JUDGMENT : Mr. Justice Lewison : Chancery Division. 25th May 2007

The issues

1. If the Financial Services Ombudsman makes a direction which, if implemented, would require a firm to pay a complaining customer more than £100,000:
   i) Is that outside the ambit of the Ombudsman's powers; and
   ii) If it is, can the firm make that assertion in proceedings to enforce the direction, or is it confined to an application for judicial review?

2. Those are the two main questions raised by these actions; although logically, I must answer them in the reverse order to that in which I have posed them. Neither is easy; and the answers may have far reaching consequences.

The facts

3. Fortunately the facts have been agreed, so I can summarise them shortly.

Bunney v Burns Anderson plc

4. Until 1992, when he was made redundant, Mr Bunney was an employee of TVS. He was also a member of the TVS Pension Scheme. Following his redundancy he approached a financial adviser employed by a company with the Burns Anderson Group for advice about a possible transfer of his deferred benefits under the scheme. He was given advice in the summer of 1992 which he took. In his decision dated 18 December 2002 Mr Richard Prior, the Ombudsman, decided that the advice that Mr Bunney received was unsuitable advice. In consequence he said: *"I direct that for the firm, adopting the regulatory guidance (using the non-profit deferred annuity as representing the benefit of the scheme) carry out a loss assessment, and, if a loss is shown, make redress in accordance with that guidance. If any unresolved issue arises between the parties as to loss or redress then, subject to our rules, it may be referred to the Service."*

5. Mr Bunney accepted that decision on 2 January 2003. Burns Anderson complied with the first part of the Ombudsman's direction by arranging for a loss assessment to be carried out in the manner that the Ombudsman had specified. That loss assessment revealed that the effect of the second part of the Ombudsman's direction would be that Burns Anderson would have to pay Mr Bunney £228,055. Mr Bunney also arranged for a loss assessment to be carried out; and that produced the higher figure of £280,953. Burns Anderson are willing to pay him £100,000; but no more. Mr Bunney has begun proceedings seeking an injunction to compel Burns Anderson to comply with the Ombudsman's direction. Burns Anderson wish to raise the defence that the Ombudsman's direction exceeded his powers.

Cahill v Timothy James & Partners Ltd

6. Mr Cahill was an employee of Olivetti and was a member of its pension scheme. It was a final salary scheme. He retired early due to ill health. Between February and November 2000 he was advised by Timothy James & Partners Ltd to transfer his benefits into an income drawdown plan. He had (incorrectly) understood that 70 per cent of his investment funds would be protected against downturns in the stock market; but this was not the case. In his decision dated 16 April 2004 Mr Philip Roberts, the Ombudsman, decided that the advice that Mr Cahill had received was non-compliant and unsuitable. In consequence he said:

   "I therefore order Timothy James and Partners Ltd to use the drawdown fund to set up an annuity at the same level and on the same basis as the pension that would have been taken under the final salary scheme, making any additional payment necessary to provide the purchase price so that the same income is payable in future as would have been payable under the final salary scheme, including widow's and other benefits. I also order Timothy James and Partners Ltd to compensate Mr Cahill for any past shortfall in tax free cash and pension instalments (relative to the amount that he actually received) with compound interest at Bank of England base rate plus 1% per annum, less tax on the interest if it is legally deductible, on each separate payment date from the date that it would have been received until the date of settlement. If Timothy James and Partners Ltd have not paid redress for the past loss within 28 days of my award it should instead pay simple interest at 8% per year on the outstanding amounts, from the date of my award until the date of settlement, less tax on the interest if it is legally deductible."

7. Mr Cahill accepted that decision on 20 April 2004. Mr Young, an actuary instructed by Mr Cahill quantified the effect of the Ombudsman's direction as follows:
   i) A sum of £157,936 represents Mr Cahill's loss attributable to a shortfall in payments up to 1 May 2005;
   ii) The cost of setting up an annuity to replicate the benefits that Mr Cahill would have enjoyed under his occupational pension scheme would be over £1.8 million.

8. Timothy James & Partners have not agreed these figures. However, they are willing to pay Mr Cahill £100,000; but no more. Mr Cahill has also begun proceedings seeking an injunction to compel Timothy James & Partners to comply with the Ombudsman's direction. Timothy James & Partners also wish to raise the defence that the Ombudsman's direction exceeded his powers.

The statutory framework

9. The Financial Services and Markets Act 2000 ("the Act") was a major re-organisation of the regulation of financial services. In place of some eight different regulators, the regulation of financial services was allocated to the Financial Services Authority ("the FSA"). One of the previous regulators was the Personal Investment Authority, which operated its own Ombudsman scheme (as did each of the other regulators). One of the rules of that scheme has featured in the arguments in these cases. I will mention it later. Part of the new regime was the establishment of a new Ombudsman scheme. The Ombudsman scheme is established under Part XVI of the Act. Section 225 of

the Act describes the Ombudsman scheme as one "under which certain disputes may be resolved quickly and with minimum formality by an independent person."

10. The Ombudsman's jurisdiction consists of his compulsory jurisdiction (Section 226) and his voluntary jurisdiction (Section 227). It is common ground that the Ombudsman was exercising his compulsory jurisdiction in these two cases. Section 228 applies to the Ombudsman's compulsory jurisdiction. Section 228 (2) says that: *"A complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case."*

11. The Ombudsman is required to give his determination in writing, with reasons. He must require the complainant to notify him, within a given period, whether he accepts or rejects the determination. He must also notify the firm of his decision. Section 228 (5) says: *"If the complainant notifies the ombudsman that he accepts the determination, it is binding on the respondent and the complainant and is final."*

12. If the complainant fails to notify the ombudsman within the period allowed, he is deemed to have rejected the determination. The ombudsman must also notify the respondent of "the outcome": section 228 (7). Under section 228 (8) a copy of the determination on which appears a certificate signed by the ombudsman is evidence that the determination was made under the scheme. Section 228 (9) says that a certificate purporting to be signed by the ombudsman is to be taken to have been duly signed "*unless the contrary is shown*".

13. Section 229 deals with the kinds of awards that the ombudsman may make in the exercise of his compulsory jurisdiction. It is at the heart of this dispute; and I must set it out in full:

"(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 amount as the ombudsman considers fair compensation for 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 could order those steps to be taken).

(3) A money award may compensate for-
(a) financial loss; or
(b) any other loss, or any damage, of a specified kind.

(4) The Authority may specify the maximum amount which may be regarded as fair compensation for a particular kind of loss or damage specified under subsection (3)(b).

(5) A money award may not exceed the monetary limit; 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.

(6) The monetary limit is such amount as may be specified.

(7) Different amounts may be specified in relation to different kinds of complaint.

(8) A money award-
(a) may provide for the amount payable under the award to bear interest at a rate and as from a date specified in the award; and
(b) is enforceable by the complainant in accordance with Part III of Schedule 17.

(9) Compliance with a direction under subsection (2)(b)-
(a) is enforceable by an injunction; or
(b) in Scotland, is enforceable by an order under section 45 of the Court of Session Act 1988.

(10) Only the complainant may bring proceedings for an injunction or proceedings for an order.

(11) "Specified" means specified in compulsory jurisdiction rules."

