Case No: CO/5225/2009

Neutral Citation Number: [2009] EWHC 2240 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Leeds Combined Court
The Courthouse
1 Oxford Row
Leeds LS1 3BG

Date: 8th September 2009

Before :

HIS HONOUR JUDGE S P GRENFELL

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Between :

THE QUEEN on the application of GRAHAM NASSAU SENIOR-MILNE	**Claimant**
- and -	
THE PARLIAMENTARY AND HEALTH SERVICE OMBUDSMAN	**Defendant**

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- -

Mr Senior-Milne, claimant, in person
Mr Child (of **Beachcroft LLP**) for the defendant

Hearing date: 17th August 2009
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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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His Honour Judge S P Grenfell

His Honour Judge Grenfell:

1. Mr Senior-Milne was a trustee of a policy issued by Scottish Widows Assurance Company ("Scottish Widows"), a mutual insurance company, which was demutualised and sold to Lloyds TSB plc in 2000. Prior to demutualisation Scottish Widows issued a circular document ("the 1999 Circular") to all policyholders which indicated that, out of a total purchase price of some £6bn, £4.5bn would be distributed amongst existing policyholders; of the balance (some £1.5bn) any remainder would be similarly distributed as a terminal bonus to the extent not needed to meet contingencies. In the event, the contingent liabilities were such that there was nothing further to be distributed, although importantly it is clear that Scottish Widows was solvent at the time of demutualisation.

2. Mr Senior-Milne complained to the defendant Parliamentary Commissioner for Administration ("Parliamentary Ombudsman"), Ms Ann Abraham, through his Member of Parliament, the Right Honourable Sir Alan Beith MP, on the 21st October 2006. The substance of the complaint was that the Financial Services Authority ("FSA") had failed properly to supervise the demutualisation of Scottish Widows in 2000, in particular, that it had approved a policyholder's circular in 1999 ("the 1999 Circular") in which Scottish Widows had failed to make it sufficiently clear that the company had outstanding contingent liabilities of some £1.5bn in respect of Guaranteed Annuity Rate ("GAR") policies.

3. The Parliamentary Ombudsman responded that she had no jurisdiction to investigate his complaint for reasons which I shall consider later. The relevant decision letter was dated 6th February 2008 sent to Sir Alan Beith and copied to Mr Senior-Milne.

4. Some time later, and outside the 3 month time limit, for reasons which Mr Senior-Milne has sought to explain, he brought the present application for judicial review on the 29th May 2009. With that application he brought a second application for judicial review of the Parliamentary Ombudsman's decision not to respond to his complaint on the 16th February 2009 on the basis that that staff lied to him about the issue of jurisdiction to prevent proper consideration of his first complaint. This complaint was not submitted through a member of parliament.

5. This was the oral hearing of the renewed application for permission to apply for judicial review, permission having been refused on a paper application by His Honour Judge Kaye QC. Unfortunately, Mr Senior-Milne misunderstood the procedure and has spent much time and effort criticising Judge Kaye's reasoning, when, as I explained to him, the oral hearing was his opportunity to present and to enlarge on his arguments afresh before me. This is not a review of Judge Kaye's decision, which necessarily was made without the benefit of oral argument.

6. The hearing proceeded unusually and exceptionally by way of a telephone hearing. Medical evidence had been received and confirmed to the effect that Mr Senior-Milne's attendance at court would be detrimental to his health. Helpfully he provided

the Court and the defendant's solicitor advocate, Mr Child, with a full electronic copy of all relevant documents.

7. *The Legal Framework*

8. The Parliamentary Ombudsman was appointed under the Parliamentary Commissioner Act 1967[1]. She performs her function through authorised officers[2]. The Parliamentary Ombudsman may investigate written complaints referred to her by a Member of the House of Commons[3], which allege injustice in connection with action taken by Government Departments and certain other public bodies[4] which are listed in Schedule 2 of the 1967 Act.

