Bankole, *Bluefin* and *Chancery*: Challenges to the Jurisdiction of the FOS

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Jurisdiction of the FOS: S.226 of the Financial Services and Markets Act 2000 (FSMA) provides for the Financial Ombudsman Scheme (FOS) to have a compulsory jurisdiction, which may be accessed by a complainant in accordance with rules made by the FCA under FSMA Sch.17. FSMA is barely prescriptive as to the eligibility conditions, with the result that a great deal of jurisdiction-defining power was vested in the Financial Services Authority and, subsequently, the Financial Conduct Authority (FCA). The rules governing the FOS' jurisdiction are to be found in chapter 2 of the Dispute Resolution section of the FCA Handbook (DISP). In broad terms, access to the compulsory jurisdiction depends upon:

- **Activity:** The activity about which the complaint is made being included in the list at DISP 2.3.1R (the overwhelming majority of complaints being made about 'regulated activities' specified for the purpose of FSMA s.22);
- **Territorial Scope:** The activity falling within the territorial scope of the jurisdiction set out in DISP 2.6.1R;
- **Eligibility:** The complainant meeting the eligibility criteria of DISP 2.7.3R (i.e. as a consumer, a micro-enterprise, a charity with an annual income of less than £1 million, or a trustee of a trust with a net asset value of less than £1 million); and
- **Timing:** The complaint being referred to the FOS in time under DISP 2.8.1R and DISP 2.8.2R. The latter provides for a quasi-limitation bar (and, like limitation, is a positive defence which must be raised by the respondent): unless there are 'exceptional circumstances' which caused the failure to comply with the time limits, the FOS cannot consider a complaint made (i) more than 6 months after the respondent 'sent' its final response to the complainant, and in any event (ii) more than 6 years after the event complained about or (iii) more than 3 years after the date the complainant became aware (or should have become aware) that he had cause for complaint.

Access to the FOS' jurisdiction depends therefore upon a series of factual conditions being satisfied, or at least not put in issue. To oversimplify slightly: was the activity regulated and carried out within the relevant territory, does the complainant fall into one of the 4 eligible categories, and was the complaint referred in time? Each question as to jurisdiction derives ultimately from the enabling statute, FSMA, which gives the FOS its jurisdiction both generally and specifically. And for each question, it appears at first glance that there is a simple 'right-or-wrong' answer: if 'yes' to all, the FOS has jurisdiction, if 'no' to any, it does not.

Control of Jurisdiction: The significance of that last comment goes to the roots of judicial review of administrative action. As Coleridge J put it in *Bunbury v Fuller*,[1] 'no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends... whether some collateral matter be or be not within the limits ... must always be open to inquiry in the superior Court'. Coleridge J spoke of 'collateral matter[s], which is to say matters demarcating the ambit of the inferior tribunal's power distinguished from the central matters that the tribunal is charged with deciding. Nowadays, we would talk about 'jurisdictional fact'[2] or 'precedent fact',[3] rather than 'collateral matter' but that is a mere linguistic difference.

[1] (1853) 9 Ex 111
[2] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147
[3] *R (Khawaja) v Home Secretary* [1984] AC 74

Famously in *Eleko v Nigeria*,[4] a power of deportation was vested in the Governor of Nigeria only if a person was a 'native chief'. Despite protestations by Counsel for Nigeria that the court could not investigate whether Eleko was a 'native chief', let alone interfere with the administrative decision that he was, the Privy Council firmly held that this was a question of jurisdictional fact which the court could and should consider objectively on the evidence. The courts of Nigeria were empowered to determine whether Eleko was truly a 'native chief'.

Perhaps unsurprisingly, in cases concerning the liberty of the subject, the courts have jealously protected their powers of review of determinations of jurisdictional fact.[5] As Sedley LJ said in *R (Lim) v Home Secretary*,[6] 'a decision taken without power is no decision at all... [The] non-existence of a precedent fact relating to immigration status can deprive the decision-maker or power to decide and render any purported decision void. The only, or at least the most appropriate, forum competent to decide the existence of precedent fact is the High Court, since the issue goes to jurisdiction.'

