Neutral Citation Number: [2018] EWCA Civ 2093

Case No: C1/2016/1159

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
ELIAS LJ & MITTING J [2016] EWHC 323 Admin

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/09/2018

Before :

LADY JUSTICE ARDEN
LORD JUSTICE NEWEY
and
LORD JUSTICE COULSON

- -

Between :

The Queen on the application of Holmcroft Properties Limited	**Appellant**
- and -	
KPMG LLP	**Respondent**
- and –	
(1) Financial Conduct Authority	**Interested Parties**
(2) Barclays Bank Plc	

Approved Judgment

Richard Gordon QC and Malcolm Birdling (instructed by **Mackrell Turner Garrett**) for Holmcroft
Javan Herberg QC and Mr Hanif Mussa (instructed by **Herbert Smith Freehills LLP**) for the **Respondent**
Richard Coleman QC and Ms Kerenza Davis (instructed by **Baker McKenzie**) for the First Interested Party
Dinah Rose QC and Ben Jaffey QC (instructed by **Linklaters LLP**) for the Second Interested Party

Hearing dates : 22-23 May 2018

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Lady Justice Arden :

1. INDEPENDENT REVIEWER IN CUSTOMER REDRESS SCHEME: AMENABILITY TO JUDICIAL REVIEW AND FAIRNESS

1. These proceedings arise out of customer redress arrangements set up by the Financial Services Authority ("the FSA") (now the Financial Conduct Authority ("FCA")) with Barclays Bank plc ("Barclays"). In common with other banks, Barclays had missold interest rate hedging products ("IRHPs") to customers for whom they were not appropriate. The FSA was until 1 April 2013 the regulator with statutory powers of the UK financial services industry.

2. As part of these redress arrangements, Barclays voluntarily agreed with the FSA that it would provide fair compensation to customers affected by the misselling. In addition, it also agreed with the FSA to appoint a "skilled person" to whom section 166 of the Financial Services and Markets Act 2000 ("FSMA") as then in force (which is set out in the Appendix to this judgment) would apply. Barclays chose to appoint the respondent firm of accountants ("KPMG") for this purpose. The FSA exercised its own statutory powers under section 166 to approve the appointment and to require the "skilled person" to make a report to it on the operation of the redress arrangements. Barclays also undertook to engage and obtain an opinion (an "AFR assessment") from the skilled person as Independent Reviewer in each case in which an offer of redress was made as to whether the compensation was appropriate, fair and reasonable.

3. The appellant ("Holmcroft") was a customer of Barclays to which IRHPs were missold. Barclays offered Holmcroft compensation under the redress arrangements but the offer did not include compensation for certain consequential loss to which Holmcroft considers it is entitled. KPMG as Independent Reviewer made an AFR assessment approving the offer. Holmcroft then sought judicial review of KPMG's decision to approve Barclays' offer on the basis that it had failed to discharge its public law duties of fairness.

4. By order dated 6 March 2016 the Divisional Court (Elias LJ and Mitting J) dismissed the proceedings, first on the ground that the decision of a skilled person with respect to an AFR assessment was not amenable to judicial review, and, secondly on the ground that in any event the AFR assessment in this case was not, as Holmcroft alleged, unlawful. Holmcroft contended before the Divisional Court that in breach of its public law duties KPMG had failed to ensure that Holmcroft was provided with the bank records on which Barclays relied in making its decision declining to make the offer sought in relation to consequential loss. Holmcroft argued that the result of KPMG's actions was that it was unable to make effective representations to Barclays. On this appeal, Holmcroft contends that the Divisional Court was wrong on both grounds, but the second ground arises only if Holmcroft is correct on the first ground.

2. IRHP COMPENSATION ARRANGEMENTS AND HOLMCROFT'S CLAIM

5. In March 2005, Holmcroft and its subsidiary, Holmwood Nursing Home Limited ("HNHL"), borrowed some £2m and £400,000 respectively from Barclays to acquire property. In April 2005, Holmcroft purchased an IRHP from Barclays. Both loans

were restructured on 21 March 2007 as a 20-year repayment loan of £2.4m. On 10 April 2008, Holmcroft purchased a second IRHP. Barclays also provided Holmcroft with current account facilities.

6. Holmcroft subsequently suffered serious financial difficulty. In May 2011, Barclays appointed receivers of Holmcroft's properties. Holmcroft contended that the IRHPs had exacerbated its financial position, and caused it consequential loss. Barclays' own perception of the affairs of Holmcroft and HNHL was different, and drew on its internal records, known as Zeus records, which are relevant to the second ground.

