Judicial review - application by the Applicant to judicially review the decision of the Respondent.

[2019]JRC041

ROYAL COURT
(Samedi)

18 March 2019

Before : J. A. Clyde-Smith, Esq., and Jurats Sparrow and Thomas.

Between	**Future Finance Limited**	**Applicant**
And	**Channel Islands Financial Ombudsman**	**Respondent**

IN THE MATTER OF THE COMPLAINT AGAINST FUTURE FINANCE LIMITED

AND

IN THE MATTER OF THE FINAL DETERMINATION OF THE CHANNEL ISLANDS FINANCIAL OMBUDSMAN

AND

PURSUANT TO RULE 16/2 OF THE ROYAL COURT RULES (2004) AS AMENDED

Advocate I. C. Jones for the Applicant

Advocate W. A. F. Redgrave for the Respondent

JUDGMENT

THE COMMISSIONER:

1. This is an application by Future Finance Limited to judicially review the decision of the Respondent (who we will refer to as "the Ombudsman") upholding the complaint of two individuals (who we will refer to as "the Complainants" which can include either of them) and ordering compensation in the sum of £63,340.06p.

2. Future Finance Limited is part of a group of companies which appear to operate under the general name of "Future Finance". The holding company is Future Group Holdings Limited and it

owns a number of subsidiaries, including Future Finance Limited and Future Loans Limited which two companies were the subject of the complaint. We will refer to the group as a whole as "Future Finance" and to the names of the two companies concerned in full.

The complaint

3. On 19th October, 2012, the Complainants emailed Mr Aaron Gouveia of Future Finance at 09:45 for assistance in relation to a new mortgage. They were already customers of Future Finance, with whom they had a personal loan. They were selling their property and would have equity from the sale of £203,000 and a combined annual income of £89,000. They were looking for approval, in principle, for a new mortgage on a new property.

4. Mr Gouveia responded at 10:06 –

> *"This is good news, a new house? Very exciting stuff!!*
>
> *More than happy to assist. Mortgages are our bread and butter. With so much equity it will be no problem at all."*

5. At 10:56, Mr Gouveia emailed saying it was very early days and he could only give a rough idea as to rates and terms, but they should be looking at roughly £450,000 for a mortgage, which was five times their joint salary. He said they may be able to go as far as 5.5 times salary, ending:-

> *"So it really does depend on who is offering the best terms at the time. I promise when the time comes I will find the best deal for you."*

6. At 11:10 the Complainants emailed again, saying that they had made initial inquiries with Skipton International which had confirmed its maximum mortgage was £485,000. Describing the new property and purchase price they had to achieve:-

> *"We would need to find one of those lenders you mention that looks at 5.5 of our joint salaries and if there is a small shortfall, I am sure we can make up the difference from a little savings.*
>
> *We will be in touch Aaron, I promise, as I am confident we will find the deal we need."*

7. Matters moved fast in that their offer of £680,000 for a new property was accepted that day, and the Complainants e-mailed Mr Gouveia again at 18:03, saying that they needed *"to get cracking on with our mortgage application"*, giving further information to Mr Gouveia, and concluding:-

"I am confident that you will be able to sort the necessary out for us."

8. There followed a meeting at the offices of Future Finance on 22nd October, 2012, to which Mr Gouveia said he would be bringing *"our mortgage guru".* Further information was provided by the Complainants on 22nd and 23rd October 2012, but there is no further e-mail correspondence until 19th November, 2012, when a decision had already been taken that the Complainants would be obtaining a private mortgage brokered via Future Finance.

9. It would seem that following the meeting of 22nd October, 2012, Mr Gouveia advised that the Complainants had been declined by conventional *"high-street"* lenders, because they had missed a mortgage payment in the previous year. Instead, he had found a private lender, Berillic Loans Limited ("Berillic") which was willing to provide a 12 month interest only loan of £478,275 at a rate of 7% per annum. This left a shortfall under the purchase price of £24,875.88p and Future Finance offered to lend the Complainants this amount for 12 months, interest only, at a rate of 15.5%. The Complainants accepted the terms of both loans. Contractually the loan from Berillic was brokered through Future Finance Limited and the shortfall loan was made by Future Loans Limited. The purchase was completed on 29th November 2012.

10. Shortly after the purchase, one of the Complainants became unemployed, and with their reduced joint income, they were unable to re-finance the mortgage with a conventional lender in 2013 after the 12 month facility with Berillic had expired. Future Finance therefore arranged for the Berillic loan to be rolled over for a further 24 months, and secured a private investor to re-finance the loan made by Future Loans Limited for the same period. In 2015, the Complainants secured enough funds to pay off the majority of their debts, and started approaching conventional lenders to re-finance their mortgage. One lender agreed, and offered a capital and interest repayment mortgage on a fixed rate of 2.57% for five years, which they accepted.

11. The Complainants subsequently complained to Future Finance that the previous private lending arrangements had caused them serious financial difficulty, and were neither affordable nor suitable for their needs at the time. Future Finance did not uphold their complaint.

12. The Complainants made a complaint to the Trading Standards Service of non-compliance with the Code of Consumer Lending, to which Future Finance had subscribed, who on 24th June,

2014, found that Future Finance (a term which was undefined) had complied with that Code. At this time the Ombudsman was not yet in existence. Advocate Jones accepted that this was not in any way binding upon the Ombudsman.

13. The Complainants wrote to the Financial Ombudsman on 10th March, 2016, asking him to look into their complaint, which they said was against the relevant companies in the *"Future Finance group".* They made specific reference to Future Finance Limited and Future Loans Limited. A complaint submission form was filed by them on 1st April, 2016.

Financial Ombudsman

14. The Financial Services Ombudsman (Jersey) Law 2014 ("the 2014 Law") established an Ombudsman with power to investigate and determine individual customer complaints regarding financial services provided in Jersey, to be operated in partnership with the States of Guernsey, where there is similar legislation.

