England and Wales High Court (Administrative Court) Decisions

Neutral Citation Number: [2017] EWHC 352 (Admin)
Case No: CO/859/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL
27/02/2017

B e f o r e :

MR JUSTICE JAY

Between:

THE QUEEN on the application of AVIVA LIFE & PENSIONS (UK) LIMITED	**Claimant**
- and -	
FINANCIAL OMBUDSMAN SERVICE	**Defendant**
-and-	
(1) MRS S.P. McCULLOCH (2) MR J.F. McCULLOCH	**Interested Parties**

Robert Moxon Browne QC and Sonia Nolten (instructed by Aviva Legal Services) for the Claimant
James Strachan QC (instructed by Senior Legal Counsel at FOS) for the Defendant

Hearing date: 22nd February 2017

HTML VERSION OF JUDGMENT APPROVED

See Order at bottom of this judgment.

MR JUSTICE JAY:

Introduction

1. In these judicial review proceedings, the Claimant ("Aviva") challenges a decision of the Defendant ("FOS") given on 16th November 2015 upholding, in part, the complaint by the Interested Parties ("Mr and Mrs McCulloch") relating to Aviva's handling of two insurance policies taken out in 2006 and 2013 respectively. Mr and Mrs McCulloch have taken no active role in these proceedings, but have made clear that anonymity is not sought under CPR Part 39.2(4).

2. The issue which arises for determination in these proceedings is narrow. FOS concedes that the decision of its Ombudsman should be quashed on the basis that it is inadequately reasoned. It contends before me, as it has consistently done since February 2016, that this concession renders these proceedings academic. Aviva's case, in essence, is that its application for judicial review should be heard to a conclusion, and a narrative judgment given, because it is unanswerably right both on the facts and in law; or alternatively because a new Ombudsman should have the benefit of whatever I might say in this judgment.

3. Before I examine these issues, I need to set out the essential factual background to this case. Fortunately, this is not in contest, both in relation to the underlying dispute between Aviva and Mr and Mrs McCulloch, and FOS's handling and adjudication of their complaint. In any event, to the extent that FOS's Ombudsman has made findings of primary fact (as opposed to secondary or inferential findings) in her determination of the complaint, I consider that these cannot be unimpeached.

Essential Factual Background

4. In July 2006 Mr and Mrs McCulloch took out a 23-year joint life policy ("the joint life policy") which included terminal illness benefits and a sum assured of £127,000. This was, in essence, a composite policy whereby Mr McCulloch was insuring against the contingency of his wife's predecease, and *vice versa*. A single premium was payable on the basis of a blended mortality risk. I understand that Mr and Mrs McCulloch paid all the required premiums under this policy.

5. At some point before August 2013, and possibly as early as 2008, Mr McCulloch (who was born in 1971) developed a rare, early-onset form of dementia known as Fronto-Temporal Dementia ("FTD"). This is an aggressive, terminal condition which entails irreversible degeneration of the brain cells in the primary cognitive areas. At that stage, Mr McCulloch's condition was undiagnosed and he was unaware of it. Even so, by that date Mr McCulloch had already suffered significant changes in personality leading to the breakdown of his marriage. There is evidence that he could no longer work and was losing control of his financial affairs.

6. In early August 2013 Mr McCulloch contacted Aviva by telephone to cancel the joint life policy, because it was no longer required. Mrs McCulloch's written consent was required, and it was obtained on 5th (or, possibly, 8th) August. She said that the premiums could no longer be afforded. The direct debit instruction was revoked and the joint life policy was cancelled by Aviva.

7. At about this time, Mr McCulloch's family had become concerned about changes in his behaviour and personality, and on 20th August 2013 his sister contacted his GP. That afternoon, the GP saw Mr McCulloch in consultation with his sister. Thereafter, a number of consultations took place and possible mental illness was considered.

8. In early September 2013 Dr B referred Mr McCulloch for routine investigations into a possible inguinal hernia.

9. On 9th September 2013 Dr B referred Mr McCulloch for routine psychiatric assessment: the main presenting complaint was described as "personality change". The referral letter states:

> "I reviewed him and his family who unfortunately still have concerns about his behaviour … I spoke to his wife who is now separated from him ... and she feels his personality has changed slowly over the last few years.
>
> …
>
> On examination I could find no significant neurological findings of note … The family are still concerned that he has significant behavioural change in the recent past and although I think he has indeed a personal attitude concerns [sic] and this is probably related to his time in the navy and also his work in convoy protection rather than a mental illness but there is significant concerns from his family that he may have a mental illness given his personality."

10. It is not altogether clear from the medical records exactly when Mr McCulloch was first seen by a psychiatrist, but on my understanding of the GP's computer record the latter had a telephone conversation with a Dr R, consultant psychiatrist, on 10th October 2013. According to Dr R's letter dated 15th October 2013, Mr McCulloch did not present with clear signs of mental illness or neurological deficit, and "it is likely that people can have personality traits which again are very much part and parcel of their nature which they fail to recognise it, as a problem". As I have said, it is not clear whether Dr R had in fact seen Mr McCulloch at that stage, or whether he was simply discussing his case in general terms with the GP.

11. In the meantime, Mr McCulloch's family's concerns were deepening. The GP was told about various specific matters which it is unnecessary for me to set out. Nonetheless, when the GP explored these concerns with Mr McCulloch, he denied any recollection of their having took place.

12. On 18th October 2013 the GP referred Mr McCulloch for further psychiatric assessment. After setting out the recent history, the GP said:

> "Although I initially thought as we discussed that his symptoms were suggestive of his personality traits and the recent stress of the breakup of his marriage and his career am now beginning to wonder if there is a more acute mental health issue giving that he is running up debts [etc.]
>
> I would appreciate your further review, have arranged for him to have a blood screen and CT scan [on 17th October] to ensure there is no evidence of frontal lobe pathology to explain his condition but I suspect these will come back normal."