7. In 2012, the FSA identified serious failings in the selling of IRHPs. The FSA reached voluntary settlements with several banks, including Barclays. As part of its settlement, Barclays undertook with the FSA that it would carry out an assessment of whether it was appropriate to provide redress to customers wrongly sold IRHPs, and if so, to determine what redress would be appropriate, fair and reasonable in the circumstances. Each offer of compensation would be reviewed by a skilled person appointed by Barclays and approved by the FSA pursuant to the exercise of its powers under section 166 FSMA. As part of its role, the skilled person had to confirm whether the redress offered to customers was appropriate, fair and reasonable.

8. Following review, on 28 March 2014 Barclays made redress offers of £243,821.43 and £197,003.37 to Holmcroft in respect of its IRHPs, plus an offer of 8% simple interest by way of compensation for consequential losses. By a response dated 22 July 2014, Holmcroft claimed further consequential losses of approximately £5.2m. Barclays rejected Holmcroft's claim on 5 September 2014. KPMG as the Independent Reviewer confirmed the appropriateness of the offer of redress in their possession. Following a failure to submit further evidence in accordance with a deadline imposed by Barclays, Barclays treated Holmcroft's case as closed. The limitation periods for Holmcroft to bring civil claims against Barclays regarding the misselling of the IRHPs expired in April 2011 and April 2014 respectively.

9. On 5 December 2014, Holmcroft issued an application for permission for a judicial review against KPMG.

3. JUDGMENT OF THE DIVISIONAL COURT

10. The Divisional Court accepted that the role of the Independent Reviewer was "woven into the fabric" of the FSA's regulatory function. The Independent Reviewer could veto an offer of compensation. It assisted the FSA in performing its regulatory function. However, on weighing up the relevant factors both ways the Divisional Court concluded that the role of the Independent Reviewer did not have sufficient "public law flavour" to make KPMG amenable to judicial review.

11. The Divisional Court gave five specific reasons, which I will summarise before setting out the relevant passage from the judgment. First, Barclays' implementation of the redress scheme was essentially voluntary. The Divisional Court considered that the FSA could not have imposed the role of the Independent Reviewer on Barclays. Moreover, Barclays decided what offer to make to affected customers.

12. Second, the arrangement between Barclays and KPMG was contractual and the customer was not a party to it. The mere fact that the FSA required the engagement of a skilled person was not sufficient to make KPMG amenable to judicial review.

13. Third, likewise, the fact that KPMG's role promoted the objectives of the regulator was not sufficient to make KPMG amenable to judicial review.

14. Fourth, the FSA had no statutory obligation, and probably not the resources, to carry out the role of the Independent Reviewer itself.

15. Fifth, the FSA could have taken other regulatory steps to sanction Barclays' misselling, and it might be amenable to judicial review if it did so, but that did not affect KPMG's position.

16. The following extract from the judgment of the Divisional Court contains the relevant passage:

> 38 We have not found this question to be easy to resolve but ultimately we consider that KPMG's duties do not have sufficient public law flavour to render it amenable to judicial review. We reach this conclusion for a number of interrelated reasons, although there are certainly pointers in favour of amenability.
>
> 39 We accept that KPMG was clearly "woven into" the regulatory function, to use the expression of Rose LJ in *Ex p Aegon Life* [1994] CLC 88 . Its function in approving the terms of any offers was critical in achieving the twin aims of objectivity and acceptability. As a matter of substance it could veto any offer which it did not approve and effectively compel Barclays to tailor its offer accordingly. Whether that was the contractual effect of the arrangements or not is of little moment; it was certainly the commercial reality. In our view there is some artificiality in treating KPMG as merely assisting Barclays in its compliance obligations, as occasionally happens in the ordinary course of affairs. This was more than a mere private arrangement and the bank would never have conferred the veto power upon KPMG unless required to do so by the FCA as part of its regulatory functions. Moreover, Barclays did not have a free hand in the appointment; it had to be approved by the regulator. The voluntary arrangement was coupled with the reporting requirements which were imposed by statute. KPMG was undertaking its duties both for Barclays and for the FCA so as to assist the latter in the effective performance of its regulatory functions.
>
> 40 Moreover, there was a clear public connection between its function and the regulatory duties carried out by the FCA. But as the authorities show, that does not of itself suffice to render it amenable to judicial review.
>
> 41 Notwithstanding these powerful pointers in favour of amenability, we have finally concluded, not without some hesitation, that the public element is not sufficiently strong for the following reasons.