14. Enforcement of a money award is dealt with by Schedule 17 paragraph 16 which says:
"A money award, including interest, which has been registered in accordance with scheme rules may-
(a) if a county court so orders in England and Wales, be recovered by execution issued from the county court (or otherwise) as if it were payable under an order of that court;
(b) be enforced in Northern Ireland as a money judgment under the Judgments Enforcement (Northern Ireland) Order 1981;
(c) be enforced in Scotland by the sheriff, as if it were a judgment or order of the sheriff and whether or not the sheriff could himself have granted such judgment or order."

15. The same schedule also required the scheme operator to make scheme rules. Those rules must, in turn, be approved by the FSA. The FSA and the scheme operator have made rules which are contained in the FSA Handbook *"Dispute Resolution: Complaints*" also known as "DISP". They are both scheme rules and compulsory jurisdiction rules. The FSA also has power to give statutory guidance (section 157). So does the scheme operator (Schedule 17 paragraph 8). This guidance is also contained in DISP. A rule appearing in DISP is sidelined "R" and guidance is sidelined "G". DISP 3.9.2R says:

"Where the Ombudsman decides to make a money award, in addition to (or instead of) awarding compensation for financial loss, he may award compensation for the following kinds of loss or damage, whether or not a court would award compensation:
(1) pain and suffering; or
(2) damage to reputation; or
(3) distress or inconvenience."

16. This is a rule. DISP 3.9.5R says: *"The maximum money award which the Ombudsman may make is £100,000."*

17. It is also a rule. But it is supplemented by the following guidance:

"3.9.6 If the Ombudsman considers that an amount more than the maximum is required as fair compensation, then he may in addition recommend to the firm or licensee that it pays the balance.

3.9.7 The Ombudsman may specify in his award that reasonable interest must be paid on the award (at the rate and from the date he states).

3.9.8 For the purposes of calculating the monetary limit referred to in ¦ DISP 3.9.5 R the amount of interest awarded does not form part of the award itself.

3.9.9 The limit on the maximum money award has no bearing on any direction which an Ombudsman may make as part of a determination."

The arguments in a nutshell

The Ombudsman's powers

18. The firms say that the Ombudsman has no power under section 229 (2) (b) to make a direction that requires a respondent to a complaint to pay money. His only power to require the payment of money arises under section 229 (2)(a). If that is not right, then they say that any power under section 229 (2) (b) to require the payment of money is limited to a payment of £100,000.

19. The two complainants, the first of whom is supported by the Ombudsman, say that the powers under section 229 (2) are cumulative rather than alternative; and that the Ombudsman does have power under section 229 (2) (b) to make a direction the effect of which will be to require a firm to pay money. That power, they say, is not limited by the statutory cap, which only applies to a money award under section 229 (2) (a).

Challenging an award

20. The complainants, the first of whom is supported by the Ombudsman, say that once an award has become final and binding, the only way of challenging it is by way of judicial review under CPR Part 54. In order for a challenge to succeed, it will be necessary for a respondent to a complaint to establish one or more of the grounds on which the court will intervene with the decision of an inferior tribunal. The challenge must be made, if at all, within the time limits laid down by Part 54.

21. The firms say that there are well recognised exceptions to the exclusivity of judicial review as the means of challenge to a decision. One such exception is where the person who challenges the decision does so in the course of his defence in civil proceedings. Moreover, they say that if there ever was a rigid rule, it has not survived the CPR.

Some features of the scheme

22. Although I have referred to the legislative provisions there are some features of the scheme to which I should draw particular attention:

i) In determining what is fair and reasonable in all the circumstances of the case it is common ground that the Ombudsman does not have to apply the law. He could for example decide that an insurer had a technical ground on which to repudiate liability under an insurance policy but decide that it was not fair to rely on it; or override a limitation defence to which the court would have to give effect if he thought that it was unfair to rely on limitation.

ii) This is reinforced in the case of a direction, because the Act says in terms that the Ombudsman may require steps to be taken even if a court could not require those steps to be taken.

iii) The complainant has a free choice whether to accept the Ombudsman's decision or not. If he does not like it, he may reject it; and pursue his remedies in court.

iv) The firm, on the other hand, has no choice. If the complainant accepts the award, then it binds the firm.

v) However, if the Ombudsman makes a money award, coupled with a recommendation that a firm pay more than the statutory cap, the firm is not bound to comply with the recommendation.

vi) There is no avenue for an appeal on the merits of an award.

Mounting a challenge

Can the court intervene at all?

23. No one suggests that the court is powerless to intervene if the Ombudsman exceeds his powers or fails to observe the rules of natural justice. So cases in which the court has been required to construe provisions in statutes that appear to oust the jurisdiction of the court are not in point. It is common ground that the court is empowered to set aside an invalid determination by the Ombudsman.

24. Nor does anyone suggest that a firm cannot challenge a decision of the Ombudsman by judicial review. Everyone agrees that such a challenge is possible, within the framework of CPR Part 54. The question is: is that the only means of challenge?

Is judicial review the only means of challenge?

25. The modern law begins with ***O'Reilly v Mackman*** [1983] 2 AC 237. Four prisoners were charged with disciplinary offences. The charges were heard by the prison board of visitors which found the charges proved and imposed penalties including the forfeiture of remission. The four prisoners began proceedings (by writ or originating summons) for declarations that the penalties imposed were null and void because the board failed to observe the rules of natural justice. The defendants were the members of the board. They applied for the proceedings to be struck out on the ground that they were an abuse of process; and succeeded in their application. In the House of Lords Lord Diplock gave the only speech. He pointed out (page 274) that no question arose about the jurisdiction of the court to grant the declarations: the only question was the procedure by which that relief ought to be sought. Was an application for judicial review the only means by which the prisoners could vindicate their rights? He said that none of the prisoners had any private right that the decision of the board had invaded, because remission of sentence was not a right but an indulgence (page 275). Thus none of the prisoners had any remedy in private law. However, they had a legitimate expectation of obtaining remission, and that gave them sufficient standing to challenge the legality of the board's decision. Lord Diplock then discussed the historical development of actions challenging decisions made by decision makers. He pointed out a number of procedural defects that had existed before the introduction of the new procedure under RSC Order 53. Until that new procedure was in place he considered that it could not have been said to have been an abuse of process for a litigant to proceed by ordinary action for a declaration (page 282). As Lord Diplock explained Order 53 contained a number of procedural safeguards: the court's leave had to be obtained; the grounds of challenge had to be verified on oath rather than merely pleaded in a statement of claim; there was a short period during which a challenge could be mounted; and the court, once leave had been granted, could act quickly. All these considerations led him to conclude (page 285) that:

> *"… it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.*
>
> *My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis…"*

26. Within a year the House of Lords had begun to consider the scope of the exceptions. In ***Wandsworth LBC v Winder*** [1985] 1 AC 461 Mr Winder was a contractual tenant of a flat of which Wandsworth LBC was the landlord. Wandsworth had a statutory power to increase the rent payable under the tenancy and purported to exercise it. They claimed the increased rent from Mr Winder who refused to pay the increase. When Wandsworth sued him for possession on the ground that he had failed to pay the rent, he served a defence alleging that the purported increase in the rent was invalid, because Wandsworth had incorrectly exercised its statutory power in having failed to take relevant considerations into account. Wandsworth applied to strike out the defence on the ground that it was an abuse of process; and that Mr Winder ought to have challenged the purported increase in rent by judicial review. Following Wandsworth's application to strike out Mr Winder did apply for judicial review, but he was refused permission because he was out of time. So by the time that the case reached the House of Lords Mr Winder had in fact unsuccessfully applied for judicial review. Nevertheless Wandsworth's application failed. Lord Fraser of Tullybelton gave the only reasoned speech in the House of Lords. Lord Fraser pointed out that the right that Mr Winder relied on was a contractual right to occupy the flat at a specified rent. However, Wandsworth were entitled to vary the rent unilaterally, provided that they exercised their statutory power to do so. Lord Fraser pointed to two important differences between that case and ***O'Reilly v Mackman*** (page 507):