15. Article 2 of the 2014 Law establishes a body corporate, to be known as the Office of the Financial Services Ombudsman ("OFSO"). The general functions of the OFSO are set out in Article 3 as follows:-

> ***(1) the primary function of the OFSO is to administer the operation of this Law to secure that complaints about financial services are resolved –***
>
> ***(a) independently, and in a fair and reasonable manner;***
>
> ***(b) effectively, quickly, with minimum formality, and so as to offer an alternative to court proceedings that is more accessible for Complainants; and***
>
> ***(c) by the most appropriate means, whether by mediation, referral to another forum, determination by an Ombudsman or in any other manner."***

16. Under Article 4 of the 2014 Law, the OFSO must appoint a ***"Principal Ombudsman"*** and secure the availability of a sufficient number of other suitable staff to perform its functions. Mr Douglas Melville was appointed to the post of Principal Ombudsman.

17. There is no dispute that the Complainants were eligible to make a complaint, pursuant to the provisions of Articles 7 and 8 of the 2014 Law, but there is a dispute as to whether Future Finance Limited is ***"a relevant financial services business"*** for the purposes of Article 9 of the 2014 Law, and we will come to that shortly.

18. On the allocation of the complaint to an Ombudsman, Article 13(2) – (6) of the 2014 Law sets out how that complaint should be handled:-

> ***"(2) The Ombudsman to whom the complaint is allocated must –***
>
> ***(a) Handle the complaint in such manner as he or she considers most appropriate for the clarification of the issues and generally for the just handling of the complaint; and***
>
> ***(b) Have regard to the primary function of the OFSO under Article 3(1), and in particular, so far as it appears to the Ombudsman appropriate to do so, seek to avoid –***
>
> ***(i) Formality in handling the complaint, and***
>
> ***(ii) Any need for legal representation for either party.***
>
> ***(3) Subject to paragraphs (2) and (5), the Ombudsman may handle the complaint as he or she sees fit.***
>
> ***(4) Without prejudice to the generality of paragraph (3), the Ombudsman –***
>
> ***(a) may make such enquiries of the Complainant and Respondent and of any other person as he or she considers appropriate;***
>
> ***(b) is not bound by any enactment or rule of law relating to the admissibility of evidence in proceedings before courts;***

(c) may consider all or any part of the complaint in public or in private and with or without a hearing;

(d) may at any stage indicate a provisional view on any issue and invite comment from both parties on that view;

(e) may invite comment from both parties on a preliminary draft of the determination, or may issue a determination without such a prior invitation, if the Ombudsman is satisfied that it is not necessary in the circumstances.

(5) The Ombudsman must not take account of evidence in determining a complaint unless –

(a) both parties have had an opportunity to see and comment on the evidence; or

(b) the evidence has been disclosed to the Respondent and not to the complainant, but the Ombudsman is satisfied in the exceptional circumstances of the case –

(i) that a fair determination cannot be made without taking account of that evidence, and

(ii) that it is necessary not to disclose that evidence to the complainant, in order to preserve the confidentiality of information revealed by that evidence.

(6) The complainant and the Respondent must assist the Ombudsman in the discharge of the Ombudsman's duties under paragraph (2)."

19. Article 15 goes on to provide:-

"15 Determination

(1) An Ombudsman, when determining a complaint, must do so by reference to what is, in the opinion of the Ombudsman, fair and reasonable in all the circumstances of the case.

(2) Without prejudice to the generality of paragraph (1), the Ombudsman, must take into particular account –

(a) the relevant law;

(b) any relevant direction, code of practice, guidance, or other rule or standard, issued by or on behalf of the Commission;

(c) any similar instrument issued by any other body if the Ombudsman considers it relevant to the complaint; and

(d) what the Ombudsman considers to have been relevant good industry practice at the time of the act to which the complaint relates."

20. In this case, the complaint was assigned to Mr Dominic Hind, a case handler and operations analyst at OFSO, with primary responsibility for investigating and resolving the complaint through mediation and non-binding recommendations, and assisting the Ombudsman with his final determinations if those attempts were unsuccessful or rejected.

21. Mr Hind produced a non-binding recommendation to the parties on 18th January, 2018, upholding the complaint and requiring Future Finance, defined as meaning Future Finance Limited, to pay compensation in the sum of £58,399.69p. He received responses from both parties indicating that they did not agree with his non-binding recommendation. The Ombudsman then produced a provisional determination on 4th May, 2018, which again upheld the complaint, although compensation payable by Future Finance Limited was in the slightly higher figure of £63,223.29p. The parties submitted responses to that provisional determination, which were considered by the Ombudsman and who then issued his final determination on 28th June, 2018. We will refer to that as "the Decision".

22. Without going into the detail of the Ombudsman's response to the submissions of the parties on the provisional determination, his central findings in favour of upholding the complaint are contained on pages 14 and 15 of the Decision as follows:-

"Future Finance have described these private facilities as a short-term bridging arrangement which [the complainants] willingly entered into on the basis that they could apply for a conventional mortgage at the end of the term.

While this may have been the case, I consider that [the complainants'] agreement to this arrangement was based on their assumption that no conventional mortgage provider would lend to them at the time.

This assumption was based on advice given by Future Finance which was, in my view, misleading. There is no evidence that Future Finance made any reasonable effort to contact conventional mortgage providers to determine if loans would be available to [the complainants].

……I therefore find it fair and reasonable to award [the complainants] compensation for the incremental costs associated with the private mortgage and the lost opportunity to obtain a conventional mortgage between 2012 and 2015.

Future Finance do not agree that CIFO should retrospectively find the [complainants] eligible for a conventional mortgage, based solely on a positive credit report from one agency.

However, this is only one factor which leads me to conclude that, on a balance of probabilities, [the Complainants] could have obtained a conventional mortgage in 2012. I have also taken into account their substantial cash deposit, combined salary, explanation for the missed mortgage payment, and the lack of any contrary written confirmation, or contiguous notes of a conversation, from the two conventional mortgage providers allegedly approached by Future Finance.