42 First, although the FCA had a number of more draconian powers it could have exercised, it none the less chose to adopt an essentially voluntary scheme of redress. Barclays was left to remedy its own errors and to identify, and where necessary provide redress for, unsophisticated customers who had been sold these products improperly. At this stage the FCA simply reserved the right to use more draconian statutory powers should the need arise. No doubt one of the circumstances where it might do so is if the report from KPMG which Barclays had to secure pursuant to a section 166 requirement concerning the redress scheme suggested that the scheme had not operated satisfactorily. For the purpose of obtaining that report, it did need to employ its statutory powers. But KPMG's role in the individual case, as vital as it was, could not have been imposed upon Barclays by the FCA in the exercise of its regulatory powers.

43 Second, the fact that KPMG's powers were conferred by contract is important, albeit not determinative, and in that context it is relevant that KPMG had no relationship with the customers at all. Also relevant is the fact that KPMG was not actually appointed by the FCA to do anything at all. All the regulator did was to approve their appointment as someone who had the skills and experience to carry out the functions which Barclays had to secure, pursuant to their voluntary undertaking. That approval of the appointment itself cannot suffice to attract public law duties, as the claimant conceded.

44 Third, the authorities, in particular *Ex p Aegon Life* and the *YL case* [2008] 1 AC 95 , show that the fact that private arrangements are used to secure public law objectives does not bring those arrangements into the public domain sufficient to attract public law principles. Those cases were admittedly concerned with factually dissimilar considerations, as Mr Gordon stresses, but they do suggest that the courts are reluctant to find amenability to judicial review merely because a private body is carrying out functions at the behest of a public body which, if performed by that public body, would be subject to public law principles. The fact that KPMG in reviewing offers was assisting in the achievement of public law objectives is not enough to subject it to judicial review.

45 Fourth, the FCA had no regulatory obligation to carry out the role which KPMG played had there been no willing skilled adviser. Indeed, it is highly unlikely that it would have had the resources to act in that way. It would have had to use other statutory means of securing appropriate redress. This reinforces the first point, that the arrangements were voluntary albeit under the cloud of more drastic statutory sanctions; and moreover, that they only directly engaged Barclays who could have kept KPMG out of the picture by choosing a different skilled person.

46 Finally, it is of some relevance that the FCA was not disqualified by the arrangements from taking a more active role in particular cases. It is obvious that one of the purposes underlying the scheme was that the FCA should not have to become involved in particular cases, and no doubt it would in almost all cases refer any complaints back to Barclays and KPMG. But if a claimant alleged that they were being treated unfairly by both

> Barclays and KPMG, the FCA would need to explore that complaint, even if only cursorily, to satisfy itself that there was no obvious failure in the operation of the arrangements which it had set up to provide redress. The FCA would potentially be subject to judicial review if it failed to regulate in an appropriate manner, although we do not underestimate the difficulty of establishing a breach in any particular case.
>
> 47 In short, there was no direct public law element in KPMG's role; and although it played an important part in the redress scheme, that of itself was also voluntarily undertaken albeit under threat of potentially more onerous statutory sanctions.
>
> 48 We recognise that it may be said that without some recourse to public law proceedings against KPMG, there is no effective redress to ensure that fair and reasonable offers are made. But that was also true in *Ex p Aegon Life* [1994] CLC 88 . Moreover, any public law remedy is a limited one. There would be no damages against KPMG absent a civil cause of action. The only relief would be to set aside the approval of the unfair offer and Barclays would have to consider the matter again. In this context it is not so surprising that there may be no effective redress—save perhaps exceptionally against the FCA itself—where both Barclays acts unfairly and KPMG does not identify the unfairness. The aim of the scheme is to remedy a pattern of improper selling. The broad regulatory objective is met if the banks adopt schemes to put the matter right and thereafter seek to implement them in good faith with close supervision from an objective and independent party. It does not guarantee a fair outcome in each and every case, but there is still the availability of civil actions, or possibly recourse to the Ombudsman, for those cases where the scheme does not allegedly work as it should.

17. In the final paragraph of this extract, the Divisional Court considered the point that the customer might as a result of its conclusion on amenability to judicial review have no remedy if Barclays failed to make an offer which was fair and reasonable or if an offer which was not fair was mistakenly accepted. But it considered that this consequence was not fatal. Counsel had invited the Divisional Court to assume that the customer would have no contractual remedy if Barclays did not comply with the obligations which it had undertaken to the FSA. If there were such remedies, then there would clearly be no grounds for judicial review because there would be a more appropriate, alternative remedy.

4. ISSUE 1: KPMG'S AMENABILITY TO JUDICIAL REVIEW

(a) Submissions for Holmcroft

18. Mr Richard Gordon QC, for Holmcroft, submits that the Divisional Court elevated form over substance, as, for example, with its assessment of Barclays' implementation of the redress scheme as "voluntary". The voluntary settlement agreed between Barclays and the FSA was a "deal" to avoid more stringent action. The reality was that the redress arrangements formed part of the FSA's single

regulatory exercise so that, while assisting Barclays, the skilled person approved by the FSA could veto a claim. The Divisional Court found in Holmcroft's favour on that point.

