

Bespoke justice? On financial ombudsmen, rules and principles

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OPSOMMING

Geregtigheid na maat? Oor finansiële ombudsmanne, reëls en beginsels

Alternatiewe geskilbeslegtingsprosedures bestaan om diegene by te staan wat nie hulle regte in die howe kan of wil afdwing nie. Die spesifieke voordeel van ombudsmanne is dat hulle prosesse toeganklik, goedkoop, informeel en vinnig is. Hierdie artikel neem twee skemas onder die loep, naamlik die *FAIS* ombud in Suid Afrika en die *Financial Ombudsman Service (FOS)* in Engeland. Daar word gekyk na die wyse waarop die twee instansies reëls sowel as beginsels toepas, wat die jurisdiksie en prosedure van elk behels en hoe daar te werk gegaan word om geskille op te los. Die belangrikste verskil tussen die twee organisasies is dat die *FAIS* ombud se beslissings in elke wesenlike opsig dieselfde uitwerking as hofbeslissings het en dat dit volledig gerapporteer word, terwyl beslissings deur die *FOS* nie ten volle gerapporteer word nie en ook nie presedente daarstel nie. Die *FOS* streef uiteraard daarna om geregtigheid te laat geskied tussen individuele partye, weliswaar binne die bestaande regsraamwerk, maar met die veronderstelling dat billikheid die belangrikste oorweging moet wees. Hierdie werkswyse kan geregverdig word omdat individuele oplossings nie op ander sake van toepassing gemaak word nie. Die *FOS* of 'n verweerder word deur wetgewing gemagtig om sake na 'n hof te verwys waar daar sprake is van 'n belangrike of nuwe regspraak. Die beslissing in so 'n saak stel dan 'n presedent daar. Die Suid-Afrikaanse *FAIS* ombud bereg ook sake binne die bestaande regsraamwerk en moet soos die *FOS* seker maak dat alle beslissings billik is. Die gevaar is egter dat die *FAIS* ombud nie verplig is om sake na 'n hooggeregshof te verwys nie, met die gevolg dat 'n beslissing wat in der waarheid oorwegend billik is vir die spesifieke partye tot die geding, presedentele waarde het. Hierdie tekortkoming in die *FAIS* Wet gee aanleiding daartoe dat die *FAIS* ombud soos 'n tweede reguleerder word en die gevaar is dat verkeerde interpretasies van die wetgewing tot onbillike resultate vir ander partye tot 'n dispuut kan lei. Hierdie aspek behoort deur die wetgewer aangespreek te word.

1 Introduction

Alternative dispute resolution systems exist in order to provide remedies to those who cannot approach the courts in order to enforce their rights. Ombudsman schemes in particular have the advantage of being accessible, inexpensive, informal and quick.¹ The origins of the word

1 Melville "Has Ombudsmania Reached South Africa? The Burgeoning Role of Ombudsmen in Commercial Dispute Resolution" 2010 *SA Merc LJ* 50 54; McVea and Cumper "The Financial Ombudsman Service and Disputes Involving 'Wider Implications' Issues" 2007 *Lloyd's Maritime and Commercial Law Quarterly* 246 247.

“ombudsman” can be traced back to Scandinavia.² Melville explains that the Old Norse word “umbodhsmaðr” referred to an individual who recovered compensation from the family of a wrongdoer on behalf of the family of the victim.³ Present-day institutions still use the term “ombudsman”,⁴ but the actual functions of these depend on whether they were created by statute or whether they operate as voluntary associations.⁵ It is therefore imperative to understand the mandate of an ombudsman before one can evaluate their rulings as based on rules of principles. Also, the matter of an ombudsman exceeding his mandate is one that needs to be assessed by looking at the stature and powers of that particular ombudsman.

This article examines the Financial Advisory and Intermediary Services Act⁶ (FAIS Act) ombudsman scheme in South Africa and the Financial Ombudsman Service in England as examples of ombudsman schemes who are tasked with adjudicating matters between financial services providers and clients. In discussing these two schemes, the article starts by first explaining the circumstances that lead to the establishment of each of these institutions and the legislative framework within which they function. What follows is an explanation of procedural aspects as well as matters pertaining to jurisdiction and the types of orders that can be made. In an attempt to establish whether these schemes rely on principles of fairness or on specific rules or both in reaching their decisions, this contribution will scrutinise enabling legislation, literature as well as determinations by both these institutions. Ultimately, the question to be answered is whether these alternative dispute resolution mechanisms lead to forum shopping and arbitrary rulings which do not ultimately satisfy one’s sense of justice or whether they provide a better alternative to the court system.

2 Rules or Principles: What is the Difference and What Does It Matter?

Perhaps one of the fastest-changing legal rules worldwide is found in the area of financial law. In South Africa alone, a bewildering number of statutes regulate the financial landscape and these are steadily supplemented.⁷ The raging debate on over-regulation versus self-

2 Melville 50.

3 *Ibid.*

4 *Idem* 51.

5 *Idem* 53, 55.

6 37 of 2002.

7 These include *inter alia* the Banks Act 94 of 1990, the Collective Investment Schemes Control Act 45 of 2002, the Consumer Affairs (Unfair Business Practices) Act 71 of 1998, the Financial Advisory and Intermediary Services Act 37 of 2002, the Financial Institutions (Investment of Funds) Act 39 of 1984, the Financial Institutions (Protection of Funds) Act 28 of 2001, the Financial Intelligence Centre Act 38 of 2001, the Financial Services Ombud Schemes Act 37 of 2004, the Insider Trading Act 135 of 1998, the Long-term

regulation is an issue in itself⁸ but regardless of one's sentiments, the fact remains that financial law is complicated and despite the best attempts of the legislator, all these rules still leave role players in the financial sphere discontented. In an attempt to explain this outlook, Athanassiou⁹ observes that financial law is the prime example of man-made, positive law. In addition, it is a body of rules that draw from contract, administrative law, property, delict and criminal law "that mankind has, until fairly recently, managed to do without".¹⁰ So, why then are the rules that constitute financial law indispensable in a modern economy?

Part of the answer lies in the financial sector's evolution from a support structure for productive and other activities into an independent industry with a variety of participants.¹¹ Furthermore, financial law is abuse-prone and difficult to police.¹² Therefore, if a body of financial rules that are contained in various acts and subordinate legislation do not have a common goal or at least some core principles upon which it rests, compliance and enforcement can be difficult.

Generally, one can say that rules prescribe relatively specific actions whereas principles prescribe highly unspecific actions.¹³ For instance, "treating customers fairly"¹⁴ amounts to a principle, whereas an obligation to take reasonable steps to gather information about a client's financial situation when rendering advice amounts to a rule.¹⁵ Of course, by rendering advice without knowledge of the client's financial situation, an advisor does not act with the necessary care and skill and the carelessness and lack of skill may lead to unfair results for the client and here the rule supports the principle. Importantly, it is not so much the

Insurance Act 52 of 1998, the Medical Schemes Act 131 of 1998, the National Credit Act 34 of 2005, the Participation Bonds Act 55 of 1981, the Pension Funds Act 24 of 1956, the Security Services Act 36 of 2004, the Short-term Insurance Act 53 of 1998, the South African Reserve Bank Act 90 of 1989 and the Stock Exchanges Control Act 1 of 1985. Then there are various acts dealing with tax, labour law and business entities.

- 8 For a general discussion on financial regulation, see Chiu "Enhancing Responsibility in Financial Regulation – Critically Examining the Future of Public-private Governance: Part II" 2010 *Law & Financial Markets Review* 286 287, 292-303.
- 9 "Financial Rules: Why they Differ, Where We Got them Wrong and how to Fix Them" 2010 *Law & Financial Markets Review* 279 280.
- 10 Athanassiou 280. The writer argues that financial law is crucial because "the welfare of millions of people and the stability of entire economies depend on getting its rules right and on administering them properly and vigilantly."
- 11 Athanassiou 280.
- 12 *Ibid.* See also Moolman *et al Financial Advisory & Intermediary Services Guide* (2010) 1-5.
- 13 Raz "Legal Principles and the Limits of Law" 1981 *Yale Law Journal* 823 838; Dworkin *Taking Rights Seriously* (1977) 24-28.
- 14 Refer to the *Treating Customers Fairly Discussion Paper*, which was released for discussion by the Financial Services Board during May 2010 (<http://www.fsb.co.za> accessed on 2011-07-01).
- 15 Clause 8(1)(a) General Code of Conduct (GCC) for Authorised Financial Services Providers and Representatives, published in terms of the FAIS Act under Board Notice 80 of 2003-08-08.

language of the stipulation but more what it requires that makes the difference between rules and principles and a good set of rules should ultimately support a principle.

