



FINANCIAL OMBUDSMAN SERVICE: FINALITY OF AWARDS OR A RECIPE FOR LITIGATION

The Court of Appeal has recently resolved inconsistencies as to whether awards made by the Financial Ombudsman Service were final such that complainants could not issue further legal proceedings for amounts in excess of the maximum award permitted.

The Court of Appeal found in *Clark v In Focus Asset Management & Tax Solutions Limited* [2014] EWCA Civ 118 that the common law principle of res judicata (meaning that a court or tribunal has already adjudicated on the matter) applied to the Financial Services and Markets Act 2000 (FSMA) in circumstances where the cause of action in both proceedings was the same.

As a result, consumers are left with a number of options:

- If their claim exceeds the (current) maximum award of £150,000, they can commence court proceedings rather than make use of the Ombudsman scheme, with an associated increase in costs and delays, or

- Consumers could complain to the Ombudsman to obtain an award, reject the award while using it as the basis to assist in establishing liability in subsequent court proceedings. This carries a risk that, as the Ombudsman determines the case based only on what they consider to be 'fair and reasonable' on the facts, the claim may fail before a court applying legal principles thus creating a potential liability for the costs of the successful defendant.

Accordingly, the only certainty that has been established is that a complainant cannot accept an award from the Ombudsman and then proceed to claim further damages in subsequent court proceedings.

Background

Mr and Mrs Clark claimed they lost more than £300,000 through negligent investment advice given by In Focus Asset Management & Tax Solutions Ltd (In Focus). They complained to



the Ombudsman and were awarded the maximum compensation (then £100,000). The Ombudsman also recommended the payment of full compensation (i.e. a further £200,000). The Clarks accepted the award, subject to their right to claim for the balance in court proceedings.

In Focus paid the £100,000 awarded on 22 March 2010 but did not pay the full amount of compensation that had been recommended. On 22 June 2010, the Clarks commenced court proceedings seeking damages for breach of contract, negligence, breach of fiduciary duty and breach of statutory duty, albeit offering credit for the sum already awarded.

At first instance, the Court held that the doctrine of merger applied and dismissed the Clarks' claim, applying the decision of the High Court in *Andrews v SBJ Benefit Consultants* [2011] PNLR 577. On appeal to the High Court, Cranston J disagreed with the decision in *Andrews* and found that there was no merger of the Ombudsman's award with the causes of action on which the Clarks sought to rely. In Focus then appealed, and the Court of Appeal had the assistance of the Ombudsman as an intervener with regard to procedure in determining complaints.

HOLMAN FENWICK WILLAN LLP
Friary Court, 65 Crutched Friars
London EC3N 2AE
United Kingdom
T: +44 (0)20 7264 8000
F: +44 (0)20 7264 8888

Decision

Following the decision of Cranston J in the High Court, there was concern that complainants to the Ombudsman would use an award as a means of establishing their case, and utilise the proceeds of that award to fund the court proceedings for any balance. The Court of Appeal has now put a stop to this opportunity, finding that the principle of *res judicata* precluded consumers that chose to accept awards under the Ombudsman scheme from taking legal proceedings if the substance of the facts underlying the Ombudsman's award are the same on which the cause of action in the legal proceedings are based. That the Ombudsman cannot award the same remedy as would be available to a court is not a requirement for the principle to apply, nor can the right to bring subsequent proceedings be reserved if, on accepting the award, the right never existed.

Section 228(5) of FSMA states that: "*If the complainant notifies the ombudsman that he accepts the determination, it is binding on the respondent and the complainant and final*". The Court of Appeal found that this operated as an absolute bar to further proceedings on the same facts if the complainant had accepted the award. It was always open to the complainant to commence proceedings in the courts in the first instance, particularly if their claim exceeded the maximum amount permitted to be awarded by the Ombudsman, or alternatively to reject the award offered and issue proceedings using the award as leverage, although it must be

remembered that the Ombudsman does not apply legal principles in making decisions, but instead considers what is "*fair and reasonable in all the circumstances of the case*" such that a court's determination of an advisers' liability in law may result in a different outcome.

The Clarks had also argued that in circumstances where the legislation was silent on the issue, the application of *res judicata* should not be read in. However, the Court of Appeal found that relevant common law principles still apply unless they have been excluded expressly or by implication by Parliament. As Parliament set up the scheme to resolve the dispute, it had "*manifested its intention that consumer protection did not go beyond the scheme.*"

The Court of Appeal was also troubled with the potential development of a claims industry to facilitate consumers seeking recourse from both avenues to remedy their position. In circumstances where financial advisers are funding what is currently an efficient system for resolving lower value disputes, the Court considered the potential for exposure to two sets of proceedings would only further increase the costs of obtaining financial advice.

For more information, please contact [John Barlow](#), Partner, on +44 (0)20 7264 8188 or john.barlow@hfw.com, or [Robert Finney](#), Partner, on +44 (0)20 7264 8343 or robert.finney@hfw.com, or [Karyn Sheridan](#), Associate, on +44 (0)20 7264 8476 or karyn.sheridan@hfw.com or your usual contact at HFW.

Lawyers for international commerce hfw.com

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