19. The redress arrangements constituted a compulsory system which moved the skilled person into the system of control. One of the terms of the settlement between the FSA and Barclays was that Barclays had to produce a provisional redress determination for each customer and provide for speedy redress. It also undertook to treat affected customers fairly. The FSA was exercising a regulatory function when it appointed a skilled person. Barclays undertook to assist the regulator's performance of its regulatory duties. The FSA did not have the resources to complete the process itself.

20. Mr Gordon submits that the method of appointment of the Independent Reviewer was not the proper focus: see *R(o/a Datafin plc) v Panel on Takeovers and Mergers* [1987] QB 815, 838, 847 and 859, and *R(Beer) v Hampshire Farmers' Market Ltd* [2004] 1 WLR 233, [16]. So, it was not enough that the FSA had approved the appointment of KPMG as the skilled person under its statutory powers. Rather, the question whether KPMG was amenable to judicial review depended on the nature of its function. Mr Gordon therefore emphasised the particular features of KPMG's involvement which Holmcroft considered critical.

21. The terms of KPMG's engagement were important. They recognised the inherent risk of conflict in the Independent Reviewer's position as between Barclays and the customer by distancing the Independent Reviewer from the customer:

> Our work will be performed to enable the Firm to comply with the draft Requirement Notice by commissioning a Skilled Person's review and to facilitate the discharge by the FSA of its statutory duties, including its regulatory and enforcement functions in respect of the Firm. *Our work will not therefore be performed for the benefit of Customers who are seeking or who obtain redress.* Despite the inherent conflict, or the perception of conflict between the Firm's interests and the interests of affected Customers and our acceptance of duties and responsibilities to the Firm and the FSA (in connection with the discharge of its statutory duties) alone, there is a risk that some Customers may seek to place reliance on our work and may feel aggrieved at the outcome for their own case or cases. Accordingly, to the fullest extent permitted by law, the Firm agrees to indemnify and hold harmless this firm, its partners and employees, against all actions, proceedings and claims brought or threatened against them or any of them, and all loss, damage and expense (including legal expenses) relating thereto, where the action, proceeding or claim is (i) brought or threatened by any Customer of the Firm and (ii) in any way relates to or concerns or is connected with the performance of the Skilled Person's review pursuant to this Engagement Letter. (emphasis added)

22. No argument was addressed to the effect of the words italicised so far as customers were concerned. Mr Gordon simply placed reliance on their existence.

23. Mr Gordon submits that the skilled person is given a measure of control over Barclays. The assessment of the Divisional Court that KPMG was "woven into" the fabric of regulation (Judgment, [39], set out in [16] of this judgment) is not appealed. KPMG had a pivotal role in the redress scheme which the FSA had created. This was reinforced by the evidence of Peter Fox, on behalf of the FCA, who said that the involvement of the skilled person was considered by the FCA to be essential because of a perceived lack of trust on the part of the customers that the banks would conduct the review objectively, concerns relating to their past conduct in selling IRHPs, and a recognition that the FSA did not have the resources to deal with each case itself. Simone Ferreira, Head of Department in the FCA's event supervision department, stated in her witness statement that the FSA's response was that all the substantive disagreements between the bank and the skilled person had to be reported to enable the FSA to have some insight into how the process was operating. The FSA had made it clear to banks that in general the skilled person's view should prevail over that of the banks. However, the skilled person could not require the bank to accept its position and, if it refused to do so, the FSA would have to consider its powers in order to require the bank to take the steps deemed necessary to provide the customer with suitable redress. The FSA would have to be satisfied that the skilled person had reached the right conclusion.

24. Mr Gordon further submits that it does not matter that the skilled person is not in a contractual relationship with the customer and cannot compel Barclays to make an offer of compensation. It is a "but for" test. An AFR assessment by KPMG was effectively decisive as to whether the customer would take the benefit. It was only if KPMG considered that it was appropriate, fair and reasonable that compensation would be paid.

25. Moreover, contrary to the Divisional Court's second reason Mr Gordon argues, the contractual position was not relevant unless it diminished the force of regulatory control, which was not the case here. The fact that the powers of the skilled person derived from contract was entirely neutral in this case because of the public law character.

26. The FCA relies on *YL v Birmingham City Council* [2008] 1 AC 95, but the provision of redress in this case was inherently a public function. Neither that case nor *R(Aegon Life) v Insurance Ombudsman Bureau* [1994] 1 CLC 88 assisted.

