that *Andrews* was decided correctly and that the Ombudsman deals with causes of action and is a tribunal so that the doctrine of merger operates."

50. Although it is apparent that this case was argued as one of merger below, the parties have argued this appeal on the basis of the more extensive requirements of *res judicata* (see paragraph 8 above). There is no dispute as to any of those requirements except requirement (i) that the decision should be a judicial decision in the relevant sense and requirement (v) that the award of the ombudsman "determined a question raised in the later litigation", i.e. that the ombudsman can be said to have determined the facts constituting the cause of action on which the claimant relies in his later proceedings. The argument on these questions overlapped and so I will take them together under Reason (1) below. As stated, I consider that these requirements were satisfied. After that, I shall deal with Reason (2), which is that section 228(5) of FSMA does not exclude the common law doctrine of *res judicata.*

REASON (1): LEAVING ASIDE FSMA, ACCEPTANCE OF AN AWARD WOULD BECAUSE OF THE DOCTRINE OF *RES JUDICATA* PRECLUDE A COMPLAINANT FROM STARTING LEGAL PROCEEDINGS TO PURSUE COMPLAINTS WHICH HE HAD ALREADY SUBMITTED TO THE OMBUDSMAN SERVICE AND WHICH THE OMBUDSMAN HAD DECIDED

51. Two issues have been argued here: (1) whether the decision of the ombudsman is a decision of a judicial body for the purposes of the *res judicata* doctrine, and (2) whether (and, if so, under what conditions) complaints to the ombudsman and causes of action relied on in subsequent proceedings are the same.

52. Both questions are important since the doctrine of *res judicata* should not be extended beyond these bounds: the rule is about not having two bites at the *same* cherry. In considering the identity of any questions decided by the ombudsman and to be decided by the court in the later proceedings, the court must focus on the substance of what occurred before the ombudsman and what is involved in the new proceedings: see ***The Indian Grace*** at 419-421 and see per Lord Clarke in ***Coke-Wallis*** at [19]. Importantly, the burden of proof is on the adviser.

53. On this appeal, we have not heard argument on the extent to which that identity existed in the present case since HHJ Barratt QC concluded in summary terms that the issues the subject of the award of the ombudsman were the same as those now raised in the action. Cranston J also took the view that, if ***Andrews*** was correctly decided, HHJ Barratt QC was right to conclude that the doctrine of merger applied (judgment, [36]). There is no appeal to this court from these findings. We therefore have to consider the question of identity from the standpoint of principle.

54. Mr Alistair Schaff QC, for the appellant, relies on the reasoning of HHJ Pelling in ***Andrews*** and he therefore submits that the judge in this case was wrong to say that the doctrine of merger had "no purchase" in relation to awards of the ombudsman.

55. On the question whether the ombudsman makes a judicial decision in the relevant sense, Mr Schaff cites the long list of statutory tribunals set out in ***Spencer Bower and Handley*** at paragraph 2.03 as examples of the wide range of decision makers whose decisions can give rise to judicial findings for this purpose. The examples include bodies such as boundary commissioners and a "collegiate or scholastic authority exercising jurisdiction under its statute or charter". The function of such a body is contrasted with a person or body exercising an administrative function, such as the function of an insurance officer who has to determine whether a person is entitled to a particular social benefit: see the speech of Lord Diplock in ***Hudson v Secretary of State for Social Services*** [1972] AC 944, 1010. In addition, Mr Schaff points out that ***Coke-Wallis*** is authority for the proposition that *res judicata* can apply with regard to the rulings of professional disciplinary bodies.

56. Mr Schaff also relies on section 225 of FSMA. This provides that the dispute is to be "resolved…by an independent person", not by agreement. The ombudsman makes an independent analysis. If the doctrine of *res judicata* does not apply in an appropriate case, the dispute is not in fact resolved since acceptance of the award leaves the complainant free on this hypothesis to start legal proceedings.

57. Mr Schaff further relies on ***Westminster City Council v Haywood (No 2)*****[**2000] 2 All ER 634. In that case, the issue was whether a complaint to the pensions ombudsman precluded a second complaint to the ombudsman on the same subject matter. Lightman J applied the following definition of *res judicata*

> " A modern and authoritative statement of the doctrine of *res judicata* is to be found in the speech of Lord Bridge of Harwich in *Thrasyvoulou v Secretary of State for the Environment, Oliver v Secretary of State for the Environment* [1990] 2 AC 273 at 289:"
>
> "'The doctrine of *res judicata* rests on the twin principles which cannot be better expressed than in the terms of the two Latin maxims "*interest reipublicae ut sit finis litium*" and "*nemo debet bis vexari pro una et eadem causa*". These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that, where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of *res judicata* applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions.'"