13. On 1st November 2013 Mr McCulloch was seen again by his GP. According to the computer record:

> "he feels capable of work – denies any abnormal thoughts actions admits to being in debt and having bought things he doesn't need and has no recollection why …"

14. On 7th November 2013 Mr McCulloch applied to Aviva for a single life policy with terminal illness benefit, with a sum assured of £500,000 ("the single life policy"). He completed the proposal form in the following material respects:

> "Q18: 'Within the last five years, other than in respect of the conditions that you have already declared have you:
>
> 1. received any medical attention at a hospital as an inpatient or outpatient, or

2. had or been advised to have any investigations, scans or blood tests?'

A: 'no'

'Q19: Other than in respect of the conditions that you have already declared, are you currently:

1. experiencing any symptoms or complaints for which you have not consulted a doctor or

2. receiving any form of treatment or medication or

3. awaiting any medical or surgical consultation or follow up or

4. awaiting any test or investigation?'

A: Yes – groin hernia (and further details were given)."

15. It follows that Mr McCulloch did not disclose to Aviva that he had been consulting his GP in relation to possible mental health issues since September 2013, that he had been referred for psychiatric assessment, and that he was awaiting a CT scan.

16. Aviva accepted Mr McCulloch's application and on 12th November 2013 cover commenced under the single life policy.

17. On 18th November 2013 Mr McCulloch was seen by Dr B, described as a "specialty doctor in psychiatry". Dr B did not give a specific diagnosis, and at the same time did not record any particular concerns. In his clinic letter Dr B did state, "[Mr McCulloch] was unable to give any explanation about his behaviour" and "at times I did feel he didn't have insight into such matters [which I interpret as being a general reference to possible psychiatric issues]".

18. On 22nd November 2013, following the result of his CT scan, Mr McCulloch's FTD was diagnosed.

19. On 11th December 2013 Aviva was informed by telephone by a relative of Mr McCulloch that he was in a hospice, that his condition was terminal, and that the family wished to notify on his behalf a claim for terminal illness benefit. I have not seen any evidence which specifies the prognosis beyond the condition being "terminal" and "incurable".

20. At this stage, three salient facts should be noted:

(1) Mr McCulloch's non-disclosures (see paragraph 15 above) were due to his illness and, as the Ombudsman was later to find, "[he] could not be expected to make the same disclosure that [one] would expect a reasonable person to make".

(2) Aviva was not aware of Mr McCulloch's disability until the telephone call on 11th December.

(3) Had Mr McCulloch's non-disclosures not taken place, Mr McCulloch's policy would not have been issued (see Aviva's evidence submitted to FOS, which was not contradicted).

21. On 23rd April 2014 Aviva declined the claim on the grounds of misrepresentation, and avoided the policy. The Claims Assessor's letter made clear that Aviva had not investigated whether Mr McCulloch in fact met the criteria for terminal benefits; the issue simply did not arise.

22. On 8th June 2014 a complaint to FOS was made on behalf of both Mr and Mrs McCulloch (by her brother) in relation to Aviva's handling of both the joint life and single life policies. My reading of the letter of complaint is that the principal focus of concern was Aviva's failure to discharge its ethical and moral obligations in relation to the joint life policy.

23. On 31st July 2014 Aviva wrote to FOS setting out its case. Aviva made the following points:

(1) Aviva denied that the joint life policy lapsed owing to Mr McCulloch's medical condition. It made the point that the policy was cancelled at the request of both Mr and Mrs McCulloch, and that there is no evidence that the latter was of other than sound mind. Aviva did, however, make clear that it would consider a claim under the joint life policy "at the same time as the later policy, to determine whether the claim criteria was [sic] met prior to it being cancelled".

(2) Mr McCulloch had made "negligent" disclosures in relation to the single life policy which entitled its avoidance.

(3) In any event, Mr McCulloch did not meet the policy criteria for a valid terminal illness claim under either policy: viz. a prognosis of death within 12 months of the making of the claim.

24. On 7th November 2014 an FOS Adjudicator rejected Mr and Mrs McCulloch's complaint in relation to the joint life policy but upheld it in relation to the single life policy. The essence of the Adjudicator's reasoning was that Mr McCulloch's misrepresentations were innocently made, and:

> "…as such, I consider Aviva should treat the claim as required under the Association of British Insurer's Code of Practice.
>
> I recommend Aviva should reinstate Mr McCulloch's policy and reassess his claim for terminal illness benefit. I note that Aviva has said that a claim for terminal illness benefit is not payable in any event, as Mr McCulloch has not been given a prognosis of less than 12 months to live. However, Mr Jones on behalf of Mr and Mrs McCulloch has told our service that they have been told that Mr McCulloch's life expectancy could be limited to a few months. As such, if Aviva agrees with the conclusions I have reached it should disregard the misrepresentation and assess a claim for terminal illness benefit.
>
> If you agree with my conclusions, and are prepared to offer the proposed settlement to … Mr and Mrs McCulloch, I would be grateful if you would let me know by 21st November 2014."

25. Aviva did not agree with the Adjudicator's conclusions. Aviva stated that in its view this was a case of negligent, not innocent misrepresentation, and that it had followed relevant insurance law and practice. The case was therefore referred to an Ombudsman for final determination.

26. On 16th November 2015 the Ombudsman gave her reasoned decision for (i) rejecting Mr and Mrs McCulloch's complaint in relation to the joint life policy and (ii) upholding it in relation to the single life policy. Her reasons were similar to those provided by the Adjudicator, but as regards issue (ii) were more expansive.

