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Gough Square Chambers' consumer credit column: January 2021

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Ruth Bala, Lee Finch, Sabrina Goodchild and Thomas Samuels are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they will share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the January 2021 column, Ruth Bala considers applications for judicial review of decisions by the Financial Ombudsman Service (FOS) in the light of the applicant's recent victory in *R (on the application of TF Global Markets (UK) Ltd, t/a Thinkmarkets) v Financial Ombudsman Service Ltd and others.*

Judicial review of FOS decisions: a rare success for Thinkmarkets

Applications for judicial review of decisions by the Financial Ombudsman Service (FOS) rarely succeed. Following the applicant's recent victory in *R (on the application of TF Global Markets (UK) Ltd, t/a Thinkmarkets) v Financial Ombudsman Service Ltd and others,* this column considers the substantial hurdles faced by applicants and the winning formulae.

The statutory test for the FOS to apply is found in section 228(2) of the Financial Services and Markets Act 2000 (FSMA): the Ombudsman must determine the complaint "by reference to what is, in the opinion of the Ombudsman, fair and reasonable in all the circumstances of the case".

Rule 3.6.4R of the Dispute Resolution: Complaints module of the FCA Handbook (DISP) identifies the matters which the Ombudsman should take into account: relevant law and regulations, FCA rules and guidance, industry codes and, where appropriate, what the Ombudsman himself considers to have been good industry practice at the relevant time.

For a case report on *Thinkmarkets*, see Legal update, Judicial review allowed and FOS final decisions quashed in light of correct construction of online trading platform's client terms (Administrative Court).

Subjective nature of test for FOS

The section 228(2) words "in the opinion of the Ombudsman" clarify that the statutory test is subjective: "he may be subjective in arriving at his opinion of what is fair and reasonable in all the circumstances of the case" (*R (IFG Financial Services Ltd) v FOS [2005] EWHC 1153 (Admin)* at [13]). This grants FOS a great deal of latitude.

Test for judicial review

Once a complainant accepts FOS' decision, it becomes binding on the firm. Significantly, there is no route of appeal to a court. The only means for the firm to challenge FOS' decision is to apply for judicial review. The bar for judicial review is high. The grounds most commonly relied upon by applicants are to:

- Challenge the Ombudsman's jurisdiction (which is based on findings of "precedent fact", which the court can make afresh on judicial review: *R (Bluefin Insurance Ltd) v Financial Ombudsman Service Ltd [2014] EWHC 3413).*
- Challenge the Ombudsman's findings of fact (for example, because he failed to take into account relevant information or took into account irrelevant information).
- Claim that the Ombudsman's opinion as to what is fair and reasonable is irrational or perverse (it is only exceptionally that an applicant will succeed on this ground).
- Allege that the Ombudsman made an error of law.

Divergence by FOS from the law

Although "error of law" is a proper ground for judicial review, pursuant to DISP 3.6.4R the Ombudsman need

only "take into account" relevant law. As Irwin J said in *R (Williams) v FOS [2008] EWHC 2142 (Admin)* (at [26]):

> "The ombudsman is dealing with complaints, not causes of action ... He can depart from the common law if justified, but must explain the extent to which there are reasons for any such departure."

In *R (IFG Financial Services Ltd) v FOS,* the applicant for judicial review was an investment adviser who had recommended certain high-risk funds to the complainants. One element of the complainants' loss resulted from dishonesty by a manager of one of these funds. It was common ground that this dishonesty was unforeseeable to the investment adviser when he made the recommendation, and that in law the complainants would be unable to recover this element of their loss.

However, the Ombudsman had deliberately departed from the legal position, considering that application of the law did not achieve a result that was fair and reasonable. The High Court refused the application for judicial review, as the Ombudsman was entitled to depart from the law for this reason. The High Court's judgment on this issue was approved by the Court of Appeal in *R (Heather Moor & Edgecomb Ltd) v FOS [2008] EWCA Civ 642*.