On the basis of all the above, I conclude that Future Finance arranged an unsuitable private mortgage for the Complainants which had significant financial consequences, and that it would be fair and reasonable for Future Finance to compensate [the complainants] for these losses …"

23. The Complainants accepted the Decision and pursuant to Article 18(3) of the 2014 Law that binds both the Complainants and Future Finance Limited. Pursuant to Article 18(6), no appeal lies against a binding determination, hence this application for a Judicial Review.

Grounds for Judicial Review

24. In broad terms, the grounds for a Judicial Review are those identified by the Royal Court in Planning & Environment Committee v Lesquende Ltd [1998] JLR 1, i.e. the GCHQ Trilogy. The GCHQ Trilogy is to be found in the speech of Lord Diplock in the well-known case of Council of Civil Service Unions v Minister for Civil Service [1984] 3 All ER at 950 – 951:-

> ***"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source it should for that reason only be immune from Judicial Review. Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by Judicial Review. The first ground I would call 'illegality,' the second 'irrationality' and the third 'procedural impropriety.' That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.***
>
> ***By 'illegality' as a ground for Judicial Review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.***
>
> ***By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is 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. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards (Inspector of Taxes) v Bairstow [1955] 3 All ER 48, [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker.***

'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to Judicial Review under this head covers also failure by an administrative tribunal to observe procedure rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

25. No point is taken as to procedural impropriety on the part of the Ombudsman, and it is clear, pursuant to Article 13(5), that both parties had an opportunity to comment on the evidence before him, the non-binding determination and the provisional determination. Accordingly, of the GCHQ Trilogy, this application is concerned with illegality and irrationality.

First Ground

26. This application for a Judicial Review is brought by Future Finance Limited, and it points to what it describes as a fundamental factual error in the Decision. At the outset the Decision defines the Respondent to the complaint in this way:-

"Future Finance Limited ("Future Finance").

Thereafter the term "Future Finance" is used.

27. The Ombudsman states on page 6 of the Decision that Future Finance made a loan to the Complainants of £24,875.88p and then on page 9:-

"Future Finance have stated that, contrary to the case handler's assertions, they are not a lender and do not subscribe to the consumer lending code of practice. Furthermore, they say that they are not supervised by the Jersey Financial Services Commission ("JFSC"). Future finance have therefore challenged the Ombudsman's jurisdiction over the case and asked for clarification as to how the complaint falls within the Ombudsman's remit.

Firstly, I note that this complaint partly relates to the provision of an interest-only loan of £24,875.88 to [the complainants]. This loan was arranged in favour of Future Finance. Future Finance's website also confirms that they offer a range of lending services including personal loans, business loans, mortgages, vehicle financing, and debt consolidation. I therefore cannot accept Future Finance's claim that it is not a lender."

28. The Ombudsman goes on page 10 to conclude that:-

"I consider that the cash loan of £24,875.88 clearly falls under paragraph 2(a) of Schedule 45 of the Law, and so there is no need to clarify this point further."

29. And finally, on page 11:-

"However, I do not consider that this exemption applies in this case. Contrary to sub-paragraphs (1)(a) and (2)(a), I consider that Future Finance's principal business is relevant credit business and therefore falls within Article 2(2) of the Exempt Business Order."

This cash loan of £24,875.88 was, of course, made by Future Loans Limited not Future Finance Limited.

30. The difficulty with this conclusion, said Advocate Jones for Future Finance Limited, is that it is clearly predicated on an understanding by the Ombudsman that Future Finance Limited is a money lender, or that its principal function is a money lender. That understanding, he said, was demonstrably incorrect, and betrays a fundamental misunderstanding of what the function and/or the purpose of Future Finance Limited is. It is also, he said, the first or primary basis upon which the Ombudsman concluded that he had jurisdiction over Future Finance Limited that was based on a fundamental error of fact. Future Finance Limited is not, and never has been, a provider of credit. This fact was objectively verifiable.

31. The Ombudsman accepts that this definition of the Respondent in the Decision was an error, but as Advocate Redgrave for the Ombudsman points out:-

(i) The complaint related to the two companies within the group, namely Future Finance Limited and Future Loans Limited, and the Ombudsman had jurisdiction over both, albeit that jurisdiction over Future Finance Limited is challenged under the second ground below.

(ii) The two services provided by Future Finance, namely brokerage and lending, are clearly set out in the Decision. The provision of credit to the Complainants by Future Loans Limited represents a very small part of the award (£200), with the vast majority of the Decision and the award relating to the brokerage business which was conducted by Future Finance Limited.

32. In the light of this it was not considered proportionate by the Ombudsman to seek to uphold that part of the Decision that should have related to Future Loans Limited, thus reducing the award to £63,051.12p. The Decision in respect of the brokerage business of Future Finance Limited was therefore the only live issue before the Court.

33. Even if withdrawn, Advocate Jones maintained his submission that this error played a material role in the reasoning of the Ombudsman that resulted in him finding and/or directing himself erroneously that he had any jurisdiction over Future Finance Limited.

34. We reject that submission. The position was not helped by Future Finance as a group not always observing the distinction between the entities within the group and in particular, its use of the nomenclature "Future Finance" to cover all the services provided by its various companies, including lending, but we accept that the Decision should have made clear that the shortfall loan was made through Future Loans Limited, as contractually it was Future Loans Limited that advanced that loan. However the Decision separates out very clearly the brokerage and credit services provided and the Ombudsman addressed at length the grounds upon which he found that he had jurisdiction over Future Finance Limited as broker (which we deal with below). Furthermore the shortfall loan played a very small part in the dealings between the parties which was taken up predominately with the brokerage of a mortgage.

35. This admitted error, in our view, played no part in the Ombudsman's reasoning in relation to the brokerage services provided to the Complainants, both in relation to jurisdiction and fact.

