EVERSHEDS SUTHERLAND

Complaint Handling Update

A snap shot of 2018 developments so far

This note highlights several developments in this area in 2018 with the Financial Ombudsman Service ("**FOS**") being in the spotlight.

FCA seeks to widen access to FOS for small businesses

The FCA is consulting on whether FOS's jurisdiction should be extended so that more businesses can refer complaints to FOS. Under the current rules, the businesses eligible to complain to FOS are micro-enterprises with fewer than 10 employees and either a turnover or a balance sheet of no more than €2 million. Businesses that do not fit this specification have limited options when harm has been suffered and are often left to resolve complaints via the courts.

The FCA has proposed that a new category of eligible complainant be introduced into DISP called 'small businesses'. In order to constitute a 'small business' all 3 of the following criteria must be met: (i) an annual turnover of less than £6.5m; (ii) an annual balance sheet total of less than £5m; and (iii) fewer than 50 employees. The consultation closes on 22 April 2018 and it is proposed that the changes to DISP should come into effect on 1 December 2018. A copy of our full article on the consultation can be accessed here.

FOS Dispatches programme

We are sure you have seen and/or heard of the 'Dispatches' programme on FOS, which aired on 12 March 2018. The programme criticised FOS heavily and suggested that FOS tended to favour financial institutions over consumers, staff are ill-trained and are put under too much pressure to get through complaints, such that decisions may not be fair and reasonable or in the customer's interests. The programme concluded by stating that FOS should provide an explanation for the findings. Some of the press commentary has said that the programme was unfair to FOS and we agree with this in the sense that some of the material may have been taken out of context or exaggerated.

Following the programme, the Chair of the Treasury Committee publically wrote to FOS requesting that it respond to the findings made in the programme by 27 March 2018.

FOS has recently responded to the allegations and has confirmed that its non-executive Board will be appointing an independent person to carry out a review and that FOS will keep the Treasury Committee updated in the meantime.

Sharing of information between the FOS and the FCA

A recent decision of the Complaints Commissioner focused on whether sharing of information between FOS and the FCA had led to improper influence. Whilst it was determined that no improper influence had occurred, the Complaints Commissioner recommended that the FCA consider discussing with FOS whether:

- there should be clear guidance about the circumstances in which information may be shared between FOS and the FCA in advance of final ombudsman decisions;
- there should be any limitations on information sharing between the two bodies (or within them); and

- where the FCA is sharing information with FOS, the norm should be that this will be made known to the parties, the reasons for any exceptions being recorded.

We await comment from the FCA/FOS on this recommendation. A copy of the Complaints Commissioners Final Report is here.

Claims Management Regulation

Following a special bulletin on new fee cap measures in November 2017, the MoJ has introduced a new set of rules to replace the Conduct of Authorised Persons Rules 2014. The Conduct of Authorised Persons Rules 2018 (the "**Rules**") come into effect on 1 April 2018 and the underlying aim is to ensure that customers are provided with clarity as to how much CMCs are charging to offer their services and the circumstances in which they can charge. The new Rules include:

- a ban on upfront fees and charges prior to the conclusion of a PPI claim. Fees for any other financial products and services must not be charged prior to the provision of any regulated claims management services (excluding advertising for, or otherwise seeking out) to the client;
- a ban on any charges to a client where it is identified that the client does not have a relationship or relevant policy with the lender(s) for which a claim is submitted on their behalf;
- CMCs will be required to ensure all charges are reasonable and to provide clients with an itemised bill setting out details reflecting the work undertaken and what the charges relate to where a contract is cancelled after the 14 day 'cooling off' period; and
- amended Client Specific Rule 16: a business, unless subject to Regulation 8 of the Damages Based Agreements Regulations 2013, must permit the client to cancel a contract at any time. Any charge to the client must be limited to what is reasonable and must reflect work undertaken by the business. Where there is a contract for a financial product and services claim the business must provide the client with an itemised bill that evidences the regulated claims management services provided and how the fees have been calculated.

All CMCs offering financial claims services in England and Wales will be required to adhere to the Rules as a condition of authorisation in accordance with Regulation 12(5) of the Compensation (Claims Management Services) Regulations 2006. The regulator has the power to vary, suspend or cancel the authorisation of claims management companies who do not follow the Rules. Consequently, CMCs will need to review their management structure, processes and procedures, people and risk management to ensure compliance. These rules are always a useful reference point when financial institutions wish to point out concerns about the conduct of CMCs.

We will be keeping a close eye on how things develop over the next coming months.

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