27. The submissions already summarised constitute Mr Gordon's criticism of the Divisional Court's first three reasons. Mr Gordon submits that the fourth reason of the Divisional Court is undermined by the fact that the FSA reserved power to impose further sanctions. The fifth reason pointed towards amenability to judicial review.

28. Moreover, amenability to judicial review was a point of principle, and the Divisional Court were wrong to approach it as one of balancing the various factors.

(**b) Submissions on behalf of KPMG**

29. Mr Javan Herberg QC, for KPMG, seeks to uphold the decision of the Divisional Court for the reasons that it gave.

30. Mr Herberg submits that Holmcroft's judicial review claim is really a contractual challenge to Barclays' decision not to award it compensation for the consequential loss that it claims to have suffered due to the misselling. The source of the power was purely contractual. The skilled person contracted its services because of Barclays' own promise to the FSA. The reporting role could not confer on KPMG a public law framework. The skilled person did not supplant the FSA's role. This is not a species of public law decision-making. There was a suite of other powers available to the FSA some of which included customer redress. It is impossible to say that because those might lead to public law remedies, this process must also do so. The case law pointed against amenability to judicial review in this situation.

31. In conclusion, the source of KPMG's power to make AFR assessments was purely contractual, derived from a contract to provide services for reward to assist in making offers to customers. AFR assessments had no effect on customers' rights. The FSA could not have required Barclays to offer redress but Barclays gave an undertaking to do so. It is not enough to show that, if it had not done so, the FSA might have imposed some other sanction.

(c) Submissions on behalf of the FCA

32. Mr Richard Coleman QC, for the FCA, also seeks to uphold the decision of the Divisional Court for the reasons that it gave.

33. Mr Coleman submits that the question which the Divisional Court had to decide was one of fact and degree, evaluation, applying the law to the facts, and that an appellate court is restricted to considering whether a relevant factor was wrongly left out of account or whether an irrelevant factor was taken into account.

34. In addition, Mr Coleman makes two broad submissions: (1) by analogy with decided cases, KPMG was not amenable to judicial review; and (2) KPMG was not doing anything that could be described as a governmental function.

35. Mr Coleman submits that Holmcroft does not refer to any case where the commercial entity is carrying on for profit an activity under a commercial contract which it was under no public duty to carry out. This case is analogous to *R (o/a Aga Khan) v Jockey Club* [1993] 1 WLR 909, where this Court held that a decision of the Jockey Club was not amenable to judicial review at the instance of a member. (The reference to a body being "woven into" a system of regulation is derived from the judgment of Sir Thomas Bingham MR in this case).

36. Mr Coleman, in a written submission signed also by Ms Kerenza Davis, relies on *YL* for the following propositions:

    i. The fact that a service is for the public benefit does not mean providing the service is a public function (per Lord Mance, [120], Lord Neuberger, [135]; see also [36] of the judgment of the Divisional Court).

ii. The fact that a function has a public connection with a statutory duty of a public body does not necessarily mean that the function is itself public (per Lord Neuberger, [140]; and see also [36] and [40] of the judgment of the Divisional Court).

iii. The fact that a public authority could have performed the function (Lord Neuberger [149] [160] and [162]) does not mean that the function is a public one if it is done by a private body (Lord Scott [29]-[31]; Lord Neuberger [144] and [14]; and see [36] and [44] of the judgment of the Divisional Court).

iv. The private profit-earning motivation behind a private body's operations points against treating it as a person with a function of a public nature (per Lord Mance, [116]).

v. Functions of a public character are essentially governmental functions (Lord Mance [115]; Lord Neuberger [159], [160] and [162]).

(d) Submissions on behalf of Barclays

37. Ms Dinah Rose QC, for Barclays, made short submissions on this point, but they are covered above. Her more detailed submissions on this appeal were focused on the fairness issue, which is the second issue on this appeal.

(e) My conclusions on KPMG's amenability to judicial review

38. Having considered the parties' submissions, I conclude for the reasons given below that the Divisional Court was right in the conclusion that it reached for holding that KPMG was not amenable to judicial review. At the same time, I consider that the Divisional Court may be said to have focussed too narrowly on the source of the Independent Reviewer's power and that, as I explain below, it should have taken a wider view of the regulatory position and factual context.

39. I shall consider first the authorities which have been cited, then the regulatory position and then the factual context.

