Briefing

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If the FOS finds against you, where do you turn?

It can be difficult for Financial Services firms to challenge Financial Ombudsman Service ("FOS") determinations, often leaving them with nowhere to turn in the face of a decision with which they are not happy.

When we considered the FOS in FSS #11, September 2014, we observed that one broker, Bluefin, had decided to try to challenge the FOS by judicial review proceedings and had been granted permission by the Court to do so.

The outcome of Bluefin's judicial review application has now been reported, so this month we look at this and also consider another recent case in which a consumer attempted to judicially review the FOS.

Is the door slowly opening to allow more challenges to decisions of the Financial Ombudsman Service?

In *R (Bluefin Insurance Services Ltd) v Financial Ombudsman Service Limited,* the Administrative Court determined that the company director bringing the complaint was not an "eligible complainant" and therefore not entitled to make the complaint in question to FOS. Importantly, the Court made it clear that the assessment of whether the complainant was an "eligible complainant" under the terms of the scheme in the DISP Rules of the FCA Handbook was a matter for the Court to determine.

The complainant, Mr Lochner, was a Director of Betbroker Ltd ("Betbroker"). Bluefin had acted as broker for a Directors and Officers insurance policy (the "D&O Policy") taken out by Betbroker. Mr Lochner was an insured person under the D&O Policy. Claims were made against Mr Lochner that he had made actionable misrepresentations and breached personal covenants in the course of fund-raising transactions on behalf of Betbroker. The insurer rejected cover for Mr Lochner under the D&O Policy in respect of these claims. Mr Lochner alleged that Bluefin had failed to act on his notification of a potential claim under the Policy by alerting the insurer to it. In effect, Mr Lochner's complaint against Bluefin was that, through its failure to notify the insurer, he had been deprived of his protection in the D&O Policy.

The Court's decision was that, at the time of and in making his complaint to FOS, Mr Lochner was not acting for purposes outside his trade, business or profession. In other words, he was not acting as a consumer and therefore was not an eligible complainant under the FOS jurisdiction. This meant that the FOS should not have upheld his complaint against Bluefin.

The Court's finding is of wider interest to firms because it has an impact on how challenges might be made against FOS decisions. The Court decided that the analysis of Mr Lochner's status (i.e. whether he could bring the complaint) was a matter which the Court itself was entitled to determine– a question of so-called "precedent fact".

In the earlier case of *R (Bankole) v FOS*, the claimant tried to challenge in Court the decision by FOS that his complaint had not been made within the appropriate time. In *Bankole*, the Court found that this decision was not one of "precedent fact". Accordingly, the FOS decision could not be interfered with by the Court unless it was reached in an unfair, unlawful, irrational or illogical way.

The *Bluefin* decision may open up greater possibilities for judicial review on questions concerning the FOS determination of its jurisdiction.

Is the Financial Ombudsman Service required to seek independent legal advice?

In *R (Fisher) v Financial Ombudsman Service*, the Court held that there was no obligation on either an insurance company or the FOS to seek independent legal advice prior to making a decision concerning the merits of an individual's claim and subsequent complaint. The Court refused to scrutinise the insurer's original decision not to provide legal funding, on the grounds that this was outside the realm of judicial review.

The Claimant had been denied funding by his insurers under legal expenses cover in a home insurance policy, on the

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grounds that his claim against a third party retailer lacked a reasonable prospect of success. The Claimant nonetheless brought the claim and won. Following his victory in court, the Claimant complained to his insurers. He argued that his insurers' in-house solicitor should not have rejected his application for legal funding (as his claim clearly did have reasonable prospects of success, since he had won it). The FOS, finding in favour of the insurers, stated that a fair test had been applied and that it was sufficient for the insurers to rely on its in-house legal team. The subsequent success of the Claimant at trial was considered irrelevant.

In response, the Claimant sought to challenge the FOS' decision, seeking judicial review on the grounds of irrationality. In particular, the Claimant argued that: (1) the insurers, and subsequently the FOS, were bound to seek independent legal advice; and (2) the insurers' original decision not to provide legal funding amounted to a misapplication of the law, it being apparent from the outset that the Claimant would succeed.

Narrowing the issues for consideration, the Court refused to evaluate the insurers' decision not to provide legal funding. It emphasised that the judicial review process is a mechanism to challenge the decisions of public bodies only. It held that the FOS was not bound to seek independent legal advice when reviewing the Claimant's complaint. Rather, the FOS must reach a decision – based on the evidence presented to it – that is "fair and reasonable in all the circumstances". The Court was satisfied that this was achieved here because it was rational for the FOS to conclude that the insurers applied a fair test without the need for independent legal advice. The Court also agreed with the FOS' opinion that the subsequent success of the Claimant could not be considered.

The Claimant was, in effect, seeking to use judicial review as a means of re-opening and challenging the decision of the insurer. The Court simply refused to entertain this: judicial review is intended only for challenge of decisions by public bodies such as the FOS, not firms.

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