27. In relation to the joint life policy, the Ombudsman said this:

> "Like the adjudicator, I think Aviva's decision not to reinstate Mr and Mrs McCulloch's joint term assurance policy was fair. It's clear to me from the medical evidence provided that Mr McCulloch was experiencing symptoms when he cancelled the policy in August 2013. So, he may not have appreciated what the consequences of cancelling the cover were. But Aviva followed the right process, ensuring that Mrs McCulloch was also happy for the policy to be cancelled before taking any action. As the premiums stopped being taken, the policy lapsed and the cover it provided ended. The terms and conditions don't allow the policy to be reinstated so, I don't think Aviva did anything wrong by not agreeing to reinstate it."

28. In relation to the single life policy, the Ombudsman's key reasoning was as follows:

> "Having considered the above questions, I do think the referral to the psychiatrist and for the scan was information Mr McCulloch should've told Aviva. This is because he had been advised to have a scan and he was awaiting an appointment with a psychiatrist. Aviva thinks Mr McCulloch's misrepresentation was careless, but I don't share that view.

I've reviewed the doctor's notes and it seems that most of the discussions about Mr McCulloch's behaviour were held with Mr McCulloch's sisters, rather than with Mr McCulloch. It is also noted that the GP felt Mr McCulloch's personality change was more related to social situations than any illness. But as Mr McCulloch's family were still concerned, a referral to a psychiatrist was made. Based on conversations Mr McCulloch's sister had with his GP, it seems Mr McCulloch's behaviour became worse in October 2013. But as per the notes, when this was discussed with Mr McCulloch, he didn't seem to remember the things his sister had told the GP about. And a note of 1 November 2013 says Mr McCulloch denied any abnormal thoughts or actions and thought he was capable of work.

After Mr McCulloch had applied for the policy on 7 November 2013, he saw a psychiatrist on 18 November 2013. I think the letter the psychiatrist wrote to Mr McCulloch's GP following the meeting gives a good explanation of Mr McCulloch's understanding of what was going on at the time. Mr McCulloch said his family was concerned that he was having a nervous breakdown but that he wasn't concerned at all. He said his mood was fine and denied having low or high moods or difficulty sleeping. The psychiatrist commented that Mr McCulloch wasn't forthcoming with information as if it wasn't relevant to him. Overall, he felt that Mr McCulloch didn't have insight into the matters they were discussing.

Having considered all of the above information, I think Mr McCulloch's misrepresentation was innocent. This is because I don't think Mr McCulloch would've thought the meetings he'd had with his GP, the referral to the psychiatrist and the arranged scan were relevant to Aviva. It seems to me that Mr McCulloch wasn't concerned at all about his behaviour and I don't think he would've thought it was related to any illness. Indeed, Mr McCulloch's GP commented several times that he thought Mr McCulloch's behaviour was more of a personality trait, most likely connected to the end of his marriage and loss of his job.

So, given the limited insight Mr McCulloch had into what was going on with his health, I don't think he would've thought the concern his family had about his behaviour was something Aviva needed to know in order to assess his application for life insurance. And I think this is demonstrated by the fact he told Aviva about his hernia, as he would've known this was a medical condition Aviva would've wanted to know about.

I've taken into account Aviva's comments that Mr McCulloch was asked a clear question and it didn't ask him to decide whether it was serious or not. I've also considered the final decision Aviva referenced which comments on this issue. ***But I think special consideration needs to be given to the illness Mr McCulloch was suffering from at the time. I don't think Mr McCulloch could be expected to make the same disclosures that I would expect a reasonable person to make.***

In cases of innocent misrepresentation, the appropriate remedy is to disregard the information that wasn't included in the application form. So Aviva should reinstate the policy on its original terms and consider Mr McCulloch's claim. [emphasis supplied]

what Aviva should do to put things right

Aviva should allow Mr McCulloch to reinstate his policy so that a claim can be considered. This is subject to the outstanding premiums being paid to date. I appreciate that Aviva has had difficulty collecting premiums in the past. But it should allow Mr McCulloch's representatives a reasonable period of time to pay the outstanding premiums.

If Mr McCulloch's claim isn't payable at this stage, Mr McCulloch's representatives should understand that they would need to continue to pay the premiums going forwards in order to keep the policy going."

29. Mr and Mrs McCulloch accepted FOS's ruling. After Aviva's pre-action protocol letter dated 22nd January 2016, on 9th February 2016 FOS set out its position as follows:

> "Whilst we maintain that the Ombudsman has a wide discretion to decide the outcome of a complaint on the basis of what is, in her opinion, fair and reasonable in all the circumstances under section 228 FSMA [see below], we accept that on this occasion more detailed reasoning could have been provided for the fair and reasonable conclusion reached in the decision. Whilst we make no admissions of liability generally or otherwise, [FOS] considers that it ought to reconsider this complaint afresh."

30. In the meantime, however, this application for judicial review was filed on 2nd February 2016. A quashing order was sought in relation to the Ombudsman's decision of 16th November 2015 (the Claim Form contains a typographical error) rather than any part of it. Aviva's Statement of Facts and Grounds was directed to that part of the Ombudsman's decision which upholds the complaint in relation to the single life policy.