58. Lightman J held that *res judicata* applied. He held:

> "As a matter of principle and common sense, the doctrine of *res judicata* should apply equally to determinations and directions of the ombudsman (and judgments on appeal from him) as to other judgments and determinations, and *res judicata* should as much be a bar to a complaint before the ombudsman as it is a bar to the commencement of legal proceedings to which (in cases where the acts of maladministration complained of consist of interference with private law rights or breaches of private law duties) it is an alternative."

59. On the issue of the identity required as between the questions determined or to be determined in the proceedings from which the decision which is said to be *res judicata* in the subsequent proceedings, Mr Schaff submits that the court has to examine the substance of the subject matter of the proceedings and the way the proceedings were decided. He notes that the judge accepted that effectively the causes of action on which the Clarks sought to rely in their new proceedings are the same as the matters in the complaint.

60. Mr Schaff submits that the duty of the ombudsman to determine disputes by reference to what is fair and reasonable, thus enabling the ombudsman to go wider than the law and take account of practice, does not mean that the ombudsman does not make a judicial decision as required for the purposes of *res judicata*. This court held in ***Heather Moor*** that such a decision was compatible with the rule of law. The Arbitration Act 1996, section 46(2) (which enables arbitrators to decide disputes by reference to the chosen law or any other agreed consideration) recognises that parties may agree that arbitration should be conducted under similar principles, and this does not affect the enforceability of awards under such an arbitration agreement.

61. Mr Schaff also contends that the fact that **DISP 3.3.4R(8)** empowers the ombudsman to dismiss (or, it follows, to decline to dismiss) a dispute which has already been determined by the court on its merits is not inconsistent with his submissions, since the applicability of *res judicata* turns on the true interpretation of FSMA. The power might have been inserted by the drafter out of an abundance of caution in line with a suggestion made by Lightman J in ***Haywood*** in case he was wrong on the *res judicata* point.

62. Mr Wolman seeks to uphold the judgment of the judge. He submits that the judge was right to hold that ***Andrews*** was wrong. He relies on a number of indications in the scheme which he submits demonstrate that the ombudsman is not "a cause-of-action-extinguishing tribunal".

63. Thus he relies on the fact that the function of the ombudsman is not merely to decide questions but also to investigate and to mediate. Thus **DISP 3.5.1R** provides that the ombudsman will "attempt to resolve disputes by whatever means appear to him to be most appropriate, including mediation or investigation". Moreover the ombudsman can go on to decide a complaint and make an award where no legal causes of action are shown.

64. Mr Wolman also makes the practical point that it is not typical for complaints to be pleaded with sufficient particularity to give rise to the doctrine of merger. He submits that ***Andrews*** shows that there is risk of striking out cases on the basis of sweeping allegations which may be loosely expressed before the ombudsman and this may be unfair. Mr Wolman accepts that in a minority of cases facts will be pleaded with sufficient particularity.

65. Mr Wolman submits that the judge correctly held that complaints cannot amount to causes of action (judgment, [25] and [26]), and that this is a further indication (indeed it would eliminate any question of *res judicata* for present purposes). Mr Wolman submits that this is so even where the facts in question are or include the same facts as a cause of action on which the complainant relies in later proceedings.

66. When pressed, Mr Wolman submits that the ombudsman can be a tribunal in a few cases but the general rule is that he is not.

67. Mr Wolman also relies on the powers of dismissal which the ombudsman has under **DISP 3.3.4R(6), (8)** and **(9)** (see paragraphs 31-34 above). These powers would, in his submission, be largely unnecessary if *res judicata* applied.

68. A further indication that an award by the ombudsman does not eliminate a cause of action is, Mr Wolman submits, the fact that the ombudsman does not decide questions by reference to legal principles but by reference to what in his opinion is fair and reasonable, subject only to avoiding bad faith and perversity.

69. A further indication, in Mr Wolman's submission, is that the ombudsman is empowered to make a non-binding recommendation that the adviser should pay compensation in excess of the limit which can be the subject of an award (**FSMA, section 229(5)**). As the judge pointed out (judgment, [27]), issuing non-binding recommendations is not the function of a judicial tribunal.

70. Mr Wolman further submits that, if ***Andrews*** is correct, there would be no purpose behind the ombudsman making a "recommendation". HHJ Pelling suggested (***Andrews***, at [40]) that the purpose may be to facilitate negotiations between the opposing parties prior to the deadline by which a complainant has to accept or reject a determination, presumably by helping each to assess its chances of success if the dispute went to court. However, if that were the purpose, FSMA would have empowered the ombudsman to issue not a "recommendation" but rather an opinion or analysis of the case.

71. Mr Wolman also relies on "the ex post facto conferral of jurisdiction" on the ombudsman, as the judge put it. At the time their awards are prepared and written, they have no binding status.

72. Mr Wolman also relies on ***Clark v Argyle Consulting Ltd*** [2010] Scot CS CSOH 154, where Lord Woolman, sitting in the Outer House of the Court of Session held, principally because the award is not binding, that the ombudsman was not an arbitrator for the purposes of the Prescription and Limitation (Scotland) Act 1973.