> *"First, the plaintiffs in O'Reilly had not suffered any infringement of their rights in private law; their complaint was that they had been ordered to forfeit part of their remission of sentence but they had no right in private law to such a remission, which was granted only as a matter of indulgence. Consequently, even if the board of visitors had acted contrary to the rules of natural justice when making the award, the members of the board would not have been liable in damages to the prisoners. In the present case what the respondent complains of is the infringement of a contractual right in private law. Secondly, in* ***O'Reilly*** *the prisoners had initiated the proceedings, and Lord Diplock throughout in his speech, treated the question only as one affecting a claim for infringing a right of the plaintiff while in the present case the respondent is the defendant."*

27. He then considered whether Mr Winder's contention could fall within one exception mentioned by Lord Diplock: viz. that it was a collateral issue in a claim; and concluded that it could not, because the allegation that the power had been improperly exercised was the whole basis of the defence. So the case was not within any of the exceptions mentioned by Lord Diplock. He pointed out that to allow Mr Winder to raise the defence that he wished to raise would indirectly affect many third parties, and would potentially upset Wandsworth's financial administration with retrospective effect over many years. But those considerations had to be balanced against the "*ordinary right of private citizens to defend themselves against unfounded claims.*" He concluded (page 509):

"It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover he puts forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour. Apart from the provisions of Order 53 and section 31 of the Supreme Court Act 1981, he would certainly be entitled to defend the action on the ground that the plaintiff's claim arises from a resolution which (on his view) is invalid …I find it impossible to accept that the right to challenge the decision of a local authority in course of defending an action for non-payment can have been swept away by Order 53, which was directed to introducing a procedural reform."

28. Mr Winder was therefore allowed to proceed with his challenge to the decision to increase his rent. But ultimately the challenge failed: ***Wandsworth LBC v Winder (No 2)*** (1988) 20 HLR 400.

29. In ***Roy v Kensington and Chelsea and Westminster Family Practitioner Committee*** [1992] 1 AC 624 Dr Roy was aggrieved by the decision of the family practitioner committee to withhold certain payments to which he thought he was entitled. He issued a writ claiming repayment of certain sums that he had paid in employing ancillary staff; and damages. The committee applied to strike out Dr Roy's claim on the ground that if he wished to challenge the committee's decision, then judicial review was the appropriate remedy. The House of Lords allowed the claim to proceed. Dr Roy's relationship with the committee was probably not a contractual one (see Lord Bridge of Harwich at page 630 and Lord Lowry at page 649); but that did not matter. The bundle of rights that he had under the statutory terms of service in the NHS (including the right to be remunerated for work that he had done) were private law rights (see Lord Bridge of Harwich at page 630 and Lord Lowry at page 649). One of those private law rights was the right "*to a fair and legally correct consideration of his claim*" (Lord Lowry at page 653). In discussing the principle laid down by ***O'Reilly v Mackman*** Lord Bridge of Harwich said (page 628):

"… I have not been persuaded that the essential principle embodied in the decisions requires to be significantly modified, let alone overturned. But if it is important, as I believe, to maintain the principle, it is certainly no less important that its application should be confined within proper limits. It is appropriate that an issue which depends exclusively on the existence of a purely public law right should be determined in judicial review proceedings and not otherwise. But where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him."

30. He also agreed with the statement of Robert Goff LJ in ***Wandsworth LBC v Winder*** in the Court of Appeal: *"For my part, I find it difficult to conceive of a case where a citizen's invocation of the ordinary procedure of the courts in order to enforce his private law rights, or his reliance on his private law rights by way of defence in an action brought against him, could, as such, amount to an abuse of the process of the court."*

31. Lord Lowry said (page 650): *"An important point is that the court clearly has jurisdiction to entertain the doctor's action. Furthermore, even if one accepts the full rigour of* ***O'Reilly v. Mackman****, there is ample room to hold that this case comes within the exceptions allowed for by Lord Diplock. It is concerned with a private law right, it involves a question which could in some circumstances give rise to a dispute of fact and one object of the plaintiff is to obtain an order for the payment (not by way of damages) of an ascertained or ascertainable sum of money."* (Lord Lowry's emphasis)

32. In ***R v Wicks*** [1998] AC 92 Mr Wicks was prosecuted for failing to comply with an enforcement notice served under the Town and Country Planning Act. He had appealed, unsuccessfully, on the planning merits; but in response to the subsequent prosecution he wished to say that the enforcement notice had been issued in bad faith. The Crown Court judge ruled that a challenge to the enforcement notice had to be made, if at all, by way of judicial review; and that the defence was not open to Mr Wicks in the criminal courts. The House of Lords upheld that decision. Both Lord Nicholls of Birkenhead and Lord Hoffmann gave speeches. The remaining Law Lords (Lords Browne-Wilkinson, Jauncey of Tullichettle and Hope of Craighead) agreed with both. Lord Nicholls (at page 104) described two possible defences to a prosecution based on an order made by a public body: first, that the impugned order is *ultra vires*, having been made in terms not authorised by the statute, and, secondly and further, that in any event the impugned order was not validly made because the public body was motivated by immaterial considerations and made the order for an unauthorised purpose. He then said that the underlying question was whether a defendant was entitled to rely on both these defences; or only the first. He continued:

"I have phrased the underlying question in this way because it is now well established that where the criminal offence lies in failure to comply with an order made under statutory powers, it is open to the defendant to challenge the lawfulness of the order on certain grounds, by way of defence in the criminal proceedings. Among the most well established of these grounds is lack of vires to make the material part of the order where this is apparent merely from a reading of the order in conjunction with the enabling Act: see, for instance, Reg. v. Rose, Ex parte Wood (1855) 19 J.P. 676. That is the first of the two defences which the defendant wishes to raise in my example. Conversely, there are decisions to the effect that not all challenges to the lawfulness of an impugned order can be raised by way of defence in the criminal proceedings. Some must be decided in judicial review proceedings. Included

in this category are some, but not, it seems, all challenges to the procedure which led to the making of the impugned order."