31. On 12th February 2016 Mr and Mrs McCulloch's representative, having been notified of FOS's stance in relation to Aviva's warning of litigation, e-mailed FOS as follows:

> "As requested further to receipt of the letter, and our conversation, we can confirm that we do not wish to re-open the investigation and believe that the Ombudsman came to the correct decision in ruling in our favour.
>
> That said, and as mentioned on our call, we are willing to discuss with Aviva a settlement figure that mitigates the potential additional legal costs incurred through the legal process which you are alluding to …"

Contrary to Aviva's Skeleton Argument, my reading of this email is that Mr and Mrs McCulloch did not wish the investigation to be re-opened at the instance of Aviva, but should it be they would be prepared to negotiate. I do not read this email as indicating that, in the event that Aviva's claim for judicial review were upheld, they would abandon that complaint. Recent communication between FOS and Mr and Mrs McCulloch's representative has confirmed that this is the case.

32. In its Acknowledgement of Service filed on 11th March 2016, FOS consented to a quashing order. FOS limited its concession to inadequacies in its Ombudsman's reasons and, "for the avoidance of doubt, [FOS] does not accept other allegations and criticisms of the Ombudsman's decision articulated elsewhere in the grounds of claim", including the contentions that the decision was in any event Wednesbury unreasonable and was tantamount to a money award for payment of a fixed sum of £500,000.

The Legal Framework

33. FOS's jurisdiction derives from Part XVI of the Financial Services and Markets Act 2000 ("FSMA 2000"). FOS provides an independent and informal complaint resolution procedure for the financial services industry without the need for resort to the courts: see section 225.

34. The rules governing complaints-handling by FOS are set out in the FCA Handbook under the section entitled "Dispute Resolution: Complaints" ("DISP"). The source of DISP is section 225(4) and paragraphs 13-14 of Schedule 17 to the FSMA. By paragraph 14(2)(a) of Schedule 17, the scheme rules "may, amongst other things, specify matters which are to be taken into account in determining whether an act or omission was fair and reasonable".

35. Given that FOS was exercising its compulsory jurisdiction in the present case (section 226), section 228(2) applies. It provides:

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

It should be added that the compulsory jurisdiction only arises if "the complainant is eligible and wishes to have the complaint dealt with under the scheme" (see section 226(2)).

36. Section 229 provides:

> "(1) This section applies only in relation to the compulsory jurisdiction.
>
> (2) If a complaint which has been dealt with under the scheme is determined in favour of the complainant, the determination may include -
>
> > (a) an award against the respondent of such an amount as the ombudsman considers fair compensation for such loss or damage (of a kind falling within subsection (3)) suffered by the complainant ("a money award");
> >
> > (b) a direction that the respondent take such steps in relation to the complainant as the ombudsman considers just and appropriate (whether or not a court order such steps to be taken).
>
> …
>
> (5) A money award may not exceed the monetary limit [£150,000]; 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."

37. DISP 3.6.4 R (which is a rule, not guidance) provides:

> "In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:
>
> (1) relevant
>
> > (a) laws and regulations;
> >
> > (b) regulators' rules, guidance and standards;
> >
> > (c) codes of practice; and:
>
> (where appropriate) what he considers to have been good industry practice at the relevant time."

38. The relevant law for these purposes is to be found in sections 2 and 3 of, and Schedule 1 to, the Consumer Insurance (Disclosure and Representations) Act 2012 ("CIDRA 2012") which came into force in April 2013. Its effect is not in dispute in these proceedings, and may be summarised as follows. CIDRA 2012 does not recognise the concept of "innocent misrepresentation" in terms. A careless representation entitles the insurer to avoid the contract if it would not have accepted the risk at all if the representation had not been made (Schedule 1, paragraphs 3 and 4). The standard of care required is that of a reasonable consumer (section 3(3)), but if the insurer was or ought to have been aware of any particular characteristics or circumstances of the actual consumer, those are to be taken into account in assessing what is reasonable (section 3(4)).

39. In his Skeleton Argument, Mr Robert Moxon Browne QC for Aviva took me to a mass of others materials, including responses to the Law Commission's proposals, detailed guidance and codes of practice, which serve to reinforce his overarching point that the test in this domain is largely an objective one, save to the extent expressly recognised by section 3(4) of CIDRA. In my judgment, his written submissions on this topic were accurate but unnecessarily expansive. The short point is this. All the materials of which account must be taken under DISP 3.6.4 R run along parallel tracks and say the same thing. Had these been legal proceedings brought by Mr and Mrs McCulloch against Aviva in the County Court, Aviva's case would have succeeded.

40. To be fair to both parties, it is necessary to touch on how the policy arguments were debated before CIDRA was enacted.

41. The Law Commission's Consultation Paper No 182, published in 2007, recognised that there was a difficult policy balance to be struck (paragraph 4.116) but that one possibility was to formulate a hybrid (in my view, part objective, part subjective) test which would reflect the particular circumstances of the proposed insured, including his idiosyncrasies and limitations. If such a test had found its way into CIDRA, it seems to me that Mr McCulloch would have been in a much stronger position on the law, having regard to the Ombudsman's express factual findings. However, this is not what ultimately found favour. The January 2009 ABI Code of Practice stated that insurers should pay the claim in full where "the customer has acted honestly and reasonably in all the circumstances, including the customer's individual circumstances but only where these were known to the insurer" (the April 2013 ABI Code of Practice, dealing with "innocent misrepresentation", is similar). The Law Commission's Paper, Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation, published in December 2009, recorded that FOS accepted this approach (paragraph 5.79). Indeed, in this context FOS had expressly stated:

> "Some insurers argued that once the law had been changed, the FOS should be required to make decisions that were in line with the law rather than by reference to a wider concept of what is fair and reasonable. The FOS responded by stating that the industry had no reason to fear that it would use law reform as a stepping stone to make further changes in favour of consumers."