The significance of rules and principles for adjudication of financial disputes lies in the outcome for the parties to a dispute. An ombudsman must take all the rules into account that have bearing on a particular case.¹⁶ Failure to do so would be unfair. However, an ombudsman may be able to demonstrate that every applicable rule had indeed been considered but the outcome may still be unfair, which is why it may be necessary to rely on fairness in order to do justice between the parties and to look beyond the black letter of the law. Importantly, it is not the function of an ombudsman to create new rules or principles and should a case arise that cannot be properly adjudicated because of a problem with the interpretation of the law, such a matter should ideally be referred to a court.

The following paragraphs examine the FAIS ombudsman in South Africa and the Financial Ombudsman Service in England in an attempt to establish whether these two jurisdictions use rules, principles or both in adjudication and whether there are perhaps shortcomings that need to be addressed.

3 FAIS Ombudsman in South Africa

3.1 Background

South Africa is no stranger to corporate scandals.¹⁷ Financial legislation in South Africa is complex and the trend is definitely towards more regulation.¹⁸ Behind a multitude of financial legislation aimed at consumer protection sits the Financial Services Board (FSB), a creature of statute with its main objective the supervision of financial institutions.¹⁹

16 Nobles "Rules, Principles and Ombudsmen: *Norwich and Peterborough Building Society v The Financial Ombudsman Service*" (2003) *The Modern LR*781 787.

17 Moolman *et al* 12-13 mention the Masterbond scandal that saw the Masterbond Group defraud investors of a billion Rand. The authors also refer to Chinza Holdings (Pty) Ltd which operated a forex trading scheme and robbed investors of R30 million.

18 Moolman *et al* 6 state: "What really distinguishes financial products from other products is the self-serving exclusive design, the complex rules and the ever-changing characteristics of the products designed by the industry to ensure that it remains as a preserve and a repository of a small minority whilst it needs the life and blood of the ignorant majority to keep it alive. Because of the ignorance of consumers, the complexities associated with financial products, the incorporeal nature, the medium through which they are sold and the fact that a client is at the mercy of an intermediary, there is a tendency for unscrupulous intermediaries to exploit unsuspecting members of the public."

19 Van Zyl *Financial Advisory and Intermediary Services Manual* (2004) 1-8. The FSB was established by the provisions of the Financial Services Board

The statutory registrar of a variety of financial institutions,²⁰ the FSB drafted the FAIS Act with the aim of creating a regulatory structure for intermediary and advisory services in respect of financial products.²¹ In terms of section 21 of the FAIS Act, the FSB is empowered to appoint a person with a legal qualification and who possesses adequate knowledge of the FAIS Act to deal with complaints relating to financial services rendered on or after 30 September 2004.²²

The FAIS ombud is an example of a statutory ombudsman and as such, it derives its mandate from the FAIS Act and its subordinate legislation.²³ Although the aim of the FAIS Act was to provide the widest possible protection to consumers, the Act is only applicable to certain situations and knowledge of statutory definitions is essential in order to ensure that the FAIS ombud is in fact the correct forum to adjudicate a particular matter.²⁴

3 2 Jurisdiction and Conceptual Framework

The complaint resolution mechanism in the FAIS Act aims at providing speedy and effective measures as an alternative to litigation in a civil court.²⁵ A complainant who wants to approach the ombud should allege that the errant services provider or representative engaged in one or more of the following activities, namely: A contravention of the FAIS Act or failure to comply with a provision of the Act which has led to the complainant suffering financial prejudice or damage or where he had not already suffered financial prejudice or damage, he is likely to do so in future;²⁶ the wilful or negligent rendering of a financial service to the

Act 97 of 1990. See also Wille *et al* Principles of Financial Law (2007) 149-150.

20 Hattingh & Millard *The FAIS Act Explained* 3 state that that the FSB is currently in control of the Collective Investment Schemes Control Act 45 of 2002 (CISCA), the Financial Services Board Act 97 of 1990 (FSB Act), Financial Institutions (Protection of Funds) Act 28 of 2001 (FI Act), Financial Supervision of the Road Accident Fund Act 8 of 1993 (FSRAF Act), Friendly Societies Act 25 of 1956 (FS Act), Inspection of Financial Institutions Act 80 of 1998 (IFI Act), Long-term Insurance Act 52 of 1998 (LTIA), Pension Funds Act 24 of 1956 (PFA), Short-term Insurance Act 53 of 1998 (STIA), Supervision of the Financial Institutions Rationalisation Act 32 of 1996 (SFIR Act), the Securities Services Act 36 of 2004 (SSA) and the Financial Advisory and Intermediary Services Act (FAIS Act). See also Wille *et al* *Principles of Financial Law* (2011) 151-152.

21 Hattingh & Millard 5.

22 Date of commencement of the FAIS Act. Before the enactment of the FAIS Act various statutes existed which had dealt with a variety of financial products such as insurance and pensions but the FAIS Act specifically deals with the way in which *intermediary and advisory services* in respect of certain financial products are rendered.

23 Hattingh & Millard 163. It is submitted that it is more correct to use the term "ombudsman" However, the legislator had opted to use the term "Ombud" in the FAIS Act and therefore "ombud" will be used throughout where the South African system is discussed.

24 Moolman *et al* 196.

25 Van Zyl 1-24; s 20(3) FAIS Act.

26 S 1(1)(a) FAIS Act, *sv* "complaint". See also Hattingh & Millard 159-160.

complainant which has caused prejudice or damage to the complainant or which will cause prejudice or damage in future;²⁷ and treating the complainant unfairly.²⁸

These three points require some further explanation, hence some background: Before the introduction of the FAIS Act, common law placed certain duties on agents and mandataries who provided intermediary services or furnished advice to clients.²⁹ This was later supplemented by the Policyholder Protection Rules issued in terms of the Long-term Insurance Act³⁰ and the Short-term Insurance Act.³¹ Thus, intermediaries and advisors were obliged to act with reasonable care and skill and to act in good faith, where reasonable care and skill were interpreted to be the “general level of skill and diligence possessed and exercised at the same time by members of the branch of the profession to which the mandatory belongs”.³² Good faith entailed three duties, namely to act in the best interest of the client, to be open and honest in all his dealings and not to make a secret profit out of the mandate.³³ The FAIS Act did not alter common law, with a result that the wilful or negligent failure to act with reasonable care and skill and in good faith which leads to financial prejudice is still actionable on exactly the same criteria as it had been before the introduction of the Act.

In addition to what common law provides for, the FAIS Act introduced certain *minimum standards* which aim to provide better protection to consumers. The Policyholder Protection Rules (“PPR’s”) were amended to deal with matters pertaining to sound insurance practice and matters in the PPR’s that dealt solely with intermediary and advice issues were incorporated in the FAIS Act by means of the General Code of Conduct for Authorised FSPs and Representatives.³⁴ Any conduct that falls short of the standards set out by these statutory requirements is actionable by a client who had suffered damage or prejudice. On the function of these statutory requirements, Rossouw states:

All legislation is in essence about complying with minimum standards and compliance always deals with that which “I *have* to do” – mostly with a primary motivation of wanting to stay out of trouble! In contrast, professionalism has to do with what I *choose* to do – that which I do voluntarily.³⁵

27 Hattingh & Millard 160.

28 *Ibid.*

29 Hattingh & Millard 74-76. See also Havenga *The Law of Insurance Intermediaries* (2001) 4.

30 Act 52 of 1998.

31 Act 53 of 1998.

32 Havenga 4.

33 *Ibid.* See also Reinecke *et al General Principles of Insurance Law* (2002) at 348.

34 Board Notice 80 of 2003 published in *Government Gazette* 25299 of 8 August 2003, s amended. See Moolman *et al* 3-4.

35 “FAIS and Professionalism: A challenge for the Financial Services Sector” *FSB Bulletin* (2008) 4. Emphasis as per the original text.

Evidently the FAIS ombud is expected to apply rules as well as principles. Section 20(3) of the FAIS Act clearly stipulates that:

The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is *equitable* in all the circumstances, with due regard to -

- (a) the *contractual arrangement* or *other legal relationship* between the complainant and any other party to the complaint; and
- (b) the provisions of this Act.³⁶

In considering a possible contravention of the FAIS Act, the ombud is expected to judge the behaviour of a defendant by measuring it against a particular stipulation. If such behaviour constitutes a factual contravention of the stipulation (breach of a rule), a claim has merits. The explicit mandate of the ombud in adjudicating a matter is to consider the legal relationship between a complainant and a defendant,³⁷ the provisions of the FAIS Act³⁸ and importantly, “what is equitable in all the circumstances.”³⁹ Where the first two amount to applying the letter of the law, the last grants the ombud the power “to grant relief where he may be constrained to do so in circumstances where the strictures of the law of contract may dictate otherwise.”⁴⁰

The third point of treating the complainant unfairly definitely involves a principle more than a rule. What is unfair will depend on the circumstances of the case. For instance, where a client had requested reasons from a financial services provider for the cancellation of his policy or for the repudiation of his claim, it is submitted that the mere failure of such services provider to provide adequate reasons within a reasonable time, amounts to unfair treatment.