FOS' interpretation of contracts

In the *Thinkmarkets* case, the applicant TF Global Markets (UK) Ltd, t/a Thinkmarkets (Thinkmarkets), operated an online trading platform for dealing in investments (including forex trading). Due to technological limitations, prices displayed on Thinkmarket's platform could fractionally lag behind those in the market. Thinkmarkets suspected that the complainants had engaged in "price latency arbitrage" to exploit these limitations. It suspended their accounts and withheld profits generated from the suspect transactions.

Thinkmarkets relied on three relevant clauses in its terms and conditions. On a literalist reading, the clause which was specifically directed to price latency arbitrage (clause 7.10), required Thinkmarkets to be satisfied on the balance of probabilities that price latency arbitrage had indeed occurred before its remedial discretion arose. However, the two other more general clauses granted Thinkmarkets a discretion at the anterior stage of determining whether a trade "clearly outside the prevailing market price" had in fact occurred. Under these clauses, a mere reasonable suspicion that there had been such a trade sufficed to trigger Thinkmarket's remedial powers.

FOS relied solely on the specific clause (clause 7.10) to uphold the complaint; it considered the evidence of price latency arbitrage did not meet the balance of probabilities test. HHJ Walden-Smith, sitting as a High Court judge, quashed FOS' decisions. She held (at [42]) that the Ombudsman erred in his construction of Thinkmarket's contract, as he (a) failed to read clause 7.10 in the context of the entire contract and (b) gave too much weight to a literalist interpretation of clause 7.10.

This was a brave decision. The court's construction of Thinkmarket's terms and conditions surpassed the Ombudsman's and if this had been an appeal rather than a judicial review it would be uncontroversial. While FOS' remit is to determine what is fair and reasonable, how can this be achieved in the context of a complaint about breach of contract other than by engaging in the legalistic task of construing the contract?

FOS' interpretation of regulation

Attempts to seek judicial review of FOS' interpretation of legal provisions or industry codes have been less successful. *R v FOS ex p Norwich and Peterborough Building Society [2002] EWHC 2379* is a notable example of the court accepting that FOS had erred by misinterpreting an industry code (the Banking Code 1998), although FOS' decision was upheld for other reasons.

More recently, in *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service Ltd and others [2018] EWHC 2878 (Admin),* the applicant alleged that the Ombudsman had erred in his legal analysis of the Handbook rules by deriving from Principle 2 a duty to carry out due diligence on an investment that was SIPPable (eligible for tax advantages if placed into a SIPP). Such a duty was not contained in any specific Handbook rule.

Jacobs J held (at [96]) that there was no error of law: the FCA Principles have room to operate irrespective of whether there is a specific rule in the field. This decision follows *R (British Bankers Association) v Financial Services Authority [2011] EWHC 999 (Admin))* where Ouseley J held at [184] that the width of the Ombudsman's duty to determine what is fair and reasonable, and the width of the materials he may rely upon, precludes any argument that he cannot uphold a complaint solely due to breach of the Principles, without breach of any specific Handbook rule.

This is a fertile area for development. As yet there have been no challenges to FOS' interpretation of specific Handbook rules.

FOS' application of FCA Principles

By contrast, there can be no error of law by the Ombudsman in applying the FCA Principles to the facts, so any challenge in this respect must be founded on irrationality and thus would be highly unlikely to succeed. See *Berkeley Burke* at [137].

FOS' approach to quantum

Another rare victory was achieved in *R (Garrison Investment Analysis) v FOS [2006] EWHC 2466 (Admin)*, where the court quashed the Ombudsman's decision insofar as it related to quantum. In assessing quantum, the Ombudsman had proceeded on an unjustified hypothesis about how the complainants would have invested their funds had the financial advice not been given. This approach to quantum was "irrational".

Conclusion

Errors of law by FOS in the interpretation of contracts or legal provisions will generally be easier to establish than irrationality in matters of fact or opinion. Whilst the hurdles facing applicants are daunting, *Thinkmarkets* demonstrates that they may be overcome in an appropriate case.

Gough Square Chambers' consumer credit columns

For previous consumer credit columns written by barristers at Gough Square Chambers, see Practice note, Gough Square Chambers' consumer credit column.