9. The Parliamentary Ombudsman cannot investigate any action for which there is a remedy at law[5]. She has a discretion whether to investigate[6].

10. The relevant part of the decision letter of the 6th February 2008 reads:

> "… Actions taken by FSA in the role of prudential regulator between January 1999 and December 2001 are … open to the Ombudsman's scrutiny. At the time of the events giving rise to

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[1] Section 1 Parliamentary Commissioner Act 1967

[2] Section 3(4) Parliamentary Commissioner Act 1967

[3] Section 5(1) Parliamentary Commissioner Act 1967
"(1) Subject to the provisions of this section, the Commissioner may investigate any action taken by or on behalf of a government department or other authority to which this Act applies, being action taken in the exercise of administrative functions of that department or authority, in any case where—
(a) a written complaint is duly made to a member of the House of Commons by a member of the public who claims to have sustained injustice in consequence of maladministration in connection with the action so taken; and
(b) the complaint is referred to the Commissioner, with the consent of the person who made it, by a member of that House with a request to conduct an investigation thereon."

[4] Section 4(1) Parliamentary Commissioner Act 1967
"Departments etc. subject to investigation.
(1) Subject to the provisions of this section and to the notes contained in Schedule 2 to this Act, this Act applies to the government departments, corporations and unincorporated bodies listed in that Schedule; and references in this Act to an authority to which this Act applies are references to any such corporation or body."

[5] Section 5(2)
"(2) Except as hereinafter provided, the Commissioner shall not conduct an investigation under this Act in respect of any of the following matters, that is to say—
(a) any action in respect of which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal constituted by or under any enactment or by virtue of Her Majesty's prerogative;
(b) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law:
Provided that the Commissioner may conduct an investigation notwithstanding that the person aggrieved has or had such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect him to resort or have resorted to it."

[6] Section 5(5)
"(5) In determining whether to initiate, continue or discontinue an investigation under this Act, the Commissioner shall, subject to the foregoing provisions of this section, act in accordance with his own discretion; and any question whether a complaint is duly made under this Act shall be determined by the Commissioner."

> Mr Senior-Milne's complaint responsibility for conduct of business regulation fell to FSA in their own right, having previously fallen to a number of industry bodies none of which was within the Ombudsman's remit. The Ombudsman cannot, therefore, entertain a complaint about the way in which FSA discharged the function of conduct of business regulator at any time, nor can she consider actions taken by them in any capacity since December 2001."

11. Mr Senior-Milne's argument in essence is that the only real issue on his first application for judicial review is whether or not the Parliamentary Ombudsman erred in making her decision that she had no jurisdiction to investigate Mr Senior-Milne's complaint. He submits that he has a complete answer, a 'killer' point, which no one but he appears yet to have grasped.

12. Mr Child, on the other hand, making what he says is an unusual appearance on behalf of the Parliamentary Ombudsman on a renewed hearing for permission, argues that Mr Senior-Milne's point is misconceived and destined to failure. Moreover, he argues that, even if the Parliamentary Ombudsman had been wrong in respect of her jurisdiction, there was no reasonable prospect of showing that she would have exercised her discretion in Mr Senior-Milne's favour to investigate his complaint or that his complaint had any prospect of success itself.

13. Mr Senior-Milne objected strongly to this line of argument, arguing that the material referred to by Mr Child in support of it was merely designed to prejudice first of all Judge Kaye and now myself into refusing his application for permission. A lot of his written material in support of his renewed application is taken up with a complaint to the same effect, even to the extent of making the remarkable allegation that Judge Kaye exhibited bias against him by relying on such material.

