Judicial Review: An Unlikely Remedy for The Defaulting Indemnity Insurer: R. (on the application of Enterprise Insurance Company PLC) v The Financial Ombudsman Service and Mr George Head (Interested Party)[1]

Angela Sandhal[*]

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This article charts the unsuccessful attempt by the now defunct Enterprise Insurance Company PLC ("Enterprise") to judicially review a decision of the Financial Services Ombudsman ("FSO") in what has been a long and protracted set of legal proceedings involving both private and public law.

Mr George Head, the claimant in an unsuccessful claim for professional negligence against his former solicitors in an industrial disease claim, had successfully complained to the FSO about his after the event ("ATE") insurers after they refused to indemnify him in respect of an adverse costs order made against him for the not insubstantial sum of £26,012.80. Enterprise had claimed that they were entitled to repudiate cover ab initio on the grounds that misrepresentation had occurred in the facts Mr Head had provided to his solicitors and which were subsequently used to create his insurance cover. The FSO did not agree and upheld Mr Head's complaint ("the decision").[2]

There is no right of appeal of an FSO's final decision and therefore the only remedy available to any party seeking to challenge the outcome is by bringing a judicial review in the Administrative Court in the High Court of Justice. As with any claim for judicial review, an application must be made "promptly and in any event not later than 3 months after the grounds to make the claim first arose" as required by CPR Pt 54; and there must be arguable public law grounds capable of challenging any decision. However, the threshold for challenging public bodies is especially high in cases of specialist tribunals like the FSO which has a wide discretion when making decisions and is not bound by the same rules of evidence that apply in court.

The Decision of the FSO in Mr Head's case seemed perfectly reasonable and reflected what is the central characteristic of the statutory scheme: a complaint is determined by reference to what is, in the opinion of the ombudsman, "fair and reasonable" in all the circumstances of the case, i.e. a subjective test. The FSO found amongst other matters that "the fact that [Mr Head] turned out to be a poor witness doesn't necessarily mean he deliberately lied".[3]

It did, therefore, come as a surprise when Enterprise decided to issue a judicial review one day before the three-month period was about to expire. Prior to that, Mr Head was not aware of the proceedings, having not been served with the letter before claim despite his clear status as an interested party in the claim. This omission was unfortunate as by the time the details were known, Mr Head had already brought a claim in the County Court to enforce the FSO's decision—claim which subsequently had to be stayed pending the outcome of the judicial review.

[1] *R. (on the application of Enterprise Insurance Company PLC) v The Financial Ombudsman Service and Mr George Head (Interested Party)* 20 October 2014.

[*] Public Law and Judicial Review Solicitor at Atherton Godfrey Solicitors, who acted for Mr Head in these proceedings.

[2] Sarah Naylor, "What to do when After-the-Event Insurers Refuse to Indemnify" [2016] J.P.I. Law 56.

[3] Complaint Reference 1550-8768/AMC/IF54 (19 June 2015).

Unsurprisingly, the judicial review was sternly defended by both the FSO and Mr Head. Although Mr Head could have chosen not to participate in the proceedings in the expectation that the FSO would itself successfully defend the claim for him, this was an unusual case where Enterprise was seeking an order that the court dismiss Mr Head's complaint to the FSO as part of the remedy sought. Although such a move by the Administrative Court would be very rare indeed, it would have essentially left Mr Head without a remedy. Moreover, the prospect of having to deal with further lengthy proceedings against a well-resourced insurance company provided an incentive to bring an end to the claim sooner rather than later.

The grounds for judicial review raised by Enterprise were not compelling. The central argument in the claim seemed to be that the FSO may not have considered the correct legal test when concluding whether there had been "misrepresentation" by Mr Head. As well as submissions on conduct and "promptitude" the claim was, in Mr Head's submission and those advanced by the FSO, misconceived and without merit. Enterprise was simply seeking a rehearing of the primary complaint rather than a review of the FSO's decision on public law principles—a mistake often made by those unfamiliar with the jurisdiction of judicial review.

The case came before HH Judge Allan Gore QC sitting as a Judge of the High Court on 11 December 2015 who refused the claimant permission to bring a claim. His reasons included Enterprise's conduct and lack of promptitude causing prejudice to Mr Head. In relation to merits, HH Judge Gore QC gave the following informative judgment:

> "The challenge misconceives the role and function of the Defendant, the jurisdiction of the Defendant is simply to decide what upon a subjective test is considered to have been fair and reasonable. Although directed to take into account relevant law, regulations, regulatory rules guidance and standards, codes of practice and industry standards, including therefore the judgement of Her Honour Judge Belcher QC, at the end of the day the Defendant makes a decision of fact and judgment as to what is considered to have been fair and reasonable. This challenge is nothing more than an attempt to appeal that decision. The Defendant had evidence and argument that entitled him to come to his decision. It is not for this court to substitute its views of the evidence for those of the Defendant. The Defendant COULD have come to the conclusion that the Interested Party consciously gave a deliberately false account which could be characterised as misrepresentation, but he was not obliged to do so on the evidence for the reasons stated in the Defendant's Summary Grounds of Resistance. No error of law is apparent. This was not a Wednesbury unreasonable or irrational or perverse decision. There are no public law grounds to challenge the decision."

The permission application was renewed and refused a second time at an oral hearing. The judgment was given ex tempore and unfortunately there is no transcript available, although there is no reason to suppose that the reasons differed in any substantial terms to those provided by HH Judge Gore QC earlier. Enterprise did not apply for permission to appeal to the Court of Appeal and the adverse costs order was subsequently discharged by Enterprise bringing to an end all substantive proceedings.

What is interesting about this case is that it highlights the suitability of the FSO as a low cost and effective arbitrator for aggrieved claimants in litigation cases dealing with ATE insurers seeking to repudiate ATE cover—something which occur with increasing regularity as defendants in personal injury litigation seek to focus on attempts to establish a "fundamentally dishonest" claimant in order to displace the usual cost protection. Although that was not an issue in Mr Head's case, Enterprise had sought to rely, however erroneously, on the trial judge's remarks about inconsistencies in his evidence as between that which appeared in his written statement and that given at trial orally, suggesting that insurance companies are alive to the possibility of repudiating cover if the circumstances might allow it.

Even so, the current case should serve as a warning to ATE providers that attempts to repudiate cover will almost inevitably find themselves being arbitrated by the FSO whether the insurance company wishes it or not. What follows will be a legally binding decision in what is essentially a private dispute between two parties to an insurance contract and the High Court will rarely intervene in such decisions.

Similarly, those acting for claimants will need to be cautious when preparing their client's evidence. Mr Head's complaint to the FSO was in part successful after the FSO had found that Mr Head was in the hands of his former solicitors who had drafted his witness statement based on questions they had asked him.