42. The Claim Form seeks a quashing order under section 31(1)(a) of the Senior Courts Act 1981. Section 31(5) and (5A) of that Act provides:

> "(5) If, on an application for judicial review, the High Court quashes the decision to which the application relates, it may in addition –
>
> (a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or
>
> (b) substitute its own decision for the decision in question.
>
> (5A) But the power conferred by subsection (5)(b) is exercisable only if –
>
> (a) the decision in question was made by a court or tribunal,
>
> (b) the decision is quashed on the ground that there has been an error of law,
>
> (c) without the error, there would have been only one decision which the court of tribunal could have reached."

43. CPR r.54.19 provides:

> **"Court's powers in respect of quashing orders**
>
> (1) This rule applies where the court makes a quashing order in respect of the decision to which the claim relates.
>
> (2) The court may –
>
> (a) (i) remit the matter to the decision-maker; and
>
> (ii) direct it to reconsider the matter and reach a decision in accordance with the judgment of the court.
>
> (b) in so far as any enactment permits, substitute its own decision for the decision to which the claim relates."

Relevant Jurisprudence

44. At paragraphs 13, 14 and 34 of his judgment in R (oao IFG) v FOS [2005] EWHC 1153 (Admin), Stanley Burnton J (as he then was) said:

> "13. Section 228(2) is at the heart of this case. It is to be noted that it does not require, as it might have done, a complaint to be determined in accordance with the law. The ombudsman is required to determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case. The words "in the opinion of the ombudsman" themselves make it clear that he may be subjective in arriving at his opinion of what is fair and reasonable in all the circumstances of the case. Of course, if his opinion as to what is fair and reasonable in all the circumstances of the case is perverse or irrational, that opinion, and any determination made pursuant to it, is liable to be set aside on conventional judicial review grounds.
>
> 14. The determination of a complaint involves consideration of the conduct, including any omission, that is relevant and any relevant advice of an investment adviser. Where the advice given is improper, that is to say, unfair and unreasonable in the circumstances of the case, the ombudsman must consider whether it is appropriate to make an award of compensation or to direct that the adviser take specific steps in relation to the matter in question.
>
> 34. It is common ground before me that [DISP 3.6.4 R], in requiring the ombudsman to take into account the relevant law, relates not only to whether an act or omission of an investment adviser was fair and reasonable, but also the determination of the ombudsman as to whether a money award should be made and if so what amount."

Mr James Strachan QC for FOS also drew my attention to paragraphs 40, 74 and 91ff of Stanley Burnton's J's judgment which I will consider in the context of the specific submission he made.

45. Stanley Burnton LJ returned to this issue when giving the main judgment in the Court of Appeal's decision in R (Heather Moor & Edgecomb) v FOS [2008] EWCA Civ 642. Paragraphs 36 and 49 are, in particular, worthy of mention:

> "36. If I confine myself to the wording of section 228 and the other relevant provisions of the 2000 Act, in my judgment they do not require the Ombudsman to determine a complaint in accordance with the common law. If section 228 had simply provided that a complaint is to be determined by the ombudsman, it would have been implicit that it was to be determined in accordance with the law apart from that section. But Parliament did not so provide. The words "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case" in section 228 are inappropriate and unnecessary if what Parliament intended was a determination in accordance with the law apart from section 228. Furthermore, in my judgment on HME's case the reference to the opinion of the ombudsman is inexplicable. If a tribunal is required to decide in accordance with the law, it must decide in accordance with what the law is, not with what in its opinion it is, and a failure to apply the law correctly will lead to its decision being quashed for error of law. By the use of the formula in section 228, Parliament excluded that possibility.
>
> 49. Does the scheme established under the 2000 Act, interpreted in accordance with its natural meaning, comply with these requirements? In my judgment, it can and does. The ombudsman is required by DISP 3.8.1 to take into account the relevant law, regulations, regulators' rules and guidance and standards, relevant codes of practice and, where appropriate, what he considers to have been good industry practice at the relevant time. ***He is free to depart from the relevant law, but if he does so he should say so in his decision and explain why.*** The other matters referred to in this rule are matters that a court would take into account in determining whether a professional financial adviser had been guilty of negligence or breach of his contract with his client. Again, if the ombudsman is to find an advisor liable to his client notwithstanding his compliance with

> all those matters, the ombudsman would have to so state in his decision and explain why, in such circumstances, assuming it to be possible, he came to the conclusion that it was fair and reasonable to hold the adviser liable. In these circumstances, I consider that the rules applied by the ombudsman are sufficiently predictable. All the matters listed in DISP 3.8.1 are formulated or ascertainable with sufficient precision. So far as guiding the conduct of financial advisors are concerned, provided that they comply with "the relevant law, regulations, regulators' rules and guidance and standards, relevant codes of practice and, where appropriate, … good industry practice", they can be assured that they will not be liable to their client in the absence of some exceptional factor requiring a different decision. Lastly, the common law requires consistency: that like cases are treated alike. Arbitrariness on the part of the ombudsman, including an unreasoned and unjustified failure to treat like cases alike, would be a ground for judicial review."
> [emphasis supplied]