An important consideration in demarcating the ombud’s powers is jurisdiction, which should be further explained with reference to the scope of application of the FAIS Act. In the light of what had already been said, it is sufficient to concentrate the present discussion on the meaning of “advice”, “financial product” and “intermediary service”.

“Advice” is defined as any recommendation, guidance or proposal of a financial nature furnished by any means or medium, to any client or group of clients.⁴¹ Importantly, the advice must pertain to the purchase

³⁶ Own emphasis.

³⁷ Moolman *et al* 196.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ S 1(1)(a) & (b) FAIS Act, *sv* “advice”. See also Moolman *et al* 197. The writers explain that a recommendation is an idea or suggestion presented to the client which is deemed suitable for a particular purpose. Where guidance is given, the advisor attempts to resolve a client’s problem (Moolman *et al* 198) and a proposal is where a client is presented with a plan, suggestion or an idea (Moolman *et al* 198).

of any financial product or the investment in any financial product.⁴² Advice also includes any recommendation, guidance or proposal of a financial nature “on the conclusion of any transaction, including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product.” The Act is also very clear on the fact that all these acts are included in the term “advice”, irrespective of whether or not it is provided to a client in the course of financial planning or whether it is incidental to financial planning in connection with the affairs of the client⁴³ or whether it in fact results in the purchase, investment, transaction, variation, replacement or termination of a financial product.⁴⁴

It is also important to take note of the exclusionary provisions contained in section 1(3) of the Act. Where factual advice is for instance given merely on the procedure for entering into a transaction in respect of any financial product,⁴⁵ in relation to the description of any financial product,⁴⁶ in answer to routine administrative queries,⁴⁷ in the form of objective information about a particular financial product⁴⁸ or by the display or distribution of promotional material,⁴⁹ this does not constitute advice and it falls outside the scope of the FAIS Act.⁵⁰

It is evident that the FAIS Act aims to regulate the furnishing of advice pertaining to financial products. For the purposes of “advice” and “intermediary services”, “financial products” include the following, namely:

- Securities and instruments, including shares in a company other than a “share block company” as defined by the Share Blocks Control Act,⁵¹

42 S 1(1)(a) & (b). See also Hattingh & Millard 5-6.

43 S 1(1)(d)(i) *sv* “advice”.

44 S 1(1)(d)(ii) *sv* “advice”.

45 S 1(3)(a)(i)(aa). See Moolman *et al* 199.

46 S 1(3)(a)(i)(bb). See Moolman *et al* 199.

47 S 1(3)(a)(i)(cc). See Moolman *et al* 199.

48 S 1(3)(a)(i)(dd). See Moolman *et al* 199.

49 S 1(3)(a)(i)(ee). See Moolman *et al* 199.

50 Hattingh & Millard 7. Other exceptions include the following, namely: An analysis or report on a financial product without any express or implied recommendation, guidance or proposal that any particular investment transaction in respect of the product is appropriate to the particular investment objectives, financial situation or particular needs of a client (s 1(3)(a)(ii); Advice given by the board of management or any board member of any pension fund organisation or friendly society to members of the organisation or society on benefits enjoyed or to be enjoyed by such members; Advice given by the board of management or any board member of any pension fund organisation or friendly society to members of the organisation or society on benefits enjoyed or to be enjoyed by such members; Advice given by the board or trustees of any medical scheme or any board member to the members of the medical scheme on health care benefits enjoyed or to be enjoyed by such members; or any other advisory activity exempted from the provisions of the FAIS Act by the Registrar, after consultation with the Advisory Committee, by notice in the Gazette.

51 Act 59 of 1980; see s 1(1)(a)(i) FAIS Act.

debentures and securitised debt,⁵² any money-market instrument,⁵³ any warrant, certificate and other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose of, or convert securities and instruments⁵⁴ and any securities as defined in section 1 of the Securities Services Act,⁵⁵

- A participatory interest in one or more collective investment scheme;⁵⁶
- A long-term or a short-term insurance contract or policy;⁵⁷
- A benefit provided by a pension fund organisation as defined by the Pension Funds Act⁵⁸ to the members of the organisation by virtue of membership⁵⁹ or a benefit provided by a friendly society referred to in the Friendly Societies Act⁶⁰ to the members of the society by virtue of membership;⁶¹
- A foreign currency denominated investment instrument, including a foreign currency deposit as defined in s 1(1) of the Banks Act,⁶² and
- A health service benefit provided by a medical scheme as defined in the Medical Schemes Act.⁶³

The legislature deemed it necessary to state that any product similar in nature to those mentioned above is included in the definition of financial services and can be declared a financial product by the Registrar upon publication in the *Gazette*.⁶⁴ Importantly, any combined product containing one or more of the products mentioned above is regarded as a financial product for purposes of this definition.⁶⁵ Finally, any financial product issued by any foreign product supplier and marketed in the Republic and which in nature and character is essentially similar or corresponding to a financial product referred to anywhere in this definition, is included in the term “financial product”.⁶⁶

“Intermediary service” denotes any act other than the furnishing of advice that is performed by a person for or on behalf of a client or product supplier that causes the client to enter into or offer to enter into any transaction with a product supplier. An intermediary service would also have been rendered where a client enters into any such transaction in future.⁶⁷

52 S 1(1)(a)(ii) FAIS Act.

53 S 1(1)(a)(iii) FAIS Act.

54 Act 36 of 2004. See s 1(1)(a)(v) FAIS Act.

55 S1(1)(a)(v) FAIS Act. See also Van Zyl 1–14.

56 S 1(1)(b) FAIS Act.

57 S1(1)(c) FAIS Act. Policies and contracts as envisaged here are those policies and contracts provided for by the Long Term Insurance Act 52 of 1998 and the Short Term Insurance Act 53 of 1998.

58 Act 24 of 1956.

59 S 1(1)(d)(i).

60 Act 25 of 1956.

61 S 1(1)(d)(ii).

62 Act 94 of 1990. See s 1(1)(f) FAIS Act.

63 Act 131 of 1998. See s 1(1)(g) FAIS Act.

64 S 1(1)(h) FAIS Act. See Hattingh & Millard 16.

65 S 1(1)(j) FAIS Act.

66 S 1(1)(j) FAIS Act. Hattingh & Millard 16. See also Van Zyl at 1–14.

67 Hattingh & Millard 16.

When referring a dispute to the FAIS ombud, clients and their legal representatives should first establish whether their complaint pertains to advice or an intermediary service pertaining to a financial product as contemplated by the FAIS Act. The legislator intended to include as many financial services and instances of intermediary services and advice as possible in order to provide the maximum possible protection to consumers. Let us turn now to the procedural aspects of claims against the FAIS ombud.

3 3 Procedural Aspects

Essential to the success of any claim is the identification of the correct cause of action, the correct defendant(s) and importantly, the correct forum. As a point of departure for deciding whether the FAIS ombud is the correct forum, rule 4 of the Ombud Rules, “type of complaint justiciable by Ombud” stipulates that the complaint must fall within the ambit of the Act and these Rules, the respondent must be subject to the provisions of the act, the rules should have been in force and the respondent must have failed to address the complaint satisfactorily within six weeks of its receipt.⁶⁸

Finally, the FAIS Act determines that a monetary claim (claim for the compensation of financial loss or prejudice) should not exceed R800,000.00, unless the respondent has agreed in writing to this limitation being exceeded, or the complainant has abandoned the amount over and above R800,000.00.⁶⁹ This relatively high limit of R800,000.00 serves to encourage complainants to rather use the inexpensive ombud route. A complainant who chooses to institute proceedings in a civil court, must use the high court if a claim exceeds R100,000.00 as it is only possible to institute proceedings in a magistrate’s court when the claim amount is R100,000.00 or less.⁷⁰

Other than the determination of jurisdiction, only two more procedural matters will be discussed, namely the complainant’s duty to utilise the respondent’s internal dispute resolution system and the effect of the FAIS ombud’s determination. As far as the internal dispute resolution procedure is concerned, the FAIS ombud will hear a matter if the respondent has failed to address the complaint satisfactorily within six weeks of its receipt. In this initial stage, the respondent has the opportunity to solve a dispute with a client if possible. The FAIS Act prescribes how services providers should solve disputes internally.