Principal conclusions in support of Reason (1)

73. In my judgment, an award of an ombudsman under the scheme can give rise to *res judicata*.

74. The key point is whether a complaint could, as the judge put it, never be a cause of action. Mr Strachan's submissions provide the answer to this point: a complaint may consist of or include facts which constitute a cause of action. In my judgment, that is enough to show that a complaint may be, or include, a cause of action: see **Letang v Cooper.**

75. Mr Strachan's submissions raise two matters which might bar *res judicata.* He points out that the ombudsman's award does not determine whether those facts amount to a cause of action in law or what the parties' rights were and whether they were infringed; but it will decide the question whether the complaint is made out on the basis of these facts and should lead to the grant of some remedy against the adviser.

76. A further potential problem to the application of *res judicata* on Mr Strachan's submission is that FSMA requires the ombudsman to resolve a dispute by reference to what in his judgment is fair and reasonable and not simply by reference to legal principles.

77. In my judgment, these points are not impediments to the application of *res judicata*. For the purposes of that doctrine, it is sufficient as I see it that the ombudsman decides a question posed by facts constituting a cause of action. The rationale of *res judicata* would apply in those circumstances and none of the authorities shown to us require that the decision in terms decides whether or not a cause of action has been shown or what the parties' legal rights or obligations were. In my judgment, it is sufficient that he decides whether the facts underlying a cause of action give rise to any claim as between the complainant and the adviser and whether the claimant has any remedy against the adviser relative to those facts. The fact that the remedy is not the same as would be awarded in a court of law is also not a requirement of *res judicata*: otherwise, *res judicata* would not be available if the first decision is that of a foreign court in which different remedies are available from those available in our courts. Again no authority cited to us goes that far. That conclusion means that if the complainant were (unwisely) to accept an award offering him only an apology, *res judicata* would apply if he chose to bring court proceedings. His wiser course would be to reject the award altogether in those circumstances.

78. Some (fictional) examples might help here. Suppose that a complainant, a woman running her own small business and approaching retirement age, has a pension with a guaranteed annuity rate, and she seeks advice from her financial adviser in 2008 about obtaining new fiscal advantage by buying a pension at the age of 55 years rather than at the age of 60 years. She understands that annuity rates were likely to fall. Her financial adviser arranges for her to buy an annuity but does not explain that she would be giving up the benefit of the guaranteed annuity rate that she would have if she retained her pension until age 60 years. She complains to the Ombudsman Service about this. The ombudsman investigates and discovers that industry practice is to explain this matter in financial terms so that the client can see what she is giving up. The award gives her compensation on the basis that the adviser had not explained to her clearly the benefits that she was giving up by buying an annuity before her pension date.

79. If the complainant in my example accepted the award but, being dissatisfied with the amount of compensation awarded to her by the ombudsman, started court proceedings to obtain further compensation in respect of the adviser's failure to give her clear advice about the benefit she was giving up when she sold her pension, the court would have to consider whether this was the same complaint and if so whether the ombudsman had determined the question raised by this complaint. The court would have to look at the detailed documentation, but on the face of the summary I have given this would be the type of case where the court could conclude that in substance the complaint and the decision involved the same matter as she now pleaded in the court proceedings and so *res judicata* applied.

80. Suppose on the other hand that her complaint to the Ombudsman Service had been based on facts that did not constitute a cause of action. Suppose that the annuity provider had overpaid her by amounts which she was well able to repay and made a demand for repayment, and she instead refused to pay and lodged a complaint that the demand should not have been made because it was the annuity provider's own fault that they had overpaid her and that the annuity provider should give her an apology. The ombudsman makes an award rejecting her complaint, observing that she has not raised any matter which would constitute in law a defence to repayment. She (somewhat surprisingly but hypothetically) accepts the award but then starts proceedings for a declaration that she was not obliged to repay the overpayments. If she does not submit to the ombudsman any basis for resisting repayment, it is difficult to see that she has made a complaint that amounts to a cause of action. If she alleges some change in her financial circumstances since overpayment in her court proceedings, she might, depending on the facts, then be precluded from pursuing those proceedings by the rule in *Henderson v Henderson*. What she should have done was to reject the award or bring forward her case on a change of circumstances when the ombudsman investigated the matter.

81. There may be cases where, as Mr Wolman points out, there will be a lack of particularity in the complaint. This may make it difficult to ascertain whether the award was the product of the facts constituting the cause of action relied on in later proceedings. But the answer to that point is two-fold. First, this point should not be overstated simply because complainants are consumers. Some of them will no doubt be well informed and they may have legal advice. In addition, as a practical matter the ombudsman will have to investigate the complaint if he is not clear what it is about and to explain what the complaint is when he upholds or declines to uphold it in his award. Second, the burden of showing that the facts constituting a cause of action formed the basis of an award and that the same cause of action is relied on in the court proceedings will lie on the adviser. If the court is not satisfied, there will be no *res judicata*. In short, the complainant has the benefit of any doubt.