Second Ground

36. Advocate Jones argued that Future Finance Limited was not conducting *"a relevant ancillary business"* acting as a mortgage broker as found by the Ombudsman on page 11 of the Decision. We need to work through the definitions.

37. ***"Relevant financial services business"*** is defined in Article 9 of the 2014 Law in this way:-

"9 Relevant financial services business

(1) Relevant financial services business is business, other than business exempted under paragraph (4), that is any one or more of the following –

(a) financial service business within the meaning of the Financial Services (Jersey) Law 1998;

(b) the business of an AIF, of an AIFM or of a service provider, as each of those terms is defined by the Alternative Investment Funds (Jersey) Regulations 2012.

(c) deposit-taking business within the meaning of the Banking Business (Jersey) Law 1991;

(d) the business of a collective investment fund, within the meaning of the Collective Investment Funds (Jersey) Law 1988, or of a functionary within the meaning of that Law;

(e) insurance business for the purposes of the Insurance Business (Jersey) Law 1996;

(f) business that would fall within any of sub-paragraphs (a) to (e) but for an exemption or exclusion conferred by or under any of the Laws or Regulations mentioned in those sub-paragraphs;

(g) business that –

(i) falls within paragraph 7 of Part B of Schedule 2 to the Proceeds of Crime (Jersey) Law 1999, and

(ii) is specified Schedule 2 business, within the meaning of the Proceeds of Crime

(Supervisory Bodies) (Jersey) Law 2008, in respect of which Article 10 of that Law requires the person carrying on the business to be a registered person within the meaning of that Law.

(h) relevant pension business, within the meaning of Schedule 3;

(i) relevant credit business, within the meaning of Schedule 4; or

(j) relevant ancillary business, within the meaning of paragraph (2)." *(our emphasis)*

38. Article 9(4) provides that the Minister for Economic Development may by order exempt classes of business to the extent that they would otherwise be a ***"relevant financial services business"*** in relation to which the Minister considers that it is not appropriate for the services of the OFSO to be available. That power has been exercised by the Minister under the Financial Services (Ombudsman) (Exempt Business) (Jersey) Order 2014, which under Article 2 exempts from being ***"relevant financial services business"*** for the purposes of Article 9 of the Law, business which does not fall within one or more of the descriptions in sub-paragraphs (a) - (l):-

"(2) Those descriptions are –

(a) deposit-taking business, within the meaning of the Banking Business (Jersey) law 1991, for which the person carrying on the business must be registered under that Law;

(b) business for which the person carrying on the business would be required to be registered under the Banking Business (Jersey) law 10991, but for the operation of Article 4 of, or Schedule 1 to, the Banking Business (General Provisions)(Jersey) Order 2002;

(c) money service business, within the meaning of the Financial Services (Jersey) Law 1998, for which the

person carrying on the business must be a registered person under that Law;

(d) ***business for which the person carrying on the business would be required to be a registered person under the Financial Services (Jersey) Law 1998, but for the operation of either or both of Articles 4 and 5 of the Financial Services (Money Service Business (Exemptions)) (Jersey) Order 2007;***

(e) ***the business of a functionary of a recognized fund, within the meaning of the Collective Investment Funds 9 Jersey) law 1998, for which the functionary must hold a permit under that Law;***

(f) ***general insurance mediation business, within the meaning of the Financial Services (Jersey) Law 1998, for which the person carrying on the business must be a registered person under that Law;***

(g) ***insurance business for the purposes of the Insurance Business (Jersey) Law 1996, for which the person carrying on the business must be authorized by a permit under that Law'***

(h) ***business for which the person carrying on the business would be required to be authorized by a permit under the Insurance Business (Jersey) law 1996, but for Article 5(5)(d) of that Law'***

(i) ***investment business, within the meaning of the Financial Services (Jersey) Law 1998, for which the person carrying on the business must be a registered person under that Law;***

(j) ***subject to Articles 3 and 6, relevant pension business, within the meaning of schedule 3 to the Law;***

(k) ***<u>subject to Articles 4, 5 and 6, relevant credit business, within the meaning of Schedule 4 to the Law</u>;***

> ***(l)*** ***subject to Article 6, relevant ancillary business, within the meaning of Article 9(2) of the Law, in respect of which the main business falls within any one or more of sub-paragraphs (a) to (k).”*** *(our emphasis)*

39. It is not in dispute that the provision of credit constituted the main business of Berillic by whom the interest only mortgage was made to the Complainants and that it was providing a ***“relevant credit business”*** within the meaning of Schedule 4 of the 2014 Law. Schedule 4 defines ***“relevant credit business”*** as including the provision of credit under credit agreements, including loans secured against immovable property. The question, therefore, arises as to whether Future Finance Limited was conducting a ***“relevant ancillary business”*** within the meaning of Article 9(2) of the 2014 Law in respect of Berillic’s ***“relevant credit business”.***

40. Article 9(2) of the 2014 Law defines ***“relevant ancillary business”*** in this way:-

> ***“(2) Relevant ancillary business is business ancillary to any other business falling within any of paragraphs (1)(a) to (i) (the ‘main business’), if –***
>
> ***(a) the main business is carried on in relation to the complainant by the same person as the ancillary business; or***
>
> ***(b) the ancillary business consists of –***
>
> ***(i) introducing, directly or by one or more intermediaries, persons who seek services, the provision of which constitutes the main business, to other persons who carry on that business; or***
>
> ***(ii) giving advice with a view to make such introduction.”***

41. Advocate Jones referred to this explanation given by the Ombudsman as to what is meant by ancillary business under Article 9(2):-

"In summary, ancillary business is any activity which supports or contributes to the main business of a financial services provider. A firm will generally conduct ancillary business in relation to their own main business. Alternatively, the ancillary business of one firm may relate to the main business of another firm."

