Neutral Citation Number: [2026] EWHC 1566 (Admin)

Case No: AC-2024-LON-002686

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2026

Before :

Dan Squires KC (sitting as Deputy High Court Judge)

- -

Between :

Wills & Trust Independent Financial Planning Limited	**Claimant**
- and -	
Financial Ombudsman Service Limited	**Defendant**
-and-	
(1) Mr Steven Booth **(2) Mrs Susan Booth**	**Interested Parties**

- -

Ruth Bala (instructed by Edesia Law) for the **Claimant**
Stephanie David (instructed by the Financial Ombudsman Service) for **the Defendant**
The **Interested Parties** did not appear and were not represented

Hearing date: 16 April 2026

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APPROVED JUDGMENT

This judgment was handed down remotely at 2pm on 23 June 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives

Dan Squires KC sitting as a Deputy High Court Judge:

Introduction

1. This is a challenge brought by the Claimant, Wills & Trust Independent Financial Planning Limited ("W&T"), a firm providing financial services, against a final decision of Mr Kuku, one of the ombudsmen of the Financial Ombudsman Service Limited ("the FOS"). Mr Kuku's decision, of 29 April 2024, was to uphold a complaint brought against W&T by the Interested Parties, Mr and Mrs Booth ("the Booths"), who had had investments managed by W&T.

2. By way of these judicial review proceedings, W&T challenge the decision of Mr Kuku ("the Ombudsman") to uphold the Booths' complaint. They argue that he exceeded his jurisdiction by determining matters that did not form part of the complaint (Ground 1), and that aspects of his decision were irrational or otherwise not properly explained (Grounds 2-4). W&T also argue that the Ombudsman's decision on redress, and in particular the method he directed be adopted for calculating the compensation W&T should pay the Booths, was irrational (Ground 5). The FOS resists the grounds of challenge. It also argues that, even if the Ombudsman erred in the way alleged by W&T, it is highly likely that the outcome would not have been substantially different, so that I should grant no relief pursuant to the Senior Courts Act 1981 s 31(2A).

3. I am grateful to counsel, both of whom put the case for the respective parties in a clear and helpful way, in writing and orally.

Legal Framework

Primary legislation

4. The FOS was established by section 225(1) of the Financial Services and Markets Act 2000 ("FSMA 2000") to provide a scheme under which "certain disputes may be resolved quickly and with minimum formality by an independent person". The scheme is known as the "ombudsman scheme" (FSMA 2000 s 225(3)), and it seeks, in essence, to resolve complaints brought by customers about the provision of financial services.

5. The FOS has a "compulsory jurisdiction" in relation to "complaints" if certain conditions are met. They are set out in FSMA 2000 s 226 which provides:

> "(1) A complaint which relates to an act or omission of a person (the respondent) in carrying on an activity to which compulsory jurisdiction rules apply is to be dealt with under the ombudsman scheme if the conditions mentioned in subsection (2) are satisfied.
>
> (2) The conditions are that –
>
> (a) the complainant is eligible and wishes to have the complaint dealt with under the scheme;

> (b) the respondent was an authorised person … at the time of the act or omission to which the complaint relates;
>
> (c) the act or omission to which the complaint relates occurred at a time when compulsory jurisdiction rules were in force in relation to the activity in question.
>
> (3) "Compulsory jurisdiction rules" means rules –
>
> (a) made by the FCA for the purposes of this section; and
>
> (b) specifying the activities to which they apply.
>
> (4) Only activities which are regulated activities, or which could be made regulated activities by an order under section 22, may be specified."

6. FSMA 2000 s 228(2) provides that "a complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case."

7. FSMA 2000 s 229 deals with "awards". It provides:

> "(1) This section applies only in relation to the compulsory jurisdiction.
>
> (2) If a complaint which has been dealt with under the scheme is determined in favour of the complainant, the determination may include—
>
> (a) an award against the respondent of such amount as the ombudsman considers fair compensation for loss or damage (of a kind falling within subsection (3)) suffered by the complainant ("a money award");
>
> (b) a direction that the respondent take such steps in relation to the complainant as the ombudsman considers just and appropriate (whether or not a court could order those steps to be taken).
>
> (3) A money award may compensate for—
>
> (a) financial loss; or
>
> (b) any other loss, or any damage, of a specified kind."

The Financial Conduct Authority Handbook

8. FSMA 2000 s 225(4) and Schedule 17 paragraphs 13 and 14 provide that the Financial Conduct Authority ("FCA") must make rules governing the jurisdiction of the ombudsman. These are contained in the FCA's Handbook. In the Handbook "R" denotes "rules" and "G" denotes "guidance".

9. The Handbook deals with complaints in the section entitled "Dispute Resolution: Complaints" ("DISP"). A "complaint" for these purposes is defined in the Handbook Glossary as "any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service … which (a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and (b) relates to an activity of that respondent…"

10. The compulsory jurisdiction rules referred to in FSMA 2000 s 226(3) are also set out in the Handbook. DISP 2.2.1G provides that:

> "The scope of the Financial Ombudsman Service … jurisdiction… depends on:
>
> (1) the type of activity to which the complaint relates…
>
> (2) the place where the activity to which the complaint relates was carried on…
>
> (3) whether the complainant is eligible …and
>
> (4) whether the complaint was referred to the Financial Ombudsman Service in time…"

11. DISP2 sets out the criteria necessary to meet the four conditions of the Ombudsman's jurisdiction. There is no dispute that the Booths were eligible complainants and were complaining about activities falling within the scope of the FOS' jurisdiction. In relation to the complaint being referred to the FOS "in time", DISP 2.8.1R provides that "[t]he Ombudsman can only consider a complaint if … the respondent has already sent the complainant its final response…" In those circumstances the complainant must complain to the Ombudsman within six months of the respondent providing its final response.

12. As set out above, FSMA 2000 s 228(2) requires that complaints be determined by reference to what is in the opinion of the ombudsman "fair and reasonable in all the circumstances of the case." That is repeated in DISP 3.6.1R. DISP 3.6.4R further provides that:

> "In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:
>
> (1) relevant: (a) law and regulations; (b) regulators' rules, guidance and standards; (c) codes of practice; and
>
> (2) (where appropriate) what he considers to have been good industry practice at the relevant time."

13. DISP 3.5.1R provides that "The Ombudsman will attempt to resolve complaints at the earliest possible stage and by whatever means appear to him to be most appropriate, including mediation or investigation."

14. DISP 3.7 makes provision in relation to "awards by the Ombudsman". It provides at DISP 3.7.1R:

> "Where a complaint is determined in favour of the complainant, the Ombudsman's determination may include one or more of the following:
>
> (1) a money award against the respondent; or
>
> (2) an interest award against the respondent; or
>
> (3) a costs award against the respondent; or
>
> (4) a direction to the respondent."

15. DISP 3.7.2R provides:

> "[A] money award may be such amount as the Ombudsman considers to be fair compensation for one or more of the following:
>
> (1) financial loss (including consequential or prospective loss); or
>
> (2) pain and suffering; or
>
> (3) damage to reputation; or
>
> (4) distress or inconvenience;
>
> whether or not a court would award compensation."

16. The FCA also has the power to make rules and principles that apply to authorised persons (such as W&T): see FSMA 2000 ss 137A and 139A. Those, too, are set out in the FCA Handbook, and they form part of the "regulations", "rules", "guidance" and "standards" that an ombudsman must consider when determining a complaint pursuant to DISP 3.6.4R. The FCA Handbook contains "Principles" for businesses at PRIN2.1. They include "A firm must conduct its business with due skill, care and diligence" (Principle 2); "A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems." (Principle 3); "A firm must pay due regard to the interests of its customers and treat them fairly" (Principle 6); and "A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading" (Principle 7).

17. The FCA Handbook also contains a "Conduct of Business Sourcebook" ("COBS") setting out appropriate conduct for those providing financial services. A number of the COBS rules are relied on by the parties in these proceedings or were referred to by the Ombudsman in his decision. They are:

i) COBS 4.2.1R which provides that "[a] firm must ensure that a communication or a financial promotion is fair, clear and not misleading."

ii) COBS 6.1ZA which sets out information that must be provided by relevant firms to their clients. COBS 6.1ZA.8R provides that where investment firms provide "portfolio management services" they should provide information on a number of issues. They include "(a) information on the method and frequency of valuation of the financial instruments in the client portfolio; (b) details of any delegation of the discretionary management of all or part of the financial instruments or funds in the client portfolio…"

iii) COBS 2.1 deals with "acting honestly, fairly and professionally" and sets out the "client's best interests rule." It provides at COBS 2.1.1(1)R "A firm must act honestly, fairly and professionally in accordance with the best interests of its client".

Legal principles

18. A number of authorities have considered the ombudsman scheme. The key principles, relevant for present purposes, are as follows:

i) The ombudsman deals with "complaints not legal action" (*R (Heather Moor & Edgecomb) v FOS* [2008] EWCA Civ 642; [2008] Bus LR 1486 paragraph 90). An ombudsman is thus "not required to determine a complaint in accordance with the common law [and has] … a much wider jurisdiction" (*R (Options UK Personal Pensions LLP) v FOS* [2024] EWCA Civ 541; [2024] Bus LR 1307 paragraph 73), and can "award … compensation … in circumstances in which an action for damages would not lie" (ibid paragraph 75).

ii) The question for the ombudsman in determining a complaint is what, in his or her "opinion", is "fair and reasonable in all the circumstances" (FSMA 2000 s 228(2). That means the "test … is … a subjective one for the ombudsman" and the ombudsman operates within a "wide latitude … so long as he is fair and reasonable in his approach to the case and the conclusions he reaches are not perverse" (*R (Berkeley Burke SIPP Administration Ltd) v FOS* [2018] EWHC 2878 (Admin); [2019] Bus LR 437 paragraph 80).

iii) It is for the ombudsman to interpret a complaint and "it is a necessary part of [the ombudsman's] function to determine the nature of [the complainant's] complaint" (*R (Full Circle Asset Management) v FOS* [2017] EWHC 323 (Admin) paragraph 52). Provided a complaint has been made and falls within an ombudsman's jurisdiction, how the complaint is to be interpretated is a matter for the ombudsman, and the "wide latitude" enjoyed by an ombudsman applies not only in relation to how to determine a complaint, but how to interpret it. As Ouseley J held in *R (TenetConnect Services Ltd) v Financial Ombudsman Service* [2018] EWHC 459 (Admin) "The Ombudsman Scheme is intended to

be an informal, reasonably speedy procedure for the resolution and remedying of complaints, without the precise definition which pleadings are intended to bring to a legal claim. [The ombudsman] is ideally placed to reach a judgment on what the complaint is about…" (paragraph 47) What is included in the complaint is thus "a matter of fact for the Ombudsman, subject [only] to review on rationality grounds" (ibid, paragraph 48).

iv) An ombudsman also has a wide discretion in relation to redress. As Stanley Burton J (as he then was) held in *R (IFG Financial Services Ltd) v Financial Ombudsman Service* [2005] EWHC 1153 (Admin) at paragraphs 17-19:

> It can be seen that the language of [FSMA 2000] section 229(2) [which provides that if "a complaint … is determined in favour of the complainant … the determination may include - … an award against the respondent of such amount as the ombudsman considers fair compensation for loss or damage"] reflects, to some extent, the language of section 228(2). The financial award that is required to be made, if one is made at all, is of such amount as the ombudsman considers fair compensation for loss or damage of the kinds referred to in subsection (3). …
>
> It is not suggested that the requirement that a complaint be determined by reference to what is fair and reasonable in all the circumstances of the case is materially any different from the requirement that a money award should be of such amount as the ombudsman considers fair compensation for loss or damage.
>
> Again, it is to be pointed out that the ombudsman is not, at least in terms of section 229(2), limited to awarding that which would be awarded by law. It is an award of the amount which he considers (and again that implies a subjective consideration), subject to the limits of reasonableness, fair compensation for loss or damage falling within subsection (3).