82. I am satisfied that the ombudsman's award is a judicial decision for the purposes of the requirements of *res judicata*. The process involves giving the parties an opportunity to state their case: the award is not the product of the ombudsman's enquiries alone. The ombudsman is not making an administrative decision. The fact that article 6 applies to the process, as the judge pointed out, is not determinative of this question but it strongly indicates that the decision of the ombudsman is a judicial one. The decision of the European Court of Human Rights on this point in ***Heather***

Moor & Edgecomb Ltd v UK (App no 1550/09) that the ombudsman was a "court or tribunal" for the purposes of article 6 of the Convention makes this clear:

> "The parties accepted that Article 6, under its civil head, is applicable to the facts of this case. The Court agrees. In deciding the complaint against the applicant and ordering it to pay compensation to L, the Ombudsman determined the applicant's civil rights and obligations. The procedure must therefore conform to the standards set down in Article 6.
>
> According to the Court's well-established case-law, an oral and public hearing constitutes a fundamental principle enshrined in Article 6 § 1 (see Jussila, cited above, § 40). As the Court recognised in that and other cases, however, the holding of a hearing is not an absolute obligation. There may be proceedings in which it is not required, where the courts, or other deciding authority, may fairly and reasonably decide the case on the basis of the parties' written submissions and other written materials (ibid., § 41). Considerations of efficiency and economy may also be relevant in certain contexts, one example being social security law. The present context is of protection for consumers in the domain of financial services and investment advice. Parliament's intention, clearly stated in the legislation, was to provide for the resolution of certain disputes quickly and with minimum formality. It notes in this respect the very high number of disputes that FOS deals with annually, which the Government put at 150,000..."

83. I also note that the Ombudsman Service accepts that it makes judicial decisions for the purposes of *res judicata*.

84. In addition, my overall conclusion is supported by the holding of Lightman J in the ***Haywood*** case, though the judge's reasoning was much more briefly expressed than I have expressed it in this judgment and the fact that the judge dealt with the case on the basis that he was wrong about *res judicata* may suggest that he was not confident that the issue had been fully ventilated in that case.

85. I am not impressed by the submission that *res judicata* is not available because the ombudsman has other functions, for example mediation. *Res judicata* can of course only apply where a relevant question is decided. Mr Wolman produces no authority to show that the fact that the ombudsman could have resolved the dispute by mediation would affect the application of *res judicata*.

86. Mr Wolman relies on the ombudsman's powers to dismiss a complaint in **DISP 3.3.4R (6), (8)** and **(9)** as showing that the ombudsman is not a "cause-of-action-extinguishing tribunal". As I see it, these rules, which do not affect the question of the content of the complaint and award, can only indicate what the regulator thought was the position when the rules were made.

87. The fact that the ombudsman has to reach a conclusion on the basis of what in his opinion is fair and reasonable does not in my judgment exclude the application of *res*

judicata. I accept this may be a novel point but I do not find anything in the requirements for *res judicata* that it can only apply if legal principles are applied. That would lead to a satellite inquiry of the kind the doctrine is intended to eliminate and also interfere with parties' autonomy to agree that a decision maker shall apply some other principle. Moreover, to be valid, the decision of the ombudsman must not be perverse, and the ombudsman is required under **DISP** to take (proper) account of the relevant law.

88. Mr Wolman cites the ombudsman's power to make a recommendation as another indication that the ombudsman is not intended to be a "cause-of-action-extinguishing-tribunal". The fact that the ombudsman may go on to make a recommendation about compensation over and above the amount awarded does not bear on the point that the award may have determined a question arising from a set of facts which constituted a cause of action.

89. My conclusion means that there will be occasions when a complainant may bring court proceedings against an adviser even though he has accepted an award to which section 228(5) applies. Whether that can happen depends on whether the substance of the proceedings asserted before the courts are the same as that before the Ombudsman Service. Fresh proceedings are not permitted if based on the same cause of action so a complainant cannot use proceedings to top up his award for that wrong. The burden of showing that the requirements for *res judicata* are made out on the facts of the two sets of proceedings will fall on the adviser.

90. There is a difference between the court concluding that there was the same cause of action as before the ombudsman and applying the rule in ***Henderson v Henderson***. Under that rule, fresh proceedings are not automatically precluded and the court has to reach a "broad merits-based judgment" as to whether the court proceedings are abusive, thus different factors might arise. The rule in ***Henderson v Henderson*** does not apply in this case so I need not say more about it.

91. I do not attach any significance to the fact that an award lacks binding status when it is written or to the fact that an award is not binding unless and until the award is accepted. The crucial point is that, in the end, an award which is accepted is binding on the complainant and the adviser.