33. The remainder of Lord Nicholls' speech is concerned with the second category of defence. I do not read his speech as having cast any doubt on the ability of a defendant to a criminal charge to rely on a defence of the first category. His discussion related to the question where the boundary between the two types of defence should be drawn. Lord Hoffmann gave the other speech; and all the other Law Lords agreed with it. In describing the decision of the Court of Appeal he said that Keene J had referred to: *"the well-known distinction which Upjohn L.J. had made in **Miller-Mead v. Minister of Housing and Local Government** [1963] 2 Q.B. 196, 226 between an enforcement notice which was a nullity ("waste paper") and one which was invalid only in the sense of being liable to be quashed. A notice which on its face failed to comply with some requirement of the Act was a nullity. A notice which could be quashed on the basis of extrinsic facts (for example, because in fact no breach of planning control had taken place) was invalid but not a complete nullity."*

34. I do not detect any disapproval of the distinction. Lord Hoffmann went on to discuss the decision of the Divisional Court in **Bugg v Director of Public Prosecutions** [1993] QB 473 in which the Divisional Court had drawn a distinction between a challenge based on "substantive invalidity" of a bye-law (which could be relied on as a defence to a prosecution) and "procedural invalidity" (which could not). One instance of substantive invalidity was where the bye-law was outwith the power pursuant to which it purported to have been made. In the course of the argument before the House of Lords counsel for Mr Wicks mounted a sustained attack on this distinction; and Lord Hoffmann said that he saw considerable force in the criticisms of the supposed distinction (page 115). But what is important for present purposes is that the criticisms were that **Bugg** had unjustifiably *narrowed* the grounds on which a challenge to the validity of a bye-law could be relied on as a defence to a prosecution. It was not suggested that it was impermissible to rely on what the Divisional Court had called "substantive invalidity" as a defence to a prosecution. It is in this context that I consider that Lord Hoffmann's later observations must be read. At page 117 he said:

"But, my Lords, while I am willing for the sake of argument to accept Mr. Speaight's submission that there is a wide right for anyone prosecuted under a local byelaw to challenge its validity, the point at which we absolutely part company is when he submits that this right can be extrapolated to enable a defendant to challenge the vires of every act done under statutory authority if its validity forms part of the prosecution's case or its invalidity would constitute a defence. In my view no such generalisation is possible. The question must depend entirely upon the construction of the statute under which the prosecution is brought. The statute may require the prosecution to prove that the act in question is not open to challenge on any ground available in public law, or it may be a defence to show that it is. In such a case, the justices will have to rule upon the validity of the act. On the other hand, the statute may upon its true construction merely require an act which appears formally valid and has not been quashed by judicial review. In such a case, nothing but the formal validity of the act will be relevant to an issue before the justices. It is in my view impossible to construct a general theory of the ultra vires defence which applies to every statutory power, whatever the terms and policy of the statute."

35. In my judgment where Lord Hoffmann refers to an act "which appears formally valid" he is referring (at least) to an act which is within the power pursuant to which it purports to have been done (i.e. what Lord Nicholls called "the first defence"). Lord Hoffmann went on to commend the approach of the Divisional Court in **Quietlynn Ltd v Portsmouth City Council** [1988] QB 114 in which Webster J said that: *"In our view, therefore, except in the case of a decision which is invalid on its face, every decision of the licensing authority under [the Act of 1982] is to be presumed to have been validly made and to continue in force unless and until it has been struck down by the High Court; and neither the justices nor the Crown Court have power to investigate or decide on its validity."* (My emphasis)

36. Thus when Lord Hoffmann went on to consider whether, as a matter of construction of the Town and Country Planning Act, a defendant to a prosecution was entitled to rely on "residual grounds of challenge" as a defence, he described them as grounds *"such as mala fides, bias or other procedural impropriety in the decision to issue the notice."* He did not include as one of the residual grounds a purported enforcement notice which exceeded the power under which it purported to have been made.

37. **Bugg** was considered by the House of Lords again in **Boddington v British Transport Police** [1999] 2 AC 143. Mr Boddington wished to challenge a bye-law which prohibited smoking in railway carriages as part of his defence to a prosecution for breach of the bye-law. Lord Irvine of Lairg LC said that the distinction between substantive and procedural invalidity that the Divisional Court had drawn in *Bugg* was wrong. He continued (page 158)

*"Subject to any statutory qualifications upon his right to do so, the citizen could, in my judgment, choose to accept the risk of uncertainty, take no action at all, wait to be sued or prosecuted by the public body and then put forward his arguments on validity and have them determined by the court hearing the case against him. That is a matter of right in a case of ultra vires action by the public authority, and would not be subject to the discretion of the court: see **Wandsworth London Borough Council v. Winder** [1985] A.C. 461."*

38. He pointed out that in **Winder** the decision to increase Mr Winder's rent appeared to be valid on its face; yet Mr Winder was permitted to challenge it. However, the quoted passage begins with the words *"subject to any statutory qualifications upon his right to do so";* and Lord Irvine returned to this in saying (page 160): *"However, in every case it will be necessary to examine the particular statutory context to determine whether a court hearing a*

criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act under it. There are situations in which Parliament may legislate to preclude such challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely."

39. He added (page 161) that: *"in approaching the issue of statutory construction the courts proceed from a strong appreciation that ours is a country subject to the rule of law. This means that it is well recognised to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings. There is a strong presumption that Parliament will not legislate to prevent individuals from doing so."*

40. He emphasised the strength of the presumption again at page 162. One feature of a statutory scheme which may lead to the conclusion that grounds of challenge may not be relied on as a defence to a prosecution is that the act in question is "*specifically directed at the defendants*" rather than being addressed to the public at large. Mr Boddington was thus permitted to raise his ground of challenge by way of defence; but the challenge failed. Lord Steyn also held that the distinction drawn in ***Bugg*** was wrong. He then continued with an examination of the scope of the principle in ***O'Reilly v Mackman*** (page 172). Omitting citation of authority, he said:

*"The general rule of procedural exclusivity judicially created in **O'Reilly v. Mackman** … was at its birth recognised to be subject to exceptions, notably (but not restricted to the case) where the invalidity of the decision arises as a collateral matter in a claim for infringement of private rights. The purpose of the rule was stated to be prevention of an abuse of the process of the court, and that purpose is of prime importance in determining the reach of the general rule … Since **O'Reilly v. Mackman** decisions of the House of Lords have made clear that the primary focus of the rule of procedural exclusivity is situations in which an individual's sole aim was to challenge a public law act or decision. It does not apply in a civil case when an individual seeks to establish private law rights which cannot be determined without an examination of the validity of a public law decision. Nor does it apply where a defendant in a civil case simply seeks to defend himself by questioning the validity of a public law decision. These propositions are established in the context of civil cases by four decisions of the House of Lords…"*

41. The remaining Law Lords agreed with these parts of the two speeches.

42. In ***Clark v University of Lincolnshire and Humberside*** [2000]1 WLR 1988 the Court of Appeal considered the impact of the CPR on the principle in ***O'Reilly v Mackman***. Lord Woolf MR pointed out that Order 53 (now Part 54) was part of the new civil code introduced by the CPR. It was therefore subject to the overriding objective. He said that if challenges to public law decisions were begun by Part 7 or Part 8 claims, they could be summarily dealt with under Part 24. He commented (page 1996): *"This is a markedly different position from that which existed when **O'Reilly v Mackman** was decided. If a defendant public body or an interested person considers that a claim has no real prospect of success an application can now be made under Part 24. This restricts the inconvenience to third parties and the administration of public bodies caused by a hopeless claim to which Lord Diplock referred."*

43. He concluded that, nowadays, the courts would be flexible in their approach. Neither side should obtain procedural advantages merely because of choice of procedures. The real question is whether the challenge to a public law decision brought by ordinary claim is an abuse of the process of the court. In considering that question the nature of the claim is relevant. If the claim is for a review or the exercise of a discretion then delay can be very relevant. If what is being claimed could affect the public generally the court will be more strict than if the proceedings only affect the immediate parties. What is important is whether the safeguards in Part 54 are being flouted in circumstances which are inconsistent with the proceedings being able to be conducted justly in accordance with the overriding objective.