14. I made it clear to Mr Senior-Milne at the hearing that this line of argument indicated a fundamental lack of understanding of the principles by which Civil courts function. The court has to treat the parties before it on an equal footing[7]. That means in the context of this case taking account of all arguments on both sides that are relevant to matters in dispute. The Parliamentary Ombudsman was entitled to raise the argument in response to an application for judicial review of her decision that, even, if she had jurisdiction, there was no reasonable prospect of the complaint succeeding. Once an argument has been raised, the Court can reasonably be expected to deal with it. I cannot help observing that, whilst Mr Senior-Milne complains of prejudicial material being relied on by the Parliamentary Ombudsman, at the same time his own claim form has many examples of advocacy designed to win over the Court. For example, at paragraph 26 he refers to the statement of Carol Sergeant of the FSA "one month before she announced that she would be taking up the newly-created post of Chief Risk Director at Lloyds TSB Bank plc, at double her existing salary, …" That is pure advocacy. There is nothing wrong with the use of advocacy, but neither side can complain of the other's use of it.

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[7] Part 1 Civil Procedure Rules, the 'overriding objective'.

15. Having said all that, I do accept that the principle argument remains whether the Parliamentary Ombudsman was wrong to refuse jurisdiction and propose to examine whether the argument that she was wrong has sufficient prospect of success to warrant permission to apply for judicial review.

16. It is common ground that the Parliamentary Ombudsman did assume responsibility for investigating matters which involved prudential regulation at the relevant time; that she had no jurisdiction to investigate matters which involved business regulation; that the short point is whether the 1999 Circular covered prudential or business regulation. Both Mr Senior-Milne and Mr Child submit that there is a complete answer to this point. The question I have to ask is whether there is scope for one or other interpretation to be correct or whether one is plainly right and the other plainly wrong.

17. Mr Senior-Milne says that he was first alerted to the possibility that the Parliamentary Ombudsman could be wrong in her interpretation that the document had been subject of business as opposed to prudential regulation, when in December 2008 he read her Report in relation to the demutualisation of Equitable Life, published in July 2008. He says that he was further misled by her staff as to the true position in relation to her jurisdiction to investigate his complaint. This, he says was why he delayed until May 2009 to issue his Claim for judicial review.

18. I consider now the history of the first complaint to the Parliamentary Ombudsman.

19. The Parliamentary Ombudsman informed Mr Senior-Milne by letter of the 26th January 2007 that Sir Alan Beith had written asking her to investigate his first (October 2006) complaint.

20. The essential basis of the complaint was that a contingent liability of £1.5bn existed at the time of the Scottish Widows' demutualisation; that this contingent liability later crystallised; that this contingent liability was not disclosed to Scottish Widows policyholders at the time of the demutualisation; that the directors of Scottish Widows must have knowingly failed to disclose the existence of this contingent liability; that, since the FSA were closely monitoring the GAR liabilities of all the life companies, the FSA must have known about the GAR liability and did nothing about it.

21. The substance of the complaint was that the FSA had indicated its view that the 1999 Circular 'generally made clear that there was a potential contingency on the Additional Account for GAR liabilities'[8]; that therefore the FSA must have known that the Circular did not disclose the existence of £1.5bn contingent GAR liability; that the FSA must have decided to allow Scottish Widows to conceal that liability from policyholders. Thus, submits Mr Senior-Milne, the FSA was guilty of maladministration.

[8] FSA letter to Sir Alan Beith 29 March 2006

22. The history of the complaint to the FSA was as follows in summary. In essence Mr Senior-Milne complained about Scottish Widows and the 1999 Circular to the FSA though a member of parliament and later Sir Alan Beith MP. The FSA wrote to Sir Alan on the 13th October 2005 giving its view that the 1999 Circular had made it "clear there was a potential contingency on the 'Additional Account' for GAR liabilities in respect of the Equitable case, which was pending at the time." By its letter of the 22nd December 2005 the FSA indicated that the case was closed. Sir Alan Beith sent Mr Senior-Milne a copy of that letter on the 9th January 2006.