92. As to ***Clark v Argyle,*** Mr Wolman is correct to suggest that decisions of arbitrators will normally be treated as judicial decisions for the purposes of *res judicata*. But it does not follow from this that the fact that a conclusion that an ombudsman under this scheme is not an arbitrator "pursuant to an enactment" under Scots law means that his decision cannot otherwise qualify as judicial for the purposes of *res judicata*.

93. As *res judicata* may be available, I do not need to consider whether merger is available. Merger could not operate in any case where *res judicata* was not available.

REASON (2): SECTION 228(5) OF FSMA DOES NOT EXCLUDE THE OPERATION OF THE COMMON LAW DOCTRINE OF *RES JUDICATA*

94. Mr Schaff QC submits that the judge was wrong to say that it is consistent with the statutory scheme for the Clarks to be free to pursue their claims in proceedings even though they have accepted an award (judgment, [29]). This conflicts with the aim of

speedy resolution of disputes. There is nothing to exclude the common law doctrine of *res judicata* that must therefore apply.

95. Mr Schaff submits that there is no unfairness on the Clarks. They elected to use a scheme with a limit of £100,000. They were also free to reject the award made. They cannot establish that they have a new cause of action simply by saying that they made a mistake when they mistakenly thought that they could accept the award and reserve the right to bring legal proceedings when they did so. He submits that they cannot avoid the merger doctrine by reserving a right to take court proceedings: see per Moore-Bick LJ in ***Fraser*** at [52].

96. Mr Wolman submits FSMA should be interpreted to exclude the doctrine of *res judicata*. He cites three principles in support of his argument.

97. First, Mr Wolman submits that the court should, when interpreting section 228(5), apply the presumption that the law should not be subject to casual change: see ***George Wimpey v BOAC*** [1955] AC 169. Bennion on *Statutory Interpretation* (Butterworths 4 ed, 2002), summarises this principle as follows at page 812:

> **"Section 269. Law should not be subject to casual change**
>
> (1) It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not change either common law or statute law by a sidewind, but only by measured and considered provisions. In the case of common law, or Acts embodying common law, the principle is somewhat stronger than in other cases. It is also stronger the more fundamental the change is.
>
> (2) The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. The court should therefore strive to avoid adopting a construction which involves accepting that Parliament contravened the principle. "

98. In support of this submission, Mr Wolman gives three reasons (1) FSMA is silent about *res judicata*: it does not say that successful complainants should *not* be able to go on and take court proceedings; (2) under at least one previous and subsumed scheme awards were not binding (see ***Halifax Building Society v Edell*** [1992] Ch 436) and Parliament has not stated that there is to be any change in that position; and (3) the transitional provisions allowing for complaints under the previous schemes to be continued under FSMA (see ***The Financial Services and Markets Act 2000 (Transitional Provisions) (Ombudsman Scheme and Complaints Scheme) Order 2001*** (SI 2001 No. 2326)) ("the Transitional Provisions") endorsed the notion that there was no substantive change.

99. I agree that points (1) and (2) are correct so far as they go, but FSMA was an amending statute. **Section 228(5)** is a new provision and it cannot simply be said to be a casual change. Mr Wolman makes a number of other points about the old schemes, including the point that under some of them ombudsman could make provisional awards. He submits that this could have been the reason for including section 228(5), but so to find on the material we have would in my judgment be mere speculation.

100. As to point (3), Mr Wolman submits that the Transitional Provisions show that complaints under the old schemes were dealt with under the new provisions. In my judgment, that is not so. For instance, **article 6(3)** (a determination under the new scheme may include such remedy as could have been granted under the earlier scheme) and **article 9** (certain appeals continued as if the new scheme had not been set up) make it clear that any substantive right of the complainant under a previous scheme was preserved. Ouseley J considered the Transitional Provisions in ***R (Norwich and Peterborough Building Society) v Financial Ombudsman Service*** [2002] EWHC 2379; [2003], All ER (Comm) 65, but he does not say that the old schemes and the new Financial Ombudsman Scheme were the same.

101. Secondly, Mr Wolman relies on the mischief rule, more commonly called today purposive interpretation, namely the principle that the court should interpret legislation so as to best achieve the purpose of Parliament, which in this case is to protect consumers. In my judgment, it does so by making a more level playing field for resolving their disputes. However, as I see it, the protection of consumers does not mean that, having succeeded under the scheme, consumers must be free to go outside the scheme and start court proceedings. If Parliament had intended consumers to be placed in some different position than other litigants, it should have said so. For the court to read in that requirement would, as Mr Schaff points out, run counter to the more specific purpose set out in section 225(1) that disputes should be *resolved* quickly and with the minimum of formality.

102. The third principle of statutory interpretation on which Mr Wolman relies is that of certainty. Mr Wolman argues that, if the doctrine of *res judicata* applies, it precludes a claimant from taking legal proceedings without fair warning and therefore lacks the necessary certainty to be consistent with the rule of law. In this particular case, he further submits, the recommendation if anything suggested that the complainant could take court proceedings to recover the balance necessary to provide him with full compensation, and the award, on his submission, did not make it clear that this would be not be so. We are however, concerned not with those matters but with the issue of statutory interpretation.

