Briefing

BURGES SALMON

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R (Chancery (UK) LLP) v FOS

Recent months have seen a number of judicial reviews brought against the Financial Ombudsman Service ("**FOS**"). We considered several of these in FSS #11 and FSS #13. The outcome of these claims is helping to clarify the situations in which Financial Services firms will be able to challenge the way an ombudsman has reached a decision.

In *R (Chancery (UK) LLP) v FOS*, which was decided on 20 February 2015, the Administrative Court rejected a judicial review application relating to the jurisdiction of the FOS to consider a complaint and provided some helpful commentary. In this month's briefing, we will consider this case and its ramifications.

Key findings

The following key points arise from the judgment in *R (Chancery (UK) LLP) v FOS*.

- While the FOS is free to take decisions regarding the procedural aspects of a complaint, it is not the *"master of the limits of its jurisdiction"*. It may be appropriate, in certain circumstances, for the Court to review FOS decisions on jurisdiction. Where this happens, the Court should make its assessment on the basis of the FOS' findings of fact.
- Whether a scheme constitutes an unregulated Collective Investment Scheme ("**CIS**") under section 235 of the Financial Services and Markets Act 2000 ("**FSMA**") will depend in part on whether the investors have a high level of participation not limited to *"supervisory oversight"*.
- The provision of tax advice does not preclude that of regulated investment advice where the reasons for providing the advice are mixed.
- A firm arguing that a matter before the FOS would be better dealt with in court will need to meet a high threshold of proving the FOS acted irrationally.

We examine these points further below.

Background

Chancery (UK) LLP ("**Chancery**") is a firm of chartered accountants who advised an individual (the "**Complainant**") in relation to entering a film investments scheme (the "**Scheme**") to take advantage of certain tax incentives.

In May 2012, the Complainant submitted a complaint to Chancery, arguing that: (a) the Scheme was an unregulated CIS under section 235 of FSMA; and (b) Chancery had not properly considered the Complainant's suitability for the Scheme under the relevant regulations, which meant that the Complainant was unable to fully benefit from the tax incentives.

Chancery rejected the Complainant's complaint, which was then referred to the FOS. In response, Chancery contended that the FOS did not have jurisdiction to deal with the complaint because:

- the Scheme did not amount to a CIS; and
- Chancery had only provided tax avoidance advice to the Complainant, rather than investment advice, and this is not a regulated activity under FSMA.

Chancery also argued that it would be more suitable for the complaint to be dealt with in court, on the basis that the compensation sought exceeded the FOS's limit of £150,000, the matter might require witness cross-examination and expert evidence and the Complainant had the financial resources to issue proceedings rather than use the FOS service.

The FOS found that it did have the jurisdiction to determine the complaint and Chancery brought proceedings against it to challenge this decision.

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Jurisdiction

In looking at the scope of the FOS' jurisdiction, Ouseley J considered the recent decision in *R (Bankole) v FOS*, in which it was found that the FOS was free to determine whether a complaint was made out of time so long as the procedure followed by the ombudsman in reaching this conclusion was fair and reasonable in the circumstances.

Ouseley J also looked at the contrasting case of *R (Bluefin Insurance Services Ltd) v FOS*, which relates to the FOS' finding that a particular complainant was eligible to bring a complaint, in which the Court decided that the analysis of the complainant's status was a matter which the Court itself was entitled to determine- a question of so-called "precedent fact".

Ouseley J agreed with the decision in *Bankole* in relation to decisions regarding the procedural aspects of a complaint. However he also said that the relevant statutory framework *"should not be construed so as to make the FOS master of the limits of its jurisdiction"*. In this case, it was more appropriate for a court to consider the question of the FOS' jurisdiction because of the factual and legal issues involved.

Interestingly, the judge also held that any judicial assessment of a FOS decision should be made on the facts as established by the FOS and that it is not for the Court to carry out any new findings of fact.

The Court concluded that when a complaint is received, it is for the FOS to determine in the first instance whether it has the jurisdiction to consider it. Where this decision is contested, the FOS should keep the question of jurisdiction under review and address it in its final decision at the conclusion of the case. Ultimately, the question of jurisdiction may need to be determined by a court.

Collective Investment Scheme

Ouseley J found that the FOS was correct in finding that the Scheme was a CIS for the purpose of section 235 of FSMA, which states that an arrangement does not constitute a CIS if the investors have *"day to day control over the management of the property"*.

The Judge's comments confirm that what constitutes *"day to day control"* should be determined by reference to the documentation involved and how the arrangement operates in practice. In this case, the fact that the investors participated in certain activities, and could make certain decisions *"if so minded"* was not sufficient to establish day-to-day control over the scheme. This suggests that the level of participation required of investors for a scheme not to be considered a CIS is high and that *"supervisory oversight"* is not sufficient.

Tax advice or investment advice

The Court also considered Chancery's argument that the FOS had failed to recognise that the advice provided was tax advice and not regulated investment advice and found in favour of the FOS.

The Administrative Court held that there is *"no sharp distinction requiring advice to be pigeonholed"* as tax advice or investment advice, and such a distinction cannot be *"sensibly drawn where there are mixed reasons behind advice"*.

On the facts the Court found that, although the Complainant had entered into the Scheme mainly to take advantage of certain tax benefits, Chancery had also provided advice as to certain technical aspects of the Scheme which amounted to investment advice.

Forum for the complaint

As to Chancery's claim that the FOS behaved unreasonably in deciding the complaint fell within its jurisdiction, the Court found that the firm's submissions were not sufficient to demonstrate this.

The question to be determined is whether the nature of the issues and material required to resolve them are such that *"it was irrational for the [ombudsman] to conclude that he could resolve them justly, fairly and reasonably within his jurisdiction"*. Chancery's submissions *"simply did not pass this high test".*

Conclusion

This case provides some helpful commentary as to the definition of a CIS for the purpose of section 235 of FSMA and in particular as to the requirement of *"day to day control"*.

It also highlights again the difficulties in successfully arguing irrationality as a basis to challenge the FOS' decisions on jurisdiction.

Finally, it provides some further gloss and commentary on the recent *Bluefin* and *Bankole* decisions.

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Contacts

Kari McCormick, Tim Pope and Canelle Goldstein advise clients on financial services disputes and regulatory matters. For further information please contact them:

Kari McCormick
Partner
+44 (0)117 902 6620
kari.mccormick@burges-salmon.com

Tim Pope
Legal Director
+44 (0)117 939 2230
tim.pope@burges-salmon.com

Canelle Goldstein
Solicitor
+44 (0)117) 307 6070
canelle.goldstein@burges-salmon.com

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

www.burges-salmon.com

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