44. This approach was taken further by the Court of Appeal in ***Rhondda Cynon Taff County Borough Council v Watkins*** [2003] 1 WLR 1864. In July 1965 the Council made a CPO entitling it to buy land owned by Mr Watkins for the purpose of providing public open space. In March 1966 they took possession; but Mr Watkins repossessed the land on the following day. Subsequently the compensation payable for the purchase was assessed; and in 1988 the Council executed a deed poll under the Lands Clauses Consolidation Act 1845 vesting the land in itself. In 2000 the Council issued proceedings for possession. Mr Watkins raised a defence of limitation, and wished to argue that the deed poll was invalid because by the time that it was executed the Council had abandoned its intention to use the land as public open space. The Court of Appeal held that he was entitled to challenge the validity of the deed poll as part of his defence to the claim for possession. Aikens J (with whom Schiemann and Arden LJJ agreed) delivered the judgment on the question whether that defence could be raised in the possession proceedings. The judge (Neuberger J) had held that the court had a discretion whether to allow the defence to be raised, rather than challenging the validity of the deed poll by judicial review. The question for the Court of Appeal was whether such a discretion existed. Aikens J said (page 1883):

***"86** I must respectfully disagree with the judge on this point. The council's claim is for possession of the land and Mr Watkins challenges that claim. If my analysis of the limitation issue is correct, then the only basis on which he can do so is by challenging the validity of the deed poll. But before the current proceedings Mr Watkins enjoyed the possession of the land and that had not been challenged by the council for 34 years after he ousted the council on 15 March 1966. If his possession was not being challenged (in court) by the council, then why should Mr Watkins*

have to take legal proceedings to question the validity of the deed poll? I can see no reason why he should need to do so or be forced to do so.

87 *But once his possession of the land was disputed by the current proceedings, then why could he not raise the validity point as a defence to the claim for possession as a matter of right, even though it was nearly 12 years after the deed poll had been executed? Again, I cannot see why not, unless statute, the Civil Procedure Rules, or authority prevents it. In my view the House of Lords has stated clearly that public law issues can, in appropriate cases, be raised as defences to what might be called "private law" claims and that this can be done as a matter of right."*

45. Aikens J distinguished *Clark* (which had held that the court did have a discretion) on the ground that Mr Watkins was not bringing a claim based on public law: he was raising a defence (page 1885). He continued: *"Sedley LJ specifically notes in his judgment, at p 757 C, that the House of Lords decided in Winder's case that where the issue of a private law right depending on a prior public law decision is raised as a defence to a claim, then the point does not have to be dealt with by judicial review. This must mean that it can be raised as a defence to a claim. Therefore the only reason for not permitting the issue to be raised as a defence would be if the court, exercising its power under CPR r 3.4, concluded that it was otherwise an abuse of process or concluded under CPR Pt 24 that the point had no reasonable prospect of success. So that leads back to the question of whether the defence would be an abuse or could not have a reasonable prospect of success just because, as a public law point, it is raised so long after the deed poll was executed. Mr Harper did not point to any other part of the CPR that gave the court a power to rule out a public law defence on the ground that it was raised long after the relevant event had occurred.*

96 *In my view the position remains as stated by Lord Fraser in Winder's case. I have concluded, with respect, that the judge erred in law by holding that CPR Pt 24 gave him a discretion to decide whether this public law point could be run as a defence at all. In my view the law does not give a judge such a discretion. It is accepted that the defence, if it can be run, raises substantive issues of both fact and law. Therefore, it should not be struck out."*

46. The final case on this part of the argument to which I need to refer is the decision of Hart J in ***Dwr Cymru Cyfyngedig v Corus UK Ltd*** [2006] EWHC 1183 (Ch). He held that the principles laid down by the House of Lords in *Winder* applied to a dispute between private parties, where one of the parties wished to challenge the validity of a public law decision as part of its defence to a claim against it. This point was not the subject of the subsequent appeal: [2007] EWCA Civ 285.

Summary

47. I would summarise my conclusions on the basis of this review of the authorities as follows:

i) The original procedural reasons which led to the formulation of the principle in ***O'Reilly v Mackman*** have lost much of their force since the introduction of the CPR;

ii) They never applied to defendants who wished to challenge public law decisions upon which a private cause of action against them was asserted in proceedings which they wished to defend;

iii) There is no longer any difference in principle between a challenge based on substantive validity and one based on procedural invalidity;

iv) Where a defendant to a claim wishes to challenge a public law decision as part of his defence, the court does not have any discretion to refuse to allow him to do so, unless either the raising of the defence is an abuse of process or it has no reasonable prospect of success;

v) It will have no reasonable prospect of success if, as a matter of construction of the statute under which the impugned act was done, the legislation forbids any challenge (or the particular type of challenge that the defendant wishes to make) to be made otherwise than by judicial review;

vi) In construing statutory schemes which enable decisions to be made under them there is a strong presumption, based on the importance of the rule of law, against concluding that the only permissible means of challenge is by judicial review.

48. I should add that I was referred to the decision of Peter Smith J in ***Financial Services Authority v Matthews*** [2005] Pens LR 241 in which the judge held that the only means of challenging a decision made by the Personal Investment Authority Ombudsman was by way of judicial review. However, I did not find that decision of assistance for three reasons. First, the judge was considering a scheme in different terms to the one that I am considering. Second, the judge does not refer to any authority in expressing his conclusion; and it does not appear from the report as though any of the relevant cases were cited to him. Third, the judge seems to have entertained the possibility (despite his earlier conclusion) that the decision could be impugned at the hearing before him on the ground that the procedure by which it was reached failed to comply with article 6 of the European Convention on Human Rights.

Construing the scheme

49. Do the relevant provisions of the Act remove the ability of a defendant to challenge the validity of an award when it is sought to be enforced against him? There are three provisions of the Act which are particularly relied on by the consumers and the ombudsman as suggesting that it does. First, there is section 228 (5) which says that once accepted, a decision is final and binding. The argument based on this provision is that if a decision is susceptible to challenge, it is not final and binding. Second, there is section 229 (8) which deals with the enforcement of a money award. Third, there is section 229 (9) which deals with the enforcement of a direction by injunction. The argument based on both these provisions is that the role of the court is limited to *enforcing* an

award or direction; and at the stage of enforcement of judgments it is not open to a party to the litigation to go behind the judgment. The argument in favour of limiting the means of challenge to judicial review is also said to be supported by a number of policy considerations. First, the purpose of the statutory scheme is to provide a complaint resolution scheme for informal and quick determination of complaints, which may then be enforced by the courts. It would defeat that purpose if, at the enforcement stage, firms could raise public law issues. Second, the statutory scheme provides for the firm to be involved at all stages of the resolution of the complaint (with power to make representations and, if need be, to ask for a hearing); and under section 228 (7) the "outcome" (which I take to mean both the ombudsman's decision and the complainant's decision to accept it) is notified to the firm. This is, therefore, one of those cases in which the impugned act is specifically directed at the firm. The firm will then be required to act promptly and, in any event, within three months in order to mount a challenge by way of judicial review. Third, the procedure for judicial review contains important protections. It is not just that permission is required to make a claim for judicial review. Of more importance is the fact that the claim will be made against the Ombudsman rather than against the consumer. The consumer will be no more than an interested party. The practical effect of this is that the consumer is protected against liability for costs if the challenge succeeds. By contrast if the firms are allowed to raise questions of validity at the enforcement stage it is the consumer who will be exposed to costs liabilities. This is a powerful deterrent to consumers in enforcing awards. Fourth, the interests of certainty would be circumvented if the firms were allowed to escape the time limits in Part 54 and simply wait until the award or direction was sought to be enforced against them.