103. On this point, Mr Wolman cited this court's decision in ***Heather Moor***, where this court rejected the argument that it was contrary to the rule of law for the scheme to provide for the resolution of disputes according to what the ombudsman considered fair and reasonable, principally on the ground that the ombudsman could be judicially reviewed if it was perverse. The Strasbourg court itself reached the same conclusion. In this court, Stanley Burnton LJ described the requirement for legal certainty as follows:

> **"**[48] The Rule of Law is undoubtedly a basic principle, perhaps the basic principle, of our unwritten constitution and of

> the Convention. In his lecture entitled "The Rule of Law" published in [2007] CLJ 67, Lord Bingham emphasised the importance of the law being "accessible, and so far as possible intelligible, clear and predictable". Professor Paul Craig, in his paper on the Rule of Law appended to the Report of the Select Committee of the House of Lords (HL Paper 151), referred to the importance of the law being "capable of guiding one's conduct in order that one can plan one's life", and of clarity as to the consequences of breach of the rule of law. So far as Convention jurisprudence is concerned, it is sufficient to refer to the preamble to the Convention, to para 34 of the judgment of the European Court of Human Rights in *Golder v UK* (1975) 1 EHRR 524, and to the judgment of the court in *The Sunday Times v UK* Case 9538/74 [1979] ECHR 1 at para 49:
>
> > '49 In the court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.' "

104. In the same case, Rix LJ identified features of the scheme that were for the benefit of the consumer (see his judgment at [84] and [89]). He construed the requirements of predictability and found they were satisfied. So, submits Mr Wolman, in this case a consumer who is not very sophisticated is faced with having to make a decision. How can it be, Mr Wolman asks, that neither the legislation nor the guidance makes the position clear?

105. Mr Wolman also relies on the dictum of Lord Diplock in ***Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*** [1975] AC 591 at 638 as showing the need for predictability:

> "The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences

> are regulated by a statute the source of that knowledge is what the statute says."

106. Mr Wolman is correct to say that the law must indeed attain a degree of predictability but the second sentence of this citation does not show, as he implies, that law can only be found in the statute. Clearly it can be found in the common law because Parliament enacts legislation against the background of the existing law. That is the answer to his objection on the grounds of uncertainty if *res judicata* applies to awards under the Ombudsman Scheme.

107. Before I set out my principal reasons for my conclusion on this issue, I should mention briefly some other submissions that Mr Wolman makes.

108. Mr Wolman submits that it would be open to an ombudsman in his award to oust the effect of *res judicata* by saying that he is unable to identify a cause of action. That is the homologue of the point whether the Clarks could make it a condition of their acceptance of an award that they were free to take court proceedings. In my judgment, a litigant cannot exclude *res judicata*, if applicable, in this way. Neither can the ombudsman. The doctrine operates independently of their wishes.

109. Mr Wolman next relies on the powers of the criminal courts to award compensation to a victim of crime. Originally, if magistrates awarded compensation, however small, it excluded a victim from bringing civil proceedings: ***Wright v London General Omnibus.*** However, when today a criminal court awards compensation under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000, **("the 2000 Act")** a victim is not prevented from bringing a civil claim for further compensation (see e.g. ***R v Vivian*** [1997] I WLR 291). To my mind, all this proves is that Parliament is aware of the issue of *res judicata* and, when it wishes to do so, excludes the doctrine.

110. Mr Wolman goes on to rely on ***R v Chappell*** (1985) 80 Cr App R 31, where the Criminal Division of this Court held that the civil and criminal remedies for compensation were not co-extensive and so the court could, for example, order less compensation under section 35 of the Powers of Criminal Courts Act 1973 (which was consolidated by the 2000 Act) than the victim would obtain in civil proceedings. He argues from that that an ombudsman under the Financial Ombudsman Scheme also might award less than full compensation and that that too was a reason why *res judicata* should be excluded in relation to awards under this scheme. The answer to this point is that *res judicata* does not cease to apply because the complainant could obtain a higher level of compensation in court proceedings. There would need to be an exception in **FSMA** for this to happen.

Principal Conclusions in support of Reason (2)

111. As I have stated above, in my judgment Mr Schaff is correct on this issue overall. My principal reason is that, as a matter of statutory interpretation, where Parliament is silent on an issue, the common law still applies unless it has been excluded expressly or by implication: see Bennion on *Statutory Interpretation*, which states at page 887:

> "**327. Presumption that ancillary rules of law apply**

> Unless the contrary intention appears, an enactment by implication imports any principle or rule of law (whether statutory or non-statutory) which prevails in the territory to which the enactment extends and is relevant to its operation in that territory…"

112. There is good reason for the court to apply this presumption. Parliament in general enacts legislation on this basis. Indeed, from time to time, it may make a deliberate decision to leave the matter silent and let the courts resolve it either because there is no consensus on any other solution or because there would be so many different circumstances that might occur and the matter is best left to judicial decision. The court would be failing in its duty if it did not consider what common law principles might apply.