In *Options*, Asplin LJ held that what constitutes "fair" compensation for loss and damage pursuant to 229(2) FSMA is "not circumscribed in any way" (paragraph 75), and "enables compensation to be awarded in circumstances in which an action for damages would not lie" (ibid). How and whether to award compensation, as with the ombudsman's decision on how to interpret a complaint and whether to uphold it, is for the ombudsman and can only be challenged if the decision is irrational.

v) As with any expert regulator, the court will be slow to conclude that an ombudsman has reached a conclusion, within his or her field of expertise, that is irrational. As Collins J held in *R (Green) v Financial Ombudsman Services Ltd* [2012] EWHC 1253 (Admin) paragraph 11 "where [a] decision maker has an expertise and is given a wide discretion, it will inevitably be more difficult to establish that a particular

decision was irrational. That is not because the hurdle is set at a higher level but because the court must respect the expertise and the powers expressly conferred by Parliament." As Collins J continued, however, "where no particular expertise is required to reach a conclusion of fact and that conclusion is challenged as being irrational, there is no reason to approach the matter in any different way from that generally applied in judicial review claims" (ibid).

vi) As to the test for irrationality, the Divisional Court held in *R (The Law Society of England and Wales) v The Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649 at paragraph 98 that "irrationality" has two aspects (and see further *R (KP) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] EWHC 370 (Admin) per Chamberlain J at paragraphs 55-57). The first aspect of irrationality is concerned with "whether the decision under review is capable of being justified or whether in the classic Wednesbury formulation it is 'so unreasonable that no reasonable authority could ever have come to it'" or to put it another way "whether the decision is outside the range of reasonable decisions open to the decisionmaker" (*The Law Society* paragraph 98). The second aspect of irrationality is that the decision contains "a demonstrable flaw in the reasoning" such as "reasoning involv[ing] a serious logical or methodological error" (ibid). The two aspects of irrationality are related, but distinct. The first is concerned with the outcome of a decision or an aspect of a decision: whether it is outside the range of decisions open to a reasonable ombudsman to conclude it is fair and reasonable to uphold a complaint or to make particular factual findings or to interpret a complaint in a particular way. As Collins J observed in *Green* at paragraph 38, based on this aspect of irrationality, "I have to bear in mind that I can only quash the decision if persuaded that the ombudsman could not reasonably on the facts found by him have concluded as he did… Whether or not I would have been persuaded that [the relevant fact] had been established is not the relevant test." The second aspect of irrationality referred to in *The Law Society* is concerned with the process of reasoning by which a decision was reached, and whether there was a logical or methodological flaw in that process. The court is not here concerned with whether no reasonable ombudsman could have reached a particular conclusion, but whether it is possible to identify some logical or methodological error or flawed reasoning in the ombudsman's decision.

vii) In relation to his decision, an ombudsman is required to "explain his reasons" including "the matters taken into account and their relevance or otherwise" (*Options* paragraph 77). An ombudsman should not be "operating by the length of his foot" but by some explicable criteria in reaching a conclusion as to what is fair and reasonable in all the circumstances (ibid). Given that the intention of the ombudsman scheme is to resolve disputes quickly and with minimum formality, however, "[i]t is axiomatic that any ombudsman's decision letter should be read as a whole and in a common sense, and certainly not in a legalistic, way" (*R (Garrison Investment Analysis) v Financial Ombudsman Service*

> [2006] EWHC 2466 (Admin) paragraph 5). As Irwin J held in *R (Williams) Financial Ombudsman Service* [2008] EWHC 2142 at paragraph 26: "[t]he ombudsman has a duty to give clear and comprehensible reasons for his decision… [However ombudsmen's decisions] are reports, not pleadings. A party to a complaint must know why he has won, or perhaps more importantly why he has lost, in clear and comprehensible terms. That is the requirement, but that is the only requirement and it can be met in a reasonably flexible way."

Factual background

The relationship between W&T and the Booths

19. W&T is a chartered financial planning firm. It is authorised by the FCA, and has permission to undertake regulated activities of advising on, and arranging, investments, insurance policies and mortgages.

20. Mr and Mrs Booth are a married couple, and Mr Booth is a retired solicitor. On 16 February 2017, shortly before Mr Booth's intended retirement, the Booths met with W&T's founder and principal, David Batchelor, to discuss the investment of around £1.3M of the couple's assets. That consisted of their pensions, an ISA and proceedings of a property sale. On the same day, the Booths entered a client agreement with W&T. Pursuant to the agreement they appointed Mr Batchelor as their financial adviser.

21. The Booths were impressed by Mr Batchelor and trusted him and the recommendations he made. As set out further below, the Ombudsman found that the personal relationship between the Booths and Mr Batchelor was important to their decision to invest their money with W&T.

22. On 31 March 2017, W&T provided the Booths with a "Wealth Management Plan" recommending a "family client" service. That meant, according to the Plan, a "very proactive relationship", including close daily monitoring, a full asset allocation review on a monthly basis, a quarterly review of each investment and priority access to W&T over other customers. Having considered the Booths' risk profile and financial position, W&T made recommendations on the investment of the Booths' portfolio. W&T also recommended that the portfolio was placed in a "WRAP" account, meaning it was a single account containing a variety of different investments each with their own tax wrappers, and that the Booths placed the portfolio on an investment administration platform called "Transact". The Booths accepted the recommendations.

23. As set out below, the core of the Ombudsman's decision concerned a transfer of the Booth's portfolio to a discretionary management firm in 2018. The process began on 14 July 2018 when Mr Batchelor sent a letter to the Booths headed "very important." The letter announced the establishment of a discretionary investment company called "WTDFM" which traded as "Trust DFM". The purpose of establishing Trust DFM was to enable W&T clients' portfolios to be subject to "discretionary management", meaning, according to the letter, that investment decisions could be made "without the … need to gain

[clients] approval on each separate occasion". For regulatory reasons, W&T could not provide discretionary management itself, and Trust DFM was set up for that purpose. The letter to the Booths stated that Trust DFM was set up, at the request of the FCA, to "enable us [i.e. W&T] to actively manage your investments without requesting your approval every time we need to make a change". Trust DFM, as explained, would "manage your money — and my money, and all the money of the [W&T] team". It was explained that Trust DFM "is wholly owned by the same staff and shareholders who own [W&T]" and that "[y]our investments will still be managed by the existing investment committee and team, via the existing Advanced Investment Strategy," The letter further stated "[w]hat will not change is that we will still inform you of every change or amendment that we intend to make, or have made quickly because of market conditions, and we will continue to provide you with the same levels of communication about our views on the market that you currently receive directly or access via the Wills & Trusts website. And, most importantly of all, there will be no increase in your fees".

24. The letter continued, under the heading "disadvantages": "[w]e have only been able to identify two downsides in the move to [Trust DFM]". The first was the "hassle" of the process of the move, but that was described as minimal. The second potential downside was that "there will no longer be the opportunity for you to decline the changes that are made to the managed investments beforehand". This too was said to be a "very slight disadvantage" given that it had been many years since anyone questioned W&T's advice "and even longer since anyone decided not to follow [it]." Mr Batchelor concluded the letter: "[c]onsidering the downsides, I believe there is a significant advantage in moving to [Trust DFM] simply because of the ability it gives us to adjust your investments quickly and without waiting to receive your approval".

25. The 14 July 2018 letter to the Booths was regarded as important by the Ombudsman and is discussed further below. In essence, and I did not understand this to be disputed, the letter intimated to the Booths that there were no real downsides to moving their investments to Trust DFM, and that the only substantive change would be to enable adjustments to be made to their investments more quickly as their consent for each transaction would not be required. Otherwise, everything would remain the same. W&T staff and shareholders would own Trust DFM, the same investment committee would manage the Booth's investments, and the same communication would be provided. The change was being made for regulatory reasons as W&T could not directly act as discretionary investment managers, and they therefore needed to set up another entity to enable "us" (i.e. W&T) "to actively manage your investments without requesting your approval every time we need to make a change". Mr Batchelor advised the Booths to accept the recommendation to transfer their investment, which they duly did. The transfer of the Booths' portfolio to Trust DFM took effect on 1 September 2018.

26. A further significant event, as far as the Booths' subsequent complaint to the Ombudsman was concerned, was that on 8 September 2020 W&T advised the Booths to transfer their portfolio from Transact onto a new bespoke investment platform called "Multrees". The transfer, it was said, would take place in

October/November 2020. The Booths agreed. There were, however, delays in the migration and it did not complete until April 2021. One of the consequences of the delay was that the Booths missed out on a quarterly re-balancing of their portfolio which should have occurred in January 2021, and did not take place until April 2021. The Booths believed that the delayed re-balancing led them to miss out on financial gains they would have enjoyed given market conditions at the time, and that formed a part of their complaint to the Ombudsman.

27. The Booths were unhappy about a number of aspects of the service W&T provided to them, and made complaints, first to W&T in December 2021, and then to the FOS. On 8 October 2023 the Booths terminated their relationship with W&T and moved their portfolio to another financial adviser, "Strategic Solutions Financial Planners" ("Strategic Solutions").

28. A number of issues arose, or were discovered, over the course of the investigation of the complaints about the relationship between W&T, the Booths and Trust DFM, which, as explained below, were regarded as significant by the Ombudsman. They were:

    i) On 2 June 2020 W&T and Trust DFM entered a contract ("the June 2020 Contract"). This was not seen at the time by the Booths and was provided by W&T to the Ombudsman in January 2024 during the course of his investigation. The contract stated that W&T was acting as "agent" on behalf of its clients (i.e. the Booths and others) in its dealings with Trust DFM and that W&T "represent and warrant" to Trust DFM that their clients had "appointed [W&T] as [their] agent with express authority to … provide all ongoing instructions [to Trust DFM]". Pursuant to the contract, W&T were required promptly to inform the provider of the platform on which clients' portfolios are administered if they ceased to act as agent for any client. The contract stated that W&T, and not their clients, would be the client of Trust DFM and that W&T would be responsible for explaining to their clients both W&T and Trust DFM's respective roles. The Booths were not aware at the time of this agreement or the agency arrangements it described.

    ii) In July 2021 the Booths were provided with a new client agreement. It stated under the heading "Discretionary Fund Manager":

> We may, where appropriate, recommend holding some or all of your investments with a discretionary fund manager (DFM), a professional investment manager appointed to monitor your portfolio and make investment decisions on your behalf. In such cases we will explain the respective responsibilities of ourselves and the DFM in relation to your investments.
>
> In some circumstances we may need to act as your 'agent' in relation to the part of your portfolio held with a DFM. This means that you will not have a direct contractual relationship with the DFM and the DFM will instead treat our firm as its client. Before setting up this type of arrangement we will explain the implications to you.

As set out above, it is apparent that in entering the June 2020 Contract W&T had already represented to Trust DFM that they had been appointed to act as agents of their clients. The July 2021 letter, however, appeared to suggest that the agency agreement was not yet set up, and would be discussed with the Booths if one were created. No such discussion occurred.

iii) The Booths complained to W&T about the service it had provided in correspondence between December 2021 and May 2022. During the course of that correspondence, in discussing the performance of the Booths' portfolio, W&T disclosed in a letter of 20 April 2022 that "Trust DFM is a separate firm, and it does have other advisor clients outside [W&T]". That was the first time it was indicated to the Booths that Trust DFM was not solely working with W&T, as the July 2018 letter had intimated, and was providing services to other financial advisers. It is not clear exactly when Trust DFM's services were opened up to other financial advisers, but it appears from W&T's subsequent representations to the Ombudsman that a decision was taken to do so at some point in 2020/2021.

iv) In W&T's letter to the Booths of July 2018 it was said that Trust DFM was "wholly owned by the same staff and shareholders who own [W&T]". As set out below, that was correct as of 2018, but on 22 April 2022 there was an opening up of the shareholding. It resulted in 5.8% of voting shares and 4.7% of overall shares being acquired by third parties. That was not disclosed to the Booths at the time, and they found out about the change of ownership to Trust DFM on 12 July 2023 in correspondence from W&T dealing with their complaint.

The Booths' complaint

29. On 9 December 2021 the Booths raised an initial complaint with W&T. There is a dispute between the parties as to the nature of their complaint, both to W&T and subsequently to the Ombudsman, and whether it was correctly understood by the Ombudsman. I deal with that below pursuant to Ground 1. In short, the Booths' complaint was that W&T had failed properly to manage their funds and that this had caused them financial losses, and that W&T had failed to communicate adequately with them. The complaint was set out in detailed correspondence as well as subsequent letters between W&T and the Booths. It culminated in W&T providing a final response letter on 21 February 2022. W&T concluded that "given the available evidence, we believe your investments have been managed appropriately in line with your objectives and attitude toward risk. We do however accept that you have not been given clear and simple responses from [W&T] when asking for clarity on performance figures and fees, despite asking on a number of occasions and for this we would like to apologise." W&T offered the Booths £200 as a gesture of "goodwill".

30. The Booths did not accept W&T's response, and they continued to correspond with W&T over the following months. That led to a further final response letter from W&T of 20 April 2022.

31. Again, the Booths did not accept W&T's response, and on 25 May 2022 they referred their complaint to the FOS. They again raised concerns that W&T had failed to manage their portfolio properly, including in the Multrees migration, leading to financial losses, and had not communicated adequately with them.

32. An investigation was carried out by the FOS. On 18 November 2022 a FOS investigator declined to uphold the complaint. That was not accepted by the Booths who escalated their complaint to an ombudsman and Mr Kuku, the Ombudsman, was allocated the case.

33. On 11 March 2024, the Ombudsman issued a provisional decision in which he upheld the Booths' complaint. His decision is considered further below. In summary the Ombudsman's provisional conclusion was that the "root cause" of the issues about which the Booths' complained in relation to the management of their portfolio was that the recommendation in July 2018 to transfer their funds to Trust DFM had been inappropriate, and that the relationship between the Booths, W&T and Trust DFM had not been properly explained to the Booths at the time. In particular, the Ombudsman concluded that the July 2018 recommendation suggested that nothing would substantially change in the management of the Booths' investments (other than that they would no longer need to approve every transaction), and that their investments would still be managed in the same way by the same people, when, in fact, the Ombudsman concluded, the arrangements involving Trust DFM fundamentally changed the relationship between the Booths and W&T. The Ombudsman provisionally concluded that if the Booths had been properly advised they would not have accepted the recommendation to transfer their portfolio to Trust DFM and their relationship with W&T would have most likely terminated in 2018. The Ombudsman also concluded that the recommendation in 2020 to migrate to the Multrees platform was not appropriate.