46. Rix LJ agreed with the judgment of Stanley Burnton LJ but added the following:

> "80. The effect of these provisions is not to leave the Ombudsman's determination to his entirely subjective views, as though he was operating according to the length of his foot, so to speak. That, it seems to me, is not the effect of the statutory language which defers to the "opinion of the Ombudsman". Rather, that is typical language to emphasise that the decision is for the Ombudsman, not for a judge. However, the Ombudsman remains amenable, through the ordinary process of judicial review, to a challenge on such grounds as perversity or irrationality. That was not in dispute. It was the view of Stanley Burnton J, as he then was, in *R v. FOS Ltd ex parte IFG Financial Services Ltd* [2005] EWHC 1153 (Admin), unreported 19 May 2005, at para 13. That is not the same, however, as saying that the Ombudsman is bound to apply the common law in all its particulars. He 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.
>
> 81. Is such a jurisdiction compatible with the rule of law, generally regarded as requiring accessibility, clarity and predictability? Stanley Burnton LJ has referred to the writings of Lord Bingham of Cornhill and Professor Craig in this regard (at para 48 above). In my judgment, that question can be approached in two separate ways. One is to consider whether the statutory provisions, and the scheme rules adopted pursuant to them, promote a jurisdiction which in its essentials meets the requirements of the rule of law. It seems to me that the provisions which I have cited above achieve at least that much. The compulsory jurisdiction is set up by statute, provides for an over-arching test of "fair and reasonable" and allows for the statement of rules which elaborate that test, and the whole process is subject to judicial review in the courts. As such, the jurisdiction is not unlike, at that structural level, much other administrative or quasi-judicial decision-making found in a modern state."

47. In my view, it is not necessary for present purposes to address Rix LJ's second way of approaching the rule of law. I should add that Laws LJ agreed with both judgments.

48. I was also referred to authority on a subsidiary issue which I will briefly address later.

The Rival Contentions

49. Mr Moxon Browne's primary submission was that the Wednesbury issue had to be characterised correctly and with precision. He relied on Stanley Burnton J's analysis in IFG, in particular paragraphs 14 and 34. There were, in effect, two stages of the analysis. The first stage is whether it could rationally be said that what Aviva did was unfair or unreasonable. The second stage, which only arises if an affirmative answer (against Aviva) is given, is what the remedy should be in such circumstances. Mr Moxon Browne's submission was that, given that Aviva has followed relevant law, guidance and practice to the letter, it could not rationally be concluded that it had done anything wrong. It followed that the second stage did not arise.

50. Mr Moxon Browne's second-line, alternative submission was that, even on FOS's formulation of the Wednesbury question, the Ombudsman's determination was not merely inadequately reasoned; it was perverse. Thus, there was only one Wednesbury reasonable decision which could be reached in these circumstances: namely, to reject the complaint in relation to the single life policy. In his oral argument in reply, Mr Moxon Browne elaborated on why this was so. The single life policy had been entered into in consequence of a common mistake as to the nature of what was being insured. Mr McCulloch may not have been at fault, but Aviva had certainly been blameless. Instead of insuring a risk or a fortuity, Aviva found itself committed to pay out on a certainty: Mr McCulloch was not merely at risk of mortality; he was bound to die during the currency of the term. This runs completely contrary to the whole concept of insurance of risk. Instead of holding that the innocence of Mr McCulloch's misrepresentation carries with it the consequence that it should be notionally expunged (the Ombudsman's approach), the only correct conclusion would and should have been to hold that, had he been well, Mr McCulloch would have disclosed the investigations that were being undertaken, and the risk would have been declined.

51. Ms Sonia Nolten advanced poised, economical and effective submissions, elaborating on Aviva's skeleton argument, on a separate ground of challenge, which had not been raised by way of representations during the decision-making process. Her point was that the Ombudsman's direction to the effect that Aviva should reinstate the policy on its original terms and consider Mr McCulloch's claim was tantamount to a decision that FOS should pay Mr McCulloch a sum in excess of the threshold of £150,000. It makes no difference, submitted Ms Nolten, whether Mr McCulloch's prognosis at the relevant time was more or less than 12 months' survival. Either way, if the policy is reinstated – but subject to any qualification expressly made in the Ombudsman's decision – Mr McCulloch's estate will be paid the sum of £500,000 before the expiry of the term in 2033. The linked cases of Bunney v Burns Anderson Plc and others/Cahill v Timothy James & Partners Ltd [2007] EWHC 1240 (Ch) are authority for the proposition that consideration must be given, for the purposes of the threshold, to matters of substance rather than of form.

52. Subsidiary submissions were advanced as to the form of relief that should be granted in these circumstances. Mr Moxon Browne submitted that no challenge has been brought by anyone in relation to the Ombudsman's decision in relation to the joint life policy, and that it is not open to FOS to contend that this separate limb of its decision should be re-examined. Further, it was submitted that the effect of CPR r.54.19 is that there is no need in these circumstances for the court to remit the complaint to FOS for further consideration.

53. Mr Strachan submitted that Mr Moxon Browne has fundamentally mischaracterised the Wednesbury issue. The Ombudsman's function is not to carry out some sort of quasi-judicial review of the insurer's decision, but rather to determine for herself whether that decision was fair and reasonable. In coming to appropriate conclusions on that issue, the Ombudsman must take into account of, but is not bound by, relevant law and practice. The problem in the present case is that the Ombudsman did not explain why she was departing from the rules and principles set out in governing law and practice. However, it would be open to an Ombudsman, correctly applying DISP 3.6.4 R, to conclude that Mr and Mrs McCulloch's complaint should be upheld in relation to both the joint life policy and the single life policy.

54. Mr Strachan submitted that any quashing of the Ombudsman's decision of 16th November 2015 should lead to an automatic reconsideration of Mr and Mrs McCulloch complaint in its entirety, because FOS remained seized of that complaint unless and until it was withdrawn. He accepted that the position would be different if there were only one Wednesbury reasonable disposal of the complaint, but he strongly submitted that this was not the case here. Finally, he submitted that Aviva's separate ground (see paragraph 51 above) was academic, not merely because the matter would have to be reconsidered in any event, but also because FOS accepts that any decision reinstating the single life policy would (at the very least) have to be read subject to an implied limitation that the insurer's liability under the policy is confined to the threshold amount of £150,000.