113. The judge in the present case proceeded on a different basis. He held that the purpose of the Ombudsman Service was to provide consumers with speedy, free dispute resolution, that it would be consistent with those aims to exclude any common law doctrine, and that it was enough that the legislation was silent on the question whether the common law should apply.

114. In my judgment, the judge was clearly right to consider the relevant provisions in the context of consumer protection and to seek to further Parliament's purpose in that regard through the judicial process of interpretation. But in doing so the judge did not in my judgment have sufficient regard to the limit on awards and to the fact that the legislation applied only to complaints so far as that limit was not exceeded. If Parliament had intended that the complainant should be able to recover loss in excess of the current limit, it is difficult to see why it would have imposed that limit in the first place. By setting up a scheme for *resolving* disputes, (see **section 225(1)**), Parliament manifested its intention that consumer protection did not go beyond the scheme. Otherwise the scheme would have expressly excluded *res judicata*, as the **2000 Act** had done. It might also have provided that findings by the ombudsman could be relied on in court proceedings to reduce legal costs and the risk of inconsistent findings.

115. Does it make any difference to this analysis that Parliament also gave the ombudsman power to make a recommendation for an award that exceeds the maximum limit permitted for an award? I do not think so. The mere power to recommend does not indicate that Parliament intended that, if the adviser rejected the recommendation, the complainant should be free to start legal proceedings. The recommendation gives the complainant no right to any sum. On the contrary the power to make a recommendation suggests that Parliament wished to make some provision for the case where the claimant had a claim which might exceed the maximum amount but was content to accept an award rather than embark on legal proceedings.

116. Likewise, it makes no difference to this analysis whether the ombudsman awarded the complainant the maximum sum of £100,000 or some lesser sum. The doctrine of *res judicata* can apply irrespective of the amount of the award.

117. In ***Coke-Wallis*** at [48] to [50], Lord Clarke pointed out that the question whether there should be an exception from *res judicata* for any particular group of claims involves policy questions and therefore was a matter for Parliament, not the courts.

That is the case in this field as well as that of disciplinary proceedings, with which *Coke-Wallis* was concerned, for the reasons given in the next paragraph.

118. There may well be a good reason for Parliament not intending that a complainant should be able to issue legal proceedings having obtained an award from the ombudsman. As is well known, individual investors vary in their experience, knowledge and net worth and Parliament would not necessarily want to provide them all with the same level of protection. The right course, therefore, in my judgment is to interpret the legislation for the purpose of promoting consumer protection only within the limits of the scheme and not to fill in gaps outside the scheme. It is not, therefore, as the judge held, enough that FSMA is neutral, or silent, on the question whether common law rules preclude a complainant from taking court proceedings. This is re-inforced by the point made by Mr Schaff that section **225(1)** (set out above) describes the scheme as one for *resolving* disputes. This is a powerful indication that Parliament did not intend consumers to be able to bring legal proceedings as well as accept an award.

119. I propose to test the interpretation suggested by the statutory language in its context by considering the likely consequences of my decision one way or the other, so far as I can tell what those consequences might be. It is true that, if the Clarks succeed, so that any complainant can first use the Ombudsman Service procedure and then start court proceedings, a complainant may be able to use an award as a fighting fund for legal proceedings. On the face of it this result would be for consumers' interests, but that is not necessarily so. If they lose court proceedings, it may lead them to losing all that they have gained through the Ombudsman Service. It may also lead to the development of a claims industry in this field that increases the costs of obtaining financial advice: there are already 210 ombudsmen and many more might be needed if a larger group of complainants can apply. The benefits of the judge's interpretation are therefore insufficiently obvious to justify the conclusion that *res judicata* must be excluded.

120. In addition, I do not know and thus cannot speculate as to whether there would be more legal proceedings, or a greater number of complaints to the Ombudsman Service, if the appeal went one way rather than another.

CONCLUSION

121. For all the reasons I have given, I would allow this appeal. Parliament did not manifest any intention that complainants to the Ombudsman Service should be in any different position from other claimants who have taken their claim for compensation through a tribunal for dispute resolution and obtained a decision, and then sought to litigate the same grievances again in the courts. They are not able to raise the same claims in court proceedings even if they could have recovered more in court proceedings. What they had to do to obtain this higher level of compensation was to reject the award and bring court proceedings for that amount.

122. On section **228(5),** it is true that this does not refer to *res judicata*. However, *res judicata* applies because it is part of the common law and Parliament legislates against the background of the common law and is presumed to intend it to apply. **FSMA** does not rebut that presumption in relation to *res judicata,* either expressly or by implication.