34. W&T and the Booths were invited to make representations on the Ombudsman's provisional decision. Both did so in April 2024. On 29 April 2024 the Ombudsman made a final decision. He dealt with the representations he had received and decided to uphold the complaint for essentially the reasons set out in his provisional decision. It is the Ombudsman's final decision which W&T seek to challenge in these proceedings.

The Ombudsman's final decision of 29 April 2024

35. In his final decision, the Ombudsman summarised his provisional conclusion, that the transfer to Trust DFM and the migration to the Multrees platform were "significantly misrepresented" by W&T and that "but for the misrepresentations … the [Booths] probably would not have accepted either [recommendation]." He found that those misrepresentations, and the way the Booths were advised and provided information more generally, breached the relevant Principles for Businesses and COBS rules set out in the FCA Handbook.

36. The Ombudsman went on to explain his provisional view. He set out the key provisions of the July 2018 letter and stated:

> The complainants were … led to believe that little had changed, other than the introduction of Trust DFM (which the letter of 14 July 2018 said W&T 'wholly owned') and the loss of their right to approve investment decisions (in return for the benefits of discretionary management). Fees remained unchanged, as did the portfolio, its risk management profile, and its home in the WRAP account on the Transact platform. Despite Trust DFM's discretionary management, even W&T's investment committee's role remained unchanged. The committee (and team) were to continue managing the portfolio through the agreed and existing Advance Investment Strategy. The above is what was presented to the complainants and is what they agreed.

37. The Ombudsman found that there were three issues that were present at the time the recommendation was made, or which emerged subsequently, and which, he considered, were "in conflict with, or having been omitted from, what [the Booths] were presented with in 2018." They were:

    i) the issue of agency. The Ombudsman considered that W&T were acting as agents for the Booths in relation to Trust DFM from the outset. The Ombudsman noted, however, that the position as presented to the Booths in the July 2018 letter and until July 2021, was that "W&T and Trust DFM were … joint principals and the [Booths] were direct clients of the former, so there was no reason to expect a role for an agent".

    ii) the issue of ownership. The Ombudsman found that it was important for the Booths, as they had been assured in 2018, that Trust DFM was wholly owned by W&T. He noted that in July 2023 they were told, for the first time, that Trust DFM was, in fact, partly owned by other financial advisers. They were also told in April 2022, for the first time, that Trust DFM had "other advisor clients outside of [W&T]." The Ombudsman continued:

    > Overall and on balance, I do not consider that the complainants would have agreed to the recommendation [to move their funds to Trust DFM] if they were fully informed, as they should have been, about how Trust DFM was owned (or was to be owned) … Trust DFM's incorporation documents suggest it began as an entity owned by W&T, so it appears that this changed over time. However, I still consider that W&T ought to have given the complainants prior notice when this became liable to change – in order for them to make an informed decision on what to do with their portfolio before it changed. It did not do this.
    >
    > [The Booths'] 2018 agreement with the recommendation was based on their reliance upon W&T's ownership of Trust DFM, so prior notice of change in this respect was material to their position in the arrangement. In simple terms, they neither asked for nor wanted the management of their portfolio to end up with a new firm that was not one and the same (essentially) as W&T; yet that appears to have been what the recommendation led them

into; and W&T appears to have done nothing to protect them from that – which was not in their best interest.

iii) the issue of decision-making with regard to the Booths' investment. The Ombudsman concluded that W&T's terms of operation with Trust DFM were not as they were presented to the Booths in 2018. He referred to the June 2020 Contract setting out the relationship between W&T and Trust DFM. He noted that the Booths had not seen the document at the time, and it was only provided to them as part of the complaints process in 2024. The Ombudsman set out a number of provisions of the June 2020 Contract and continued:

> [The terms in the June 2020 document are] not the arrangement[s] that was recommended to the complainants in 2018. In the [2020] document, Trust DFM gave no preferential or deferential treatment to W&T (and/or its clients) or, it appears, to anyone. The document also expresses no superiority in W&T within the relationship. In broad terms, the document sets out provisions for Trust DFM to behave completely independently in all aspects of its operations and responsibilities.
>
> Crucially, the document confirms that Trust DFM had full control and full decision-making powers in the discretionary management of its model portfolios and, as a result, in its portfolio management service. Contrary to the 2018 recommendation, W&T's investment committee had no share in those powers and no role in making those decisions.
>
> It appears that the arrangement with Trust DFM was never – and was never intended to be – what the 2018 recommendation presented to the complainants. Trust DFM was a separate and independent firm beyond W&T's operational control, it had full discretion and investment decision making powers for its model portfolios, and it operated its discretionary portfolio management service as it saw fit (within the relevant regulatory rules). Its service was not subject to oversight and/or decisions from W&T's investment committee.

38. The Ombudsman concluded that, given his findings on the issues of agency, ownership/clients and investment decision-making, the relationship between Trust DFM, W&T and the Booths was not that described to the Booths in the July 2018 letter. He continued: "I am satisfied that the [Booths] would not have agreed to a recommendation in 2018 that set out the full and accurate terms of the Trust DFM proposal; they were misled by W&T to agree the recommendation; and the recommendation was unsuitable and contrary to their best interests." The Ombudsman continued "Overall, on balance … I consider that full, accurate and suitable advice from W&T about the 2018 recommendation would probably have led to the end of its relationship with the complainants."

39. The Ombudsmen then set out W&T's response to his provisional decision. That included W&T's assertion that the provisional decision "appears to have assumed that Trust DFM's client base in 2022 and its ownership in 2023 reflected its client base and ownership at the time of the 2018 recommendation." According to W&T "that assumption is incorrect." W&T stated that Trust DFM and W&T were, as the Booths were informed in 2018, owned by the same shareholders, and it was only some years later that ownership was "modestly extended" to a handful of third-party shareholders. Therefore, W&T said, there was no misrepresentation in 2018. Similarly, W&T stated that the provisional decision was "wrong to say the agency-based arrangement appeared to have been concealed from or misrepresented to the complainants prior to July 2021. Given that the arrangement did not arise until 2021, it stands to reason that this could not have been the case."

40. The Ombudsman dealt with W&T's representations as follows:

    i) On the question of W&T acting as agents for their clients in relation to Trust DFM, the Ombudsman noted W&T's assertion that the agency arrangement was not formalised until 2021 and therefore it could not have been misrepresented or concealed in 2018. The Ombudsman noted that in his provisional decision he had referred to the June 2020 Contract between W&T and Trust DFM which indicated that W&T were acting as agents for their clients in their dealings with Trust DFM, and that he had stated that unless W&T "evidenced" to the contrary he would assume that the same agreement was in place from the outset in 2018. He continued:

    > I do not appear to have received the comment from W&T that was invited [in the provisional decision]. On balance, and for the reason given in the [provisional decision], I retain the view that it is reasonable to draw the inference and conclusion that the terms in the 2020 document reflect those that were in place from the outset of W&T's arrangement with Trust DFM [i.e. 2018].
    >
    > As I also explained in the [provisional decision], the 2020 agreement confirms the existence and application of the agency based arrangement at the time, so it is wrong to say or suggest that it was launched in 2021 or that it did not exist before 2021. [I]t probably existed earlier (formally or informally) and was probably applied from the outset of the W&T/Trust DFM relationship in 2018.

    The Ombudsman then noted that the 2021 client agreement sent to the Booths stated that it might be necessary to set up an agency agreement for a portfolio held by Trust DFM, and that the Booths were told that "before setting up this type of arrangement we will explain the implications to you". The Ombudsman continued:

    > The above notified the complainants of scope for and the possibility of an agency arrangement, not that one already existed. I have not seen evidence that they were ever given notice

> by W&T that one was to be introduced or that, as promised …, they received an explanation of its implications. Therefore, the agency, on behalf of the complainants, that W&T appears to have introduced and conducted in its relationship with Trust DFM happened without prior notice to the complainants, without an explanation to them of its implications, and therefore in breach of the above term.
>
> Furthermore, as the complainants have pointed out, it happened without their express consent to the introduction and application of such agency.

ii) In relation to Trust DFM having non-W&T shareholders and clients, the Ombudsman stated that it was not correct that he had assumed that W&T's shareholders and clients were the same in 2018 as in 2022/2023. He noted where he had recognised in his provisional decision that Trust DFM's ownership and clients changed over time and repeated his concern that the Booths were not given prior notice of the changes. He repeated what he described as a "key finding" that "Trust DFM's independence and its service to clients outside W&T were not previously apparent to the complainants until confirmed in the 2022 notice" and that "the issue … was, and remains, about the complainants having been led by the 2018 recommendation to believe Trust DFM was created and existed to serve W&T clients … and then learning in 2022 that this was not the case."

iii) As to the relationship between Trust DFM and W&T in the making of investment decisions, the Ombudsman noted W&T's submission that "its investment committee continued to sit and make investment decisions in the Trust DFM arrangement". The Ombudsman made clear that he did not accept that assertion. He considered it to be inconsistent with the terms of the June 2020 Contract between Trust DFM and W&T which he said supported his conclusion that "Trust DFM had full control and full decision-making powers in the discretionary management of its model portfolios and, as a result, in its portfolio management service." The Ombudsman confirmed his conclusion that "[c]ontrary to the 2018 recommendation, W&T's investment committee had no share in those powers and no role in making those decisions."

41. The Ombudsman then summarised the Booths' representations in response to his provisional decision. He noted that they had stressed the importance of the personal relationship between themselves and Mr Batchelor and that that had been "very important" in their working with W&T. They stated that they had relied on Mr Batchelor's assurance in the 2018 recommendation that nothing substantive would change if they moved their portfolio to Trust DFM, and they noted that they had never met anyone connected to the day-to-day management of Trust DFM. The Booths stated that "[i]f in 2018 or at any time thereafter we had been told that the investment decisions … were to be made by a body of people whom we had never met, to whom we had no access and who would have decision making powers that could not be challenged or at least influenced by [W&T] then … we would have had a very serious discussion about this …

and would almost certainly (unless the position could be changed) have looked to move our portfolio elsewhere." The Booths also stated that "[t]here is correspondence that shows the investment committee in W&T had a counterpart in Trust DFM that became visible around 2020. It was the Trust DFM counterpart that made the investment decisions, and it is probable that this had been the case since Trust DFM's entry in 2018."

42. The Ombudsman essentially accepted the Booths' submissions. He accepted the Booths' statements as to how they would have acted if they had been accurately informed about the Trust DFM proposal in 2018, repeating his finding from the provisional decision that they would probably not have agreed to the recommendation to move their portfolio to Trust DFM, and would have most likely ceased to work with W&T.

43. The Ombudsman's final decision, as with his provisional decision, also dealt with the Multrees migration. He concluded that the Multrees platform was not fit for purpose, and that, even if the recommendation to move to it was given in good faith, it should not have been made. W&T do not challenge that conclusion in these proceedings, so I say no more about the basis for it. The fact that the Ombudsman would have upheld the complaint, in any event, because of the Multrees migration issue, and irrespective of the Trust DFM issues, is, however, said by the FOS to be relevant to whether W&T are entitled to relief in these judicial review proceedings. I will return to that matter below.

44. On the basis of the above, the Ombudsman upheld the Booths' complaint both on the Trust DFM issue and the Multrees migration issue. He went on to consider redress. He awarded the Booths £750 for "distress, trouble and inconvenience". He also made an award for "compensation" to place the Booths "as close as possible to the position they would now be in if they had been given full, accurate and suitable advice in the July 2018 recommendation." If that had occurred, the Ombudsman concluded, the Booths "would have probably rejected the Trust DFM service recommendation and instead moved their portfolio to a new firm by 1 September 2018." The Ombudsman determined that the "start date" for any compensation should therefore be 1 September 2018. He concluded that the "end date" should be the "date of settlement" i.e. the date on which W&T pays the compensation to the Booths. The Ombudsman concluded that the sum of the compensation should be calculated as the difference between the "actual value" of the Booths portfolio as at the settlement date, and the "fair value." The "actual value" is the value of the Booths' portfolio at whatever date the settlement is paid to them by W&T. The "fair value" is the value that the Booths' portfolio would have had at the settlement date if it had been invested on 1 September 2018 in funds that performed in line with a benchmark index. For that purpose, the Ombudsman selected the "FTSE UK Private Investor Income Total Return Index".