23. There was further correspondence. The FSA gave further clarification for its view in its letter of the 29th March 2006, quoting the 1999 Circular:

> "The contingencies allocated to the With Profits Fund are any additional costs of meeting guaranteed benefits including annuity benefits on Transferred Policies allocated to the With Profits Fund and any unexpected liabilities which arise in the future but relate (with certain exceptions) to the operation of the Society and its subsidiaries prior to the Effective Date, including those arising as a result of the SIB pensions review and tax liabilities on pre-Transfer transactions."

24. Sir Alan Beith sent a copy to Mr Senior-Milne on the 10th April 2006. 6 months later Mr Senior-Milne wrote to the Parliamentary Ombudsman on the 21st October 2006. On the 25th October the Parliamentary Ombudsman replied setting out the procedure for referring a complaint through an MP, observing that his complaint appeared to be referring to the FSA's maladministration in 2003 and pointing out the 12 months time limit for making a complaint to the Parliamentary Ombudsman.

25. Mr Senior-Milne made it clear that he did not feel in a position to make a complaint to the Parliamentary Ombudsman until he received a copy of the FSA's letter of the 29th March 2006; that in January his complaint to the FSA was not against them but against Scottish Widows; that he did not have a basis of a complaint against the FSA until April 2006.

26. The Parliamentary Ombudsman by letter of the 26th October 2006 gave specific reasons for not investigating the complaint which can be summarised as follows. The complaint related to a matter between Scottish Widows and its customers, namely the sending out of the 1999 Circular, an action of the FSA under its conduct of business responsibilities.

27. It is, of course, clear law that the Parliamentary Ombudsman is under a duty to investigate complaints fairly. That plainly includes her decision whether to exercise her discretion to investigate in the first place.

28. Mr Senior-Milne submits that the FSA was under a duty to monitor that aspect of the Scottish Widows demutualisation which involved sending out the 1999 Circular to

policy holders. He cites section 49 Insurance Companies Act 1982 and, in particular, the following subsections which governed the transfer of long term business at the relevant time:

> "49(2) The court shall not determine an application under this section unless the petition is accompanied by a report on the terms of the scheme by an independent actuary and the court is satisfied that the requirements of subsection (3) below have been complied with.
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> "(3) The said requirements are—
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> "(a) that a notice has been published …;
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> "(b) except where the court has otherwise directed, that a statement—
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> "(i) setting out the terms of the scheme; and
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> "(ii) containing a summary of the report mentioned in subsection (2) above sufficient to indicate the opinion of the actuary on the likely effects of the scheme on the long term policy holders of the companies concerned,
>
> "has been sent to each of those policy holders and to every member of those companies;"

29. Mr Senior-Milne relies on the fact that the Court of Session was satisfied in respect of the above in order for it to have granted the application.

30. What then is business regulation as opposed to prudential regulation? Did the terms of the Insurance Act 1982 definitively indicate that the 1999 Circular came within prudential regulation?

31. Business regulation plainly included regulation of the acquisition, disposal of insurance products, but that does not mean that it was exclusively concerned with that side of business. It is more helpful to consider what constituted prudential regulation. The important aspect of prudential regulation is to supervise the ability of an insurance company to meet its liabilities. The FSA's prudential regulation plainly lay in ensuring that Scottish Widows could meet its liabilities including its GAR liabilities. Mr Senior-Milne's complaint, however, was that the 1999 Circular potentially misled policy holders into believing that the 'Additional Fund' of £1.5bn might be distributed to them in whole or in part; therefore, they were misled into agreeing to the demutualisation and sale.

32. In my view, the Parliamentary Ombudsman's view that the FSA was concerned only with Scottish Widows' ability to meet its liabilities in full as prudential regulator is entirely logical. Similarly the Parliamentary Ombudsman's view that the FSA had no

concern as prudential regulator with regulating the sending out of the Circular is entirely logical. The Parliamentary Ombudsman's view that the sending out of the Circular was a matter of business regulation is entirely logical and correct.