123. If my Lady and my Lord agree, this means in future cases that, if and to the extent that the defendant can show that before the Ombudsman Service the claimant relied on a complaint which was in substance based on a set of facts which constitutes the cause of action on which he relies in his subsequent proceedings, and the ombudsman determined that complaint whether by reference to what is fair and reasonable or by reference only to legal principles (which he considered to be fair and reasonable to apply), then *res judicata* applies. It does not matter whether the award was for the maximum sum that can be awarded or for a lesser amount.

Lady Justice Black:

124. I have had the advantage of reading in draft the judgments of Arden LJ and Davis LJ and I agree with them that this appeal should be allowed because I too have concluded that the doctrine of res judicata can, in principle, apply where the Financial Ombudsman Service has determined a dispute such as that which arose here. Whether it does, in practice, apply will depend upon the facts of the particular case; we have not been asked to involve ourselves in that question on this appeal. Although there may, at first sight, appear to be an unfairness in preventing a claimant from taking legal proceedings to recover the balance of his loss over the award made by the ombudsman, it is important to remember that the claimant himself holds many of the cards. He can consider the award issued by the ombudsman and any recommendation that the ombudsman makes for additional compensation and, with the benefit of that independent evaluation of his claim, decide whether to take the award or to reject it. If he rejects it, his right to bring proceedings in the courts is untrammelled. If he takes it, he has benefited from a practical scheme which he has been able to use without risk of costs. As Davis LJ says, one can have sympathy with the Clarks and their advisers who sought to preserve their position by accepting the award on terms, but that does not determine the outcome of the appeal.

Lord Justice Davis:

125. I agree that this appeal should be allowed for the reasons given in the comprehensive judgment of Arden LJ. I also think that the conclusion and essential reasoning of HHJ Pelling QC in *Andrews* was correct. I do not think it material, for present purposes, that his conclusion was based more on the doctrine of merger than on the doctrine of res judicata.

126. Mr Wolman expressed concern that if this appeal were allowed that might hereafter operate as a trap for complainants (many of whom will not be legally represented): in that sweeping and unparticularised allegations raised in a complaint to the ombudsman might then operate as a bar to subsequent legal proceedings. I understand the concern. But the doctrine of res judicata is not conclusively delimited by the wishes or intentions of the parties; and in any case the court, if an adviser were to seek to argue for a stay of subsequent legal proceedings on the ground of res judicata or merger, would be astute to look at the substance of things and to assess the true subject matter of the prior complaint and determination.

127. In the present case the Clarks were awarded the (then available) maximum of £100,000, with a recommendation for significantly more. Further, in accepting that award they sought expressly to reserve the right subsequently to take legal proceedings. That scenario clothes their subsequent claim with some merit. One can

also sympathise with the Clarks and their then legal advisers in the position they found themselves in, at a time when the law was not clearly established and when in practical terms the Clarks doubtless wanted and needed money immediately. But purported reservation of the right to sue cannot operate to create such a right when, on acceptance of the award, such a right was never there. And, after all, it had been open to them not to use the ombudsman scheme in the first place and open to them (having used it) to reject the award; thereby on any view preserving their legal rights. Moreover the Clarks perhaps could have asked the adviser if it would abide by the recommendation before deciding whether or not to accept the award.

128. Further, the logic of the argument on their behalf would mean that if a fully particularised complaint is made to an ombudsman seeking an award of £75,000 for certain losses and the complaint is accepted and an award is made but only for £25,000 for those losses, then the complainant could, having accepted that award, immediately make precisely the same claim in legal proceedings with a view to obtaining the remaining £50,000. I do not think that the FMSA has that intention or consequence.

129. There was some limited discussion before us as to whether the doctrine of *Henderson v Henderson* could be applied in legal proceedings brought subsequent to a prior complaint to the ombudsman on an application by the adviser to stay the legal proceedings: on the footing that such claim *could and should* have been raised in the ombudsman proceedings, even if it had not been. That is not this case and I would wish to reserve my opinion on it. One can, at the least, see potential objections to such an approach. Complainants before an ombudsman often have no legal advice and may not be alive to all the various claims or causes of action available to them. Even if they are, they may consciously, and for reason, choose not to deploy them: for example, because to do so may take them over the statutory maximum for an award. At all events, even if that aspect of the doctrine of *Henderson v Henderson* were in principle capable of being available in such a situation, one can expect a court to scrutinise very closely indeed (by reference to the facts of the case) any application for a stay of the legal proceedings on such a basis.

130. In this regard, I also would note that HHJ Pelling QC in *Andrews* expressed his conclusions in the context of a case where the legal claim arose out of the same facts *and* alleged the same particular types of loss as had been asserted in the complaint to the ombudsman. Quite what the position might be if the facts giving rise to the initial complaint and the subsequent legal claim were the same but the alleged types of loss arising out of those facts were different did not fall for decision there; and has not fallen for decision in the present case. Such matters will have to be dealt with, on the particular circumstances of the particular case, if they hereafter arise.