45. One of the consequences of the Ombudsman calculating compensation by reference to the difference between the "actual" and "fair" value of the Booths' portfolio at the date of settlement, is that the amount ultimately awarded will depend on how the Booths' portfolio performed after they had moved their investments to Strategic Solutions in October 2023. That is challenged by W&T as leading to compensation depending on investment decisions over which they

had no control. I deal with that argument when I consider Ground 5. Finally, on redress, the Ombudsman noted that the events complained of began before 1 April 2019, and the complaint was referred to the FOS between 1 April 2022 and 1 April 2023. Pursuant to DISP 3.7.4R, that meant the applicable limit to any compensation was £170,000.

Grounds of claim

Ground 1: The Ombudsman's decision upheld allegations that did not form part of the Booths' "complaint"

Parties' positions

46. Pursuant to Ground 1 of their claim, W&T contend that the Ombudsman exceeded his jurisdiction, or was irrational, in that he determined issues outside the scope of the Booths' complaint to the FOS.

47. Essentially, W&T argue, there were four issues raised by the Booths in their complaint (that W&T had mismanaged their portfolio and allowed it to underperform, W&T had mishandled the Multrees migration, W&T had failed to keep them fully informed about their portfolio valuation and performance, and W&T had not been open and transparent on fees: see further below at paragraph 54). The Ombudsman's core conclusion (other than on the Multrees migration which W&T do not challenge) was that W&T misrepresented Trust DFM's service and W&T's relationship with Trust DFM to the Booths, and that had the service been accurately represented to them they would not have agreed to transfer their investments to Trust DFM. W&T's case is that those matters were not raised by the Booths in their complaint, and they argue that the Ombudsman does not have jurisdiction to determine such "non-complaint issues". They argue that the Ombudsman could lawfully only "determine the expression of dissatisfaction put forward by the complainant". Alternatively, W&T submit that, if the Ombudsman interpreted the Booths' complaint as including the Trust DFM issues, that was irrational.

48. The FOS contends that no issue of jurisdiction arises. Its case is that, properly understood, the relationship between W&T, Trust DFM and the Booths was an element of the Booths' complaint. It submits that the Ombudsman's interpretation of the complaint in that regard can only be challenged on grounds that it is irrational, and that irrationality has not been made out

Legal principle

49. I agree with W&T that an ombudsman does not have jurisdiction to consider issues not raised by complainants in their complaint. I did not understand that to be disputed by the FOS.

50. FSMA 2000 s 226 is headed "compulsory jurisdiction" and s 226(1) states that in prescribed circumstances (which it is accepted apply in the present case) "*a complaint* … is to be dealt with under the ombudsman scheme" (emphasis added). Section 228(2) provides that "*a complaint* is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all

the circumstances of the case" (emphasis added). That is reflected in DISP 3.6.1R which again requires an ombudsman to determine "a complaint". DISP 2 concerns the "jurisdiction" of the ombudsman and provides at 2.8.1R that "the Ombudsman can only consider a complaint if … the respondent has already sent the complainant its final response or summary resolution communication," and a "complaint" is defined in the FCA Handbook Glossary as "any oral or written expression of dissatisfaction, whether justified or not, on or behalf of a person about the provision of, or failure to provide, a financial service … which (a) alleges that the complainant has suffered (or may suffer financial loss, material distress or material inconvenience and (b) relates to an activity of that respondent…"

51. It is clear from the statutory language and the applicable rules governing the ombudsman scheme, that the scheme is premised on "a complaint", as defined, having been made by "a complainant" which must first be considered by the respondent before being "determine[d]" by an ombudsman. An ombudsman, therefore, only has jurisdiction to consider and determine "the complaint" that has been made to the FOS. He or she does not have a general power to investigate wrongdoing or poor practices by a financial service provider where they have not been referred by an eligible complainant. Nor could an ombudsman lawfully receive an expression of dissatisfaction by a complainant about a financial service provider doing, or failing to do, X, and then, in the course of their investigation, decide that they would investigate the financial service provider for doing or failing to do Y, some other poor practice identified by the ombudsman but not raised in the complaint. It would mean the financial service provider has not had the opportunity to deal first with the complaint themselves. It would also be inconsistent with the purpose of the statutory scheme, which is for the ombudsman to resolve complaints from those affected, and not to act as a general regulator of the financial services profession seeking out for him or herself failings or poor practices that the ombudsman believes should be rectified.

52. It was also accepted by W&T, at least during the course of the hearing before me, and again correctly in my view, that it was for the Ombudsman to interpret the Booths' complaint. As Nicol J held in *Full Circle Asset Management* at paragraph 52, it is a necessary part of the ombudsman's function to determine the nature of the complainant's complaint, and an ombudsman's interpretation of the complaint can only be challenged on the grounds that it is irrational and not an interpretation open to a rational ombudsman (see per Ouseley J in *TenetConnect* at paragraphs 47 and 48 and discussion above paragraph 18(iii)). The correct interpretation of a complaint, and what the complainant has included in the complaint, is thus not a fact precedent or otherwise for the Court to determine. It is for the ombudsman to decide what is the subject of the complaint and what it encompasses, subject only to a rationality review. Thus if an ombudsman considers that a case is about a financial service provider doing X, but the ombudsman decides to investigate Y, they are acting outside their jurisdiction. If, however, an ombudsman concludes that a complainant's complaint about a financial service provider doing X, also incorporates or encompasses a complaint about their doing Y, no issue of jurisdiction arises and

the ombudsman's interpretation of the complaint can only be challenged on rationality grounds.

53. Both parties also agree that, in interpreting the complaint, the Ombudsman was not confined to what was written by the Booths in the Complaint Form that they submitted to the FOS (see *Full Circle Asset Management* paragraph 54). A requirement for formal pleadings of that kind would be antithetical to the ombudsman scheme and its purpose of speedy and informal resolution of disputes. As defined in the FCA Handbook Glossary, a "complaint" is "any oral or written expression of dissatisfaction". That envisages complaints being raised in different ways, including potentially informally, and not being confined solely to what is written in a Complaint Form as though they constitute some form of pleading. The courts have also held that an issue can be treated as part of a "complaint" if it is raised "obliquely" by the complainant (see *R (Linear Investments Ltd) v FOS* [2024] EWHC 1428 (Admin) at paragraph 76), and that a "complaint" can be contained in the letters written by the complainants that are cross-referenced in their Complaint Form (*TenetConnect Services* at paragraph 24). In determining what is included in a complaint, an ombudsman is thus "entitled … to look … at the correspondence which [the complainant] and her adviser had written to the [financial services provider that was the subject of the complaint] and to [the FOS]" (*Full Circle Asset Management* paragraph 54).

Discussion

54. The Ombudsman began his decision by explaining that the Booths' complaint was that W&T "mismanaged their investments", and, in summary, that they had complained that: (i) W&T had mismanaged their portfolio and allowed it to underperform, (ii) W&T had mishandled the Multrees migration, (iii) W&T had failed to keep them fully informed about their portfolio valuation and performance, and (iv) W&T had not been open and transparent on fees. The Ombudsman described these as "issues 1-4". The Ombudsman also set out the "context" for the "complaint issues 1-4" that was "presented … by the [Booths]", namely that "the [Booths] believed W&T controlled Trust DFM" and that "it was responsible for prioritising their interests at all times in its dealings with Trust DFM concerning their portfolio."

55. The Ombudsman then summarised his provisional conclusion, namely that the transfer to Trust DFM and the migration to the Multrees platform were "significantly misrepresented" by W&T, and that without the misrepresentations the Booths would not have accepted either recommendation. He found that those misrepresentations breached the relevant Principles for Businesses and COBS rules set out in the FCA Handbook.

56. The Ombudsman stated that "due to these findings … I have not found it necessary to draw any focused conclusions on issues 1-4" and that "on balance… the events in these issues would not have happened if Trust DFM's service and the Multrees platform had not been misrepresented to the complainants in the beginning." He explained in his decision:

> I also consider that the root cause of the claims in issues 1 and 4 was the misrepresented – and therefore unsuitable – 2018 recommendation. The complainants' management related expectations of W&T during the critical period (and within the issues) were, in the main and in reality, beyond its powers, but they reasonably considered otherwise because they had been led to believe W&T remained in control of their portfolio. W&T might argue that they did not initially make a complaint about 'suitability'. However, our service has an inquisitorial remit that allows us to look into and determine root cause issues, and submissions from the complainants in recent times, as they discovered more about matters related to their complaint, have made the consideration of suitability inevitable in key aspects of their case.

57. A rational ombudsman could have understood the Booths' complaint to relate solely to "issues 1-4", narrowly understood, and as not encompassing the relationship between W&T, Trust DFM and the Booths. That was how the FOS investigator initially interpreted the complaint when she considered, and dismissed it, in November 2022. That does not, however, mean that a rational ombudsman could not interpret the Booths' complaint more broadly.

58. As the Ombudsman observed, the Booths' complaint was, at its core, a complaint that their portfolio had been mismanaged. The Ombudsman considered the "root cause" of that mismanagement was "the misrepresented – and therefore unsuitable – 2018 recommendation [to transfer the Booths' investment to Trust DFM]". As the Ombudsman explained in his witness statement, he considered "the root of the main complaint issues, [to be] key mismatches between the portfolio management service the [Booths] expected from [W&T] and the services [W&T] were contractually obligated to provide after the change in 2018". The issue before me is whether it was rational, and open to the Ombudsman, to regard the Booth's complaint that their portfolio was mismanaged as encompassing, or being at its "root", a complaint about the transfer of their portfolio to Trust DFM and how that was presented to them.

59. That requires examining how the complaint was put by the Booths. It was, in summary, as follows:

    i) It is correct, as W&T submit, that the Booth's Complaint Form to the FOS of 25 May 2022 did not expressly refer to their expectations about Trust DFM which the Ombudsman focused upon. The Form did, however, refer repeatedly to the Booths' concerns about "the failure of W&T to actively manage our investments" and explains that "instrumental to our choosing to become a client of W&T were the commitments they gave to actively monitor and manage our financial plans and investments." As set out in his decision, a key aspect of the Ombudsman's conclusion, was that, after September 2018, it was, in fact, Trust DFM managing the Booths' portfolio, and therefore W&T was not, and could not, "actively manage" and "monitor" their investments as the Booths had wished.

ii) Further, as set out in *Full Circle Asset Management*, the Ombudsman was not confined to the contents of the Complaint Form, and was entitled to review correspondence between the Booths and W&T, and between the Booths and the FOS to understand the nature of their complaint. According to the Ombudsman's witness statement, the Booths' complaint to the FOS was accompanied by their initial complaint to W&T of 9 December 2021 and further responses the Booths made to W&T of 6 March 2022 and 11 May 2022. That correspondence did refer to the relationship between the Booths, W&T and Trust DFM.

iii) In the Booths' letter of 9 December 2021, they raised a series of concerns about the management of their portfolio, and emphasised the trust they had placed in W&T. In W&T's reply of 21 February 2022, they stated, on a number of occasions, that they had "discussed your concerns *with Trust DFM* and have asked them to provide information in relation to your performance" (emphasis added). The letter set out Trust DFM's reply on those matters, and explained that "your portfolio was managed in line with *the Trust DFM strategy*" (emphasis added). In their letter of 6 March 2022 the Booths expressed concern that W&T's response had been to "pass on a confirmation from Trust DFM" that "individual performance will always different from what is reported", and that "we cannot see, in relation [to the] core issue of loss [to the portfolio] that you [i.e. W&T] (as opposed to Trust DFM) have carried out any actual analysis of the records of our fund movements… Rather it has taken you 75 days since we lodged our formal complaint to simply advise us that you have asked Trust DFM to provide an explanation and to then report to us what they have said". The Booths also reiterated that they had "[come] to W&T precisely because we wanted active management. We continue to want active management but of a kind that accurately reports to us the trust performance of our fund and does not involve unexplained losses." In W&T's response of 20 April 2022, they explained why they had sought information from Trust DFM as "[i]t is Trust DFM that carry out the management of the portfolio and therefore we feel it most appropriate to request further information from them to understand if the management of your portfolio is [in] line with what we expect." They also explained that "Trust DFM is a separate firm, and it does have other advisor clients outside of Wills & Trusts" (a matter that I deal with further below). That issue was then referred to in the Booths' response of 11 May 2022.

iv) It is thus clear the Booths were concerned when W&T's response to their complaint about the management and performance of their portfolio was repeatedly to suggest that it was Trust DFM that needed to provide that explanation as it was Trust DFM that was responsible for the portfolio, and that the portfolio was managed in line with the "Trust DFM strategy". It led the Ombudsman to state in his provisional decision that "[t]he [Booths'] management related expectations of W&T during the critical period … were, in the main and in reality, beyond its powers, but they reasonably considered otherwise because they had been led to believe W&T remained in control of their portfolio."

