Litigation involving FOS predecessors

MASU Financial Management Pty Ltd v Financial Industry Complaints Service Limited and Julie Wong **(No. 1) [2004] NSWSC 826**

MASU was a financial adviser which had provided advice to a client who then purchased a property. The client complained about the transaction to the Financial Industry Complaints Service (FICS). FICS reviewed the dispute and determined that MASU should pay to the client the amount of the commission it received, together with any difference between the price the client paid for the property and the price for which it was sold. MASU rejected the FICS decision and appealed to the NSW Supreme Court on constitutional grounds and on the basis that it had been denied procedural fairness by FICS.

In this case the NSW Supreme Court dealt with the issue of whether the FICS scheme intruded upon the exercise of judicial power in Australia and whether such powers of adjudication can only be exercised by a court constituted in conformity with the Australian Constitution.

The NSW Supreme Court found that the purpose of FICS panels included acting as a complaints resolution body in the financial services industry and dealing with complaints arising from transactions involving participants in the industry and members of the public. FICS was designed to adjudicate in relation to consumer complaints, but was not established by parliamentary legislation. Rather it was constituted under regulations and a policy statement issued by ASIC.

The Court decided that FICS was not a court and did not exercise judicial power as its jurisdiction was administrative rather than judicial.

Further, the Court found that the FICS scheme did not intrude in an impermissible way upon the exercise of judicial power in Australia and these powers of adjudication were not limited to a court constituted under the Australian Constitution. Accordingly, FICS's powers of adjudication were not contrary to the Australian Constitution.

MASU Financial Management Pty Ltd v Financial Industry Complaints Service Limited and Julie Wong **(No. 2) [2004] NSWSC 829**

This was a further hearing that arose from the events described above. In this hearing the NSW Supreme Court reviewed whether FICS decisions were amenable to judicial review or, alternatively, whether FICS was contractually bound to the member in a way that gave rise to a claim of breach of contract.

The Court also considered whether FICS was bound by the established principles of administrative law in its functions: in particular, the process of procedural fairness.

The NSW Supreme Court was of the view that because FICS was empowered to make decisions of a public character, it was susceptible to judicial review on the basis that it administered a public external complaints scheme. In any event, as part of its contractual obligations, FICS was obliged to provide procedural fairness to each member.

The Court found that there was no actual bias in the FICS decisions, but there was however a reasonable apprehension of bias. This was overcome by an order directing that the matter be remitted to a different FICS panel to re-determine the complaint.

***National Mutual Life Association of Australasia Ltd (t/as AXA Australia) v Financial Industry Complaints Service Limited and Mr. Kevin Day* [2006] VSC 121**

These proceedings arose after FICS dealt with a dispute involving an insurance complaint.

AXA Australia issued proceedings and alleged that there were four errors in FICS's reasoning that gave rise to challenge. Those errors were that:

- The Panel had said that the issue it needed to determine was whether the Applicant was "working" at relevant times within the terms of the relevant policy. AXA said the Panel had asked itself the wrong question;
- As the Panel had asked itself the wrong question, it had also failed to ask itself the correct question, namely whether the Applicant had been fraudulent by giving false answers to certain questions on claim forms;
- The Panel had failed to consider whether the Applicant had been reckless in answering those questions and was thereby fraudulent; and
- The Panel had misconstrued the word "working" in the relevant policies.

The Victorian Supreme Court reviewed whether the alleged errors in the FICS Determination could result in the Determination being set aside by the Court. It looked at whether:

- the alleged errors constituted a breach of the contract between FICS and the FICS member, and

- FICS had fallen into jurisdictional error and was therefore liable to judicial review.

After reviewing the available information, the Victorian Supreme Court decided that there was no error by FICS in the relevant Determination. Accordingly, there was no case for a breach of contract obligation against FICS and nor was FICS liable to judicial review.

***Financial Industry Complaints Service Limited v Deakin Financial Services Pty Ltd* [2006] FCA 1805**

In this case the Court reviewed the ambit of financial products that FICS could review in accordance with its jurisdiction.