68 Rule 4(a). The fourth requirement implies that a complainant should first attempt to resolve the matter with the respondent before approaching the Ombud. The meaning of this will become apparent in the discussion in the next paragraph that deals with claims procedures.

69 Rule 4(b) Ombud rules.

70 S 29 Magistrates' Courts Act 32 of 1944. It is submitted that a regional court would have jurisdiction in matters which may be interpreted as a dispute over “movable or immovable property” where the amount is less than R300 000, according to the Jurisdiction of Regional Courts Amendment Act, 31 of 2008 which took effect on 2010-08-09.

Clause 16(1) of the General Code of Conduct for Authorised Financial Services Providers and Representatives (GCC) describes “internal resolution” as “the process of the resolving of a complaint through and in accordance with the internal complaint resolution system and procedures of the provider.”⁷¹ The GCC stipulates that a provider has the following primary obligations, namely to request any client who has a complaint against the provider to lodge the complaint in writing;⁷² to maintain a record of complaints for a period of five years;⁷³ to handle complaints from clients in a timely and fair manner;⁷⁴ to take steps to investigate and respond promptly to such complaints;⁷⁵ and where a complaint is not resolved to the client’s satisfaction, to advise the client of any further steps which may be available to the client in terms of the FAIS Act or any other law.⁷⁶

Apart from these primary obligations, a provider must also ensure that a number of basic principles must be adhered to, namely the maintenance of a comprehensive complaints policy,⁷⁷ transparency and visibility,⁷⁸ accessibility of facilities⁷⁹ and fairness.⁸⁰

It is of primary importance that services providers adhere to the requirements of the GCC pertaining to the internal resolution of complaints. Where a service provider failed to do so, the disgruntled client has no alternative but to approach the ombud or to resort to litigation and there is probably many a niggling matter that may easily be resolved by staff members of service providers who apply their minds to complaints.

As far as the ombud’s determination is concerned, it is important to note that the ombud has extensive powers and such determination may include the dismissal of a complaint⁸¹ or the upholding of the

71 Published in Board Notice 80 in *Government Gazette* 25299 of 8 August 2003, as mended.

72 Clause 16(2)(a) GCC; clause 11(2)(a) Short-term Deposit Code (“SDC”).

73 Clause 16(2)(b) GCC; clause 11(2)(b) SDC.

74 Clause 16(2)(c) GCC; clause 11(2)(c) SDC.

75 Clause 16(2)(d) GCC; clause 11(2)(d) SDC.

76 Clause 16(2)(e) GCC; clause 11(2)(e) SDC.

77 Clause 17(a) GCC. Hattingh & Millard 161 n 15 explain that this complaints policy should outline the provider’s commitment to, and system and procedures for, internal resolution of complaints.

78 Clause 17(b) GCC. Hattingh & Millard 161 n 16 comment that this serves to ensure that clients have full knowledge of the procedures for resolution of their complaints.

79 Clause 17(c) GCC. This entails that the provider should ensure the existence of easy access to internal dispute resolution procedures at any office or branch of the provider. It can also be done through additional postal, fax, telephone or electronic helpdesk support. See Hattingh & Millard 161.

80 Clause 17(d) GCC. According to Hattingh & Millard 161 n 18, “fairness” in this context means that the process should be even-handed to clients and the provider and its staff alike.

81 S 28(1)(a) FAIS Act.

complaint.⁸² Where a complaint is upheld, the ombud has the option of upholding a complaint either wholly or partially and this simply means that the ombud may award an amount as fair compensation for any financial prejudice or damage suffered.⁸³ In addition, the ombud may also issue a direction “that the authorised financial services provider, representative or other party concerned take such steps in relation to the complaint as the ombud deems appropriate and just.”⁸⁴ This gives the ombud far-reaching powers to ensure that a solution is reached which is fair to both parties. Finally, the ombud may make any other order which a court will make.⁸⁵ This will for instance include an order forcing a financial services provider to disclose information, to refrain from acting in a specific way or an order declaring a contract or trade practice invalid.

Another matter that sometimes influences a complainant’s decision to rather institute an action in a civil court is a cost award. In complex cases a complainant will no doubt utilise the services of a legal professional and the FAIS Act also contains favourable stipulations on this matter.⁸⁶

In conclusion: The ombud’s powers in terms of its enabling legislation do not differ materially from those of a civil court.⁸⁷ Section 28(3) of the FAIS Act states that the ombud should not make an award which is higher than would have been granted by a civil court.

The discussion on the actual procedures to be followed by the ombud illustrates that the rules are strict and needs to be followed meticulously. However, it is important to understand that these rules serve a number of fundamental principles, namely the objectivity of the ombud,⁸⁸ the *audi alteram partem*-rule,⁸⁹ the right to an appeal⁹⁰ as well as the right to review.⁹¹

82 See also Hattingh & Millard 171.

83 S 28(1)(b)(i). See also Hattingh & Millard 172.

84 S 28(1)(b)(ii).

85 S 28(1)(b)(iii). See also Hattingh & Millard 172.

86 According to Hattingh & Millard 172: “A final determination may also include a cost order. Normally, a cost order in a civil suit follows the result of the case. In other words, should a matter be decided in favour of a complainant, the Ombud may rule that the respondent is responsible for the payment of the complainant’s legal costs. What is also interesting is that the Ombud may also grant a cost order against a complainant in favour of the Ombud or the respondent if the Ombud is of the opinion that the conduct of the complainant was “improper” or “unreasonable” or where “the complainant was responsible for an unreasonable delay in the finalisation of the relevant investigation”. See s 28(2)(b)(iii)(aa) and s 28(2)(b)(iii)(bb) FAIS Act.

87 Hattingh & Millard 172.

88 Rule 2(a), s 31(b)(i) & (ii).

89 As embodied in rule 2(b) Ombud rules.

90 S 39 FAIS Act.

91 Moolman *et al* 225.

3 4 Some Determinations

3 4 1 General

Determinations by the FAIS ombud are reported on the Internet.⁹² This article singles out two cases which incidentally dealt with complaints against the same respondent(s) as an illustration of the way in which rules and principles are used in the adjudication process and how this may lead to difficulties.

3 4 2 *Malan v Jordaan*⁹³

In this particular case Malan had used Jordaan's services as financial advisor for 20 years. During October 2006, he had R80,000.00, 00 to invest and was considering investing these in either retail bonds at 8.5 per cent per annum or in a Nedbank two year fixed deposit at 9.57 per cent per annum.⁹⁴ Malan was risk averse, a fact well known to Jordaan.⁹⁵ Despite thus, Jordaan convinced Malan to invest the amount of R80,000.00 together with an additional R30,000.00 in a bridging finance scheme.⁹⁶ When the scheme collapsed a year later, Malan's entire R110,000.00 was lost and he blamed Jordaan or his employer at the time, Sanlam, for his loss.⁹⁷

Central to this particular dispute is the question whether this bridging financing scheme was indeed a financial product as defined by the FAIS Act. Jordaan alleged that it was not and that the ombud therefore had no jurisdiction to hear the matter.

In adjudicating the matter, the ombud observes that consumers who were sold products that do not fall within the "strict definition" of financial products in the FAIS Act often approach the ombud. Relying on the decision of *Nebbe vs Oosthuizen*,⁹⁸ the ombud explains that although bridging finance is not specifically mentioned in the definition of "financial product", the act also provides for "any other product similar in nature to any financial product referred to in paragraphs (a) to (g), inclusive, declared by the registrar, after consultation with the Advisory Committee, by notice in the Gazette to be a financial product for the purposes of this Act".⁹⁹ Therefore, this bridging financing scheme should be considered a financial product. Furthermore, the ombud argues that one needs to bear in mind "what mischief the particular piece of legislation was designed to prevent."¹⁰⁰ The ombud does not elaborate on this aspect but proceeds to explain that:

92 <http://www.faisombud.co.za>.

93 Case FOC5452/07-08/EC (1).

94 Par 3.

95 Par 4.

96 *Ibid*.