40. The authorities cited demonstrate, as the Divisional Court pointed out, that the fact that the decision emanates from contractual arrangements does not mean that public law principles are inapplicable. The question is whether the body is carrying out a public law function: see *Datafin, Beer* and *Aegon Life.*

41. In the leading case of *Datafin,* the decision sought to be reviewed was that of the Panel on Takeovers and Mergers ("the Panel"). The applicant was bidding in competition with another company for a controlling interest in a third company. Datafin considered that the other company was acting in breach of the rules of the Panel on takeovers, but the Panel ruled against it. Datafin then sought judicial review of the decision of the Panel and this Court had to consider whether the Panel was amenable to judicial review. Sir John Donaldson MR held at pages 838-9:

> [The Panel] is without doubt performing a public duty and an important one. This is clear from the expressed willingness of the Secretary of State for Trade and Industry to limit legislation in the field of take-overs and to use the Panel as

> the centrepiece of his regulation of that market. The rights of citizens are indirectly affected by its decisions, some, but by no means all of whom, may in a technical sense be said to have assented to this situation, eg the members of the Stock Exchange.... Its source of power is only partly based on moral persuasion and the assent of institutions and their members, the bottom line being the statutory powers exercised by the Department of Trade and Industry and the Bank of England. In this context I should be very disappointed if the courts could not recognise the realities of executive power and allowed their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted.

42. Despite the fact that the legal source of the Panel's power was merely contractual and private, and that its functions were hybrid, partly public and partly private, this Court held that the Panel was amenable to judicial review. In reaching this conclusion, this Court looked beyond the mere source of the Panel's power and the manner in which it had been appointed: see in particular per Lloyd LJ at page 847, and per Nicholls LJ at page 850.

43. Unlike *Datafin*, *Aegon Life* concerned a compensation scheme administered by the Insurance Ombudsman Bureau ("the IOB"). This scheme had some statutory recognition under the Financial Services Act 1986 ("the 1986 Act"), but it was originally set up before that Act. By 1993, it was supported by some 350 insurers representing some 90% of the insurers eligible to participate in it. If the IOB did not deal with customer complaints, they would have to be dealt with under the rules of a self-regulatory organisation recognised under the 1986 Act. Rose LJ, sitting in the Divisional Court, with whom McKinnon J agreed, held that the IOB was not amenable to judicial review. He derived certain principles from *Aga Khan*, including the following principle which makes it clear that a body whose powers are derived from contract may be amenable to judicial review:

> A body whose birth and constitution owed nothing to any exercise of governmental power *may* be subject to judicial review if it has been woven into the fabric of public regulation or into a system of governmental control (per Sir Thomas Bingham MR at pp921C and 923H) or is integrated into a system of statutory regulation (per Hoffmann LJ at p932H) or is a surrogate organ of government (per Hoffmann LJ at p932D) or but for its existence a governmental body would assume control (per Farquharson LJ at p930B and Hoffmann LJ at p932B)…

44. Rose LJ also relied on a passage from the judgment of Leggatt LJ in *R(o/a Briggs) v Corporation of Lloyd's* [1993] 1 Lloyd's Law Rep 176, 185 where Leggatt LJ held that Lloyd's was not amenable to judicial review at the instance of a name (an underwriting member of the Society of Lloyd's) who had agreed to its rules containing powers to perform the act which the name sought to judicially review:

> The fact is that even if the Corporation of Lloyd's does perform public functions, for example, for the protection of policy holders, the rights relied on in these proceedings relate exclusively to the contract governing the relationship between Names and their members' agents and, in some instances, their managing agents. We do not consider that that involves public law. This is consonant with Mr Justice Saville's conclusion that a Name was not entitled to disregard a cash call made in good faith by the

> members' agents. We accordingly endorse Mr. Pollock's submission that "all of the powers which are subject of complaint in the present application are exercised by Lloyd's over its members solely by virtue of the contractual agreement of the members of the Society to be bound by the decisions and directions of the Council and those acting on its behalf".
>
> Lloyd's is not a public law body which regulates the insurance market. As Mr Pollock remarked, the Department of Trade and Industry does that. Lloyd's operates within one section of the market. Its powers are derived from a private Act which does not extend to any persons in the insurance business other than those who wish to operate in the section of the market governed by Lloyd's and who, in order to do so, have to commit themselves by entering into the uniform contract prescribed by Lloyd's. In our judgment, neither the evidence nor the submissions in this case suggest that there is such a public law element about the relationship between Lloyd's and the Names as places it within the public domain and so renders it susceptible to judicial review.

45. The facts of *Aegon Life* make it the closest to this case of all the authorities cited to us. As explained, there was a pre-existing voluntary arrangement for customer redress. On the other hand, there are important differences between the facts of the present case and the facts of that case, as Mr Gordon pointed out. In particular, in this case there was a requirement by the FSA. As the Divisional Court held, the Independent Reviewer had a key role in the scheme (Judgment, [28]).