It is too simplistic, however, simply to say that wherever a factual circumstance must be satisfied before the jurisdictional gateway is opened, then the court will have power to review the fact-finding and to determine the material facts for itself. Statutes may expressly[7] or impliedly[8] provide for certain matters to be conclusively determined by the decision-maker, whether they amount to jurisdictional thresholds or not. Statutes which give powers of administrative decision-making frequently describe the jurisdictional thresholds by reference to what, for instance, 'appears' to the decision-maker to be the case.[9] The jurisdictional threshold may be described in language which is sufficiently opaque as to allow for a range of possible conclusions on any given set of facts.[10] In cases such as these, the court's powers of review are typically limited to interference with the administrator's decision only where it can be shown to be wrong on conventional administrative law grounds: the court will not come to its own decision on the facts.[11]

The leading authority of *R (A) v Croydon LBC*[12] demonstrates the difficulties in defining the boundary between issues which the court can determine and those which are left to the decision-maker. The case raised the question of who was the ultimately determiner of whether a person was a 'child in need' under s.20(1) of the Children Act 1989, which triggered a responsibility to accommodate him. Baroness Hale drew a line between the determination of whether a person was 'in need' (which was an evaluative determination susceptible only to conventional review) and whether he was a 'child' (which was an objective question going to the 'outer boundaries of the jurisdiction', susceptible to a black-and-white answer, of which the court would be the ultimate arbiter).

***Bankole*, *Bluefin* and *Chancery*:** Turning back to the FOS' jurisdiction, in *R (Bankole) v FOS* ,[13] the claimant's complaint had been held to be out of time under DISP 2.8.2R. The respondent bank had sent a final response about his complaint more than 6 months before he complained to the FOS. In a suggestion heard every day in the courts, he said that he had not received it. The FOS did not believe him, on what appear from the decision to be perfectly rational grounds (he had somehow managed shortly after the response was sent to do exactly what had been suggested in the letter).

[4] [1931] AC 662
[5] Eg *R (Budd) v Home Secretary* [1942] 2 KB 14; *Khawaja* (above).
[6] [2007] EWCA Civ 773
[7] Eg *R (Barnsley Corp) v Ludlow* [1947] KB 634
[8] Eg *Dowty Boulton Paul Ltd v Wolverhampton Corp (No.2)* [1976] Ch 13
[9] Eg *SoS for Employment v Associated Society of Locomotive Engineers and Firemen (No.2)* [1972] 2 QB 455
[10] Eg *R (South Yorkshire Transport Ltd) v Monopolies and Mergers Commission* [1993] 1 WLR 23, where the minister's reference powers arose where the potentially monopolised area covered 'a substantial part' of the UK
[11] Which explains the 'bum-boat' case, *Brittain v Kinnaird* (1819) 1 Br & B 432: it was for the magistrates to determine whether or not the vessel in question was a 'boat' within the meaning of the Bum-boat Act (2 Geo 3, c.28). The answer to the claimant's rhetoric about the magistrates' hypothetically deciding that a 74-gun ship of the line was a 'boat' is that such a decision would be irrational within the *Wednesbury* meaning.
[12] [2009] 1 WLR 2557
[13] [2012] EWHC 3555 (Admin)

Mr Bankole, acting in person, wanted to argue before the administrative court that the FOS had calculated the time limits wrongly. This, some might have thought, was something of a black-and-white, non-evaluative issue of fact, i.e. of the existence (or absence) of a set of objective facts which would (or would not) confer jurisdiction. However, Sales J held that 'the question whether a complaint is brought within 6 months ... or not is primarily a decision for the FOS, subject only to review in this court on usual judicial review grounds. In terms of the construction of the relevant limitation rules in the DISP regime, the question whether a complaint is brought within time or not cannot be categorised as turning on judgment of precedent fact in the sense of being factual determinations for this court to make for itself.'