60. On the basis of the material submitted by the Booths, the Ombudsman concluded that underpinning their complaint was that, while they expected W&T to be managing their portfolio, it was Trust DFM doing so and that that had not been properly explained to them in 2018. I do not consider that to be an irrational interpretation of the Booths' complaint. That does not mean that the Booths' complaint could not have been interpreted differently, but it does seem to me that a rational ombudsman could interpret the Booths' complaint in the way the present Ombudsman did. It was open to the Ombudsman to conclude that the Booths' complaint, at least, included or encompassed a complaint about the relationship between themselves, W&T and Trust DFM. That was because, ultimately, the Booths wanted W&T to actively manage their portfolio and were concerned about its perceived mismanagement and performance. Contrary to the Booths' understanding, however, it was, on the Ombudsman's findings, Trust DFM that was managing the portfolio and not W&T. It was therefore not irrational for the Ombudsman to conclude that the appropriateness of the transfer of the Booths' portfolio to Trust DFM, and whether that was properly explained to them, formed a part, if not the core, of their complaint to the FOS.

61. In that regard it should be noted that W&T's challenge is one of jurisdiction and the rationality of the Ombudsman's interpretation of their complaint. They, rightly, do not say that the Ombudsman acted unfairly by making findings against them to which they were not given a proper opportunity to respond. The Ombudsman set out in detail in his provisional decision his concerns about the 2018 recommendation, and W&T were able to, and did, respond to them. The Ombudsman then dealt with their submissions in his final decision.

62. Finally, I note that both parties addressed me on what was described as the Booths' "second complaint" to the FSO which they made on 8 August 2024 shortly after the present proceedings were issued. W&T submitted that in that complaint the Booths raised issues in relation to Trust DFM, rather than in the complaint that was before me. The FOS submitted that that was incorrect, and that the second complaint concerned separate "service issues". I was not provided with a copy of the second complaint so am not able to resolve this dispute. Ultimately, however, the question before me was whether it was open to the Ombudsman to interpret the first complaint as he did, and I have concluded that it was. It is difficult to see what relevance the contents of a second complaint will have to that issue. I consider that the Ombudsman's interpretation of the first complaint was one that was reasonably open to him, and he was thus acting within his jurisdiction in examining it as he did. Ground 1 therefore fails.

Ground 2: Irrationality/error of law in finding future changes misrepresented

Parties' positions

63. Ground 2 of W&T's challenge is that the Ombudsman was irrational and/or erred in law in finding that the July 2018 advice misrepresented the relationship between W&T and Trust DFM. W&T's argument focuses on the Ombudsman's findings concerning statements in the July 2018 recommendation letter that Trust DFM was "wholly owned by the same staff shareholders who own [W&T]". W&T submit that was, in fact, true at the time the July 2018

recommendation was made, and that it was only in April 2022 that shares in Trust DFM were provided to other Independent Financial Advisers who used Trust DFM's services. W&T argue that it was irrational and/or an error of law to find that the July 2018 recommendation letter misrepresented the ownership of Trust DFM, when the letter was accurate at the time the recommendation was made.

64. In response, the FOS argues that the Ombudsman was not using the word "misrepresentation" in a formal legal sense, but was seeking to convey that the Booths had not been fully and accurately informed about the relationship between Trust DFM and W&T and how that would affect them. The FOS also submits that it is important that the Ombudsman's decision is read as a whole. The issue of ownership was only one part of the overall conclusion that the Booths were not properly informed about how their portfolio would be managed, and their relationship with those who managed it, if it were transferred to Trust DFM. The FOS submits that, read as a whole, the finding the Ombudsman made on ownership does not render irrational his decision that the Booths had not been properly informed about the relationship between Trust DFM and W&T, nor betray any error of law.

Discussion

65. I do not consider that this ground is made out.

66. Reading the Ombudsman's decision as a whole, I agree with the FOS that it is clear the Ombudsman was not using the word "misrepresented" in the formal legal sense of a false statement of fact that induced the Booths to agree to W&T's recommendation. He was using it, as he set out elsewhere in his decision, in a more colloquial sense to convey that the Booths were not given "full, accurate and suitable advice from W&T about the 2018 recommendation". On that basis it is difficult to see what error of law the Ombudsman has made, and, in fairness to Ms Bala, she did not push that point with any vigour. Instead, W&T's case was that it was irrational for the Ombudsman to conclude that full, accurate and suitable advice had not been provided in 2018.

67. As to irrationality, as the FOS submits, it is important to read the Ombudsman's decision as a whole. The starting point is that the Booths' personal relationship with W&T and Mr Batchelor was important to them, and that the Trust DFM recommendation was presented to them, essentially, as a regulatory change to enable their funds to be managed on a discretionary basis without them needing to approve each transaction. Otherwise, the Booths were assured, everything would remain the same. They were told that "[y]our investments will still be managed by the existing investment committee and team" (i.e. the W&T investment committee and team), and that W&T "will continue to provide you with the same levels of communication about our views on the market." The Booths were told that there would be no real disadvantages to making the change and that Trust DFM "is wholly owned by the same staff and shareholders who own [W&T]".

68. In reaching his conclusion that the Booths were not provided with full, accurate and suitable advice, the issue of ownership of Trust DFM was only one of the

matters on which the Ombudsman based his decision. The Ombudsman also considered that the Booths had not been told that W&T was acting as their agents in its dealing with Trust DFM. That is the subject of Ground 3 of W&T's challenge and is dealt with below. In addition, and critically in my view, the Ombudsman found that, contrary to the way in which the position was set out in the July 2018 recommendation, Trust DFM was able to "behave completely independently in all aspects of its operations and responsibilities" and had "full control and full decision-making powers in the discretionary management of its model portfolios and, as a result, in its portfolio management service." The Ombudsman concluded that "contrary to the 2018 recommendation, W&T's investment committee had no share in those powers and no role in making those decisions." He continued: "it appears that the arrangement with Trust DFM was never – and was never intended to be – what the 2018 recommendation presented to the complainants." That was, in particular because, as the Ombudsman found, "Trust DFM was a separate and independent firm beyond W&T's operational control, it had full discretion and investment decision making powers for its model portfolios, and it operated its discretionary portfolio management service as it saw fit". That meant, the Ombudsman found, "[Trust DFM's] service was not subject to oversight and/or decisions from W&T's investment committee" as the Booths had been assured would occur. That aspect of the Ombudsman's decision is not concerned with formal ownership of Trust DFM, but with who, in fact, managed the Booths' portfolio.

69. W&T made submissions to the Ombudsman on the issue of decision-making about the Booths' portfolio when it received his provisional decision. W&T do not, however, challenge the Ombudsman's findings on those matters when they were upheld in his final decision. They do not argue that it was irrational or otherwise not open to the Ombudsman to find that it was Trust DFM that had full decision-making powers over the Booth's portfolio, that W&T's investment committee had no role in decision-making, that the Booth's portfolio was not subject to oversight and/or decisions from W&T's investment committee, and that that was inconsistent with the 2018 recommendation. In light of those unchallenged findings, I do not consider it irrational for the Ombudsman to conclude that the Booths were not given suitable, full and accurate advice in 2018, or, as the Ombudsman put it, that the position was misrepresented.

70. It is in that context that the Ombudsman's findings about ownership of Trust DFM should be viewed. The Ombudsman found that, in his view, "the complainants would [not] have agreed to the recommendation if they were fully informed, as they should have been, about how Trust DFM was owned (or was to be owned)". He continued:

> "Trust DFM's incorporation documents suggest it began as an entity owned by W&T, so it appears that this changed over time. However, I still consider that W&T ought to have given the complainants prior notice when this became liable to change – in order for them to make an informed decision on what to do with their portfolio before it changed."

The Ombudsman was thus aware that Trust DFM was fully owned by W&T at the outset, but that that changed, and he considered that the Booths should have

been told about that change before it occurred, so that they could decide how it affected them. Again, I do not consider that to be an irrational decision.

71. Reading the decision as a whole, the Ombudsman thus concluded that the Booths were not provided with full, suitable and accurate advice in July 2018. That was primarily concerned with who would make decisions about the Booths' portfolio if they transferred it to Trust DFM, as well as about the agency arrangements that the Ombudsman found were in place in 2018. Those matters did not relate to ownership of Trust DFM. In addition, the Ombudsman concluded that the Booths should have been told in 2018 about how Trust DFM "was owned (or was to be owned)", and that they should have been told about the subsequent changes of ownership of Trust DFM before they occurred, but were not. In my view those were all conclusions open to the Ombudsman, and cannot be properly characterised as irrational, and meant that it was open to him to conclude that the Booths were not provided with full, accurate and suitable advice from W&T.

Ground 3: Irrationality/error of law in ascertaining contractual terms concerning agency

Parties' positions

72. Pursuant to Ground 3, W&T argue that the Ombudsman's conclusions about the agency relations as between the Booths, W&T and Trust DFM was irrational While W&T pleaded a separate error of law in the Ombudsman ascertaining the contractual terms regarding agency, W&T accepted during the course of the hearing that this came down to an argument of irrationality. The Ombudsman's finding on agency was another aspect of his conclusion that the July 2018 recommendation failed accurately and fully to represent the true picture to the Booths. W&T contend that the Ombudsman's reasoning was irrational because the Ombudsman erroneously inferred that the agency arrangements that were in place as between W&T and Trust DFM in 2020 had been in place in 2018. W&T argue that there was no agency arrangement in place in 2018, and, as in relation to the ownership of Trust DFM, there was therefore no failure to provide full and accurate information to the Booths at the time.

73. The FOS submits that the Ombudsman was entitled to conclude that the agency arrangements in place in 2020 had been in place in 2018, and that pursuant to those arrangements W&T were to act as agents for their clients, including the Booths, in their relationship with Trust DFM. The FOS also submits that the Ombudsman was entitled to conclude that this too was a matter that should have been explained to the Booths in 2018, and that he was entitled to regard that as another factor in his determination that the arrangements as between the Booths, Trust DFM and W&T were not fairly and accurately presented to the Booths before they accepted the recommendation to transfer their portfolio.

Discussion

74. Again, I do not consider this ground is made out. I do not consider that it was irrational for the Ombudsman to conclude that the agency relationship in place in 2020 had been in place at the outset, and that that should have been

communicated to the Booths before they accepted the recommendation to transfer their portfolio.

75. The basis of the Ombudsman's conclusion as to the agency arrangement was as follows:

i) The Ombudsman noted in his provisional decision that, pursuant to the June 2020 Contract between Trust DFM and W&T, it was stated that W&T "represent and warrant" to Trust DFM that their clients had "appointed [W&T] as [their] agent with express authority to … provide all ongoing instructions [to Trust DFM]". The Ombudsman stated in his provisional decision that the Booths had asked when the June 2020 Contract became effective and he "invite[d] W&T to comment on this." He continued "[u]nless [W&T] comments with a specific evidenced date in this respect, I consider it reasonable to draw the inference and conclusion that the 2020 document presented the same terms that were in place from the outset of its arrangement with Trust DFM. It is arguably inconceivable that an arrangement that was operating before 2020 had no terms until 2020."

ii) W&T provided representations in response to the provisional decision on 5 April 2024. W&T submitted that when Trust DFM "opened up its offering" to third party financial advisers "it made more sense that it move to an agency-based agreement and this progressed in 2021 to a formal 'launch'". W&T continued "The [Ombudsman's provisional decision] suggests that 'up to July 2021, the agency-based arrangement appears to have been concealed from and/or misrepresented to the [Booths]'. As these arrangements did not arise until 2021, it stands to reason that they could not have been and were not concealed…"

iii) In the Ombudsman's final decision he quoted from his provisional decision and continued by noting that he had not received the evidence from W&T that he had invited on when the June 2020 agency arrangement became effective, and that he thus "retain[ed] the view that it is reasonable to draw the inference and conclusion that the terms in the 2020 document reflect those that were in place from the outset of W&T's arrangement with Trust DFM." That meant he found, contrary to W&T's assertion, that the agency relationship was, in fact, in place in 2018. The Ombudsman also noted that as the June 2020 Contract "confirm[ed] the existence and application of the agency based arrangement at the time… it is wrong to say or suggest that it was launched in 2021 or that it did not exist before 2021."

iv) The Ombudsman also noted that "I have not seen evidence that [the Booths] were ever given notice by W&T that [an agency arrangement] was to be introduced or that …, they received an explanation of its implications. Therefore, the agency, on behalf of the complainants, that W&T appears to have introduced and conducted in its relationship with Trust DFM happened without prior notice to the complainants, without an explanation to them of its implications."

76. The Ombudsman thus drew an inference from W&T's failure to provide evidence he had requested in his provisional decision. He concluded, based on that inference, that the agency arrangements as set out in the June 2020 Contract were in place in 2018. That is a finding of fact which I do not consider to be outside the range of reasonable conclusions open to the Ombudsman. I also do not consider that it was irrational for the Ombudsman to conclude, given his findings about the agency arrangements in place in 2018, that the failure to explain the arrangements to the Booths before they accepted the recommendation to transfer their portfolio to Trust DFM, or indeed subsequently, was a failure to provide full, accurate and suitable advice to them. Ground 3 therefore fails.