42. This, Advocate Jones argued, is an incorrect interpretation of Article 9(2) which fails to understand or recognise the fact that for a business, in this case the business of Future Finance Limited, to meet the definition of ***"relevant ancillary business"*** that business has first to be ancillary (giving the word its ordinary meaning) to the ***"main business"***, namely, ancillary to the business of Berillic. Plainly, he said, Future Finance Limited is not ancillary to Berillic in any ordinary sense of the word. They are entirely distinct from one another, their only connection being on an *ad hoc* basis, as and when the opportunity arises to contract with one another on an arm's length basis. Simply put, he argued that Future Finance Limited cannot be conducting relevant ancillary business for the purposes of the 2014 Law, as Future Finance Limited is not on any analysis already ***"ancillary"*** to Berillic, as required by the 2014 Law.

43. We reject this interpretation. We are not concerned with the ordinary meaning of ***"ancillary"*** as what is meant by ***"relevant ancillary business"*** is defined in Article 9(2). It is clear from Article 9(2)(b)(i) that the main business need not be carried on by the same person carrying on the ancillary business. Future Finance Limited was introducing customers to the main business i.e. mortgage lending provided by Berillic. There is no requirement under this definition of ***"relevant ancillary business"*** for there to be any connection between the two.

44. The Ombudsman addressed the question of whether any exemptions under the Order applied, and said this on page 11 of the Decision:-

"There is an exemption to ancillary brokerage business which is contained within Article 6 of the Law which is as follows:

'6: Exempt ancillary brokerage business

(1) Business is exempt business if –

(a) it does not fall within any of sub-paragraphs (a) to (i) of Article 2(2): and

(b) it is relevant brokerage business.

(2) Business is relevant brokerage business if it –

(a) is carried on by a person whose principal business does not fall within any sub-paragraph of Article 2(2), as wholly incidental to that principal business; and

(b) is relevant ancillary business, by virtue of Article 9(2)(b) of the Law, in respect of which the main business –

(i) is carried on by another person, and

(ii) falls within any one or more of sub-paragraphs (a) to (k) of Article 2(2).

(3) Nothing in this Article is to be read, without more, as exempting the business that is the main business in relation to the exempt ancillary business.'

However, I do not consider that this exemption applies in this case. Contrary to sub-paragraphs (1)(a) and (2)(a), I consider that Future Finance's principal business is relevant credit business and therefore falls within Article 2(2) of the Exempt Business Order." (Our emphasis)

45. The first point to make is that the emphasised reference to Article 6 of ***"the Law"*** is clearly an error; it can only be a reference to Article 6 of the Order, which is headed ***"Exempt Ancillary Brokerage Business"***. Article 6 of the 2014 Law is concerned with the arrangements with Guernsey and the adaptation of European standards.

46. Advocate Redgrave submitted that the reference to the emphasised word ***"credit"*** is also an obvious mistake in that the Ombudsman was concerned in this section of the Decision with exemptions to ***"ancillary brokerage business"*** and therefore the word ***"ancillary"*** should be substituted for the word ***"credit"***. Advocate Jones rightly pointed out that Future Finance Limited is not a provider of credit and he argued that this showed that the Ombudsman failed to appreciate or understand that it is a distinct legal entity with a distinct and discrete function.

47. We agree that these are both errors and we also agree with the Ombudsman that the exemption did not apply for the following reasons:-

(i) Article 2(1) of the Order provides that business is exempt from Article 9 of the Law if it does not fall within at least one of the descriptions set out in Article 2(2). That paragraph lists various types of financial services business including (k) relevant credit business under Schedule 4 and (l) relevant ancillary business as defined in Article 9(2) where the main business is within one of the preceding sub-paragraphs (a) to (k).

(ii) Article 6 is headed *"Exempt ancillary brokerage business"* and thus plainly deals with exemptions to relevant ancillary business under Article 9(2), where that is brokerage business. However it does not, of course, exempt all ancillary brokerage business. That would render the statutory scheme absurd. It only does so if that business is carried on wholly incidentally to a separate principal business which is not within Article 2(2) of the Order i.e. it is outwith the Ombudsman's scope altogether. The obvious example is a retailer recommending a credit or insurance provider to its customers. (See also the Economic Development Department of the States of Jersey consultation document in relation to the Order at question 6).

(iii) The business here is providing mortgage broking business. That is a key service provided by Future Finance Limited. It was described by Mr Gouveia to the Complainants as *'our bread and butter"*. It could not conceivably be described as being provided wholly incidentally to a principal business which is not financial services related.

(iv) Taking the elements of Article 6 in turn:

(1) Paragraph (1)(a) is satisfied. Mortgage broking business falls not within article 2(2) sub-paragraphs (a) to (i), but in (l). It is relevant ancillary business (as defined in Article 9(2) of the Law) in respect of which the main business falls within one of sub-paragraphs (a) to (k), i.e. (k) namely relevant credit business (which includes mortgage lending).

(2) However, paragraph (1)(b) is not satisfied, and it needs to be for the exemption to apply. This is because of the definition of ***'relevant brokerage business".***

(3) That definition has two parts, both of which must be satisfied. The first, under (2)(a), is that the brokerage business is wholly incidental to the principal business of the person and that that principal business is not within any sub-paragraph of Article 2(2) of the Order. That is simply not the case here. Mortgage broking is far from being incidental to Future Finance Limited's

business; it is a central activity of Future Finance Limited. Indeed it is its principal business. Future Finance Limited's principal business is arranging loans, which falls within Article 2(2)(i).

(4) As for 2(b), this is irrelevant as (2)(a) is not satisfied, but in itself it is satisfied because the main business (Berillic's lending business) is carried on by another person and is within Article 2(2)(a) – (k) as it is within (k).

48. For all these reasons, we agree with Advocate Redgrave that it is plain that as commonsense would suggest it should be, mortgage brokerage business is within the jurisdiction of the Ombudsman and can therefore be the subject of a determination and an award.