46. *YL* concerned a different issue. The question was whether a private company, in providing accommodation and care for the claimant, was exercising a public law function for the purposes of section 6(3)(b) of the Human Rights Act 1998. The majority considered that the actual provision of care was not a public function. Mr Gordon submits that this case is not analogous. The present case, he submits, was closer to determining eligibility for care. I do not consider that this is a valid argument because there was no policy element in the work of KPMG in making AFR assessments. The list of propositions from *YL* put forward by Mr Coleman and Ms Davis is helpful but does not take matters much further than the authorities cited above.

47. In my judgment the passage from the judgment of Dyson LJ in *Beer* cited by the Divisional Court at [26] of its judgment is important because it summarises the jurisprudence on amenability and makes it clear that all the circumstances relating to the nature and function of the power are relevant. That passage reads:

> the law has now been developed to the point where, unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging. But it provides the framework for the investigation that has to be conducted.

48. The point that all the circumstances should be considered is relevant to this case. In my judgment, the first four reasons given by the Divisional Court disclose a concern with the source of KPMG's power as Independent Reviewer. Thus, the first and second reasons relate to the origin of the arrangements and the source of the power to make an AFR assessment. The Independent Reviewer had no statutory power to make AFR assessments. Its power to make those assessments derived from its engagement by contract by Barclays, though Barclays was of course acting under a requirement made by the FSA and the redress arrangements undoubtedly in general promoted the objectives of statutory regulation. The third reason was largely an analysis of the authorities on the consequence flowing from the source of the power. In its fourth reason, the Divisional Court emphasised that the FSA could not itself have done what the skilled person was engaged by Barclays to do, again a point about the source of the power. That brings me to the second area I wish to consider, namely the regulatory position.

49. As to the regulatory powers, consistently with the Divisional Court's fourth reason, the parties stressed in argument that the powers to appoint a skilled person went no further than to require him to investigate and report to the FSA. The rest of his role in relation to the AFR assessments was grafted on to that position.

50. I would analyse the position of the skilled person as part of a wider regulatory context. In my judgment, it is necessary to stand back and examine the function that the Independent Reviewer fulfilled in the overall scheme of things. The so-called voluntary settlement involved an investigation by the FSA into IRHPs and its conclusion that they had been missold to non-sophisticated investors who ought to be compensated for any recoverable loss. It obtained the commitment of the banks which had been responsible for the misselling to provide fair, reasonable and appropriate compensation to their customers. It policed this commitment by a high-level review conducted on its behalf by the skilled person, followed by detailed reporting to itself. The FSA did not seek to be involved in the negotiations with the individual customers, so the main activity for agreeing compensation rested with the bank and its customer and constituted the pursuit of private law rights. To say that the function of making AFR assessments was outside the scheme of statutory regulation in my judgment involves too narrow a view of the FSA's statutory functions and what it was aiming to achieve. To this extent I would accept Mr Gordon's submission on this point.

51. Turning to the relevant factual context, I consider that this too can and should be viewed more widely. There are similarities between the scheme agreed between the banks and the FSA and other industry-wide redress schemes for consumers who were entitled to compensation. In this context, "consumers" are those persons who under FSA rules were non-sophisticated investors for whom the IRHP was not a suitable product. There were two different features in this case: first the industry regulator, the FSA, imposed an obligation on the banks to grant redress and, second, the regulator required Barclays to engage the skilled person to opine on whether the compensation offered was appropriate, fair and reasonable.

52. Those features, however, do not alter the nature of the scheme which is essentially for the pursuit of private rights. Thus, customers' legal rights were unaffected, although as a practical matter any refusal of the Independent Reviewer to make a favourable AFR assessment might lead to the customer receiving a better offer under

the scheme. The FSA made no stipulation that there should be a process for dealing with a customer's complaint that the skilled person ought not to have given a confirmation, provided of course that the confirmation qualified as a confirmation for the purposes of its settlement with the bank. There is nothing to suggest that it intended that there should be any challenge on public law grounds to the issue of the confirmation and therefore in my view a review of the AFR assessment was over and beyond the regulatory exercise performed by the FSA. The compensation was moreover to be negotiated on private law principles: limitation, heads of recoverable damage and causation. If compensation was agreed, that agreement would be enforceable through the courts: the FSA imposed no system for this. The FSA did not aim to remove the role of the courts in enforcing civil claims, and its regulatory function did not extend to replacing the role of the court. Far from being neutral the fact that the engagement of the Independent Reviewer was contractual was all of a piece with the fact that it was not performing any public function.