These comments were rendered necessary to the decision because of the manner in which the case had apparently been argued. They are surprising in context not least because, on one view, they were unnecessary on the facts. The factual precondition to an eligible complaint was that it be presented within 6 months of a final response being 'sent'. Receipt of the response is not a precondition.[14] Since the FOS' decision that the notice was sent by the bank was not at issue, the claimant had not satisfied DISP 2.8.2(1). Nor, given the FOS' reasonable decision that he had in fact received the letter, would there have been scope for challenge on conventional grounds of a decision not to disapply the time limits.[15]

Be that as it may, Sales J's decision was not made on the grounds suggested above, but on the basis that the question of whether a complaint is made in time is something where the FOS is the ultimate determiner. It is not a question of jurisdictional fact which the court will determine for itself. This is a troubling decision, and sits very uneasily with *R (Bluefin Insurance Services Ltd) v FOS*,[16] in which a challenge was made to the FOS' determination that a person insured under a company directors' and officers' insurance policy brokered by Bluefin was acting as a 'consumer', which is to say 'outside his trade, business or profession'.

Contrasting *Bankole*, Wilkie J held that the determination on a given set of facts as to whether a person was a 'consumer' (and by clear extension at para.68, a micro-enterprise or either of the other 2 eligible persons) was a hard-edged question susceptible of only one answer. The objective of the FOS scheme to determine cases quickly and informally, which was important to Sales J's decision in *Bankole*, was not sufficient to give the FOS both primary and ultimate power to decide whether the eligibility criteria had been met. 'I am satisfied ... that in the context of this statutory scheme access to the compulsory jurisdiction of FOS, with its enhanced benefits or burdens, is determined by reference to limiting conditions stated in objective terms. That being the case ... this is a case where the FOS decision was one of precedent fact and, upon its being challenged in judicial review proceedings, it is a decision which the court has to take, rather than being limited to review of the decision of FOS on conventional judicial review grounds.'

Although Wilkie J did not consider that Sales J was anything other than 'wholly right' in *Bankole*, it is difficult to explain why it should be that the limiting conditions in DISP 2.8.2R are not themselves 'stated in objective terms', just like those in DISP 2.7.3R. Indeed, in *R (Chancery (UK) LLP) v FOS*,[17] Counsel for the FOS submitted that *Bankole* and *Bluefin* were not readily distinguishable (although it was *Bluefin*, he said, that was wrong). It is, however, of some importance that the question in *Bluefin* was not one of primary fact (since the facts relevant to the decision were not in issue) but on the application of the law to those facts (ie whether those facts legally justified the conclusion that the

[14] Compare, for instance, the service of notices under the Consumer Credit Act 1974, under which 'serve on' is defined by s.189 as 'send to' and not by reference to receipt.
[15] It goes without saying that the FOS' consideration of 'exceptional circumstances' under DISP 2.8.2(3) is only susceptible to challenge on conventional grounds.
[16] [2014] EWHC 3413 (Admin)
[17] [2015] EWHC 407 (Admin)

complainant was a 'consumer'). As it turned out, *Bluefin* was not so much concerned with the court's review of precedent fact as of the application of the law to primary facts.[18]

In *Chancery* itself, the challenge to the FOS' jurisdiction principally concerned DISP 2.3.1R: it was said that the schemes did not fall within the meaning of 'regulated activities' because they concerned advice on tax (not investments) and/or schemes which did not satisfy the definition of 'collective investment schemes' in FSMA s.235. Inevitably, the apparent conflict between *Bankole* and *Bluefin* had to be tackled. Harking back to *Bunbury v Fuller*, Ouseley J said that FSMA did not make the FOS the master of its own jurisdiction. However, in light of *A v Croydon*, it was a matter of interpretation of FSMA to determine and distinguish the decisions challengeable only on conventional judicial review grounds from those which require a different approach, whether:

- For the court to decide the law, find the facts and apply the law to those facts;
- For the court to decide the meaning of the statute (or rules), for the FOS to find the facts and apply the law to them 'in its own reasonable judgment' (as for instance in the meaning of 'substantial part' of the UK in *South Yorkshire Transport*); or
- For the court to decide the meaning of the statute (etc), for the FOS to find the facts and apply the law correctly and not merely 'reasonably'.