50. I do not find the argument based on the phrase "final and binding" persuasive. On the one hand it proves too much. It is common ground that a decision of the ombudsman is susceptible to challenge by way of judicial review. So the words "final and binding" do not preclude all forms of challenge. Once that position has been reached, the only question is procedural. On the other hand it leaves open the question: what is it that is final and binding? One possible answer is that what is final and binding is a determination that has been made in accordance with the powers conferred on the Ombudsman and not a purported determination in excess of those powers. In other words, section 228 (5) only precludes a challenge to the *merits* of a determination rather than a challenge to its *validity*. In addition there are other indications in the scheme that challenges to the validity of a purported determination are not outlawed. In the first place section 228 (8) says that a certified copy of a determination is "evidence" (not conclusive evidence) that the determination was made under the scheme. In the second place section 228 (9) envisages the possibility of leading evidence that a certificate purporting to be signed by the ombudsman was not in fact signed by him at all ("unless the contrary is shown"). Bearing in mind the strong statutory presumption against removing a citizen's right to defend himself against a claim based on an invalid exercise of public powers, I consider that this is the right interpretation.

51. The second feature of the scheme on which the complainants rely is that the court is exercising powers of enforcement only. In general terms it is true that on an application for the enforcement of a judgment the judgment itself cannot be impeached; although there are exceptions. For example leave to enforce an arbitration award will not be given where the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award: Arbitration Act 1996 s. 66 (3). A judgment given by a foreign court will not be registered where that court acted without jurisdiction. In addition in the case of a judgment there is usually a means of impeaching the judgment; namely by appeal. That is one reason why an attempt to impeach a judgment at the enforcement stage is an abuse of process. The availability of an appeal system dealing comprehensively with challenges to the merits of the original decision was the principal reason why the House of Lords concluded in *Wicks* that it was not permissible to challenge the validity of an enforcement notice on what Lord Hoffmann described as "the residual grounds" otherwise than by judicial review. Where, however, there is no avenue for impeaching the judgment (still less an avenue for impeaching it on the merits) it seems to me to be more difficult to say that it is abusive to resist its enforcement on the grounds that it was made without jurisdiction. Even in the field of judgments, where a judgment made without jurisdiction is subsequently relied on in later proceedings, it is permissible to challenge it by way of defence to those later proceedings: *Nicholls v Kinsey* [1994] QB 600. As Mr Bartlett submitted the challenge that the firms wish to make is not a challenge to the merits of the decision: it is a challenge to its legality. In effect what the firms say is that that which the complainants seek to enforce is formally invalid. In other words it is not a determination at all.

52. There are also policy reasons countervailing those relied on by the complainants. First, although in a sense the making of a determination by the Ombudsman is a matter of public law it is, so to speak, at the margins. His determination affects only the complainant and the respondent to the particular complaint. In my judgment this consideration also seriously weakens the arguments based on the need for administrative certainty. Second, since the Ombudsman must do what he considers is fair and reasonable in all the circumstances of the case, and is not required to apply the law, his decision can have little, if any, precedential value. Third, it is up to the complainant to decide whether to enforce the determination or not. It is well-known that the Administrative Court is clogged with hundreds, if not thousands, of applications by asylum seekers and others. Why should the burden on that court be increased by requiring firms to challenge awards? Fourth, the involvement of the Ombudsman in claims for judicial review is likely to increase the public cost of providing the Ombudsman service. Since the enforcement of an award is essentially a matter of private right between the complainant and the firm, there is no obvious reason to involve the Ombudsman. Fifth, in the vast majority of cases there can be no argument whether the Ombudsman has exceeded his powers. So the potential deterrent effect on consumers is likely to be rare.

Conclusion

53. In the end, I come back to the strong presumption, based on the rule of law, that a citizen's right to defend himself against an unfounded claim is not to be taken away except by clear words. I do not consider that the words of the Act are clear enough. In my judgment it is open to the firms to raise in these proceedings the question whether the Ombudsman had formal jurisdiction to make the determinations that he purported to make. They are not confined to judicial review. I say nothing about other grounds on which judicial review might be sought (e.g. bias, irrationality etc).

The Ombudsman's powers

The statutory provisions

54. I repeat, for convenience, the statutory description of a determination in section 229 (2):

> *"(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 amount as the ombudsman considers fair compensation for 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 could order those steps to be taken). "*

Are the powers in section 229 (2) (a) and section 229 (2) (b) mutually exclusive?

55. In their written argument the firms appeared to submit that the Ombudsman's powers under section 229 (1) (a) and section 229 (2) (b) are mutually exclusive. Thus he could either make a money award or make a direction; but could not do both. Mr Bartlett QC explained in his oral submissions that this was not in fact their position. He was right to disavow that apparent submission. First, there is no linguistic indication in section 229 (2) that the section is intended to have this effect. On the contrary, the section says that a determination may "include" what follows in the section. Second, I cannot think of a good reason to interpret the section in that way; and good reason why I should not. For example, the Ombudsman may require a firm to make a modest payment to compensate a claimant for distress (a money award under section 229 (2) (a)) and require a letter of apology to be written (a direction under section 229 (2) (b)). Third, this interpretation is contrary to the guidance given by the FSA and the scheme operator in DISP.

Can a direction under section 229 (2) (b) require the payment of money?

56. The financial advisers submit that the Ombudsman has no power under section 229 (2) (b) to make a direction that would result in the payment of money. The only power he has to make a money award is that contained in section 229 (1) (a), which is subject to the statutory cap. They advance five reasons in support of this submission.

57. First they point out that the section is divided into two limbs. If a direction under (b) could include a direction to pay money, there would be no need for paragraph (a) at all. Second, they say that the section contemplates that a limit will be placed on money awards, but contains no similar mechanism for limiting the financial consequences of directions. It makes no sense to construe paragraph (b) as permitting a direction to pay money (if necessary in excess of the limit), because to do so would be to make the monetary limit illusory. Third, Section 229(5) deals expressly with the situation where the ombudsman considers that fair compensation requires payment of a larger amount than the limit. In that situation the power to make a recommendation applies. If the Ombudsman could, by the expedient of making a direction under paragraph (b), evade the monetary limit placed on awards under paragraph (a), what would be the point of the separate power to recommend payment in excess of the monetary limit? The Ombudsman has that power to make recommendations precisely because he cannot make a binding order requiring that a sum in excess of £100,000 be paid. Fourth, they say the clear distinction between the two types of award is underlined by comparison of s 229(8), which provides for interest in the case of a money award, and s 229(9), which does not so provide in the case of a directional award. The reason for the latter is that a directional award cannot require the payment of money. Fifth, they say that the remedy for enforcement of a directional award is a mandatory injunction: s 229(9). If such an injunction is granted and not complied with, defendants are potentially subject to penal sanctions for contempt of court. Where the defendant is an individual this could involve committal to prison. The consequence of holding that a directional award can require the payment of money would be that a person could be imprisoned for failing to discharge a debt. The remedy of imprisonment for debt was generally abolished by the Debtors Act 1869 s.4. It is improbable that Parliament intended to reinstate it for failure to pay amounts required by an Ombudsman's award, particularly in light of the fact that the award will have been arrived at without the ordinary procedural safeguards of an action in the courts (disclosure, cross-examination, etc).

