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Financial Lines Alert

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Two bites at the cherry in FOS disputes

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In **Clark v In Focus Asset Management & Tax Solutions Ltd [2012] EWHC 3669 (Clark)** the English High Court recently determined that complainants who have had a dispute favourably determined by the UK Financial Ombudsman Service (FOS) are not prevented from bringing subsequent court proceedings based on the same facts to recover damages which are in excess of the FOS ruling.

Clark is contrary to the earlier English High Court decision in **Andrews v SBJ Benefit Consultants [2010] EWHC 2875 (Andrews)** which dismissed a claim based on nearly identical facts. The judge in **Andrews** considered that the doctrine of merger meant that a complainant's acceptance of a FOS determination extinguished any further claim it might seek to make based on the same subject matter. The judge's decision was influenced by his opinion that, since the purpose of FOS was to resolve complaints with minimal formality, any accepted determination should be final and binding.

In **Clark**, FOS had determined that the financial advice given to the complainants was inappropriate and awarded the statutory maximum compensation (then £100,000). The complainants accepted the award subject to a handwritten amendment that reserved their right to pursue their claim through the courts. When the complainants subsequently commenced court proceedings to recover the balance of their loss, the financial services firm applied to have the proceedings struck out.

The judge at first instance granted the firm's application to strike out the proceedings. On Appeal the High Court reinstated the proceedings. In doing so it held that FOS was not bound to act in accordance with English law but only to decide matters based on what it believed to be fair and reasonable. Furthermore, since FOS deals with complaints and not legal causes of action, the High Court considered that any determination by FOS could not extinguish a cause of action. In those circumstances, the High Court disagreed with the decision in **Andrews** and held that:

- + FOS was not a competent tribunal for the purposes of the doctrine of merger; and
- + a determination by FOS did not preclude the complainants from claiming further losses based on the same facts even though the FOS determination was expressed to be final and binding.

Notably for Australian financial services licensees and their insurers, the FOS Terms of Reference (TOR) in the UK are remarkably similar to the Australian FOS TOR. The decision in **Clark** creates uncertainty for Australian financial services licensees, that are subject to FOS' jurisdiction, about how Australian courts will decide a similar issue. If followed in Australia, the effect of **Clark** is that complainants could use FOS as a "test run" for litigation in a forum which is free to access and has "zero" risk for complainants. Any award by FOS could then be used by complainants to effectively "bank roll" subsequent court proceedings against the licensee. Licensees (and their insurers) would therefore effectively have to pay for the costs of dealing with the same claim twice.

However, licensees in Australia have some protection under the Australian TOR which can be used to avoid the outcome which occurred in **Clark**. In Australia clause 8.8 of the FOS TOR provides that in order to accept a recommendation or determination a complainant must (if requested by the licensee) provide the licensee with a binding release from liability in respect of the matters resolved. The release must be for the full value of the claim which was the subject of the complaint, even if that amount exceeds the remedy decided on by FOS. For that reason alone, Australian financial services licensees should always exercise their rights to require a complainant to execute a binding release in relation to any FOS recommendation or determination.

Given the conflicting conclusion reached in **Andrews** we consider it likely that **Clark** will be appealed. We will monitor the evolution of the decision in **Clark** closely. Watch this space! ■