97 Par 5.

98 Case FOC 2243/07-08 (KZN) (1).

99 S 1(1)(h) FAIS Act.

100 Par 19.

If schemes such as bridging finance and so-called investment clubs were to be allowed to be marketed by financial services providers (FSPs) on the basis that they fell outside of the FAIS Act then it would frustrate the very purpose for which the FAIS Act was designed. Unscrupulous financial advisors will continue to ensnare unwary investors who may then have no recourse against the provider concerned.¹⁰¹

It was common cause between the parties that Malan would participate in a bridging financing scheme operated by a company called Auctum Capital (Pty) Ltd. The sole director, Hermann Heydenrych, provided Malan with a letter in which he welcomed Malan “as a participant in the Joint Venture with Auctum Capital.” Also, he indicated to Malan that his “participation should not be seen as an investment, but rather a contribution to the Joint Venture, thus ensuring profit sharing in the venture.”¹⁰² The ombud concludes that the legislative definition is wide enough to also include the product bought by Malan and rules that Jordaan is liable to Malan for payment of R1 10,000.00.¹⁰³

Interestingly, the ombud had ruled in this particular case that Sanlam was not liable to Malan as Jordaan had acted outside the scope of his employment with Sanlam. On the facts it was evident that Jordaan had previously interested Malan in products that were not marketed by Sanlam.¹⁰⁴

If one considers that the ombud is bound to have regard to the legal relationship between the parties, the provisions of the FAIS Act as well as what is equitable in the circumstances,¹⁰⁵ it seems that this particular determination was based on equity and not on the letter of the law. It is also clear from the wording of section 1(1)(g) that it is the task of the legislator to declare other products as financial products for purposes of the FAIS Act. However, The ombud proceeds to include a scheme such as the one in question in the definition of “financial product” and one may very well ask whether the ombud had not exceeded its powers. Even more important, was the ombud not perhaps influenced by the fact that Heydenrych was the same individual who recruited investments for “the now spectacularly failed Fidentia Group”?¹⁰⁶

It is submitted that a case such as the present one should ideally have been referred to a civil court. A legal question pertaining to something as fundamental as the FAIS Act’s scope of application should not be left open to arbitrary an unconvincing interpretation such as is evident from

101 *Ibid.*

102 Par 11.

103 Pars 21-22.

104 Par 24. The ombud states: “Jordaan, on the other hand, not only went on a frolic of his own by advising clients to invest in financial products that he was not authorised to market by his employer but went further and advised the complainant to invest in a product that he, as a registered FSP, knew was not a financial product as defined and then raises that very point in his own defence.”

105 Moolman *et al* 196.

106 Par 11.

this determination. Above all, a civil court could have granted Malan a remedy based on Jordaan's failure to act honestly and with integrity and above all, failure to act in the best interests of the client. Unfortunately there is nothing in the current FAIS Act or subordinate legislation that compels the ombud to refer a matter to a court in cases such as this one.¹⁰⁷ Another risk is that interpretations such as this one actually amount to "two tier regulation." This aspect is discussed in more detail in paragraph 3.4.1 below.

3 4 3 Elizabeth September v Sanlam Life Limited¹⁰⁸

Willie Jordaan, the same culprit who was the respondent in *Malan v Jordaan supra*, had in November 2004 invested R254,000.00 on behalf of Elizabeth September.¹⁰⁹ Jordaan, an employee of Sanlam, invested the money in Fidentia Asset Management.¹¹⁰ Upon hearing that Fidentia had been placed under curatorship, she approached Sanlam, who advised her that they had nothing to do with Fidentia. In investigating September's complaint, the ombud referred it to Sanlam, only to be told that Jordaan did similar investments for other clients and that the complaint should be addressed to Fidentia's curators.¹¹¹ The ombud held that it was just and equitable to hold the respondent liable as employer for the acts of its employees.¹¹²

It is quite evident that September could in fact approach the ombud because the financial product here had clearly been an investment. As far as Sanlam's vicarious liability is concerned, this case also differs from Malan's in that September was under the impression that her money was with Sanlam, whereas Malan was aware of the fact that the money was put into the hands of another entity.¹¹³ This case is in fact cited as an example of how the ombud reached an equitable decision where it would otherwise not have been able to do so because of the "strictures of the law."¹¹⁴

3 4 4 Comment

From a consumer point of view, it is easy enough to understand why a dispute resolution mechanism is needed which is based on fairness.

107 The FOS in England operates differently; see Par 3.2 below.

108 Case FOC1291/07-08/EC(1); all further references will be to the discussion of the case by Moolman *et al*.

109 Moolman *et al* 240.

110 *Ibid*.

111 Moolman *et al* 241.

112 *Ibid*.

113 This was also the case for Marna and George Rossouw who gave an amount of R210 000 to the same Willie Jordaan to invest while he was an employee of Sanlam. They were in fact informed that their investment was in Fidentia and not in Sanlam, which is why Jordaan was held personally liable to the Rossouws for lack of due skill, care and diligence. See *Marna and George Rossouw v Willie Jordaan* Case FOC 816/07-08/EC (1) as discussed by Moolman *et al* 241.

114 Moolman *et al* 196-197.

However, the fact remains that an ombud operates within a particular legal framework. A public office with such an important task should be careful not to exceed its powers and fall into disrepute for reaching arbitrary decisions. Moreover, cases that require individual solutions should be just that and should not have any value as precedents. The next section investigates the Financial Ombudsman Service in England in order to see whether the same difficulties arise as those that have been pointed out in the previous paragraphs.

4 Financial Ombudsman Service in England

4 1 Background

The Financial Services Authority (FSA) came into existence on 1 December 2001 by virtue of the Financial Services and Markets Act, 2000 (FSM Act).¹¹⁵ The FSA has four general functions, namely to make rules,¹¹⁶ to prepare and issue codes,¹¹⁷ to give general guidance¹¹⁸ and to determine the general policy and principles “by relation to which it performs its particular functions.”¹¹⁹ In addition, the FSA has a duty¹²⁰ to act in accordance with the four regulatory objectives, which are market confidence,¹²¹ the public awareness,¹²² protection of consumers¹²³ and the reduction of financial crime.¹²⁴ It is then the protection of consumers as an objective that enables the FSA to establish the Financial Ombudsman Service (FOS) as a scheme operator to ensure that certain disputes are resolved.¹²⁵ Although the FSA and the FOS are bodies independent of each other, a Memorandum of Understanding effective from 2002-07-11 sets out the terms of their cooperation necessitated by the nature of their statutory duties.¹²⁶ The memorandum deals with matters pertaining to information sharing and budgeting.¹²⁷

It is the task of the FOS to appoint a panel of ombudsmen as well as a chief ombud.¹²⁸ In addition, the FOS is tasked with making procedural rules governing the compulsory and voluntary jurisdiction of the scheme and with publishing guidance on matters as it deems appropriate.¹²⁹

115 Morris in Winckler ed *A Practitioner's Guide to the FSA Handbook* (2006) 1.

116 S 2(4)(a) Financial Services and Markets Act (FSM Act) 2000.

117 S 2(4)(b) FSM Act 2000.

118 S 2(4)(c) FSM Act 2000.

119 S 2(4)(d) FSM Act 2000.

120 S 2(1) FSM Act 2000.

121 S 3 FSM Act 2000.

122 S 4 FSM Act 2000.

123 S 5 FSM Act 2000.

124 S 6 FSM Act 2000.

125 In terms of Part XIV and Schedule 17 FSM Act 2000.

126 Melrose "Consumer relations: Complaints and compensation" in *A Practitioner's Guide to the FSA Handbook* (ed Winckler) (2006) 612.

127 *Ibid.*

128 Melrose 611.

129 Rules pertaining to the compulsory jurisdiction of the scheme are made with the consent of the FSA. See also Melrose 612.

4 2 Jurisdiction and Conceptual Framework

A complaint is defined as “any expression of dissatisfaction, whether oral or written and whether justified or not.”¹³⁰ Interestingly, the FOS distinguishes between compulsory jurisdiction and voluntary jurisdiction.¹³¹ The so-called “DISP Rules”¹³² stipulate that the FOS has compulsory jurisdiction in relation to acts or omissions by a firm¹³³ carrying on one or more of the following activities,¹³⁴ namely regulated activities;¹³⁵ payment services;¹³⁶ consumer credit activities;¹³⁷ lending money secured by a charge on land;¹³⁸ lending money (excluding restricted credit where that is not a consumer credit activity);¹³⁹ paying money by a plastic card (excluding a store card where that is not a consumer credit activity);¹⁴⁰ providing ancillary banking services;¹⁴¹ or any ancillary activities, including advice, carried on by the firm in connection with them.¹⁴²

According to the DISP Rules,¹⁴³ the ombudsman can consider a complaint under the voluntary jurisdiction in the following circumstances, namely:

- (1) it is not covered by the Compulsory Jurisdiction or the Consumer Credit Jurisdiction; and
- (2) it relates to an act or omission by a VJ [voluntary jurisdiction] participant in carrying on one or more of the following activities:
 - (a) an activity carried on after 28 April 1988 which:
 - (i) was not a regulated activity at the time of the act or omission, but
 - (ii) was a regulated activity when the VJ participant joined the Voluntary Jurisdiction (or became an authorised person, if later);

130 DISP Rule 1.1.10. See also Virgo & Riley *Compliance Officer's Handbook* (2004) 113.

131 S 226 FSM Act 2000. See also Schlueter *Banks as Financial Advisers: A Comparative Study of English and German Law* (2001) 143.