58. I do not accept this submission in the broad terms in which it was put. There can be very few steps that an Ombudsman might direct to be taken that would not involve cost of some sort. Even if one excludes internal administrative costs of complying with a direction (e.g. the cost of writing a letter of apology), there will be many cases in which external costs are involved. For example the calculation of the loss that a consumer has sustained might involve the engagement of an actuary and the payment of his fees. There is nothing in the statute which, in my judgment, would preclude the Ombudsman from making a direction simply because it required the payment of money. Mr Bartlett submitted in the alternative that if it was open to the Ombudsman to make a direction that involved the payment of money it was implicit that the amount of money could not exceed the statutory cap.

59. The complainants counter these submissions by pointing out that although there is a clear statutory cap on the size of a permitted money award, there is no such limit placed on a direction. Mr Randall, for Mr Bunney, submitted

that there need not even be a statutory cap on a money award if the FSA did not choose to set one. I do not agree with this latter submission; the Act is plainly drafted on the assumption that a statutory cap would be set by the FSA. Mr Virgo, for Mr Cahill, placed particular reliance on the former provisions of the Terms of Reference of the Personal Investment Authority Ombudsman Bureau (which were superseded by the current Financial Ombudsman Service Scheme). Paragraphs 5.4 and 5.5 of those terms said:

"5.4 An award may comprise a money sum to be paid by the firm or a direction to the firm to take or desist from taking such steps as the Ombudsman may specify (or a combination of a sum of money and a direction) provided always that the Ombudsman shall be satisfied that the cost to the firm of complying with a direction will not (when taken together with the value of any money sum) exceed the monetary limits prescribed by paragraph 5.5 below.

5.5 The value of an award shall not exceed £100,000 or £20,000 per annum in respect of a policy of permanent health insurance…."

60. He submitted that the terms of the PIA Ombudsman's Terms of Reference clearly restricted the cost of compliance with directions. The current regime does not contain this express provision. Therefore no such restriction can exist; and the Ombudsman has unlimited jurisdiction to make directions, no matter what the cost of compliance with them. I cannot place much weight on this submission. First, the current Ombudsman regime supersedes not only the PIA Ombudsman service, but seven other Ombudsmen services as well. So a comparison between one of eight former sets of terms of reference and the current regime would be partial and dangerous. Second, the PIA Ombudsman's terms of reference were not (I believe) the subject of Parliamentary scrutiny. Third, I have not been shown any material which would lead me to the conclusion that these terms of reference were before Parliament when it was considering the 2000 Act.

61. Mr Virgo also said that a money award was confined to payment to the complainant himself. If a payment was to be made to a third party (e.g. a pension provider) that was not a money award, but a direction. The purpose underlying this submission was to escape the statutory cap on money awards. I cannot see any rational policy which would have led Parliament to cap an award of money made to a consumer to enable him to top up his pension himself, while at the same time giving the Ombudsman power to direct a firm to make an unlimited payment to a pension provider for the very same purpose. Similarly, suppose that an insurer wrongly refused to honour a claim relating to damage to a dwelling house. What would be the policy reason for capping a money award to the insured in order for him to engage a builder, but giving the Ombudsman unlimited power to direct the insurer to make payments direct to the builder himself?

62. Mr Strachan, for the Ombudsman service, said that a money award was restricted to an award of an "amount". This meant a sum which was quantified in pounds and pence. If the sum was not or could not be quantified at the date of the determination, then it could not be a money award. He supported this submission by reference to the decision of Moses J in ***Davies Walters & Associates Ltd v PIA Ombudsman Bureau*** [2001] EWHC (Admin) 1159. Moses J described the issue between the complainant and the firm as being whether the firm carried out an execution only service for the complainant or whether it was required to give him advice. The Ombudsman decided it was the latter. In his determination, he said:

"It is now my decision that it will be necessary to establish whether Davies Walters & Associates Ltd non-compliance has caused you to suffer a loss. The member company should proceed to a loss assessment on the basis of the Personal Investment Authority Guidelines. If a loss has occurred the redress under those guidelines would come due."

63. When the firm carried out the loss assessment, it discovered that it would have to pay the complainant far more than the limit on the value of an award (see para 59 above). The firm then challenged the Ombudsman's decision on the ground that it was outside his powers. Moses J rejected the argument. He pointed out that redress under the PIA guidelines might not require the payment of money; but that there were other forms of redress or combinations of forms of redress that would compensate the claimant for his loss. He said:

*"**17.** In that context the decision of the Ombudsman becomes, to my mind, perfectly plain. He was concerned with the dispute laid before him, namely whether this was an execution only business or not. He concluded it was not. He then directed as his award in the case loss assessment and made it clear that that loss assessment was to be conducted, as he put it, "on the basis of the Personal Investment Authority Guidelines". He then reminded the claimants, as was perfectly plain, that if a loss had occurred the redress under those guidelines would come due. He was stating no more than the obvious. He was not making any monetary award. For my part, I cannot see any sensible argument to the contrary. If he had been making a money award, it would have been quite impossible for him to make any money award before any loss assessment had been undertaken. He was not purporting to carry out any loss assessment, he was leaving that to be done pursuant to the scheme.*

***18.** In those circumstances, I reject the argument that there is no method of enforcing redress should loss assessment reveal that redress was required. There was a clear method of enforcing such redress through the scheme and rule 7.2.2. Any failure to comply with the requirements of the scheme would result in disciplinary proceedings being taken under chapter 10 of the rules. In those circumstances, I reject the submission of the claimants."*

64. I respectfully agree that the Ombudsman in that case was not making a money award. One obvious reason is that it was not clear whether the complainant had suffered a loss at all. Hence the loss assessment to discover "whether" the complainant had suffered a loss. But I do not consider that Moses J was saying that an award had to be quantified in pounds and pence before it could be described as a money award. Quite apart from anything else the distinction between a money award and a direction requiring the payment of money was not a

relevant one under the terms of reference of the PIA Ombudsman (see paragraph 59 above). In addition, it seems to me to be fair to describe an award which requires the payment of a sum to be ascertained by a formula as being a money award. If, for example a consumer had given up benefits under, say, 20 cluster pension policies, an award of, say, £5,000 compensation per policy would, I think, be properly described as a money award. If an award that required the payment of money to the complainant were to be held not to be a money award simply because the amount of money was not quantified at the date of the award, that would in my judgment be an incentive to firms to place the question of quantum as well as liability before the Ombudsman. On the claimants' submission, if the Ombudsman decides questions of "liability" only, his jurisdiction to order the payment of money is unlimited; but if he decides "quantum" too, then it is restricted to £100,000. (I have put "liability" and "quantum" in inverted commas because the Ombudsman is not bound by the strict rules of law). In some cases, perhaps, a firm might contest "liability" but admit that if it is established then the "quantum" would exceed £100,000. If the claimants are right, that admission would cap the award. If there were no such admission the Ombudsman's powers to make directions would be limitless. In others the firm might decide to contest both "liability" and "quantum", engaging expert actuaries for that purpose. That would only serve to complicate what is meant to be a simple procedure; and rack up the costs of what is meant to be a relatively cheap dispute resolution process. In my judgment these consequences cannot be ascribed to Parliament. I consider that an award that requires the payment of money is a money award, even if the amount of money that must be paid is unquantified at the date of the award.

65. There is another point that I should make about the decision in ***Davies Walters & Associates Ltd v PIA Ombudsman Bureau.*** As I read it Moses J held that the enforcement of the Ombudsman's direction was a matter for the scheme itself and was not a question of enforcement of his award. What he does not say is that the Ombudsman would have had power to direct a payment in excess of the cap imposed by the scheme itself.

