SQUIRE SANDERS

COURT OF APPEAL CONFIRMS FINALITY OF FOS AWARDS

The Court of Appeal Brings into Focus the Finality of Financial Ombudsman Service Awards

The financial services industry was rightly very concerned by the High Court's decision in *Clark v In Focus Asset Management & Tax Solutions Limited* in 2012.

In summary, the High Court had ruled that the acceptance of an award from the Financial Ombudsman Service ("FOS") did **not** prevent a complainant from then bringing Court proceedings to claim the balance of the loss from a firm, where that loss exceeded the FOS' statutory maximum award of £100,000 (now £150,000).

In a very welcome decision handed down by the Court of Appeal on 14 February 2014, the Court overruled the High Court's decision. This means that a complainant **cannot** now accept financial redress from a firm via the FOS and then pursue the firm in Court for further compensation in respect of the same complaint.

Background

The Clarks complained to the FOS that they had lost more than £300,000 through negligent advice given by In Focus, their former financial advisor, in respect of a geared traded endowment plan.

The Ombudsman decided that the Clarks were entitled to compensation exceeding the then FOS limit of £100,000 (it is now £150,000 – see the FCA Handbook at DISP 3.1.4). In addition to awarding the Clarks £100,000 (binding upon the firm), the Ombudsman made a non-binding recommendation (see DISP 3.7.6) that In Focus should pay the Clarks the full compensation.

The Clarks accepted the award and In Focus paid them £100,000 but not the full amount of the FOS recommendation. The Clarks then issued legal proceedings to recover the remaining balance of from In Focus.

The Clarks' claim was originally dismissed by the County Court (HHJ Barratt QC), applying the Court's decision in *Andrews V SBJ Benefit Consultants*. But on appeal, the High Court (Cranston J) reinstated the proceedings.

In Focus then appealed to the Court of Appeal.

The Court of Appeal's Judgement

The leading judgment in the Court of Appeal was given by Lady Justice Arden.

The Court ruled that if a firm can show that a complainant relied in his FOS complaint on a set of facts which in substance made up the same facts as he then set out in his court claim, and if the complainant accepted a FOS award on his complaint, then the complainant was barred from taking court proceedings (because of the operation of the legal principal of *res judicata*), and any court claim would be liable to be struck out.

Res judicata is the common law doctrine which precludes a person who has obtained a decision from one Court or Tribunal from bringing a claim before another Court or Tribunal for the same complaint.

Cranston J had held that the FOS deals with "complaints" and that a "complaint" was not a cause of action, so that the doctrines of merger (a cause of action is extinguished when a court gives judgment, the effect of merger being that the claimant can enforce the judgment but cannot bring a second set of proceedings to enforce his cause of action) and of *res judicata* could not be engaged.

Arden LJ held that the Judge was wrong.

She said that a complaint might "consist of or include facts which constitute a cause of action" and therefore a complaint was capable, in such a case, of being or including a cause of action. She added that if the FOS decided a question posed by facts constituting a cause of action, then that question would be *res judicata* and further litigation would not be allowed. It was not necessary that the remedy should be the same as would have been available in a court.

It was also not a part of the application of the rule of *res judicata* that the FOS decides complaints on the statutory basis of what is *"fair and reasonable"* (see DISP rule 3.6.1) rather than according to the law, particularly since the decision of the FOS must be lawful. In determining whether the FOS had decided the question posed by facts constituting a cause of action, the Court would look at the substance of the matter.

Cranston J had also decided the FOS was not a "tribunal" in the sense required to bring the doctrine of merger into play; if this was correct then the *res judicata* doctrine would also not apply.

Arden LJ held that the Judge was wrong also on this point.

She said that she was "satisfied that the ombudsman's award is a judicial decision for the purposes of the requirements of *res judicata*".

Arden LJ noted here that the FOS complaint handling process involved giving both parties an opportunity to state their case: the award was not the product of the Ombudsman's enquiries alone. Further, the Ombudsman did not make an administrative decision; the fact that Article 6 of the European Convention of Human Rights applied to the process was not determinative, but it strongly indicated that the FOS' decision was a judicial one.

Arden LJ also noted that the FOS had accepted that it made judicial decisions for the purposes of *res judicata* and that it was irrelevant that the FOS had other functions, for example, mediation. Arden LJ stated that the fact that the FOS had to reach a conclusion on the basis of what was "fair and reasonable" did not exclude the application of *res judicata*.

Arden LJ also held that there was nothing in the Financial Services and Market Act ("FSMA") which went against her conclusions on *res judicata*. Just because FSMA was silent as to *res judicata*, it did not mean that the common law rule was displaced.

Comment

The Court of Appeal's judgment is undoubtedly a very welcome one.

There is a manifest public interest in the promotion of certainty, whereby firms (and their insurers) can rely upon an Ombudsman's final decision as the last "word" on a complaint.

But also it is unfair for firms to be exposed to the risk of "double jeopardy" in respect of complaints where redress exceeds the FOS limit of £150,000; FOS redress should not be looked upon as a "fighting fund" for the complainant to continue to pursue the complaint in Court.

Indeed it is probably right that the FOS is not the appropriate forum for deciding upon such high value and complex complaints in any event and that cases where the loss exceeds £150,000 are more suitable for determination by the Court (after a more forensic examination than that applied by the FOS to a complaint in any event).

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