Deakin Financial Services Pty Ltd's professional indemnity insurer challenged the ability of FICS to accept certain disputes involving "promissory notes", arguing that such notes were not financial products as defined by the *Corporations Act 2001*. It said that as a result, FICS did not have jurisdiction to review the relevant disputes, and it threatened injunctive proceedings in the Supreme Court of Victoria.

Prior to these proceedings being issued, FICS issued proceedings of its own in the Federal Court, seeking a declaration that it had jurisdiction to deal with complaints involving the promissory notes. FICS submitted that not only was its authority under the 2005 FICS Rules wider than the definitions contained in the *Corporations Act 2001*, but that promissory notes were financial products as defined by the *Corporations Act 2001*, and were also interests in an unregistered managed investment scheme.

The Federal Court declared that a "promissory note" did fall within the FICS jurisdiction and that it was a financial product. Further, the source of the authority of FICS to deal with the dispute was derived from the private contract formed by the relevant Constitution, the Rules and the Membership Application Form. That contract gave a wider jurisdiction than that contained in the *Corporations Act 2001*.

***Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service and Norris* [2009] VSC 7**

In this matter, Wealthcare Financial Planning Pty Ltd challenged FICS's decision on the ground that it had failed to take into account an applicable law – namely, the proportional liability provisions of the Victorian *Wrongs Act 1958*. It submitted that FICS was susceptible to judicial review and that there had been a breach of contract in the Panel's failure to "have regard to all applicable legal rules and judicial authority", as it was required to do under Rule 5 of the 2005 FICS Rules.

The Victorian Supreme Court considered whether FICS was bound to apply principles of proportionate liability when determining a retail client's complaint against a financial planner.

The Victorian Supreme Court dismissed proceedings and held that FICS was not bound by an obligation to apply principles of proportionate liability to each decision. The primary duty of FICS, under the terms of the contract with its members, was to do what was fair in all the circumstances, having regard to various listed factors. The FICS panel was required to "have regard" to all of the law (statutory and judge-made) that was relevant or capable of being applied; however, proportionate liability was not an "applicable legal rule" that the Panel was obliged to put into effect in this case.

Litigation involving FOS

Mickovski v FOS and Metlife [2011] VSC 257; [2012] VSCA 185

In this matter, the Victorian Supreme Court considered whether a Jurisdictional Decision to exclude a dispute was amenable to judicial review or a review based on breach of contract.

These proceedings were initiated by an Applicant whose dispute involved a claim under a group salary continuance policy for ongoing benefits. The dispute was deemed to be outside of the relevant Terms of Reference as it was lodged outside of the allowed time frames.

Initially, the Supreme Court of Victoria held that FOS had acted appropriately in its Jurisdictional Decision. The consumer appealed to the Victorian Supreme Court of Appeal on various grounds, but predominantly on the basis that the initial judgment had only been an interlocutory (or provisional) judgment.

The Victorian Court of Appeal held that FOS decisions were not generally amenable to judicial review. Further, it said that where parties have agreed that a Determination is to be 'final', as they had done in the circumstances of this case, they are taken to have agreed that the Determination will not be subject to review unless it is affected by fraud or dishonesty or lack of good faith, or unless it is otherwise apparent that the Determination has not been carried out in accordance with the agreement.

Therefore, as the Terms of Reference state that a Jurisdictional Decision is a final decision, it was unable to be reviewed, even in theoretical circumstances of an Ombudsman having erred in his consideration of FOS's jurisdiction.

In the Matter of *Australian Property Custodian Holdings* [2011] VSC

In this matter, the Administrator of Australian Property Custodian Holdings sought an order from the Court, by way of a declaration, that it did not have to respond to the FOS process. The declaration application was based on the assertion that the *Corporations Act 2001* prevented FOS from initiating, or continuing to handle, disputes against a member while the member was in administration.

The proceedings were discontinued by the Administrator, as they conceded that FOS did not fall within the statutory meaning of a "court", and so was not impeded by the operation of the *Corporations Act*.