66. Mr Bartlett submitted that whether an award was a money award depended on the substance of the award, and not whether it purported to be merely a direction. Mr Strachan was, I think, inclined to agree that the Ombudsman could not, for example, make a money award of £100,000 (the statutory cap) and then in addition "direct" a firm to pay, say, another £100,000. I agree with that, but I would go further. One example that Mr Bartlett gave was a consumer who had lost, say, 100,000 shares as a result of bad advice. The value of the shares was, say, £250,000. Clearly, because of the statutory cap, the Ombudsman could not make a binding money award in favour of the consumer of £250,000. Nor, in the light of the common ground between counsel, could he make a money award of £100,000 and "direct" the firm to pay the additional £150,000. Mr Bartlett submitted that it would be absurd if, with these fetters on the Ombudsman's powers, he were entitled to "direct" the firm to buy 100,000 shares (at a known cost of £250,000) and then transfer them to the consumer. This is, to my mind, a very powerful submission.

67. Mr Virgo also submitted that a direction could require a firm to make periodical payments (e.g. payments under a health insurance policy). It might be impossible at the date of the award to know what the cost of compliance with such a direction might be, because that cost might, for example, depend on the longevity of the life insured. In such a case the statutory cap could not apply at the date of the award because the cost of compliance would be unknown; and it would be rewriting the statute to say that an award by way of direction ceased to be binding once the cost of complying with it had reached the statutory cap. Mr Bartlett retorts that this would indeed make the statutory cap illusory; and that an award by way of direction must be subject to an implicit limitation to the effect that it is not binding to the extent that it requires payment of more than the statutory cap. In the alternative he submitted that it was unlawful for the Ombudsman to make a direction where, at the time of his award, he knew that the cost of complying with it would exceed the statutory cap; although it would be lawful for him to make a direction where the cost of compliance was not known to exceed the cap.

68. In the end, it seems to me that the key question is: if the Ombudsman can direct a firm to make a payment that exceeds the statutory cap, what is the point of the cap? None of the counsel, to my mind, gave a satisfactory answer to that question. It is, I think, unanswerable. I agree with Mr Bartlett that whether a determination is a money award or a direction depends on the substance of the decision and not on the form in which it is expressed. If the determination requires the payment of money to the complainant or for his benefit it is a money award. I also hold that the Ombudsman does not have power to make a direction that would require a firm to make a payment that exceeds the statutory cap. If the cost of compliance with a direction is unknown at the time when the direction is made, it is, in my judgment, subject to an implicit limitation that it will not be enforceable beyond the statutory cap, once reached.

69. It is always open to the FSA to change the amount of the cap if this is unsatisfactory. If it decides to do so it may also provide a different cap for different kinds of complaint, so that it could, for instance, prescribe an annual cap for periodical payments if it chose to.

The determinations in this case

70. I must now consider whether the two awards made in this case are, in truth money awards which exceed the statutory cap.

Mr Bunney

71. In Mr Bunney's case the Ombudsman did not, in my judgment, require the payment of money. He required the firm to carry out a loss assessment in accordance with regulatory guidance, and, if a loss is shown, make redress in accordance with that guidance. Plainly the first part of the direction is not a money award. The purpose of

carrying out the loss assessment was to ascertain whether there was a loss at all. To that extent this award is indistinguishable from that considered by Moses J in ***Davies Walters & Associates Ltd v PIA Ombudsman Bureau.*** The second part of the direction required the firm to make redress. Redress might in theory take a number of forms. It might, for instance take the form of a guarantee; or persuading the trustees of an occupational pension scheme to readmit a former member; or the waiver of future charges. I do not consider that the Ombudsman's determination can be said to have required the firm to make a money payment.

72. In addition, the Ombudsman's determination said that any unresolved issue could be referred back to him. If, therefore, Mr Bunney and Burns Anderson cannot agree what form the redress should take that issue can be referred back to the Ombudsman. At that stage if the question is one of money, the Ombudsman would be obliged to apply the statutory cap. He could make a money award of £100,000, but could only recommend payment of the balance.

Mr Cahill

73. In Mr Cahill's case the Ombudsman did require the firm to make payments of money. First he required the firm in setting up an annuity to make any additional payment necessary to provide the purchase price so that the same income is payable in future as would have been payable under Mr Cahill's final salary scheme. Second, he ordered the firm to compensate Mr Cahill for any past shortfall in tax free cash and pension instalments. Both elements of his determination are, in my judgment, money awards. Neither is enforceable in excess of the statutory cap.

The grant of injunctions in aid of directions

74. Compliance with a direction by the Ombudsman is "*enforceable by an injunction*": section 229 (9). There is a slight conundrum here. The Ombudsman can direct steps to be taken even though a court could not order those steps to be taken: section 229 (2)(b). Yet if the court grants an injunction to enforce compliance with a direction by the Ombudsman to take such steps, it will be ordering them to be taken. Logically, either the court cannot order them to be taken (in which case the direction is not enforceable by injunction); or it can (in which case any steps that the Ombudsman directs to be taken are steps that the court can order to be taken). Fortunately the solution to this conundrum does not arise in the present case.

75. Mr Bartlett submits that the mere fact that a direction is enforceable by injunction does not alter the fundamentally discretionary nature of the remedy. If, for example, the Ombudsman has exceeded his powers, the court could, as a matter of discretion, decline to enforce the direction by injunction. Equally, if an injunction would serve no useful purpose, the court could decline to grant one. Although he did not say so in terms, I think that the thrust of his submission would also apply to a case in which (in the case of a mandatory injunction) it was not clear enough what the firm had to do in order to comply with the direction.

76. I agree with Mr Bartlett that the fact that the Act says that a direction is enforceable by injunction does not change the discretionary nature of the remedy; although there will be a strong presumption that the discretion would be exercised in favour of the claimant, where compliance with a direction remains outstanding. But in a case in which the Ombudsman has exceeded his powers, I do not consider that it would be right for the court to exercise its discretion in the claimant's favour. Put another way, what is enforceable by injunction is a valid direction and not an invalid one.

Disposition

77. In Mr Bunney's case I consider that the grant of an injunction would serve no useful purpose. The figures necessary to compensate Mr Bunney have not been agreed; and the Ombudsman has directed that any unresolved issue be referred back to him. I also consider that if I were to grant an injunction which had the effect of requiring the firm to pay more than £100,000 I would be lending the court's aid to an invalid direction. The firm has agreed to pay Mr Bunney £100,000 which is the maximum sum that he could have been awarded.

78. In the case of Mr Cahill, I also decline to grant an injunction. The firm is willing to pay Mr Cahill £100,000; and to the extent that the Ombudsman's direction requires it to pay more, it is in my judgment, invalid.

79. The result is that I dismiss both claims. I recognise that my answers to the questions I have been asked to consider upset current thinking (at least so far as the FSA and the Ombudsman Service are concerned). I have also found the questions difficult to resolve; and I believe that there are obscurities and lacunae in the statutory scheme. I would therefore be receptive to any application for permission to appeal.

Mr Nicholas Randall (instructed by Thompsons Solicitors) for the Claimant (Mr Bunney)
Mr John Virgo (instructed by Clarke Willmott Solicitors) for the Claimant (Mr Cahill)
Mr Andrew Bartlett QC and Mr Simon Howarth (instructed by CMS Cameron McKenna) for the First Defendant and for the Defendant Timothy James & Partners Limited
Mr James Strachan (instructed by Financial Ombudsman Service Ltd) for the Second Defendant