



## The Financial Ombudsman Service

The Financial Ombudsman Service (“FOS”) was created as an alternative forum for consumers and micro-enterprises seeking compensation from businesses providing financial services, allowing them to avoid the significant costs and time involved in court litigation.

*This month’s briefing provides a reminder of the FOS’s complaints handling procedure, highlighting the rules in relation to timings, costs and the reasoning used by the FOS to determine claims; reviews the recent significant case of Clark v In Focus Asset Management; and considers the difficulty of challenging a FOS decision.*

### FOS complaints handling - a reminder

The FOS is a public body set up by Parliament under the provisions of the Financial Services and Markets Act 2000. It provides a dispute resolution service for consumers as an alternative to the civil courts, investigating and resolving complaints against businesses that provide financial services.

The FOS will only consider a complaint after the business has had the opportunity to deal with it through its own complaints handling process: at this point it will become a “chargeable” case.

Disputes are usually settled informally by a FOS adjudicator, through mediation or conciliation. If unresolved, the adjudicator will give their opinion on how the case should be resolved, either informally or in a formal adjudication report.

In more complex cases, or where either party disagrees with initial findings, matters can be escalated to an ombudsman who will issue a final decision, usually on the basis of the documentary evidence already provided. Hearings are only held in exceptional cases and where requested by a party.

The FOS has the power to instruct a business “to do what is necessary to put things right for the consumer”. The largest sum that a firm could be required to pay is £150,000, although the FOS has the power to recommend a higher figure.

Generally however, the amounts involved are more modest than this.

It is important to remember that once a FOS decision is handed down, the consumer may either accept or reject it. If the consumer accepts the FOS decision within the time limits set down by the ombudsman dealing with the case, both the business and the consumer will be bound by it. Otherwise, the business is not bound.

If the consumer does not accept the FOS decision, the consumer remains free to initiate court proceedings against the business if they wish. This is in contrast to the business which has no right of appeal of the decision of the FOS if the consumer accepts it.

### Time limits

Consumers will be time **time-barred** from bringing a complaint to the FOS:

- six months from the business sending the consumer a final response (which mentions the six-month time limit); and
- six years from the event the consumer is complaining about (or, if later, three years from when the consumer knew or could reasonably have known that they had a cause to complain).

If the business does not tell the complainant about their right to complain to the FOS and about the six-month time limit in a letter, this letter cannot constitute a final response and the start of the six-month period will not be triggered.

The FOS will still be able to consider a time-barred complaint where a business does not clearly object to it. In addition, the FOS may waive the time limits in exceptional circumstances.

*Continued overleaf*

### Who bears the costs?

The FOS does not charge consumers for bringing a complaint. Its funding is currently covered by a general levy collected from businesses and from individual case fees paid for by businesses.

Once a complaint has become a “chargeable” case, businesses will incur a case fee of £550. However, all businesses are entitled to 25 “free” cases a year and will only be charged for the 26th case onwards.

Businesses cannot reclaim this fee from the complainant. In addition, and in contrast to proceedings in Court, neither party will be able to recover any legal costs from the other side.

### How does the FOS reach a conclusion about a complaint?

Another major difference between the way the FOS and a court determine a claim is that the FOS will do so in accordance with what it considers **fair and reasonable in the circumstances** - even where the strict application of the law would produce a different outcome.

Under the FCA’s *Dispute Resolution: Complaints Sourcebook* (“DISP”), the FOS is required to take into account the law, rules, codes and good practice applied at the time of the event complained about when reaching its decision, but is **not bound by legal precedent** and can choose to discount previous court decisions.

In *R (on the application of IFG Financial Services Ltd) v FOS* the High Court expressly supported the ombudsman’s right to make an award that differs from that which a court applying the law would make, provided “*he concluded that the award he wished to make was one which was fair and reasonable in all the circumstances of the case*” and provided he had taken into account the matters identified above.

In addition the FOS is not bound by its own decisions. Although it aims for consistency in the way it deals with particular types of complaints it will rarely, if ever, mention in one case the outcome of another.

### “Topping Up” FOS Awards In The Courts

Until relatively recently it was unclear whether complainants who had been awarded the maximum statutory award from the FOS (currently £150,000) could pursue legal proceedings to obtain the balance of what they claim is their full loss.