33. In my judgment, the Parliamentary Ombudsman was entitled to take the view that she had no jurisdiction to investigate the sending out of the Circular and any misleading effect it may have had on policy holders. The Parliamentary Ombudsman's stance in respect of the Equitable Life investigation is logically distinguished by her on the simple basis that Equitable Life could not meet its GAR liabilities, which was plainly a matter of prudential regulation, unlike Scottish Widows which could meet its GAR liabilities.

34. In my judgment, the Parliamentary Ombudsman's decision not to accept jurisdiction cannot successfully be challenged on judicial review. It follows that on that simple ground permission to apply must be refused.

35. Even if the Parliamentary Ombudsman had been wrong not to accept jurisdiction, then, in my view, there are further reasons why in any event the first application for judicial review would have failed.

36. Mr Senior-Milne had to bring his application for judicial review promptly and in any event no later than 3 months after the grounds on which it was based first arose[9]. Under Part 3.1(2)(a) Civil Procedure Rules the court may extend the time if there was good reason or adequate explanation for the delay[10].

37. The starting point is the date of the decision letter of the 6th February 2008. On Mr Senior-Milne's case that is when the grounds on which he seeks to base his application first arose.

38. Mr Senior-Milne's reasoning and explanation are first of all that there was some kind of continuing "breach": the Parliamentary Ombudsman was "continuing not to do something", that is accept jurisdiction, "until she does that thing." There is, however, no basis for this argument. The Rule is clear that time runs from when the grounds *first* arose. There is no room for an argument that there is a continuing form of reviewable decision.

39. His explanation proceeds that he did not discover that his complaint about the 1999 Circular was, as he now submits, within the Parliamentary Ombudsman's jurisdiction

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[9] Part 54.5 Civil Procedure Rules 'Time limit for filing claim form'
'(1) The claim form must be filed-
'(a) promptly; and
'(b) in any event not later than 3 months after the grounds to make the claim first arose.'

[10] '(2) Except where these Rules provide otherwise, the court may-
'(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)'

until he read her report in respect of the Equitable Life demutualisation. The Report was published in July 2008 and he read it in December 2008. He then wrote a series of letters asking for an explanation as to why there could be any distinction as between her accepting jurisdiction in respect of Equitable Life and not in respect of Scottish Widows. These, he says, were dismissed with complement slips. Thus, he argues, he gave the Parliamentary Ombudsman time to make her response; it would be unfair for him to be penalised for giving her time to do so. When it was clear that there was to be no further response he issued his claim form.

40. In my judgment, the explanation which Mr Senior-Milne gives for not bringing his application for judicial review promptly and within the time limit is inadequate. It follows that there is no good reason to extend that time limit in this case.

41. A further and more sinister reason is advanced that the Parliamentary Ombudsman's 'staff concealed the fact that the complaint was in her jurisdiction.'

42. Where a potential defendant conceals material facts and that concealment results in a claimant failing to meet a time limit for bringing a claim for judicial review, then that would be a powerful factor for the exercise of discretion in favour of such a claimant.

43. Could Mr Senior-Milne make out a case for such concealment?

44. At the time of the complaint to the Parliamentary Ombudsman the complaint either was or was not within her jurisdiction. Her view that it was not was made clear as early as October 2006. To suggest that her staff deliberately sought to conceal the opposite is entirely without foundation. Mr Senior-Milne was entitled to express his disagreement, but according to him it was always a matter of argument based on clearly established facts. No facts, on his case, have been concealed from him. This allegation does not advance his argument in support of his application for judicial review.

45. Mr Child advanced several further reasons why, even if the Parliamentary Ombudsman had accepted jurisdiction, there was no reasonable prospect of showing that the Parliamentary Ombudsman would have exercised her discretion to investigate the complaint. These reasons would only have been relevant as arguments why the application for judicial review should fail in the event that permission had been granted. In the circumstances, therefore, it is not necessary to consider these reasons further.