53. The reality is that Holmcroft's bringing of a complaint against KPMG was ancillary to pursuing a private law claim. The requirements of the FSA merely overlaid, or sat alongside, a private dispute. They did not change the character of that dispute, which was fundamentally a private law matter.

54. Contrary to the submission of Mr Gordon, the possibility that regulatory sanctions might still be imposed if the FSA considered that that was an appropriate step does not mean that actions of the Independent Reviewer are amenable to judicial review. Sanctions were a separate matter and only a possibility.

55. My conclusion exposes a gap in the protection which the FSA secured for customers of Barclays, and the question arises whether that undermines the conclusion. I do not consider that to be so. As the Divisional Court made clear at [48] of its judgment, if an AFR assessment was not judicially reviewable, the customer would have no means of redress in public law where the offer was insufficient and the skilled person gave a confirmation incorrectly. However, the customer would be free to reject the offer and his legal remedies against the bank for the misselling would be unaffected. The protection intended by the AFR assessment is lost only if the customer is unaware of the defect. As to this, as the Divisional Court pointed out, the FSA did not confer on customers a guarantee that every customer will receive an offer which is appropriate, fair and reasonable. The regulatory objectives could still be met because the institution of the redress arrangements by the FSA made it likely that the customer would do so, and in addition would be likely to help restore confidence in the domestic banking system, which was one of the aims of the FSA: on this, see the evidence of Peter Fox, [23] above.

56. Contrary to Mr Coleman's submission, the Divisional Court did not balance the factors in the way that leads to a judicial evaluation which should not be overturned on an appeal unless it is clearly wrong. Amenability to judicial review is a question of law.

57. As already explained, I consider that the conclusion of the Divisional Court was correct and that the decision of the Independent Reviewer is not amenable to judicial review, and that accordingly this ground of appeal fails.

5. ISSUE 2: FAIRNESS IN RELATION TO ACCESS TO BARCLAYS' INTERNAL RECORDS

58. In the light of my conclusions on Issue 1, this issue does not arise.

59. I do not propose to deal with it for that reason and for the further reasons given below.

60. As Ms Dinah Rose QC, for Barclays, pointed out, Holmcroft has failed to identify any relevant point in support of its claims for consequential loss that it could not make because of the non-disclosure to it of the internal records of Barclays. This is so even though those records have now been disclosed to it. I also bear in mind that, after careful consideration of the material, the Divisional Court concluded that the summaries of the reasons which Barclays gave Holmcroft for its decision to reject the claim for consequential loss were accurate. It is not enough for Holmcroft to argue on this appeal that it might have been able to find a point if it had disclosure at the time.

61. In addition, again as Ms Rose points out, Holmcroft had remedies under the general law against Barclays which it could have pursued for the misselling of the IRHPs. By the time KPMG had made its AFR assessment, its claims had become statute-barred. However, Barclays had offered Holmcroft the possibility of a standstill on limitation while the process initiated by the FSA was being undertaken, but, for reasons that have not been explained, Holmcroft did not take this offer up. In any event, Holmcroft could have issued claims on a precautionary basis to protect its position in respect of those remedies.

62. In those circumstances, irrespective of its unfairness argument, Holmcroft's claims for judicial review would have been refused as a matter of discretion.

6. CONCLUSION

63. For the reasons given above, I would dismiss this appeal.

Lord Justice Newey:

64. I agree.

Lord Justice Coulson

65. I also agree.

APPENDIX TO JUDGMENT OF ARDEN LJ

SECTION 166 FINANCIAL SERVICES AND MARKETS ACT 2000

(as in force at the time of the events in these proceedings)

166.— Reports by skilled persons.

(1) The Authority may, by notice in writing given to a person to whom subsection (2) applies, require him to provide the Authority with a report on any matter about which the Authority has required or could require the provision of information or production of documents under section 165.

(2) This subsection applies to–

(a) an authorised person ("A"),

(b) any other member of A's group,

(c) a partnership of which A is a member, or

(d) a person who has at any relevant time been a person falling within paragraph (a), (b) or (c),

who is, or was at the relevant time, carrying on a business.

(3) The Authority may require the report to be in such form as may be specified in the notice.

(4) The person appointed to make a report required by subsection (1) must be a person–

(a) nominated or approved by the Authority; and

(b) appearing to the Authority to have the skills necessary to make a report on the matter concerned.

(5) It is the duty of any person who is providing (or who at any time has provided) services to a person to whom subsection (2) applies in relation to a matter on which a report is required under subsection (1) to give a person appointed to provide such a report all such assistance as the appointed person may reasonably require.

(6) The obligation imposed by subsection (5) is enforceable, on the application of the Authority, by an injunction or, in Scotland, by an order for specific performance under section 45 of the Court of Session Act 1988.