Grounds 3 and 4

49. Advocate Jones submitted that the Ombudsman failed to take into account relevant considerations and took into account a number of irrelevant considerations.

Relevant Considerations not taken into account

50. The Ombudsman stated that *"Future Finance claims to have approached two [mortgage providers] albeit there is no evidence that this was done".* This, said Advocate Jones, was plainly wrong, as there was evidence from Mr Gouveia that Future Finance Limited had approached retail based mortgage providers verbally, and it was a fundamental error that there is no evidence that Future Finance Limited approached other retail based mortgage providers. That evidence did exist, and should have been taken into consideration by the Ombudsman.

51. Advocate Redgrave responded that this appears to be a terminological issue, as it was plain that the Ombudsman did take into account the claim of Future Finance Limited to have approached other mortgage lenders, as the sentence set out above plainly states, but there was no supporting evidence to back up that assertion.

52. The issue being considered by the Ombudsman was an important one: could a conventional mortgage have been obtained at the time? If so it would have been wrong for Future Finance Limited to have informed the Complainants that they would not be able to obtain a conventional mortgage and to have presented the more expensive private loan as the best available option. Future Finance Limited claimed to have had conversations with Skipton and HSBC, but to have

been told in both cases that they would be *"unable to assist"*, because the Complainants had one missed credit card payment and one missed mortgage payment with their current lender.

53. Mr Hind contacted HSBC, who told him that HSBC would not have said the Complainants could not get a mortgage purely on the basis of those missed payments; rather they would have recommended making a formal application in which all factors would have been considered. Future Finance Limited provided no material to contradict this.

54. Subsequently Future Finance Limited provided an email from Skipton dated June 2018 to support the contention that Skipton had said they would not have lent to the Complainants; however that email did not address Skipton's position as in 2012, but rather under the lending environment in 2018. The communication to Skipton which elicited this email was not disclosed. There remained no material to support the notion that Future Finance Limited had made those inquiries in 2012, still less that they had made sufficient inquiries to establish that no conventional mortgage would have been available to the Complainants. The Ombudsman also noted that Future Finance Limited had not made use of a credit scoring website and that the Complainants had been able to acquire a conventional mortgage in 2015.

55. Taking all of this into account, we agree with Advocate Redgrave that it cannot sensibly be said that there was any failure to take a relevant matter into account.

56. The Ombudsman determined at paragraph 15 of the Decision that *"on the balance of probabilities [the Complainants] could have obtained a conventional mortgage in 2012 …. I have … taken into account …. the lack of any contrary confirmation, or contiguous notes of a conversation, from the two conventional mortgage providers allegedly approached by Future Finance."* There was no evidence, Advocate Jones said, that Future Finance Limited concluded that there was no conventional mortgage product available to the Complainants; rather that Future Finance Limited could not obtain one for them. The Ombudsman had failed to take into account either that the Complainants could have continued to search for a conventional mortgage themselves and chose not to (thereby choosing the option of a private mortgage put forward by Future Finance Limited), or that the Complainants did choose to search elsewhere and failed. The Ombudsman had not explained why it is possible to dismiss out of hand Future Finance Limited's evidence that it tried to find a conventional mortgage for the Complainants, and does not even consider the possibility that the Complainants either made or failed to make a number of their own inquiries.

57. The complaint here, in essence, is that if the Ombudsman had decided that a conventional mortgage would have been available in 2012, then it is unfair to blame Future Finance Limited for the fact that the Complainants failed to obtain one by themselves. We agree with Advocate

Redgrave that this mischaracterizes the position. The Complainants had gone to Future Finance Limited for assistance in finding a mortgage.

58. Future Finance Limited told them *"I promise when the time comes I'll find the best deal for you"*. The Complainants' offer on a house was accepted and they told Future Finance Limited they needed to get on and arrange a mortgage. They said they wanted *"the best product on the market at this point in time."*

59. Future Finance Limited subsequently told the Complainants, wrongly as the Ombudsman found, that they would not be able to obtain a conventional mortgage because of the missed payments. A short term private mortgage was proposed, with a small cash loan from Future Loans Limited to make up a shortfall between the funds needed and the amount Berillic was prepared to lend. The Complainants intended to move back on to a conventional mortgage as soon as they could.

60. The Complainants, having approached Future Finance Limited as finance experts to find the best deal for them, were entitled to rely upon it having researched the market on their behalf before telling them they could not get a conventional mortgage and proposing a private mortgage. No rational person would take out a more expensive private mortgage if they believed a cheaper conventional mortgage would be available. We agree with Advocate Redgrave that it follows, for the finding that Future Finance Limited did not make adequate inquiries to conventional lenders, that the Complainants were wrongly given the impression that it was in their interests to opt for the more expensive private mortgage.

Irrelevant considerations

61. The Ombudsman stated that the Complainants did not make any formal mortgage application prior to appointing Future Finance Limited and even if they had that fact *"would not absolve Future Finance from the reasonable expectation that they would make further inquiries before concluding that a more expensive private mortgage was the only remaining option."* This, said Advocate Jones, misunderstands and/or distorts the point raised by Future Finance Limited. First, the point being made by Future Finance Limited is relevant to the circumstances which gave rise to the Complainants engaging with it; the Complainants could not obtain a satisfactory mortgage product and made an inquiry with Future Finance Limited to ascertain whether it could assist. Secondly, Future Finance Limited did make further inquiries. Thirdly, Future Finance Limited never stated that a private, more expensive mortgage was the only option available to the Complainants. Future Finance Limited's position was that the best option they were able to identify, particularly on an expedited basis, was the private mortgage option.

62. There is no basis, in our view, for the contention that the Ombudsman did not appreciate Future Finance's position or take it into account. As Mr Hind states in his affidavit at paras 57-8, the Ombudsman found that the Complainants had made tentative enquiries with Skipton but no formal application was ever made.