132 S 138 FSM Act 2000 authorises the FSA to make rules. These rules are published as part of the FSA Handbook in a separate chapter entitled: Dispute Resolution: Complaints. All further references will be to “DISP Rules”. The latest version of these rules is available at <http://www.fsa.co.uk> (accessed on 2011-07-01).

133 According to DISP Rule 2.6.1R, the FOS's Compulsory Jurisdiction covers only complaints about the activities of a firm (including its appointed representatives) or of a payment service provider (including agents of a payment institution) carried on from an establishment in the United Kingdom.

134 DISP 2.3.1R. See also Virgo & Riley 117.

135 DISP 2.3.1R(1).

136 DISP 2.3.1R(1A).

137 DISP 2.3.1R(2).

138 DISP 2.3.1R(3).

139 DISP 2.3.1R(4).

140 DISP 2.3.1R(5).

141 DISP 2.3.1R(6).

142 See Virgo & Riley 117.

143 Rule 2.5.1R.

- (b) a financial services activity carried on after commencement by a VJ participant which was covered in respect of that activity by a former scheme immediately before the commencement day;
- (c) activities which (at 1 July 2009) were regulated activities or would be regulated activities if they were carried on from an establishment in the United Kingdom (these activities are listed in DISP 2 Annex 1 G);
- (d) activities which would be consumer credit activities if they were carried on from an establishment in the United Kingdom;
- (e) lending money secured by a charge on land;
- (f) lending money (excluding restricted credit where that is not a consumer credit activity);
- (g) paying money by a plastic card (excluding a store card where that is not a consumer credit activity);
- (h) providing ancillary banking services;
- (i) acting as an intermediary for a loan secured by a charge over land;
- (j) acting as an intermediary for *general insurance business* or *long-term insurance business*;
- (k) National Savings and Investments' business;
- (l) activities which (at 1 November 2009) were *payment services* or would be *payment services* if they were carried on from an establishment in the *United Kingdom*, or any ancillary activities, including advice, carried on by the *VJ participant* in connection with them.¹⁴⁴

In terms of the FOS dispensation, eligible complainants include private individuals,¹⁴⁵ businesses with a group annual turnover of less than £1million,¹⁴⁶ charities with an annual income of less than £1million¹⁴⁷ and trustees of trusts which have a net asset value of less than £1million.¹⁴⁸ In addition, a complaint is defined as “any expression of dissatisfaction, whether oral or written and whether justified or not.”¹⁴⁹

It is quite evident that the FOS has wide ranging powers. Having consolidated a number of functions that were previously performed by other institutions under the FOS, this institution had wide ranging powers and as with the FAIS ombud in South Africa, the idea is to make the statutory ombudsman accessible to as many complainants as possible. Let us now turn to the procedural aspects.

4 2 Procedural Matters

It is evident from the DISP rules in general that fairness is firmly embedded in the prescribed procedures for dealing with complaints. Similar to the process followed by the FAIS ombud in South Africa,

¹⁴⁴ Emphasis in the original.

¹⁴⁵ Virgo & Riley 112.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ Virgo & Riley 113. See also Melrose 613.

complaints handling starts with a compulsory internal dispute resolution mechanism.¹⁵⁰ Such internal procedure must provide for receiving, responding to and investigation of complaints as well as notification to complainants of their right to refer an unresolved complaint to the FOS.¹⁵¹ In fact, Part 1 of the DISP Rules is entitled: “Treating Complainants Fairly”, which already alludes to the core value that drives the dispute resolution process. It is not the black letter of the law but rather an equitable outcome that is at the core of the dispute resolution procedure. An essential requirement for the procedure to be fair is for it to acknowledge a complaint promptly.¹⁵² It is then important to keep the complainant informed of the progress that is being made.¹⁵³ The respondent is obliged to provide the complainant with a final response by the end of eight weeks after receipt of the complaint.¹⁵⁴ Where the respondent is not in a position to supply the complainant with a written response, the complainant should be informed of reasons for the delay and of his right to refer the matter to the FOS.¹⁵⁵

Although perceived as red tape by many, an internal procedure such as the one described here serves an important purpose in that it provides a respondent with an opportunity to forward his reasons for having acted in a particular way. Respondents too are treated fairly if afforded the opportunity to state their case. The FOS cannot consider a complaint if it is referred less than eight weeks after receipt by the respondent.¹⁵⁶ Similarly, the ombudsman cannot consider a complaint if the complainant refers it “more than six months after the date on which the respondent sent the complainant its final response.”¹⁵⁷ A further disqualification applies to complaints referred more than six years after the event complained of¹⁵⁸ or if the complaint is received even later, more than three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for

150 See par 2.3 above.

151 Virgo & Riley 111-112. DISP Rule 1.4.1 states as follows: “Once a *complaint* has been received by a *respondent*, it must: (1) investigate the *complaint* competently, diligently and impartially; (2) assess fairly, consistently and promptly: (a) the subject matter of the *complaint*, (b) whether the *complaint* should be upheld; (c) what remedial action or redress (or both) may be appropriate; (d) if appropriate, whether it has reasonable grounds to be satisfied that another *respondent* may be solely or jointly responsible for the matter alleged in the *complaint*, taking into account all relevant factors; (3) offer redress or remedial action when it decides this is appropriate; (4) explain to the complainant promptly and, in a way that is fair, clear and not misleading, its assessment of the *complaint*, its decision on it, and any offer of remedial action or redress; and (5) comply promptly with any offer of remedial action or redress accepted by the complainant.” Emphasis in the original.

152 DISP Rule 1.6.1(1).

153 DISP Rule 1.6.1R(2).

154 DISP Rule 1.6.2R(1).

155 DISP Rule 1.6.2R(2). See also Virgo & Riley 113.

156 *Virgo & Riley 119*.

157 *Ibid*, DISP Rule 2.8.2R(1).

158 Virgo & Riley 119; See DISP Rule 2.8.2R(2)(a).

complaint”.¹⁵⁹ Importantly, these time limits do not apply where the time limit is missed because of exceptional circumstances or where the complainant had in fact referred the claim within the six- or three year periods and has in fact a written acknowledgement or some other record of the complaint having been received.¹⁶⁰

Upon receipt of a complaint, the FOS deals with the matter in accordance with chapter 3 of the DISP Rules. A matter may be dismissed on merits¹⁶¹ or it may be dismissed without reference to the merits so

¹⁵⁹ Virgo & Riley 119; See DISP Rule 2.8.2R(2)(b).

¹⁶⁰ Virgo & Riley 119; DISP Rule 2.8.2R.

¹⁶¹ In accordance with DISP Rule 3.3.4R, The *Ombudsman* may dismiss a *complaint* without considering its merits if he considers that: “(1) the complainant has not suffered (or is unlikely to suffer) financial loss, material distress or material inconvenience; or (2) the *complaint* is frivolous or vexatious; or (3) the *complaint* clearly does not have any reasonable prospect of success; or (4) the *respondent* has already made an offer of compensation (or a goodwill payment) which is: (a) fair and reasonable in relation to the circumstances alleged by the complainant; and (b) still open for acceptance; or (5) the *respondent* has reviewed the subject matter of the *complaint* in accordance with: (a) the regulatory standards for the review of such transactions prevailing at the time of the review; or (b) the terms of a scheme order under section 404 of the *Act* (Schemes for reviewing past business); or (c) any formal regulatory requirement, standard or guidance published by the *FSA* or other regulator in respect of that type of *complaint*; (including, if appropriate, making an offer of redress to the complainant), unless he considers that they did not address the particular circumstances of the case; or (6) the subject matter of the *complaint* has previously been considered or excluded under the *Financial Ombudsman Service*, or a *former scheme* (unless material new evidence which the *Ombudsman* considers likely to affect the outcome has subsequently become available to the complainant); or (7) the subject matter of the *complaint* has been dealt with, or is being dealt with, by a comparable independent complaints scheme or dispute-resolution process; or (8) the subject matter of the *complaint* has been the subject of court proceedings where there has been a decision on the merits; or (9) the subject matter of the *complaint* is the subject of current court proceedings, unless proceedings are stayed or sisted (by agreement of all parties, or order of the court) in order that the matter may be considered under the *Financial Ombudsman Service*; or (10) it would be more suitable for the subject matter of the *complaint* to be dealt with by a court, arbitration or another complaints scheme; or (11) it is a *complaint* about the legitimate exercise of a *respondent's* commercial judgment; or (12) it is a *complaint* about employment matters from an employee or employees of a *respondent*; or (13) it is a *complaint* about investment performance; or (14) it is a *complaint* about a *respondent's* decision when exercising a discretion under a will or private trust; or (15) it is a *complaint* about a *respondent's* failure to consult beneficiaries before exercising a discretion under a will or private trust, where there is no legal obligation to consult; or (16) it is a *complaint* which: (a) involves (or might involve) more than one *eligible complainant*; and (b) has been referred without the consent of the other complainant or complainants; and the *Ombudsman* considers that it would be inappropriate to deal with the *complaint* without that consent; or (16A) it is a *complaint* about a pure landlord and tenant issue arising out of a *regulated sale and rent back agreement*; or (17) there are other compelling reasons why it is inappropriate for the *complaint* to be dealt with under the *Financial*
continued on next page