Utopia Financial Services Pty Ltd v FOS and Rees [2012] WASC 279

In this matter, Utopia Financial Services Pty Ltd challenged a FOS Determination on the basis that the contract had been breached by the FOS Panel's allegedly incorrect calculation of loss suffered by an Applicant. The Court considered whether FOS had breached the membership contract in any way.

The WA Supreme Court said that a FOS Determination creates new rights and obligations but that it does not amount to the performance of a judicial function. The power to create new rights and obligations arises from the contract between FOS and a member.

The Court also said that FOS's discretion to decide a remedy is very wide, which means that its powers should not be narrowly construed to decisions that could only be made at common law or in equity.

Therefore, the Court said that it was not necessary to enquire whether or not the FOS Panel correctly quantified the loss or damage. The contract between FOS and Utopia required FOS to deal with the dispute between Utopia and the Applicant in accordance with the FOS Terms of Reference. The Terms of Reference require FOS to decide a remedy on the basis of what in its opinion is fair in all the circumstances. The Court agreed that this is what had occurred.

Candice Gate v FOS [2012] NSWCTTT GEN: 12/51694

In this case the Consumer, Tenancy and Trader Tribunal (CTTT) of New South Wales considered whether its jurisdiction covered FOS. The matter arose when Ms Gate brought a complaint against FOS for damages.

The CTTT found that FOS does not provide a 'service' as defined by the enabling consumer protection legislation, and so was not subject to CTTT's jurisdiction. It also found that any contract that may have been formed by the consumer's lodgement of a dispute with FOS was formed outside of NSW.

Lazarus v HSBA and FOS [2012] VCAT C6851/2012

In this matter, the Victorian Civil and Administrative Tribunal (VCAT) considered whether its jurisdiction covered FOS. The matter arose when Mr Lazarus brought a complaint against HSBA and FOS for damages.

VCAT held that FOS does not provide a 'service' as defined by the enabling consumer protection legislation, and so was not subject to VCAT's jurisdiction.

Wealthsure Pty Ltd v Financial Ombudsman Service Ltd [2013] FCA 292

In this matter, the Federal Court considered whether a FOS dispute was comprised of three discrete claims or a single claim and cause of action. In addition, in the event that there was a single claim, the Court considered the issue of whether the claim had been improperly split.

The Federal Court stated that there was no splitting of claims as contended by Wealthsure. It followed that FOS was correct in the approach it ultimately adopted in treating the Dispute as comprising three separate claims each subject to a monetary cap of $150,000.

Bilaczenko v FOS [2013] FCCA 420

In this matter the Applicant had sought to overturn two FOS decisions. His reasons included that FOS did not have the authority to decide that his dispute lacked substance, and that he did not sign the relevant authority forms.

The Federal Circuit Court dismissed the case, essentially on the basis that FOS's two decisions in this case were not susceptible to judicial review.

***Cromwell Property Securities Limited v Financial Ombudsman Service Limited and Radford* [2013] VSC 333**

In this matter the Supreme Court considered whether FOS had committed an error of law in failing to exercise its discretion to exclude a dispute. This followed submissions from Cromwell Property Securities Limited (Cromwell) that it would be unfair to Cromwell's interests for FOS to consider the dispute.

The Supreme Court dismissed the applications that FOS had committed an error of law and stated that in order to successfully challenge a FOS decision, a party to the contract must establish *Wednesbury* unreasonableness – namely that the decision was one to which no reasonable decision-maker could properly arrive at on the evidence.

This decision of the Supreme Court was appealed by Cromwell to the Victorian Supreme Court and subsequently, again to the High Court. On both occasions, the Courts supported the FOS submissions that the correct standard was *Wednesbury* unreasonableness for FOS determinations and jurisdictional decisions.

***FOS v Pioneer Credit Acquisition Services* [2014] VSC 172**

This matter was brought by FOS as a debt recovery action for outstanding dispute fees totalling approximately $112,000. Pioneer's defence was that FOS was biased in its handling of the disputes and that as a result, the invoices were not valid.