63. The Ombudsman proceeded, quite reasonably, on the basis of the material available to him and on the footing that the Complainants had come to Future Finance Limited seeking help in identifying the best deal available; that Future Finance Limited had agreed to do so but failed to make adequate inquiries as to the availability of a conventional mortgage; that the Complainants were given the clear impression by Future Finance Limited that they would not be able to obtain a conventional mortgage and that a private mortgage was the best deal available.

64. It was a distortion of the true factual position, said Advocate Jones, that Future Finance Limited *"recommended"* a private mortgage. It did not recommend anything to the Complainants. It simply introduced the Complainants to Berillic, who were, in the event, prepared to provide financing. It was entirely a matter for the Complainants as to whether or not they wished to enter into such arrangement, and Future Finance Limited did not induce them, advise them or otherwise encourage them to do so. Its role was limited to making an introduction.

65. Advocate Redgrave responded that the Complainants were in a hurry to arrange a mortgage and sought the help of Future Finance Limited in identifying the best deal available. They were entitled, on the basis of what was said between them, to assume that Future Finance Limited had tried hard but failed to find a conventional lender, and that the missed payments were a genuine obstacle to a conventional mortgage. The Ombudsman found that they were misled by Future Finance Limited in that regard, and we agree with Advocate Redgrave that whether Future Finance Limited *"recommended"* the mortgage or not is not the point. It gave the false impression that it was the best deal available.

66. The Ombudsman has based the Decision, in part, on the assumption that Future Finance Limited was, or is, required to make *"reasonable efforts to secure a conventional mortgage for [the Complainants]"*. This assumption or statement, said Advocate Jones, is not explained or otherwise expanded upon in the Decision and even if it is correct, the Ombudsman does not explain why Future Finance Limited is required to make such efforts. The Decision was, he said, in part based on the finding or assumption that it was required to make reasonable efforts to secure a conventional mortgage for the Complainants in the absence of any explanation as to why such an obligation existed or bound it.

67. We agree with Advocate Redgrave that it is plain that Future Finance Limited was bound to make reasonable efforts to secure a conventional mortgage. It had undertaken to do so, as is set out above. Further, the Code of Practice for Consumer Lending to which Future Finance Limited subscribed states under ***"Our key commitments to you"***:-

> ***"We will act fairly, reasonably and responsibly in all our dealings with you and help you when you need information and guidance.***
>
> ***We will make sure that all advertising and promotional material is clear, fair and does not mislead and, as responsible lenders/advisors, we will make sure that all applications are soundly and properly assessed.***
>
> ***We are committed to acting in a responsible manner. We do not wish to place any customer in a position that is likely to cause financial difficulty. Your application will receive a proper and sound credit assessment which may require you to provide certain information about you and your financial affairs."***

68. The Complainants had a legitimate expectation in all the circumstances that Future Finance Limited would make reasonable efforts to find a conventional mortgage before putting forward a more expensive private lender. We agree with Advocate Redgrave that it was reasonable of the Ombudsman to conclude that that expectation had not been met in this case.

69. In summary, we do not agree that the Ombudsman failed to take into account relevant considerations or took into account irrelevant considerations.

Ground 5

70. The Ombudsman has applied a rate of 8% to certain aspects of the compensation award outlined in the Decision, and describes the figure of 8% as a "standard court rate", as well as explaining that 8% is the rate *"used by our counterpart office in the UK, the Financial Ombudsman Service".* Advocate Jones points out that the *"standard court rate"* applied by the Court in Jersey on judgment debts is 2% above the UK selected retail banks short term money rates (base rate) (from time to time) - see Practice Direction 05/03. The Bank of England current base rate is 0.75%, and therefore, the rate of interest ordered by the Ombudsman is greatly in excess of that which would be awarded by the Court on a judgment debt.

71. As Advocate Redgrave submitted, the rate of interest applied by the Ombudsman is ultimately a matter of discretion, by virtue of Article 16(9)(a) of the 2014 Law, which is in the following terms:-

> ***"16(9) 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 (but not so as to take the total over the limit in paragraph (7) on or before the time when the determination becomes binding); and***
>
> ***(b) is recoverable by the complainant as a debt due from the Respondent."***

72. The first point to make is that interest has only been applied by the Ombudsman to *"compensation for deprivation of funds to date"*, namely the fees and stamp duty paid out by the Complainants in the total sum of £9,686.75p, the interest amounting to a total of £4,254.82p. Secondly, it is not unreasonable, in our view, for the Ombudsman to follow the approach of the UK Financial Ombudsman Service, as a policy benchmark considering their scale, experience, similar scope and mandate and the similarities between the two jurisdictions. As Advocate Redgrave says, 8% is a much better approximation of the cost of funds to a consumer who finds himself in an unexpected cash shortfall, as a result of the actions of a financial services provider. They are likely to have to pay at least that rate to borrow unsecured funds at short notice. We have no grounds to interfere with the rate of interest applied by the Ombudsman in this case.

73. We would observe in general that it needs to be borne in mind that the purpose of the 2014 Law is to provide an alternative to Court proceedings which is more accessible and in which complaints are resolved effectively, quickly, with minimum formality, without any need for legal representation (if appropriate) and in a manner that is fair and reasonable. The Ombudsman is not a Court of law and his decisions are not to be scrutinised as if they were judgments of a Court of law.

74. The Ombudsman was entitled to and did proceed by way of written inquiry (conducted by the case handler Mr Hind) and to reach a decision on the results of those written inquiries, which both parties were able to see and comment upon, without a hearing. He is not obliged to descend into a legal analysis of the contractual position as between the parties, but to reach a determination which, in his opinion, is fair and reasonable in all the circumstances of the case. In our view, the Ombudsman has done so and we have no basis to interfere on the grounds of illegality or irrationality.