that the courts may consider it a test case.¹⁶²

Where the ombudsman elects to make an award, it is done with reference to what is “fair and reasonable in all the circumstances of the case.”¹⁶³ The DISP Rules unpack this further, stating that when considering what is fair and reasonable, the ombudsman will take into account relevant law and regulations,¹⁶⁴ regulators’ rules, guidance and standards,¹⁶⁵ codes of practice,¹⁶⁶ and what he considers to have been good industry practice at the relevant time, where appropriate.¹⁶⁷ This is similar to the position in South Africa.¹⁶⁸

Section 229 of the Financial Services and Markets Act empowers the ombudsman to make a monetary award of up to £100,000.00,¹⁶⁹ which amount excludes any interests awarded on the amount, cost awards or interest on cost awards.¹⁷⁰ Interestingly, if the ombudsman considers an amount in excess of £100,000.00 to be a fair amount, he may recommend that the respondent pay the balance to the complainant.¹⁷¹

What probably makes the ombudsman as a forum more attractive than a civil court, is the ombudsman’s powers to direct a firm to “take such steps in relation to the complainant as the ombudsman considers just and appropriate.”¹⁷² What is also important to note is that the monetary awards by the ombudsman can be for financial loss (which includes consequential and prospective loss) and also for pain and suffering, damage to reputation or distress or inconvenience.¹⁷³ Where a third party had been misinformed about the customer’s circumstances, such as where a cheque had been dishonoured or where private information had been disclosed in an improper way, these will fall under damage to reputation.¹⁷⁴ In turn, “distress” includes “embarrassment, anxiety, disappointment and loss of expectation”.¹⁷⁵ Pain and suffering are regarded as more extreme forms of distress and inconvenience.¹⁷⁶ South African legislation does not provide for compensation for pain and suffering, damage to the reputation or distress or inconvenience.¹⁷⁷

161 *Ombudsman Service.*” Emphasis in the original.

162 DISP Rule 3.3.5R. See par 3.4.2 below.

163 Winckler 629, DISP Rule 3.6.1R.

DISP Rule 3.6.4R(1)(a).

165 DISP Rule 3.6.4R(1)(b).

166 DISP Rule 3.6.4R(1)(c).

167 DISP Rule 3.6.4R(2).

168 See par 2.2 above and more specifically, s 20(3) FAIS Act.

169 DISP Rule 3.7.4R.

170 DISP Rule 3.7.5G.

171 DISP Rule 3.7.6G.

172 S 229 FSM Act.

173 Winckler 631.

174 Winckler 631-632.

175 Winckler 632.

176 *Ibid.*

177 This particular feature of the FSM Act is very interesting and forms the subject of an independent discussion. The South African position is quite

It is clear from the discussion so far that the FOS has wide ranging powers and that the golden thread that runs through the legislation is fairness to consumers. It is also clear from the very detailed DISP Rules that the rules are supposed to enhance the principles of fairness. The discussion that follows takes a look at FOS determinations and how these compare to FAIS determinations.

4 3 Determinations

4 3 1 Reporting of Determinations

As was seen in paragraph 2 4 1 above, ombudsman determinations in South Africa are published on the Internet, reflecting the full details of the parties involved as they would in the record of a court case. The situation is quite different in England. In fact, the general reporting of the FOS on their determinations have been one of the subjects under investigation by Lord Hunt.¹⁷⁸ The arguments against detailed reporting are that the volumes of cases would be too large to manage,¹⁷⁹ that there is a danger of seeing these decisions as precedent-setting¹⁸⁰ and that publication can “create false and undesirable misapprehensions.”¹⁸¹ Arguments in favour of such publication include guiding practitioners about developing FOS “thinking and practice” and “to facilitate debate on the evolution of practice over time.”¹⁸² Reporting also serves a purpose in the handling of so-called “lead cases”.¹⁸³ The latter refer to “the occasional practice of identifying a group of very similar cases ... and holding back the investigation of all of them until a decision is made on a specific lead case.”¹⁸⁴ Lord Hunt comments that the FOS proceeds to resolve the other (similar) cases in the same way, unless there are “specific circumstances” which necessitate a different outcome.¹⁸⁵ Furthermore, the so-called lead cases are not regarded as precedents, they feel similar to firms and probably also to consumers.¹⁸⁶ There are also those who

different. Where an individual alleges inconvenience, distress or damage to his reputation, the FAIS Ombud is not the correct forum. Where the services provider’s conduct is such that it constitutes a cause of action, that case should be adjudicated by a civil court.

178 Lord Hunt *Opening up, reaching out and aiming high: An Agenda for Accessibility and Excellence in the Financial Ombudsman Service* 2008.

179 *Idem* 50.

180 *Ibid.*

181 *Ibid.*

182 *Ibid.*

183 *Ibid.*

184 *Ibid.*

185 *Ibid.* Lord Hunt 4 states: “I do not, however, want the FOS ever again to be accused of ‘making it up as it goes along’, to quote a phrase used by one of the more thoughtful and respected respondents to this Review. There must be more transparency on both cases and practices, which will help set realistic expectations for consumers and their advisers, spread best practice within the industry in order to prevent complaints coming to the FOS in the first place, and also achieve greater consistency in decision-making without compromising the current jurisdiction.”

186 *Ibid.*

believe that Lord Hunt's proposed "FOSBOOK" in which cases would be reported will amount to "second tier regulation".¹⁸⁷

It is evident that the practice of only reporting on findings in general and also anonymous is very different from the South African practice of making full judgments available to members of the public.¹⁸⁸ It is much easier to analyse, compare and criticise the FAIS ombud's decisions. Also, the latter are precedents and similar to judgments of civil courts for all intents and purposes, whereas FOS determinations are not precedents. This is problematic: If a FOS case does provide an individual solution based on fairness, it may be justified because it solves a problem between the parties to a dispute. However, if it is to be a precedent, any other presiding officer should be careful in exporting that particular solution to other (similar) cases. The question that arises is whether it is not sometimes necessary to create a precedent and to ensure that important cases with wider implications do form precedents worth following. The next two paragraphs deal with this issue.

4 3 2 Test Cases

A "test case" raises an important or novel point of law, which has important consequences and would more suitably be dealt with by a civil court.¹⁸⁹ Where a respondent feels that a case brought against him raises an important or novel point in law with significant consequences, he must present the ombudsman with a written motivation¹⁹⁰ together with an undertaking to pay the complainant's reasonable costs and disbursements.¹⁹¹ Alternatively, where the ombudsman is of the opinion that the complainant "raises an important or novel point of law, which has important consequences,"¹⁹² such case is then dismissed with the understanding that a court is a better suited forum for the particular dispute. This rule effectively prevents the ombudsman from creating instead of applying law and an arrangement such as this one is important: Without detracting from the ombudsman's general powers of assessing matters in a way that is fair, provision is also made for those instances where there is ambiguity and a court of law should interpret the law in order to ensure legal certainty. Courts have different roles than ombudsmen and the inclusion of an explicit statutory arrangement such as this one may safeguard against an ombudsman exceeding its powers.¹⁹³ Here, the words of Nobles ring true:

Ombudsmen are not regulators, a fact doubly obvious when, like this ombudsman, they work alongside bodies that are entrusted with the

187 Blackmore "AIFA fears second tier regulation via FOSBook" (2008) *Moneymarketing* (<http://www.moneymarketing.co.uk/analysis/aifa-fears-second-tier-regulation-via-fosbook/165002>.article accessed on 2011-07-01).

