



Alternative Dispute Resolution - is the Financial Ombudsman Service a viable alternative?

The Financial Ombudsman Service (FOS) was established by the Financial Services and Markets Act 2000 (FSMA) to provide a non-Court mechanism for resolving complaints which consumers and financial services providers have been unable to resolve themselves.

In this article we consider how attractive this alternative route to justice is for consumers with complaints against their financial services providers, and for those financial service providers. Achieving an FOS award may be quicker and cheaper than going to Court but do the financial limits make it the wrong jurisdiction for those with larger claims? And should the size of the potential claim have an impact on the way in which the service provider approaches the FOS referral?

The FOS

Once a complaint is referred to the FOS, the relevant adjudicator will first seek to mediate an agreement between the complainant and respondent. However, if this is not possible, the FOS has the power, if it considers it to be "fair and reasonable", to award up to £150,000 plus - at its complete discretion - interest and costs¹. The FOS may also recommend that the service provider pays more, but this recommendation is not binding.

The FOS scheme covers all firms regulated by the Financial Conduct Authority (FCA) (known as the Compulsory Jurisdiction), businesses currently licensed under the Consumer Credit Act 1974 and those businesses who have voluntarily contracted with the FOS. What follows focuses on the most common of the three, the Compulsory Jurisdiction.

¹ Costs awards are in practice extremely rare and are never awarded against a complainant.

A complaint relating to an act or omission of a FCA regulated firm will be subject to the FOS if:

- (a) the complainant is eligible and wishes to make a complaint (Eligible Complainant);
- (b) the respondent is eligible to be a respondent (Eligible Respondent); and
- (c) the act or omission to which the complaint relates occurred at a time when Compulsory Jurisdiction rules were in force in relation to the activity in question (Eligible Act).

Eligible Complainant

An Eligible Complainant² is a consumer, micro-enterprise³ or certain charities or trustees.

It is also necessary for the complaint itself to derive from one of the relationships listed in DISP 2.7.6R⁴. The most common examples are where the complainant is (or was) a real or potential customer, payment service user or electronic money holder of the respondent.

Eligible Respondent

For complaints under the Compulsory Jurisdiction any firm regulated by the FCA is automatically an Eligible Respondent.

Eligible Act

Under the FCA rules an Eligible Act includes regulated activities, payment services, lending money, ancillary banking services “or any ancillary activities, including advice, carried on by the firm in connection with them.”

This reference to ancillary activities could be important since it potentially extends the Compulsory Jurisdiction to cover activities beyond the regulated activities which have been contracted for.

Complaint Process

A complaint must first be made to the service provider or business in question. Once the complaint is registered, the clock stops for FOS limitation purposes⁵. If the complainant and the business are unable to resolve the complaint, the complainant may refer the complaint to the FOS within 6 months of the business sending its final response, or, if the business does not respond to the complaint, within the 6 months following the date which is 8 weeks from the business having received the complaint.

The FOS aims to make its first decision, usually made by an adjudicator, within three months. This determination is either accepted as final by both sides or may be referred by either to an Ombudsman, who then makes a final decision

² as defined in the FCA's “Dispute Resolution: Complaints” (“DISP”) Handbook at 2.7.3

³ An entity employing fewer than 10 persons and either has a turnover OR annual balance sheet that does not exceed €2 million

⁴ Please follow the link <https://fshandbook.info/FS/html/FCA/DISP/2/7> to see all relationships listed in DISP 2.7.6R

⁵ The FOS rules provide that complaints must be made within 6 years from the event subject to complaint or 3 years from when the complainant knew (or ought to have known) that he had cause to complain which ever is later. Note that any relevant statutory limitation periods under the Limitation Act 1980 will continue to apply



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Finality

Once a final determination has been made by the FOS, this becomes binding if the complainant notifies the FOS that he accepts the determination. The financial service provider has no control at this point: such acceptance is completely at the discretion of the complainant.

For a complainant with a claim in excess of £150,000 the decision whether to accept is significant. The recent Court of Appeal decision in *Clark v In Focus Asset Management & Tax Solutions Ltd*⁶, has made it clear that once a complainant has accepted a determination it cannot seek to “top up” at Court, perhaps using the FOS Award as a fighting fund. A complainant has to either accept what it has achieved via the FOS or decline it and take its chances at Court (albeit evidentially supported by the FOS finding).

Arguably, and assuming that the relevant time limits allow, any complainant ought to use the FOS as a first step. The freedom of having the choice of accepting the FOS award or not also provides a great framework for a complainant to run parallel processes.

For a financial services provider faced with a complaint in the context of a significant potential Court claim, the best course may be not to contest the FOS jurisdiction in the knowledge that this could result in the maximum £150,000 award. Given that this passive approach may help to minimise the information and assistance given to the complainant it could discourage them from refusing the bird in the hand and switching to a Court claim.

Authors

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⁶ [2014] EWCA Civ 118