75. In conclusion, the application for a Judicial Review is dismissed.

Anonymity of Complainants

76. Advocate Redgrave sought orders preserving the confidentiality of the identity of the Complainants for the following reasons:-

(i) It is the policy of the Ombudsman as with other such Ombudsman schemes to maintain confidentiality over the identity of a complainant.

(ii) The Complainants are informed of this at the outset of the process and the Ombudsman undertakes to maintain confidentiality subject to legal obligations.

(iii) Preserving such confidentiality as far as possible is important to encourage Complainants to use the Ombudsman process.

(iv) In a small community like Jersey there is all the more need to avoid revealing personal information about people's personal financial affairs.

77. Advocate Redgrave acknowledged that it is, of course, a fundamental principle that justice should be done openly in public unless there is a strong countervailing reason to restrict public knowledge of particular facts. The identify of individuals connected to litigation may be withheld from public knowledge in certain cases, either by operation of statute e.g. the identity of children in family or child abuse cases or by court order e.g. the identity of the complainant in a blackmail case. The presumption in favour of full disclosure is not lightly overridden. See for example JEP v Al Thani [2002] JLR 542 at 12-16.

78. The orders he sought were:-

(i) That the public not have access to any documents held by the Court in a form which enables the identification of the Complainants in the Decision without the matter being referred to the parties and in the event of a dispute resolved by the Court;

(ii) That no document issued by the Court shall name or identify the Complainants, including any judgment or Act of Court; and

(iii) There be no publication or broadcasting in the media which, for the purpose of this order, shall include in any written publication, including social media and, websites, or any sound or television broadcast, or other communication whatever form which is addressed to the public at large or any section of the public, of any material or information or report relating to, or connected with, the identity of the Complainants in these proceedings or anything leading to the identification of the Complainants in these proceedings.

79. JEP v Al Thani was concerned with whether a hearing should be held in private. There was no suggestion, rightly, in our view, that this case should be held in private, and it was therefore held in public. One member of the public did attend, but there were no representatives of the Press present.

80. We accept that the identity of the Complainants is irrelevant to the issues for consideration and determination in this Judicial Review application. These issues relate to:-

(i) a legal analysis as to whether the Ombudsman had jurisdiction to make a determination regarding the business of Future Finance Limited, and

(ii) the decision making process undertaken by the Ombudsman including his evaluation of the evidence.

81. Advocate Redgrave drew to our attention the following, namely that:-

(i) The names of the Complainants have already briefly been made in public as they were named in the summons for the enforcement proceedings brought by the Ombudsman against Future Finance Limited, which proceedings are currently stayed.

(ii) It is understood that the Complainants have had some contact with the media, following the above, though not at the Complainants' instigation, and that nothing has been published linking them to the Decision or to this Judicial Review.

(iii) It is understood that whilst the Ombudsman's services in other jurisdictions such as England and Wales apply confidentiality during their own processes as in Jersey, there is no established precedent for the confidentiality of the identity of the Complainants being preserved in any subsequent litigation. The UK Financial Ombudsman Service instead

anonymises the Complainants in the final determination. In that regard, however, Advocate Redgrave asked us to bear in mind the nature of Jersey as a small community.

(iv) One of the Complainants has a conviction in Jersey for dishonesty which attracted public reporting at the time of conviction. She has sought, to some extent, to blame the outcome of her dealings with Future Finance Limited for her offending, but this is not relevant to any issue in these proceedings, as is not referred to in the application. It was expressly disregarded as a relevant factor in the Decision.

82. The Court is invited by Advocate Redgrave to consider the matter in this way:-

(i) There is absolutely no public interest reason for the public to know who the Complainants were in order for this application to be properly and openly heard and reported. They could be anyone; the result would be the same.

(ii) Unlike in cases where publication of someone's identity can be beneficial to justice being done (e.g. causing people to come forward with material undermining a witness's credibility, or with further allegations of wrongdoing) or where it could be in the wider public interest for there to be scrutiny of the identity, motivations, or financial backing of a litigant (e.g. the Brexit legal challenges), the Complainants' names simply have no relevance here to the public understanding of the case, nor is there any wider public interest in them being identified.

(iii) On the other hand there is a good reason to restrict public knowledge of their identity. It is desirable, as far as is consistent with the public interest in open justice, to preserve the confidentiality of the process, so that people with grievances will want to use it.

83. The Court is therefore asked to make orders that strike the appropriate balance in the circumstances.

84. We think it right to make orders that continue the confidentiality given to the Complainants by the Ombudsman in accordance with his policy, because such complaints will very often involve disclosure of the private financial affairs of Complainants. They are told at the outset that confidentiality will be maintained and that confidentiality will encourage Complainants to use the service. We also accept the greater impact on Complainants of revealing personal information in a small community.

85. We have no difficulty, therefore, with the first two orders sought, which relate to the Court's own processes, but are not convinced as to the third order, which involves very wide time unlimited orders against the media at large. Such orders are only effective to the extent that the media are informed, and if imposed, the Judicial Greffier would have to notify all of the accredited media. We are not aware of any practical way of informing those who might wish to publicize the identity of the Complainants on social media.

86. Complainants are not afforded anonymity in court proceedings under the provisions of the 2014 Law, and so we are concerned here with having due regard to the policy of the Ombudsman and we think on the facts of this case that is done in a balanced way by maintaining the confidentiality of the Court's own processes and in any judgment it issues, as does the Ombudsman in his processes and in the decisions he issues. Going beyond that, and actively imposing wide-ranging time unlimited reporting restrictions on the accredited media would, in our view, be disproportionate. That is not to say that there could be no circumstances in which such orders would be proportionate.

Authorities

The Financial Services Ombudsman (Jersey) Law 2014

Planning & Environment Committee v Lesquende Ltd [1998] JLR 1

Council of Civil Service Unions v Minister for Civil Service [1984] 3 All ER at 950 – 951

Financial Services (Ombudsman) (Exempt Business) (Jersey) Order 2014

JEP v Al Thani [2002] JLR 542