Ground 4: Irrationality and/or failure to explain departure from law re obligation to give prior notice

Parties' positions

77. As well as challenging the Ombudsman's decision concerning misrepresentations he found in the 2018 recommendation, W&T, by Ground 4, challenge the Ombudsman's findings that W&T failed adequately to communicate changes to the ownership and the client base of Trust DFM to the Booths when they occurred in 2020-2022. W&T argue that, in reaching those conclusions, the Ombudsman was departing from COBS 4.2.1R and 6.1ZA, which apply to the provision of information by financial service firms to clients, but had failed to explain the reasons for the departure, and that he was holding W&T liable despite their compliance with all relevant applicable standards governing communication with clients. Alternatively, W&T argue it was irrational for the Ombudsman to conclude that there had been failures in W&T's communication with the Booths about changes to Trust DFM's ownership and client base.

78. The FOS argues that the premise of the ground is misconceived as the Ombudsman did not depart from COBS 4.2.1R or 6.1ZA, and therefore there was no departure to explain. The FOS also submits that the Ombudsman was entitled to conclude that the Booths should have been, but were not, told about changes to Trust DFM's shareholding and client base when they occurred, and that in making that finding the Ombudsman was concluding, as he was entitled, that W&T were in breach of rules and principles to which financial advisers are subject.

Legal principles

79. COBS 4.2.1R provides that "[a] firm must ensure that a communication or a financial promotion is fair, clear and not misleading." COBS 6.1ZAR sets out specific information that must be given by investment firms providing "portfolio management services" to their clients. W&T's case is that COBS 4.2.1R applies only to communications that are actually given, and does not apply to *failures* to communicate, which was the issue in the present case. W&T also argue that there was no suggestion that it had failed to provide the information required by COBS 6.1ZAR.

80. I do not consider that COBS 4.2.1R and COBS 6.1ZA assist W&T. It was common ground that COBS 4.2.1R has no application in the present case. It was also common ground that W&T had not failed to provide the information specifically required by COBS 6.1ZA. That means that there was no departure from any rule that required an explanation.

81. In response, Ms Bala sought to rely upon *Heather Moor*. She argued that unless the Ombudsman had found W&T had breached some particular code of practice or rule or aspect of good industry practice, he needed expressly to explain why he had nevertheless upheld the complaint against W&T. That is a more sophisticated argument, and it is necessary to examine *Heather Moor*, and subsequent authority that has considered it, in a little more detail to understand it.

82. In *Heather Moor* the claimant financial adviser had sought to challenge a decision of an ombudsman. The claimant argued that the ombudsman was only entitled to uphold a complaint against it if he could identify some specific unlawful act that the adviser had committed. If there was not such a requirement, the claimant argued, the ombudsman scheme would not be in "accordance with the law" as required by the European Convention on Human Rights ("ECHR") as the ombudsman would not be making decisions on the basis of accessible and foreseeable legal rules. The claimant relied on *Sunday Times v United Kingdom* (1979) 2 EHRR 245 paragraph 49, in which the European Court of Human Rights held that an individual must "be able, if need be with appropriate advice, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." The claimant argued that if a financial adviser could have a complaint upheld against them when it was not possible to identify some law or rule they had broken, the operation of the scheme would not be sufficiently "foreseeable" and therefore not "in accordance with the law". Stanley Burnton LJ, with whom the other members of the Court of Appeal agreed, rejected both of the claimant's arguments.

83. As to the argument that an ombudsman can only uphold a complaint if he or she is able to identify some specific act by a financial adviser that is unlawful at common law, Stanley Burnton LJ held at paragraphs 36-37 that an ombudsman was not required to determine a complaint in that way. Pursuant to the FSMA 2000, an ombudsman determines a complaint by reference to what is, in his "opinion", fair and reasonable in all the circumstances of the case. That does not suggest the ombudsman is required to determine a complaint by reference to legal rules, and the statement that decisions should be based on the "opinion" of the ombudsman is inconsistent with any such requirement.

84. Stanley Burnton LJ also rejected the claimant's "in accordance with the law" argument. He held at paragraph 49

> Does the scheme established under the 2000 Act, interpreted in accordance with its natural meaning, comply with [the in accordance with the law requirement in the ECHR]? In my judgment, it can and does. The ombudsman is required by DISP rule 3.8.1 to take into account the relevant law, regulations, regulators' rules and guidance and standards, relevant codes of

> practice and, where appropriate, what he considers to have been good industry practice at the relevant time. He is free to depart from the relevant law, but if he does so he should say so in his decision and explain why. The other matters referred to in this rule are matters that a court would take into account in determining whether a professional financial adviser had been guilty of negligence or breach of his contract with his client. Again, if the ombudsman is to find an advisor liable to his client notwithstanding his compliance with all those matters, the ombudsman would have to so state in his decision and explain why, in such circumstances, assuming it to be possible, he came to the conclusion that it was fair and reasonable to hold the adviser liable. In these circumstances I consider that the rules applied by the ombudsman are sufficiently predictable. All the matters listed in DISP rule 3.8.1 are formulated or ascertainable with sufficient precision. So far as guiding the conduct of financial advisors are concerned, provided that they comply with "the relevant law, regulations, regulators' rules and guidance and standards, relevant codes of practice and, where appropriate … good industry practice" they can be assured that they will not be liable to their client in the absence of some exceptional factor requiring a different decision.

85. On the basis of Stanley Burnton LJ judgment, Ms Bala argued that if the Ombudsman in the present case wished to find that there was a failure to communicate certain information to the Booths, he needed to identify what law, regulation or guidance he was relying on to impose the duty to communicate, and if there was no such applicable law, regulation or guidance, then he had to "explain" why he was nevertheless upholding the complaint.

86. I do not accept W&T's submissions. In particular, I do not consider them to be consistent with the subsequent Court of Appeal decision in *Options.*

87. In *Options* the claimant, a pension provider and administrator, sought to rely on *Heather Moor* in a similar way to Ms Bala. The claimant argued that an ombudsman must set out all relevant applicable legal provisions and explain why, if they have not been breached, he was "going beyond them" and, nevertheless, upholding a complaint. That was rejected by the Court of Appeal. Asplin LJ, with whom the other members of the Court agreed, noted that the ombudsman is required to "explain his reasons" including "the matters taken into account and their relevance or otherwise" (paragraph 77), and should not be "operating by the length of his foot" but by some explicable criteria in reaching a conclusion as to what is fair and reasonable in all the circumstances (ibid). That, however, was all that was required. In particular, Asplin LJ rejected the argument based on *Heather Moor*, explaining at paragraph 79:

> In the passage in the *Heather Moor* case which [the claimant] relies upon, Stanley Burnton LJ refers to the need to explain a divergence from the "relevant law" and goes on to state that if the ombudsman finds an advisor liable notwithstanding that he has complied with all other relevant matters he would have to

> say so and explain why. It seems to me that [the claimant] has sought to use the passage at paragraph 49 in the Heather Moor case in a very restrictive and unwarranted way. I do not understand the dicta to mean that in each and every case, the ombudsman must first, set out all the relevant contractual provisions and tortious duties which apply and state why it is considered appropriate in the particular case to go beyond them. Nor do I consider that it was intended that the same exercise should be carried out in a formulaic manner in relation to regulations which are actionable …, before turning on to nonactionable regulations, guidance and best practice.

88. The FOS in the present case argues that W&T are seeking to rely on *Heather Moore* in the same manner as was rejected in *Options*. I agree. It is important to have in mind the context of Stanley Burnton LJ's observations in *Heather Moor.* He was responding to a submission that the ombudsman regime does not ensure decisions are in accordance with the law because it lacks the required accessibility and foreseeability. Stanley Burnton LJ's conclusion does not go further than, as Asplin LJ held, requiring an ombudsman properly to explain their reasoning and what he or she has taken into account. The ombudsman is not required to set out all possible legal provisions that apply, and then explain why, if none have been breached, it is nevertheless considered appropriate in the particular case to uphold a complaint. Provided an ombudsman applies some ascertainable principles or criteria, so that their decision is not arbitrary, and that the complainant and respondent can understand the basis on which a complaint has been upheld or rejected and what matters have been taken into account, that will suffice to ensure a decision is "in accordance with the law".

Discussion

89. In the light of *Options* there are two bases on which W&T can pursue Ground 4. First, W&T can argue that the Ombudsman failed to apply explicable criteria or properly explain his decision that W&T should have provided information to the Booths. Second, W&T can argue that the decision to uphold the Booths' complaint in relation to post-2018 communication was irrational. Both arguments were made by Ms Bala, and I consider each argument in turn.

Failure to apply clear criteria or explain decision

90. W&T argue that the Ombudsman found that it should have communicated to the Booths earlier than it did about the changes of ownership and client base of Trust DFM, but did not identify which rules or other provisions W&T had thereby breached. W&T argues that is an error in the Ombudsman's reasoning. I do not accept the argument. It is based on a flawed premise. The Ombudsman did identify the provisions he considered to have been breached, namely Principles for Business and provisions of COBS.

91. The Ombudsman referred in his decision to the FCA Handbook and the Principles for Businesses and COBS that it contained. They include COBS 2.1 which sets out the "client's best interests rule" and provides that "A firm must act honestly, fairly and professionally in accordance with the best interests of

its client". They also include as Principle 2 that "[a] firm must conduct its business with due skill, care and diligence" and Principle 6 that "[a] firm must pay due regard to the interests of its customers and treat them fairly". The Ombudsman noted that the Principles require financial advisers "in broad terms, … to conduct their services with due skill, care and diligence, to make reasonable efforts to manage and control their affairs responsibly and effectively, and to uphold their customers' interests and treat them fairly." That is an accurate summary of the Principles. The Ombudsman referred to *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) in which Ouseley J had made clear the importance of an ombudsman taking the Principles into account. In *Options UK* Asplin LJ held, referring to *British Bankers Association*, that while the Principles are not "actionable" in legal proceedings they can and should be considered by an ombudsman, and that a complaint can be upheld based upon their breach (paragraphs 75-76).

92. The Ombudsman determined that, in terms of communication about changes in ownership and client base, W&T had not followed the Principles and COBS he had cited. He reached the conclusion as follows:

    i) The Ombudsman noted that Trust DFM was owned by W&T at the outset, but that that changed when the shareholding was opened up to third parties, a fact that was not communicated to the Booths at the time. Those factual findings are not impugned, and it is accepted by W&T that the shareholding of Trust DFM was opened up in April 2022, but that the Booths were not told about it until July 2023, and then only in passing in correspondence about their complaint. The Ombudsman concluded: "I … consider that W&T ought to have given the complainants prior notice when [the shareholding] became liable to change – in order for them to make an informed decision on what to do with their portfolio before it changed. It did not do this." The Ombudsman continued "[the Booths] 2018 agreement with the recommendation was based on their reliance upon W&T's ownership of Trust DFM, so prior notice of change in this respect was material to their position in the arrangement."

    ii) In relation to Trust DFM's client base, the Ombudsman again noted that at the outset Trust DFM's only client was W&T, but that that too changed post 2018, and that was not communicated to the Booths. Again, those factual findings are not disputed. A decision was taken for Trust DFM to provide services to other financial advisers, and not just W&T, in 2020/2021, but this was not communicated to the Booths until April 2022. The Ombudsman concluded "[g]iven the circumstances in which the complainants accepted the 2018 recommendation, prior notice about the extension of Trust DFM's client base should have been given to them – to allow for consideration of whether (or not) it made a difference to them, having previously believed the service was exclusive to W&T and its clients. That did not happen".

93. The Ombudsman did not find that W&T had breached COBS 4.2.1R or COBS 6.1ZA or any another specific rule requiring information to be communicated to customers. His decision was based upon the more general provisions in the Principles and COBS which he referred to and which require firms to act in the

best interests of their clients and treat them fairly and conduct their business with due care skill, are and diligence. Those are explicable criteria the Ombudsman applied, and it is clear, in my view, why he found that they had been breached. He found that W&T's recommendation to the Booths to transfer their portfolio was made on the basis of representations about the ownership and client base of Trust DFM. There were subsequentially changes in that regard as the ownership and client base of Trust DFM were opened up. The Ombudsman concluded that a financial service provider acting with due skill, care and diligence and upholding their customers interests and treating them fairly consistently with the Principles and COBS 2.1, would have informed the customers of the changes before they occurred, but that W&T did not do so. Hence his upholding the complaint in that regard. That is a reasoned decision applying explicable criteria as required by *Options*, and, as made clear in *Options,* the Ombudsman was not required, in addition, to list all relevant duties and rules and explain "why it [was] considered appropriate … to go beyond them."

Irrationality

94. W&T argue, in the alternative, that it was not rational for the Ombudsman to conclude that there was a breach of the Principles or COBS in relation to communication about Trust DFM's ownership and client base. They note that the Ombudsman did not explain when precisely W&T should have communicated the changes of ownership or client base to the Booths, and suggest it was irrational to conclude those matters were material to the Booths, noting that they did not raise an objection when told about the change to the ownership of Trust DFM in April 2022.

95. I do not accept that the Ombudsman's decision was irrational in this regard.

96. Firstly, another Ombudsman might not have found that W&T's failure to inform the Booths of the changes of ownership and client base of Trust DFM prior to or at the time they occurred was a failure by W&T to conduct their services with "due skill, care and diligence" or to "uphold their customers' interests and treat them fairly." That does not, however, mean it is a decision no rational ombudsman could make. I consider it was a matter within the Ombudsman's sphere of expertise, and that his decision was one he was entitled to reach.