However, the Court of Appeal has confirmed in the case of *Clark v In Focus Asset Management* that where a consumer has accepted a FOS award, they will be prohibited from bringing the same claim in court for further damages.

In *Clark*, the claimants argued that they had lost more than £300,000 following negligent investment advice. The FOS held that they were entitled to compensation exceeding the then statutory limit of £100,000 and recommended payment of full compensation. The claimants accepted the award, specifically stating that this was subject to their right to claim the balance in court proceedings, and issued a claim in court for these losses.

The Court of Appeal held that where a complainant accepts an award by the FOS, they cannot bring the same claim for damages in court. The Clarks were therefore restricted to the £100,000 they had already been awarded.

However, the Court of Appeal noted that complainants may still bring proceedings against a business after accepting a FOS award where the substance of these proceedings is different from those considered by the FOS.

### Judicially reviewing a FOS Decision

Although a FOS decision cannot be appealed in England and Wales, it can be subjected to judicial review by either the firm or the consumer. A judicial review would usually focus on the way in which an ombudsman reached a decision, rather than the individual facts and merits of the dispute itself.

In practice, the number of judicial reviews brought against the FOS remains relatively small, presumably because of the time and costs involved and the high risk of failure. As long as the ombudsman has considered the law and as long as they have clarified their reasoning, they will have a wide discretion to call upon their own values of fairness and reasonableness rather than applying the law- see box above “*How does the FOS reach a conclusion about a complaint?*”.

The recent judicial reviews below illustrate the difficulty of questioning a decision by the FOS.

#### **R (Bankole) v FOS**

*In R (Bankole) v FOS the applicant sought to judicially review the FOS’s decision to treat his complaint against Lloyds TSB as being out of time. The bank had rejected his complaint in relation to a remortgage in June 2008 but he denied ever receiving their final response letter and complained to the FOS in January 2009. The FOS made a finding of fact, following an investigation, that the complainant had received the letter and that he was time-barred from bringing a complaint.*

*In his judgment, Sales J affirmed that under statutory rules the ombudsman is free to determine the question of whether a complaint has been made to the FOS within the appropriate time limit.*

*In addition, the FOS's finding that the customer had received the bank's final response letter in June 2008 could not be challenged as irrational or unlawful. The procedure followed by the ombudsman in reaching his conclusion had been fair: the parties had been given fair notice of all points raised, had been given the opportunity to comment on them and the ombudsman had taken into account all the correspondence in the case.*

### **R (Calland) v FOS**

*In this case an independent financial advisor sought to challenge a FOS decision against him on the grounds that (a) the time taken by the FOS to investigate the matter, over 6 years, was unreasonable and in breach of his human rights; (b) the decision was taken without an oral hearing; and (c) the investigation was unfair.*

*Males J found that: (a) although there had been significant delay, most of it had been as a result of the claimant's conduct, which included sustained objections to the investigations and a refusal to cooperate over lengthy periods; (b) the default position as to oral hearings is that they are only required where necessary fairly to determine a dispute. The presence of a disputed issue of fact does not automatically make an oral hearing a necessity; and (c) there were no other grounds of unfairness which justified quashing the decision.*

## **Upcoming JR proceedings on the jurisdiction of the FOS**

Permission to bring judicial review proceedings against the FOS has recently been granted to Bluefin Insurance Services Limited ("Bluefin") in relation to the FOS's decision to consider a complaint about a directors and officers liability policy.

Bluefin has challenged the FOS's jurisdiction on the grounds that the director who brought this complaint does not fall within the definition of "eligible complainant" under Rule 2.7.1 of the DISP. This definition includes consumers, micro-enterprises, small charities and trustees. The FOS does not have jurisdiction to handle a complaint were the eligible complainant test is not met.

The substantive hearing date is expected to be later this year and will address the question of whether the complainant was acting as a consumer when he brought this matter to the FOS. A clarification of the definition of "consumer" under the DISP rules is likely to be of wider interest to businesses providing financial services. We will look out for reporting of this case after the hearing and will provide an update on our website.

## **Contacts**

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