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A “Hybrid” Jurisdiction: High Court Analysis of Financial Services and Pensions Ombudsman’s Jurisdiction

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The High Court recently considered the jurisdiction of the Financial Services and Pensions Ombudsman (“**FSPO**”), as well as the issues the courts will consider in an appeal of an FSPO decision to the High Court. Although this judgment concerned the payment of income protection by an insurance provider, it provides useful guidance for all financial services providers (“**FSPs**”) when dealing with their customers and the FSPO in the context of a complaint.

BACKGROUND

A complainant made a claim to her insurer on the basis of inability to work due to disability, caused by two conditions, fibromyalgia and rheumatoid arthritis. Although the latter condition was covered by her income protection policy with Utmost PanEurope DAC (“**UPE**”), the former was excluded.

In seeking to make a claim under the policy, the complainant argued that her disability was predominantly due to her rheumatoid arthritis. This was rejected by UPE on the grounds that the complainant’s fibromyalgia predominated in relation to the impact on her ability to work.

The FSPO upheld the complaint, concluding that UPE had placed an “*overemphasis*” on quantifying the impact that the two medical conditions had on the complainant’s ability to work. It found that this was unreasonable and unfair to the complainant and directed UPE to retrospectively admit the claim.

UPE appealed the FSPO’s decision to the High Court.

FSPO’S HYBRID JURISDICTION

The High Court overturned the FSPO’s decision and directed it to reconsider the complaint. In doing so, the judgment of Mr Justice Simons provided useful clarity in relation to the FSPO’s jurisdiction. He noted that the FSPO enjoys a “*hybrid*”

jurisdiction, making decisions based on both contractual (purely legal) issues, and non-contractual (non-legal) issues. Non-contractual issues include the conduct of the FSP which, even if it is technically found not to be unlawful, may be considered unreasonable or unjust in some way. This provides an important reminder to all FSPs, from banks dealing with a mortgage customer in arrears to an investment manager processing a complaint from a retail investor, to ensure that their interactions with customers are not only lawful, but fair and just.

In this case, the High Court concluded that the FSPO’s decision in relation to the complaint was based on its non-contractual jurisdiction – it related to the behaviour of the insurance provider in assessing the claim, as opposed to the precise terms of the insurance policy.

STANDARD OF REVIEW ON APPEAL

The High Court also provided a helpful explanation of the standard it will apply when assessing appeals of FSPO decisions.

Mr Justice Simons noted that a decision will be overturned where it involves “*a serious and significant error or a series of such errors*” and, in applying this test, the High Court will have regard to the expertise and specialist knowledge of the FSPO.

Notably, Mr Justice Simons went on to draw a distinction between the levels of deference owed by the High Court to the FSPO in respect of the two elements of its hybrid jurisdiction. He clarified that, for purely contractual or legal matters, the High Court will consider its expertise as superior to that of the FSPO. However, for issues concerning the conduct or behaviour of the FSP (i.e. non-legal issues), the High Court will defer to the FSPO given its specialist expertise in such matters.

This clarification will, in particular, be of relevance to any FSP weighing up the merits of appealing a decision of the FSPO to the High Court. A clear error by the FSPO on a matter of law is likely to have better prospects of being overturned on appeal to the High Court; however, where the FSPO decision is grounded on the unreasonableness or unfairness of an FSP’s conduct, that FSP should be conscious of the deference that will be afforded by the High Court to the FSPO.

DECISION OF THE HIGH COURT – FSPO CANNOT IGNORE THE CONTRACT

Ultimately, Mr Justice Simons concluded that the FSPO erred in determining UPE was unreasonable and placed too great an emphasis on UPE’s decision to decline cover without measuring that conduct against both the Consumer Protection Code and the terms of the policy, which

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expressly permitted UPE to verify a claim’s validity before deciding whether to admit that claim.

In doing so, the High Court made it clear that, although the FSPO has a hybrid jurisdiction, the two elements are not entirely independent of each other and there is necessarily some degree of overlap. The High Court indicated that the FSPO is not free to ignore the plain terms of a contract when making a decision based on the conduct and/or reasonableness of an FSP.

Even if the FSPO’s findings on the substance of the complaint were upheld, the High Court was of the view that the FSPO had no jurisdiction to direct UPE to admit the claim for income protection. The FSPO’s findings were as to the allegedly improper conduct of the FSP in verifying the claim; they did not find a breach of contract, or establish that the claim was legally sound and should have been admitted under the policy. In other words, the FSPO applied a contractual remedy to a non-contractual issue – an

approach that, it seems, will not be entertained by the High Court.

KEY TAKEAWAYS FOR FSPS

In one of the clearest judicial statements on the jurisdiction of the FSPO, the High Court has provided very useful takeaways for FSPs:

1. It will not be enough for an FSP to follow the strict letter of its contracts in dealing with its customers; it must also carefully consider its conduct and, in particular, whether that conduct might be deemed unreasonable or unjust to a customer.
2. In engaging with a complaint, FSPs should reflect on the standard of review by which the High Court will assess an appeal of an FSPO decision, particularly with regard to its hybrid jurisdiction and the level of deference that will be afforded to the FSPO on non-legal issues.

To read the full judgment of the High Court, click [here](#).

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