97. Secondly, it is important, again, to read the Ombudsman's decision as a whole. He found that W&T had failed to provide full, accurate and suitable advice about Trust DFM in 2018. In particular, he found that the suggestion that, in effect, nothing would change in terms of the management of the Booth's portfolio (other than that they would not need to approve every transaction) was misleading. He found that Trust DFM had full discretion and investment decision making powers for its model portfolios, that it operated its discretionary portfolio management service as it saw fit, and that its service was not subject to oversight and/or decisions from W&T's investment committee. He found that was not how matters were presented to the Booths in 2018. He also found that the agency arrangements, in place from 2018, were not properly explained to the Booths. That was *in addition* to the Ombudsman finding the Booths should have been told about the subsequent changes of ownership and

client base of Trust DFM that occurred in 2020-2022. He concluded that, taken together, those were all matters of importance to the Booths. W&T may disagree, but I do not consider it irrational for the Ombudsman to have reached the view he did, and to find a failure to provide full, accurate and suitable advice in 2018 and a failure to update the Booths of significant matters that occurred subsequently.

Ground 5: Irrationality in relation to redress

Parties' positions

98. As set out above, the Ombudsman directed W&T to compensate the Booths by paying them the difference between the "actual value" and the "fair value" of the Booths' portfolio as at the "date of settlement" (i.e. when the compensation is paid). W&T argue that is an irrational way of compensating the Booths. That is because in October 2023 the Booths terminated their relationship with W&T and moved their portfolio to Strategic Solutions. From that date W&T had no role in the performance of the Booths' portfolio. W&T argue that it is irrational to require them to pay compensation in a way that depends on decisions made by Strategic Solutions after October 2023 over which W&T had no control, and which were unrelated to any of the failures of W&T found by the Ombudsman.

99. The FOS argues that the Ombudsman's decision on redress was not irrational. It argued that the Ombudsman had a wide discretion in awarding compensation and that the reasons he determined compensation be calculated in the way he did was set out in his decision and witness statement, and that they provided a rational basis for considering the actual value of the Booths' portfolio at the settlement date even if that falls after the portfolio was moved to Strategic Solutions.

Legal principles

100. An ombudsman has a wide discretion in determining redress. FSMA 2000 s 229(2) provides that when a complaint is determined in favour of the complainant, an ombudsman can include an award of "such amount as the ombudsman considers fair compensation for loss or damage". The award need not be one that would be ordered by a court (*IFG Financial Services Ltd* paragraph 19), and it is expressly stated in DISP 3.7.2R that an award can be made "whether or not a court would award compensation". The award is what the ombudsman in his or her "subjective consideration" believes is "fair compensation" (*IFG Financial Services Ltd* paragraph 19). Such a decision can only be challenged on the basis of irrationality, and insofar as the ombudsman is making a judgment within his or her sphere of expertise, as Collins J held in *Green*, the court should "respect the expertise" which renders it "inevitably … more difficult to establish that a particular decision was irrational."

101. An ombudsman's discretion on redress is not, however, unlimited. In particular, it is clear from the statutory scheme that any award must be for "such amount as the ombudsman considers fair *compensation* for loss or damage … suffered by the complainant" (FSMA 2000 s 229(2)(a), emphasis added). Pursuant to DISP 3.7.2R the "compensation" can only be for certain specified matters including "distress and inconvenience" and "financial loss (including

consequential or prospective loss)". The Ombudsman in the present case awarded the Booths £750 for distress and inconvenience. That is not challenged by W&T. They challenge the decision to provide "compensation" for "financial loss" and, in particular, the way it is to be calculated. The fact that the award is for what an ombudsman considers "fair *compensation*" provides a limit to his or her discretion in making the award. An award of "compensation for … financial loss" is a sum that seeks to reflect the amount the complainant has lost financially as a result of the acts or failures of the respondent found by the ombudsman. That is, indeed, what the Ombudsman was seeking to do in the present case. As he explained in his decision "[m]y aim [in terms of financial redress] is to put the [Booths] as close as possible to the position they would now be in if they had been given full, accurate and suitable advice in the July 2018 recommendation." He was thus seeking, in terms of redress, to calculate the losses caused to the Booths by W&T's failures to give suitable advice in 2018 and subsequently, and compensate them for such losses.

102. The question is whether the Ombudsman's way of calculating a sum to achieve that aim was irrational. In particular, did it involve "a demonstrable flaw in … reasoning" or "reasoning involv[ing] a serious logical or methodological error" (*The Law Society of England and Wales* paragraph 98)? Was there a logical error in calculating compensation by reference to the value of the Booths portfolio at the date of settlement, where that would inevitably depend on investment decisions taken after the Booths switched their portfolio to Strategic Solutions?

103. W&T drew my attention to *R (Garrison Investment Analysis) v FOS* [2006] EWHC 2366 (Admin) in which Sullivan J (as he then was) found at paragraph 26 that "there [was] no logical connection between the redress ordered [by the ombudsman] and the error found [in the actions of a financial analyst]." Sullivan J continued "the redress does not fulfil the aim set by the ombudsman himself and is, therefore, on its face, irrational" (ibid). As the FOS pointed out before me, the facts of *Garrison* are different to the present case, but it does demonstrate that if there is not a logical connection between the redress and the error for which compensation is being provided, the method of calculating the award will be irrational.

104. W&T also referred me to *Linear Investments* in which the claimant, a provider of investment services, sought to challenge a decision of an ombudsman to award compensation, as in the present case, by calculating the difference between the complainant's actual portfolio and a selected benchmark. Unlike in the present case, however, the ombudsman calculated compensation in that way only until the date the complainant's portfolio with the claimant was surrendered, and thereafter ordered the payment of interest to the settlement date (paragraph 58). The claimant in *Linear Investments* sought to challenge the ombudsman's decision on redress on the basis that the incorrect benchmark index had been selected. As part of that challenge the claimant argued that the ombudsman should have sought information from the complainant about his investments after he ceased his relationship with the claimant. That was rejected by Stacey J. She held "[t]he issue for the ombudsman was how to put right what had gone wrong in 2017…. Information about [the complainant's] investments

following termination of his relationship [with the claimant] in February 2019 was not relevant" (paragraph 87). She continued "[the complainant's] investment appetite may well have changed after his experience with [the claimant]. What relevance to the calculation of fair compensation would it have had if he had placed his returned money from [the claimant] under the mattress in March 2019?" (ibid).

105. The FOS argued before me that the fact that another ombudsman in *Linear Investments* calculated compensation differently does not mean the decision with which we are concerned is irrational. The FOS also noted that the reason that events after the complainant's termination of his relationship with the claimant was being considered in *Linear Investments* was that it was said to go to whether the benchmark index selected was appropriate, which is not challenged here. I accept those submissions, but they only go so far. *Linear Investments*, in my view, does show that alternative methods of calculating compensation can be made, and it is notable that Stacey J, in fairly robust terms, questioned the relevance of information about investment decisions made after a complainant's portfolio ceased to be managed by the claimant. That is the issue before me.

Discussion

106. In the present case the Ombudsman concluded that if the Booths had been provided with suitable advice in July 2018 about Trust DFM, they would have declined the recommendation to move their portfolio, and would most likely have terminated their relationship with W&T on 1 September 2018. That is a factual finding the Ombudsman was entitled to make. It gave a starting date for calculating compensation of September 2018. That is not challenged. The Ombudsman then determined that compensation should be calculated by comparing a "fair value" for the Booths' portfolio, i.e. the value it would have reached if invested in a benchmark index, with its "actual value." That again is a decision he was entitled to reach.

107. The issue in dispute is the selection of the date for the calculation of difference between the "actual" and "fair value" of the Booths' portfolio. The Ombudsman selected the settlement date (rather than, for example, the date at which the Booths relationship with W&T terminated or some earlier date). The reason for selecting the settlement date was explained by the Ombudsman in his final decision as follows:

> The effect of W&T's unsuitable advice in July 2018 includes the Trust DFM managed portfolio which would otherwise not have existed, its performance thereafter, any 'lost value' … and any loss of potential returns, to date, on such lost value. Therefore, the effect presently continues, despite movement of the portfolio to a new firm in October [2023]. The redress calculation must fairly reflect this, so it must be conducted to the date of settlement.

108. In his witness statement, the Ombudsman further explained his decision:

When considering compensation in the context of investment portfolios, it is important to bear in mind that the portfolio will be invested and therefore exposed to the market and that exposure will fluctuate with the result that it can perform well, badly or both. The portfolio's value will not crystallise until it is sold or a decision is taken to liquidate the assets. There can also be a compounding effect in the performance of portfolios whereby the capital first produces a gain, which, in turn, also produces a gain. My reference to "any loss of potential returns, to date, on such value" is to the compounding effect. The benchmark sets the basis on which 'fair' performance should be calculated.

This contrasts with the investment of cash where it may just gain interest.

A common approach to calculating compensation is to calculate the lost value at an end date, which, if my other findings had been different, given the [Booths] moved firms, the end date may have been October 2023. Interest would then have been applied from the end date to the date of settlement, most likely at a rate of 8% per year simple interest. This would have addressed only the loss amount (not the portfolio as a whole).

This approach is usually applied where there is no issue with the existence of the portfolio, the only issue is that the investments within it were unsuitably advised or mismanaged, in which case, the investments related to the unsuitable advice or mismanagement would be expected to have been reviewed and addressed when the new firm stepped in.

Ultimately, the question of end date is fact specific based upon what, in the opinion of an individual ombudsman, is fair on the facts of a case.

I considered that, given my findings on the complaint, I was not concerned with unsuitable investment as such but that the Trust DFM portfolio would never have existed because the [Booths] would never have accepted the July 2018 recommendation. Discretionary management as part of the Trust DFM product would therefore have never come into play, up to July 2018 their previous WMP portfolio was managed on an advisory basis. They would have terminated the relationship with the Claimant in September 2018.

My approach in this case was to calculate fair performance to cover the period from the start date to the date of settlement in order to reset the complainants' position altogether (as though they had left the firm in 2018, gone elsewhere and had in place a new portfolio under the new firm). Using this idea of a 'new portfolio' and using 'growth' alone to illustrate what I mean in

> this passage, all growth would have had a compounding effect (i.e. growth on growth across the portfolio). This is what I mean by lost value and the loss of potential returns on the lost value (i.e. growth on growth). I considered that the same (be that growth and/or loss, depending on the actual benchmark performance) should be reflected in the calculation to the date of settlement, hence why I did not use an end date at the point of transfer to a new firm.

109. There was no evidence before me as to the current value of the Booths' portfolio, though there was some suggestion in the Ombudsman's witness statement that the portfolio had been performing well at the new firm. In order to test the potential consequences of the Ombudsman's method of calculating compensation, I therefore gave some hypotheticals at the hearing. Ms David asked for a short break to discuss them with the Ombudsman, and did her best to respond on her feet. She, very fairly, wrote to me after the hearing and asked for the hypotheticals to be set out in writing so that she and the Ombudsman would have a further opportunity to consider them. I sent the hypotheticals to the parties in writing, and the FOS and W&T provided helpful post-hearing written submissions in response.

110. The note I sent to the parties stated:

> The example I posited at the hearing to illustrate the position on redress was as follows.
>
> > a) [Suppose the Booths] ("IPs") invest £100,000 in 2018 through [W&T] ("C").
> >
> > b) By October 2023 the investment had increased in value by 25% and was worth £125,000. The relevant benchmark ("RB") had, however, increased by 50% in that time. If the IPs had invested in the RB, their investment would therefore be worth £150,000. That would mean, it can be said, that the IPs had lost £25,000 because of their investment through the C.
> >
> > c) In October 2023 the IPs took their investment to another financial adviser ("A"). From October 2023 to April 2026, the RB had increased by a further 50%. That would mean that if the £100,000 had been invested from 2018 at the RB rate, it would be worth £225,000 by April 2026 (i.e. £150,000 by October 2023 and £225,000 by April 2026). If April 2026 is the "settlement date", on the Ombudsman's calculation, £225,000 is the "fair value" of the portfolio.
> >
> > d) Suppose A did a very good job investing the IPs' money, and from October 2023 to April 2026, the IPs' investment had outperformed the RB and increased by 100%. That would mean that the portfolio of £125,000 transferred in October 2023, was now worth £250,000 and that would be

> the "actual value" of the portfolio on the Ombudsman's approach. On the Ombudsman's approach to redress, the IPs will receive no compensation. That is because the "actual value" of £250,000 is greater than the "fair value" of £225,000. The IPs have, however, clearly suffered losses because of C's advice. If they had invested in the RB in 2018 they would have had £150,000 in October 2023. If that had been transferred to A, and A had doubled the value of the investment, by April 2026 the IPs would have £300,000. They have therefore lost £50,000 by following C's advice between 2018 and October 2023 but will not be compensated
>
> e) Now suppose A did a very poor job with their investment advice and from October 2023 to April 2026 they lose all of the IPs' investment. The "actual value" of the investment is now worth £0. The difference between the "fair value" of £225,000 and the "actual value" of £0 is now £225,000, and that is what the IPs will receive in compensation from C on the Ombudsman's approach. That, however, is significantly greater than any losses caused by C's advice, and is mostly the result of the A's poor investment advice and not C's.
>
> The question I asked at the hearing was whether that was a rational approach to calculating redress, as it would appear to lead to over or under compensating the IPs depending on A's performance.
>
> As I also indicated at the hearing, I appreciate that the Ombudsman was seeking to reflect the fact that the market will have fluctuated between October 2023 and April 2026 in his calculation. That, however, could be achieved by considering how the IPs loss of £25,000 as at October 2023 (see above at (b)) would be reflected in an RB portfolio. Assuming an RB portfolio will have increased by 50% between October 2023 and April 2026 (see above paragraph d)) the losses caused by the C's advice would be £37,500 (i.e. the £25,000 loss as at October 2023 plus the further £12,500 loss as at April 2026).