Discussion and Conclusions

55. FOS was right to concede at the earliest possible stage that the Ombudsman's determination was flawed for inadequacy of reasons. The Ombudsman did not follow relevant law, guidance and practice. Although, as I will explain below, she was not required to do so, it was incumbent on her to explain why she did not. The Court of Appeal spelt out this requirement in Heather Moor & Edgecomb: see the sentence I have highlighted in the judgment of Stanley Burnton LJ (paragraph 45 above).

56. It follows that a quashing order should be made in this case. Contrary to Mr Moxon Browne's submission, such an order should serve to quash the whole of the Ombudsman's determination. I do have power to limit the quashing order in the manner contended for by Aviva, but in my judgment I should not do so in these circumstances. In its Claim Form Aviva did not seek a limited quashing order, and in my view it should be open (subject to paragraphs 61-62 below) to FOS's Ombudsman to reach a different decision in relation to the complaint directed to the joint life policy. This would be consonant with the position taken by Mr and Mrs McCulloch as well as the submissions advanced both orally and in writing by Mr Strachan.

57. I also agree with Mr Strachan that, given that FOS exercises a statutory jurisdiction in relation to complaints, the legal effect of quashing the Ombudsman's determination of 16th November 2015 is that Mr and Mrs McCulloch's complaint remains in being and must be re-determined. However, he accepted that, were there to be just one Wednesbury reasonable conclusion that could be reached on the complaint, I could and should say so. My judgment would have the effect of constraining FOS to reach a unique outcome upon the re-determination.

58. I agree with Mr Moxon Browne that it is important to define the Wednesbury issue, but I cannot accept his formulation of it. The question for this court is whether the Ombudsman's decision was irrational, in the sense of being "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" (see Lord Diplock in CCSU v Minister of the Civil Service [1985] AC 374). The question for the Ombudsman was not solely whether Aviva had followed relevant law, guidance and accepted practice, but whether Aviva had acted fairly and reasonably in all the circumstances of the case. In my judgment, the Ombudsman was not reviewing Aviva's decision-making process, or examining Aviva's decision on a rationality basis, but was reaching her own evaluative assessment of the merits of the decision reached. Section 228(2) requires the Ombudsman to do precisely that, and no contrary outcome is dictated by paragraph 14(2)(a) of Schedule 17 to the FSMA. I do not read paragraphs 14 and 34 of Stanley Burnton's judgment in IFG as supporting any different or narrower approach.

59. It is not in dispute that Aviva followed relevant law, guidance and practice. In that sense, and to that extent, it could not rationally be said that what Aviva did was wrong, unfair or unreasonable. However, Mr Moxon Browne's formulation of the issue in these terms does not merely achieve the answer he wants, it forces the Ombudsman to reject a complaint where relevant law, guidance and practice has been followed. That is precisely the narrow approach that the Court of Appeal disapproved in Heather Moor & Edgecomb. The enquiry may go wider, and it may do so because the Ombudsman may decide that the insurer did not act fairly and reasonably despite its adherence to sound legal principle, guidance and practice. This is exactly what happened on the facts of IFG: see paragraphs 40, 74 and 91ff.

60. Thus, and in relation both to the joint life policy and the single life policy, the question which should be posed and answered is whether a different Ombudsman, properly directing herself as to her powers, could rationally conclude that it would be fair and reasonable to uphold the complaint.

61. In relation to the joint life policy, it seems to me that the Ombudsman in fact followed an approach to the question she had to address which was much closer to Mr Moxon Browne's formulation than it was to Mr Strachan's. This is a jury point (which Mr Moxon Browne did not take) lending weak forensic support to Aviva's principal submission. However, it is a point which cuts both ways, because if the exercise undertaken by the Ombudsman in relation to the joint life policy was too narrow (and I have rejected Mr Moxon Browne's primary argument), that would strengthen the contention that, upon a reconsideration, she might reach a different decision. I do not read the Ombudsman as adopting the same narrow approach to the complaint regarding the single life policy.

62. I have carefully considered whether it would be open to an Ombudsman to uphold the complaint in relation to the joint life policy. I do not believe that there is much force in the argument that Mr McCulloch could have satisfied the claim criteria before that policy was cancelled in August 2013. He would need to show that, at that stage, his prognosis was of less than 12 months' survival, and I consider that it would be difficult for him to adduce evidence to that effect. Nonetheless, I cannot altogether rule this out. In my judgment, the stronger point – but its precise strength is not for me to say – is that, because it seems possible (putting the matter at its lowest) that the effective cause of Mr McCulloch's decision to cancel the policy was his illness - it was his illness which caused his marital breakdown as well as his impecuniosity - the Ombudsman might rationally conclude that it is fair and reasonable that Aviva should reinstate the policy. The fact that Aviva followed correct procedure throughout and obtained Mrs McCulloch's written consent may not be a complete answer to such a conclusion. I should add that, contrary to Aviva's submissions to FOS, the fact that there is no evidence that Mrs McCulloch is other than of sound mind is not the point.

63. The issues arising in the context of the single life policy are more complex. Taking these in order, I do not accept Mr Moxon Browne's submission that much may be gained by considering FOS's representations to the Law Commission in the context of the evolution of the 2012 Act (see paragraph 41 above). The highest the point may be put is that FOS may have to explain why it has changed its mind (I am not expressly holding that it does have to do so). Mr Moxon Browne did not submit that any form of estoppel arises, and he was right not to go that far. Mr Moxon Browne's much stronger argument was that, in a case of innocent misrepresentation such as this, it is wrong to "disregard the information that wasn't included in the application form [sic]" and reinstate the policy (see the Ombudsman's reasons in the present case). Rather, the correct analysis should proceed on the premise that the misrepresentation had not been made in the first place. On such a hypothesis, Aviva would not have accepted the risk.