The claim that FOS made to the court for outstanding dispute fees was upheld in full and the counterclaim by Pioneer, which alleged that it had terminated the Membership contract and the invoices were void as a result, was dismissed in its entirety. The main points are:

- FOS is not prevented by the Terms of Reference from continuing to deal with a dispute if proceedings are commenced by an FSP after the dispute has been lodged, irrespective of whether the dispute is based on the same events and facts and with the same Applicant as any matter which is, was, or becomes the subject of any proceedings in any court;
- There is no implied or express term of the membership contract obliging FOS to correctly decide questions of law;
- If it is the function of FOS to interpret the meaning of a law, a Determination may be challenged on the basis of an error in doing so, but as applicable laws are only one factor to be considered by FOS in making a decision, it is unlikely that it is the function of FOS to interpret the law in this manner;
- Only Determinations may be the subject of review by the Courts as they are the binding decision. Other non-final decisions, such as Recommendations

and Findings are not, however it is likely that the basis for Justice Ferguson's decision on this point would extend to final Jurisdictional Decisions; and
- FOS decisions should be subject to the Wednesbury unreasonableness test.

FOS was ultimately awarded the bulk of its legal costs on an indemnity basis, due to the manner in which Pioneer had conducted the proceedings.

Goldie Marketing and Ors v FOS and ANZ [2015] VSC

This matter was brought by Goldie Marketing (an Applicant) following a decision by FOS to exclude the dispute under paragraph 5.2 of the Terms of Reference and find that the court was a more appropriate forum. Goldie submits that the main reason for this decision was a temporary lack of skilled employees –an invalid basis for the exercise of the discretion.

Given the nature of the proceedings to date, FOS stepped aside and agreed to abide by the outcome in accordance with the *Hardiman* principle applicable to independent tribunals.

The Supreme Court handed down judgment on 29 June 2015 and held in favour of FOS and ANZ, noting that the primary issue for determination was whether FOS exercised its discretion in accordance with the Terms of Reference. The Court held that it did for the following reasons:

- the Terms of Reference constitute the entire contract between the parties and the Operational Guidelines to the Terms of Reference dated 1 May 2012 do not form part of that contract;
- FOS has a broad discretion to exclude disputes under the Terms of Reference which does not prevent FOS from taking into account staffing or resourcing issues;
- the relevant Jurisdictional Decision provides comprehensive, rational, cogent and persuasive reasons why FOS should exercise its discretion to exclude the dispute. There is nothing on the face of the Jurisdictional Decision that would suggest the decision was infected by bad faith, bias or was so unreasonable that no other decision-maker could have arrived at that decision; and
- even if the Operational Guidelines form part of the Terms of Reference, the reasons set out in the Jurisdictional Decision are in accordance with the Operational Guidelines as they are 'compelling'.

Patersons Securities Limited v FOS [2015] WASC 321

This matter was brought as a challenge to FOS' approach to putting the Applicant in the position that she would have been had the Applicant received the service that had been agreed to. Patersons asserted that this represents 'lost opportunity' and is therefore consequential loss and should be capped at $3,000.

The Ombudsman awarded approximately $150,000 to restore the Applicant to the position that the Applicant would have been in but for the poor implementation of the advice.

Judgment was handed down on 28 August 2015 in favour of FOS. Mitchell J noted that the Panel had performed its function properly and that it had asked itself the correct questions when determining the dispute – giving support for the approach that has been taken by FOS in calculating loss in these types of dispute.

The only criticism of the FOS approach came when dealing with a small portion of the quantum which arose between the date of crystallization of the losses and the date of the Determination. The Panel concluded that as there would have been no impetus for the Applicant to crystallize the loss had the advice been implemented properly and so the loss calculation could be extrapolated out to place the Applicant in the position that she would have been in as at the date of the Determination.

Mitchell J however stated that he would have categorised this loss (of $33,758.00) as indirect or consequential, but as he is not determining the matter on its merits, it is the Panel's view that stands as it was not irrational or unreasonable.

The FOS claim for specific performance was therefore granted and the Applicant has received orders that Patersons should make payment in accordance with the terms of the Determination.