46. I turn to the second claim for judicial review.

47. Mr Senior-Milne puts his case in this way. Having read the Parliamentary Ombudsman's report in respect of Equitable Life in December 2008 he wrote to her on the 22nd January 2009 asking for an explanation as to why she had wrongly stated that his first complaint was not within her jurisdiction, but received no response. He complained about this in a letter dated 16th February 2009 with reminders dated 15th

March and 13th April 2009, to which he received no more than acknowledgement slips. His second application for judicial review, therefore, is based on the Parliamentary Ombudsman's failure to assess his second complaint fairly and in accordance with natural justice.

48. The substance of this complaint is that staff lied to him about the issue of jurisdiction to prevent proper consideration of his first complaint. He submits that the complaint stands on its own merits; that he could have made this complaint even if the Parliamentary Ombudsman had decided the other way on the first complaint; that it is not a repetition of the first complaint, because the question of lying is a different basis of complaint. As to when the grounds first arose he submits that he could not complain till the Parliamentary Ombudsman first responded to his complaint about her staff; that trying to mislead a member of the public by lying to him is not a proper business of government.

49. The difficulty, however, with the second complaint is that Mr Senior-Milne in this regard did not bring this complaint through a member of parliament. That is a complete answer to his application for judicial review.

50. However, even if there should be some kind of exception where the complaint is against the Parliamentary Ombudsman herself and judicial review is sought of her decision not to investigate a complaint against her staff, there was no reason why the Parliamentary Ombudsman should have investigated Mr Senior-Milne's complaints that her staff had lied to him about whether to refuse jurisdiction. The correspondence shows that her staff had made it clear why she was not accepting jurisdiction for the first complaint; that in an e-mail dated 23rd January 2009 Nicki Smith, executive assistant to the Parliamentary Ombudsman, wrote: "I acknowledge receipt of your e-mails of 22 and 23 January 2009 which have been added to your file. We will carefully consider the issues you have raised but if we do not feel that they case doubt on our previous decision on your case, we will not send you a substantive response." There is no evidence that any further matter was raised by Mr Senior-Milne which might have cast doubt on the Parliamentary Ombudsman's previous decision. In any event, therefore, the second complaint had no real or reasonable prospect of success.

51. For these reasons, therefore, the second application for judicial review of the decision not to investigate that complaint has no reasonable prospect of success and is dismissed.

52. Costs

53. In *R (Mount Cook Land Limited) v Westminster City Council* [2004] 1 PLR 29 the Court of Appeal established that the costs of successfully objecting to a permission application should generally be awarded to a defendant or an interested party who has complied with the pre-action protocol but the costs would only be in relation to the costs of the Acknowledgement of Service and not for attendance at an oral hearing. Mr Child made it clear that he sought no further order for costs to cover his attendance

at the hearing of the renewed application. I consider afresh the costs of the Acknowledgement of Service. It is clear in this case that costs should follow the event, so that the Parliamentary Ombudsman is entitled to her costs of the Acknowledgement of Service. The calculation of those costs was set out at the conclusion of the Acknowledgement of Service. Ordinary principles of summary assessment apply. First I consider whether the amount claimed is or is not disproportionate to the complexity of the application. Next I identify the correct rate of charging, in this case a solicitor of Grade B, London rate. Then I consider the number of hours worked, assessing the reasonable amount of time required and multiplying the result by one-tenth of the rate. Mr Child would have been entitled to charge the London 1 rate of £291 per hour, so plainly the £200 per hour claimed is reasonable. He has claimed 15.7 hours work in the preparation of the Acknowledgement of Service. When I consider the detailed arguments of Mr Senior-Milne which the Parliamentary Ombudsman had to address, I conclude that the number of hours spent on preparation is entirely reasonable, if on the conservative side. For those reasons I assess the costs of the Acknowledgement of Service in the sum of £3,120. How this is to be paid it purely a matter of enforcement.