In each of the last 2 cases, the fact-finding would be susceptible to review on conventional grounds, but in the first the FOS is given a considerable margin of error in the application of the law. In the context of the case before him, Ouseley J decided (surely correctly) that the third approach was right: the question of whether for instance an investor exercised 'day-to-day control' over his investment in a scheme may involve analysis of an intricate web of fact as to which different people could reasonably come to different conclusions; once those facts are determined the question of whether they justify the conclusion that 'day-to-day control' was exercised is an application of the law to those facts as to which there is a right answer. Unfortunately for the claimants in *Chancery*, the jurisdictional facts overlapped so significantly with the facts of the complaints on the merits that the FOS was legitimate to have provisionally accepted jurisdiction, although it would have to keep open the jurisdiction question throughout the proceedings before it.[19]

To allow the FOS a margin of reasonable application of the law (where it might apply different legal tests both internally and when compared to the test laid down by the courts) would make it the master of its own jurisdiction, which was not Parliament's intention. This puts the decision on all fours with the interpretation of *Bluefin* offered above. Ouseley J suggested that if the facts in the earlier case had not been agreed, there is no implication in *Bluefin* that Wilkie J would have found them for himself.[20]

Further, he said, *Bluefin* and *Bankole* were clearly distinguishable. The latter was about a procedural issue which, by implication if not expressly at para.68, Ouseley J said was a matter which Parliament intended to leave exclusively to the judgment of the FOS. *Bluefin*, by contrast, was a case involving an issue which, if the FOS was wrong, meant that it was deciding that a person who was not eligible was 'indeed'[21] eligible. And likewise in *Chancery*, once the facts were rationally determined by the FOS, the questions of whether the schemes were collective investment schemes and whether the advice was or was not investment advice were susceptible to black-and-white answers. If the FOS gets those answers wrong, judicial review will be available.

[18] Cp *R (Shah) v Barnet LBC* [1983] 2 AC 309
[19] The FOS promised to do so. A review of jurisdiction once accepted (provisionally) has not to date been an exercise that the FOS is known to have carried out.
[20] Although para.72 to 75 of *Bluefin* may perhaps suggest quite the contrary.
[21] Para.69. Ouseley J appears to have meant 'in law'.

This explanation of *Bluefin*, and its application in *Chancery*, makes good legal sense and is administratively proper. What remains unsatisfactory, however, is the explanation of *Bankole*. As noted above, Sales J's bold statement of the court's limited powers to interfere with DISP 2.8.3R decisions was not necessary on the facts of the case as presented to the court. The outcome can be justified and explained in the same way as *Bluefin*: on the facts as found by the FOS, the complaint was (in law) out of time. The suggestion that it was up to the FOS to decide when the complaint was presented (and that this justifies the statements of principle in *Bankole*) was particularly odd, given that there was no argument about the date on which it was presented; the argument was all about whether the complaint was in time, within the meaning of DISP 2.8.3.

With respect to Ouseley J's rationalisation, even if it is right to label DISP 2.8.3R as 'procedural', that should not of itself lead to the conclusion that Parliament has left to the FOS to decide not only when a complaint is made but also whether that satisfies the meaning of the words in DISP 2.8.3R. There can be only one right answer to that. A decision about the primary time limit under DISP 2.8.3R falls as neatly within the third category of decision-making described by Ouseley J[22] as does a decision about whether a complainant satisfies the eligibility criteria, or whether an investor has day-to-day control of a scheme. Further, given that the *Bankole* decision must apply also to DISP 2.8.2(2)R, it would be at the very least surprising to most lawyers to suggest that the courts will have little to say about the date on which a complainant 'ought reasonably to have become aware' of the grounds of his complaint.[23]

The result in *Bankole* can be explained as a decision that the FOS correctly applied the law (ie the meaning of DISP 2.8.2R) to the facts that it reasonably found (ie that the bank had sent the response on a particular date, and the complaint was not presented within 6 months). Explained in that way, there would be no conflict between the three jurisdiction cases.

[22] See bullet-points above

[23] It is worth nothing the introduction of an objective test here ('reasonably'), and that DISP 2.8.2(2)R is obviously modelled on s.2 and s.14A of the Limitation Act 1980.