64. I recognise that there is considerable force in this submission. Insurance is about risk, not certainty. Insurers require proposal forms to be completed accurately so that the risk may be properly valued, and the premium assessed. Moreover, some weight must be given to the argument that fairness and reasonableness is not just about the interests of the insured, but must also accommodate the commercial interests of the insurer.

65. Nonetheless, I am not persuaded that a differently-reasoned decision upholding Mr and Mrs McCulloch's complaint in relation to the single life policy would necessarily be irrational. I accept Mr Strachan's submission, reflecting as it does the language of the Law Commission's Consultation Paper, that we are in the realm of difficult policy judgments. Relevant law, guidance and policy reflect *one* policy judgment but there is, or may be, another policy judgment which could be regarded as tenable.

66. I put to Mr Moxon Browne a variant of the present facts. If Mr McCulloch had completed the proposal form for the single life policy in August 2013, then Aviva could have had no complaint. The difference between insuring a risk and insuring a sure outcome can be somewhat artificial: in August 2013, Mr McCulloch's prognosis was already desperately poor (although no-one knew it); in November 2013, the position was exactly the same from his point of view, although he completed the proposal form incorrectly. So, on analysis, the real point here is that in August the proposal form would have been accurate, and in November we know that it was inaccurate. It is quite true that the whole point of a proposal form is for the insurer better to illuminate and understand the risk. Yet, the inaccuracy in November was not caused by any morally culpable error on Mr McCulloch's part; it was altogether innocent, or – and put more precisely – no one disputes that the Ombudsman was not entitled to take that view.

67. I note Mr Moxon Browne's submission that had Mr McCulloch been well, he would have disclosed the fact that a CT scan had been booked. This proves too much: had he been well, there would have been no need for such a scan.

68. I accept that it is unclear whether FOS are now applying a general policy to the effect that insurers should be bound where innocent misrepresentations are made, whether there are particular features of the present case which render it exceptional (and, if so, what these are), or whether some different policy judgment is being applied. In due course, FOS may have to explain its broader rationale. The

breadth of its jurisdiction under section 228(2) of the FSMA does not absolve it from consistency in decision making.

69. Nonetheless, all the concerns I have expressed in my foregoing paragraph pertain to the reasons rather than the irrationality issue.

70. Asking myself the strict Wednesbury question, therefore, I am not driven to conclude that it would be outrageous to hold an insurer to its contract in the unusual circumstances of a case such as the present. Despite the policy direction that the law has taken, as well as guidance and codes of practice that reflect it (including the Financial Conduct Authority's mandatory guidance for insurers), an Ombudsman properly directing herself as to her powers *could* reach a different view. I recognise, as must FOS, that careful reasons would need to be given for any lawful decision upholding Mr and Mrs McCulloch's complaint in relation to the single life policy in particular.

71. Given that Mr Strachan accepted that the Ombudsman cannot give a direction which has the effect of removing the £150,000 threshold, and that in my opinion the point is in any event academic as regards the determination under scrutiny, I may be fairly brief on the second issue. It does not matter for these purposes whether Mr McCulloch had a prognosis of less than 12 months' survival at the time he made his claim. Either way, Aviva (if the complaint in relation to the single life policy is upheld) would have to pay out within the currency of the term. To be clear: its liability, actual or contingent, would be limited to £150,000. In my judgment, it is good practice to spell this out in Ombudsman's decisions, rather than leaving the matter implicit.

Disposal

72. This application for judicial review must be allowed, but only on the basis expressly conceded by FOS. The Ombudsman's determination of 16th November 2016 must be quashed. No formal remission is required, because Mr and Mrs McCulloch's complaint will now have to be re-determined under the statutory scheme.

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

74. All these things having been said, I recognise what Parliament has laid down in section 228(2) of the FMSA (and in other similar jurisdictions), and it is also my duty to follow Court of Appeal authority.

ORDER

UPON the Claimant's claim for judicial review dated 18 February 2016

AND UPON hearing Mr Robert Moxon Browne QC and Sonia Nolten for the Claimant, and Mr James Strachan QC and for the Defendant,

IT IS ORDERED THAT:

1. **The Ombudsman's Final Decision dated 16 November 2015 is quashed.**

2. **The Defendant pay the Claimant's costs up to and including the costs of filing the Acknowledgement of Service, to be subject to a detailed assessment if not agreed.**

3. **The Claimant pay the Defendant's costs thereafter, to be subject to a detailed assessment if not agreed.**

4. **The Claimant pay the Defendant an interim payment in relation to costs in the sum of £12,500.**

OBSERVATIONS

Given that the IPs did not consent to the quashing of the Defendant's decision, the Claimant was obliged to institute these proceedings.

Had the Claimant accepted the Defendant's proposal (quashing and reconsideration), it would have been open to the IPs to continue to defend the decision under challenge, but this is not what happened. The Claimant did not accept the Defendant's proposal, when (on my ruling) it should have done. The fact that the Claimant may (on one view) have achieved some benefit from my narrative judgment is nothing to the point; the Claimant should have accepted the Defendant's offer.

Had the Claimant accepted the Defendant's offer, we do not know what the IPs would have done; but it cannot be assumed for these purposes that they would have sought to defend the decision. However, I should proceed on the basis that the costs I have awarded under paragraph 2 of my Order would have been incurred by the Claimant in any event, i.e. even had the Defendant's proposal been accepted by all parties.

Dated: 27th February 2