111. In the FOS' post hearing note, it stated that there were only "two relevant ways of approaching redress". One was to assume that loss crystalised at a certain point in time and that interest can be applied to the loss thereafter. The FOS called that "the first method". The other is to apply the method the Ombudsman adopted in his decision in the present case ("the second method"). The FOS submitted that the first method is "adopted where there is no issue about the existence of the portfolio", but there has been some "specific unsuitable investment advice". The FOS submitted that the second method was appropriate where, if suitable advice had been provided, the "portfolio would never have existed". The FOS submitted that the latter was the position in the present case, and that had the Booths received suitable advice in July 2018 they would have

moved to a new firm in September 2018. The FOS argued that it was therefore appropriate to consider the actual value of the Booths' portfolio at the date of settlement as that would allow for "the compounding growth effect of the investment portfolio", and that the Ombudsman's approach did not involve "over or under compensation" of the Booths.

112. I have carefully considered the FOS submissions, as well as the Ombudsman's evidence and the reasoning in his decision. Together they explain in some detail the basis for his calculation of the award. I am conscious that it is not for me to determine how redress should be determined, and that the Ombudsman's decision can only be overturned if it is irrational. I am also conscious that the Ombudsman has particular expertise in financial matters. I am not sure, however, how far that goes on the issue before me. I accept, for example, that where an ombudsman selects a particular benchmark index for calculating redress, that is likely to be a question on which he is clearly the expert and not the Court. When it comes to the ways in which compensation is determined for losses, however, that is much closer to an area in which a Court has expertise, and that is so even though the Ombudsman is not required to calculate loss as if determining a tortious or contractual claim. That said, I am happy to accept that the Ombudsman will have expertise in calculating compensation. The issue, however, is not whether or not I agree with the Ombudsman's decision in that regard, but whether the method by which he decided compensation should be determined involved "a serious logical or methodological error" or "a demonstrable flaw in … reasoning". In this case, I consider there is such a flaw.

113. As set out in the hypothetical examples I provided to the parties, any calculation of the actual value of the Booths' portfolio at the date of settlement will inevitably reflect decisions taken by Strategic Solutions after October 2023. Those are decisions over which W&T had no control and for which they are not responsible. In the FOS' post-hearing submissions, it noted that the Ombudsman's final decision was taken in April 2024, so only six months after the Booths had moved their portfolio to Strategic Solutions. Thus, the FOS argues, any impact of decisions made by Strategic Solutions would have been comparatively less at the date of the Ombudsman's decision than they might be at the date of the hearing before me, which was 2 ½ years after the Booths had transferred their portfolio. I cannot see how that makes a difference. If it is not logical for the Ombudsman to adopt a method of calculation which over or under compensates the Booths because it will depend on action taken by a third party over which W&T have no control, it does not matter that that effect may become greater with time. Furthermore, the compensation has not been paid to the Booths because of these judicial review proceedings. Any determination of compensation should take account of the possibility that a party may seek to challenge the Ombudsman's conclusion, and so the date of settlement can take some time. Indeed, if the present case proceeds further on appeal, the final settlement date may end up being an even greater distance from W&T ceasing to have any involvement with the Booths' portfolio. and therefore affected to an even greater extent by Strategic Solutions' decisions.

114. The Ombudsman submitted that his method of determining redress would not lead to over or under compensation, in the sense of compensation not reflecting

the losses caused to the Booths by W&T. I do not consider that to be correct. As set out in the hypothetical examples I gave, the level of compensation W&T will be required to pay will inevitably depend on decisions taken after October 2023 by Strategic Solutions. If they have made successful investment decisions, it will reduce the compensation W&T pay the Booths. If they made poor decisions, it will increase the compensation. That, however, has nothing to do with compensating the Booths for the losses caused by W&T and does not fulfil the Ombudsman's aim of putting the Booths "as close as possible to the position they would now be in if they had been given full, accurate and suitable advice in the July 2018 recommendation." It will inevitably increase or decrease the compensation paid to the Booths depending on actions of a third party over which W&T have no control and that are unrelated to the actions or failures of W&T.

115. I consider that to be a "demonstrable flaw in the reasoning". The logical flaw is apparent if one considers an observation made by the Ombudsman in his decision. He stated "[i]t is … likely to be in W&T's interest [not to delay payment of the award to the Booths] because delayed settlement, and therefore extension of the end date [for calculating loss], potentially increases the amount of redress to be paid." That is true if Strategic Solutions were making poor investment decisions and underperforming the benchmark index, such that the difference between the actual value of the Booths' portfolio and the fair value as reflected by the benchmark would increase with time. On the other hand, if the Booths' portfolio was doing well with Strategic Solutions, as apparently the Ombudsman thought it was, then it would, in fact, be in W&T's interest to delay settlement. If the portfolio is doing well and overperforming the index, the longer W&T wait in paying compensation, the less would be the difference between the actual and fair value of the portfolio, and indeed the former might end up being greater than the latter meaning no compensation would be paid. That would create a perverse incentive to delay paying compensation. It also shows that the level of compensation paid will depend on decisions over which W&T have no control and are unrelated to the failings found by the Ombudsman. That is not a rational way of calculating loss.

116. I also do not consider that the FOS was correct in its post-hearing note that there were only two methods of calculating compensation. The Ombudsman wished to reflect the fact that losses are compounded, i.e. that if there were losses of £x as at October 2023 that will be further compounded by the date of settlement because the additional £x will not have been in the portfolio and so the portfolio will have increased by less than it would otherwise have done. As set out in my post hearing note, and as was suggested in W&T's skeleton, that loss could be calculated by the payment of interest from October 2023 or by considering how much the sum of £x would have been worth at the date of settlement if invested in the benchmark index. As to the latter, in my hypothetical example if there were losses of £25,000 in October 2023, and the benchmark increased by 50% between then and the date of settlement, the total loss would be £37,500. There were thus at least three possible ways to calculate losses rather than two, and the Ombudsman was not faced with the choice of either calculating the losses as at October 2023 and then interest thereafter, or the method he selected.

117. I also do not consider the method the Ombudsman adopted, rather than requiring the payment of interest on any losses that had crystalised in October 2023, better reflected the factual finding he had made. The Ombudsman considered that the method he selected was more appropriate than treating losses as crystallising at October 2023 and then applying interest thereafter because he was "not concerned with unsuitable investment as such but that the Trust DFM portfolio would never have existed [if the Booths had been properly advised in 2018]" and that the method he selected would take account of the "compounding" of losses. In any case in which unsuitable advice has caused losses, however, the losses will be "compounded". If unsuitable advice is given, so that a complainant has less money than they otherwise would have had at a particular moment in time, those losses will be "compounded" going forward in the sense that less money will be invested, and if the person's portfolio grows, there will be less growth than there would otherwise have been. That, however, is usually compensated by determining the losses as and when they are suffered, and an interest payment thereafter, rather than seeking to calculate lost growth. It does not provide a reason to take a different approach because, on the Ombudsman's findings, the Booths' portfolio would have been transferred in September 2018 if they had been properly advised.

118. In any event, as set out at paragraph 116 above and in W&T's skeleton, if the Ombudsman had wished to compensate the Booths for the lost growth after the time W&T ceased to manage their portfolio, that could be achieved by calculating the loss that had been occasioned by the date the Booths removed their investments from W&T and then calculating a benchmark return for that loss until the settlement date. Calculating compensation in that way, or calculating losses as at October 2023 and interest thereafter, would have avoided determining compensation in a way that is inevitably affected by decisions made by Strategic Solutions after October 2023. I consider that determining compensation as the Ombudsman did was not rational.

Senior Courts Act 1981

119. Senior Courts Act 1981 ("SCA 1981") s 31(2A) provides:

> "The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award … on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. […]"

120. The FOS argued that as W&T do not challenge the Ombudsman's decision to uphold the Booths' complaint in relation to the Multrees migration, the outcome would have been the same even if the Ombudsman had erred in relation to the Trust DFM issue. Or to put it another way, the FOS argues that even if W&T succeeded on any of their Grounds 1-4 in their judicial review, such that the

Ombudsman's decision on the Trust DFM issue was erroneous, there would have been the same outcome because the complaint would still have been upheld.

121. Given that I have not found for W&T on any of Grounds 1-4, this issue does not arise. If I had, however, found that the Ombudsman had erred in upholding the complaint in relation any of the Trust DFM issues, I do not consider that SCA 1981 s 31(2A) would have applied. As set out below, I am unable to conclude that the redress would have been the same if only the Multrees complaint had been upheld. More fundamentally, however, I do not consider that the "outcome" can be regarded as being simply the upholding of the complaint, such that there would be the same "outcome" if the Ombudsman had not made the findings he did on the Trust DFM issue and upheld the complaint only on the Multrees issue. In my view the *basis* on which a complaint is upheld is also an element of the "outcome". Suppose, for example, an ombudsman upheld a complaint on some relatively minor issue, but then found, in a way that was conspicuously unfair or plainly irrational, that a financial services firm had behaved improperly in some much more serious way. If the FOS' analysis of s 31(2A) is correct, the "outcome" would have been the same even if the latter error had not been made and the firm would be entitled to no remedy. Indeed, they should be refused permission to bring a judicial review claim pursuant to SCA 1981 s 31(3C) and (3D). That cannot be correct. An ombudsman's decision is published, and if he or she finds serious misconduct by a financial service firm on a basis that was unlawful, it cannot be correct that the firm would have no remedy because a complaint was also upheld in relation to some other relatively minor issue. That, indeed, is not far from the present case. The Multrees issue concerned technical problems with a platform that meant there were difficulties with the migration of the Booths' portfolio. The Ombudsman's findings concerning Trust DFM were more serious. If the latter findings had been irrational or otherwise unlawful, I would not have held that the "outcome" was substantially the same because the complaint would have been upheld in any event on the unchallenged Multrees findings.

122. The FOS also sought to rely on SCA 1981 s 31 in relation to the Ombudsman's decision on redress. It argued that if, as I have, I allowed W&T's challenge on Ground 5, I should refuse a remedy because the Booths would have received compensation flowing from the errors in the Multrees migration in any event. Furthermore, it may be, the FOS submitted, that W&T would be worse off if they succeed on Ground 5. If compensation was calculated, as W&T say it should have been, by reference to the losses as at October 2023 followed by interest or a benchmark return on that loss, they might be required to pay more by way of compensation than under the Ombudsman's formula challenged pursuant to Ground 5.

123. The present case is an unusual one. It is not usual for a claimant to pursue a case where, if they succeed, they may find themselves in a worse position than if the unlawful decision they are challenging had stood. That, however, is a matter for W&T. I cannot conclude that it is highly likely that the outcome would not have been substantially different but for the erroneous approach taken to redress. It

may be that the outcome will be better for W&T or it may be worse if compensation is calculated differently, but it is very unlikely to be the same.

124. The FOS also suggested that the outcome would have been the same in terms of redress because the Ombudsman would have awarded the Booths compensation, in any event, because of the Multrees migration issue. The FOS noted that the Booths had attributed much of their portfolio losses to the problem in the migration to Multrees. As W&T pointed out, however, their own calculation suggested that the migration had not caused the Booths any losses. I do not have evidence before me to enable me to determine the losses, if any, that flowed from the Multrees migration. Nor is there evidence to enable me to determine the Booths' losses if the Ombudsman had not made the error I have identified pursuant to Ground 5 and calculated compensation in a way that did not depend on investment decisions taken after the Booths left W&T. I cannot therefore determine that the outcome, in terms of the compensation W&T will be required to pay, would have highly likely been the same if the error I identified pursuant to Ground 5 had not been made.

Conclusion

125. For the reasons above, I reject W&T's challenge on Grounds 1-4 but allow their challenge on Ground 5. The FOS suggested that, if I was against it on the issue of redress, I should invite the parties to provide written representations on the form that any order on remedy should take. I consider that to be an appropriate course, and invite the parties to agree a draft order to that effect.