188 See par 3.4.3 below.

189 DISP Rule 3.3.5R (2). McVea and Cumper 263.

190 DISP Rule 3.3.5R(1)(a); McVea and Cumper 263.

191 DISP Rule 3.3.5R(1)(b); McVea and Cumper 263.

192 DISP Rule 3.3.5(2)(a); McVea and Cumper 263.

193 Nobles 790.

regulation of the industry. As such, they are not empowered to create the rules that regulate their industry. The existing rules and institutional arrangements provide an essential part of the context for any assessment of fairness.¹⁹⁴

To return to the point of “bad” precedents: FOS cases are not precedents and may serve the needs of particular parties. Legislation provides for certain cases to be referred to a court. In South Africa, “fairness” cases are precedents and it is submitted that the FAIS Act should be amended to force the FAIS ombud to refer certain matters to the courts.

4 3 3 Case Studies

Despite the recommendations of Lord Hunt, the FOS continues to report determinations as case studies. In *Ombudsman News*,¹⁹⁵ cases are reported under a number, such as “92/1 consumer complains about insurer’s proposal for replacing a specially-commissioned item of jewellery”,¹⁹⁶ and then proceeds to report how “Mr C was very unhappy with his insurer’s response after he made a claim for a diamond ring that his wife had lost”.¹⁹⁷ What follows is a summary of the case presented to the ombudsman as well as the services provider’s response. The result is then reported, and will typically be “complaint upheld” or “complaint not upheld”, followed by reasons for the ombudsman’s decision.

Reporting in such fashion is acceptable if one considers that the FOS aims at achieving *individualised justice*. James and Morris comment that the aim of doing justice in an individual case “became something of a hallmark of the second generation ombudsmen in the sense that they were not bound by precedent and most were able to take considerations of substantive fairness into account in their decision-making, usually to the benefit of the complainant.”¹⁹⁸

Eventually, the whole debate on reporting also comes down to the application of rules or principles. On this matter, James and Morris observe:

There is often a fine balance to be struck, however, between the rational application of rules to ensure consistency, and an over-reliance on rules which leads to a failure to exercise discretion in individual cases. If the FOS because of its size of operation and delegation arrangements were to lean too far towards a strict rules-based approach might it open the way to challenges on the ground of fettering of discretion through the rigid application of a policy of rules?¹⁹⁹

194 *Idem* 787.

195 February/March 2011. This publication can be accessed at <http://www.financial-ombudsman.org.uk> (accessed on 2011-07-01)

196 *Ombudsman News* February/March 2011 5.

197 *Ibid.*

198 “The Financial Ombudsman Service: A Brave New World in ‘Ombudsmanry?’” 2002 *Public Law* 640 641.

199 James & Morris 645 646.

This then is the point: Reporting FOS decisions in the same fashion as court cases in a publication such as Hunt's suggested FOS Handbook may lead (unintentionally) to a precedent-based system where these reported decisions may very well become more rules-based for fear of creating a perception of treating seemingly like cases in an unlike manner. In a system where fairness outweighs anything else, reporting in this fashion achieves the aim that is sought, namely to provide the parties to a dispute with a fair solution.

5 Some Observations

The above comparison between the FAIS ombud in South Africa and the English Financial Ombudsman Service highlights a number of issues. First, it is evident that the complexity of financial law is an internationally observable fact. The lack of obvious, universal values in financial law supports this view. Second, financial law is abuse prone and many a consumer had been slaughtered in the battle between services providers for a significant slice of the action. Third, because the odds are seemingly stacked against consumers of financial products, dispute resolution mechanisms which exist independently of civil courts have the potential to assist disgruntled consumers who would otherwise not have had the means to enforce their rights. Four, a system such as an ombudsman needs to function in a specific regulatory framework in order to be legitimate and to enforce the rules of the financial system in which it operates. Finally, over and above the rules, it must be necessary for an ombudsman to look wider than the rules and to consider principles of (individual) fairness in order to resolve disputes quickly and inexpensively.

In evaluating the FAIS ombud and the FOS against these observations, one draws a number of conclusions. Most importantly, the FAIS ombud as well as the FOS have extensive powers and need to consider a substantive portion of financial law in reaching their decisions. In both countries there are examples of consumer abuse, hence the need for an ombudsman. Furthermore, both institutions may be classified as statutory ombudsmen, deriving their power from statutes and its subordinate legislation and functioning independently from the civil courts.

In the final instance, the dilemma faced by both institutions in as far as they apply rules, principles or both, is equally real in both countries but dealt with differently. The FAIS ombud is bound by its strict procedural rules for purposes of administrative fairness, as is the FOS. However, in South Africa the FAIS ombud has the same powers of a civil court for all intents and purposes, determinations are published containing as much detail as a reported court case and these determinations are regarded as precedents for all intents and purposes. A further complication is that the FAIS ombud can refer a case to another ombudsman where the FAIS ombud does not have jurisdiction *but* the FAIS Act does not provide for a referral to a civil court where there is an

important legal issue or matter that requires proper interpretation of the legislation. The difficulty that arises is that the ombud may make a determination in an attempt at individualised, principles-based justice which is well within its mandate but this precedent may not provide a fair solution between other parties. An in-depth study of determinations may very well reveal that a system such as the present one amounts to second tier regulation. This is a serious shortcoming in the FAIS Act and a matter that should be addressed by the FSB.

The English system also has all the detailed rules aimed at procedural fairness and administrative justice but there is the habit of reporting determinations as general case studies with the understanding that these are not precedents. To ensure fairness, provision is made for the adjudication of “lead cases” which may have wider implications, thereby saying that like cases should still be treated alike in order for the FOS not to be perceived as acting in a way that is patently unfair or arbitrary. Furthermore, a case may be referred to a civil court at the insistence of the FOS or a respondent where a case involves an important or novel point of law, thereby stating that although the FOS have jurisdiction, a true precedent is needed to set the way for future interpretation. If applied properly, this is to be preferred to the South African system.

6 Conclusion

What emerges from this article is that the FAIS ombud and the FOS are both new institutions. Their establishment had been prompted by complex financial law aimed at protecting consumers of financial services and products. Financial law in both countries consists mostly of statutes and subordinate legislation. As an alternative dispute resolution mechanism, an ombudsman may be either voluntary or a creature of statute, such as the FAIS ombud or the FOS. In performing this all-important task of protecting consumers, ombudsmen need to adhere to strict rules in order to achieve procedural and administrative fairness and to be accountable to all role players in the industry. However, in order to provide consumers with a solution which is fair in the circumstances, it is also necessary for ombudsmen to look wider than the letter of the law and to ensure that disputes are adjudicated fairly. Even though it is harder to deduce clear principles in the area of financial law, fairness to the client as a principle goes a long way in restoring confidence in financial markets, thereby bringing stability, financial inclusion and a safe environment for investors.

In South Africa, equating FAIS ombud determinations with court cases bring about a number of difficulties. The FAIS ombud may disregard the letter of the law in favour of fairness and this makes the FAIS ombud a more attractive option than a civil court. Discrepant judgments such as those discussed above on matters such as the meaning of “financial product” and vicarious liability should ideally be referred to civil courts for purposes of interpretation. Furthermore, the reporting of seemingly discrepant determinations in the same fashion as court cases may very

well lead to “second tier regulation”, where interpretations of the law which are not necessarily correct become a source of the law. So, where the FAIS ombud was guided by fairness to do simple justice between parties and in doing so, had crafted an individual judgment to serve that purpose, the ombud would have acted within its mandate. However, by quoting a bespoke judgment as a precedent and basing future decisions thereupon, one runs the risk of misinterpreting the law and doing an injustice.

In England, the advantage of the FOS is that although there are strict, detailed rules, the FOS may similarly revert to fairness in order to offer a solution to a complainant. Despite criticism, determinations are reported as case studies and are not regarded as precedents. Although the treatment of lead cases are aimed at treating like cases alike, each individual case is determined by looking at rules and over and above those, principles such as fairness. By enabling the FOS and respondents to refer cases to civil courts for considering important or novel points of law, the FOS avoids the pitfall of misinterpreting the law and thereby allowing a possible miscarriage of justice.

In conclusion: Ombudsmen are indispensable in guiding consumers through the maze that is financial law. Ideally, they should strive to do justice in individualised cases by balancing rules and principles. This is a tall order indeed! It is submitted that the FAIS ombud would do well to report cases in such a way that it is clear why bespoke justice was indeed required in a particular instance. Finally, the South African legislator will do well to include a provision that will force the FAIS ombud to refer important or novel points of law to a civil court. In the final instance it is submitted that cases such as these, if properly adjudicated by the courts, have precedential value and will go a long way in preventing miscarriages of justice, building confidence in the ombud’s office and ultimately achieving effective consumer protection.