



Successful judicial review of FSCS compensation award

15 October 2012

Emptage v Financial Services Compensation Scheme [2012] EWHC 2708 (admin)

The High Court has ruled that the Financial Services Compensation Scheme misdirected itself and acted irrationally in awarding too little compensation to a consumer who received unsuitable mortgage advice. Whilst the decision relates to compensation awarded by the FSCS, it will have broader implications for the value of claims against IFAs and mortgage brokers.

Ms Emptage and her partner had an outstanding repayment mortgage of £40,000, which was due to be repaid in 2015. On the advice of an IFA, Ms Emptage remortgaged her property for £110,000 on an interest only basis and invested the £70,000 proceeds in a property investment in Spain. In theory, the investment would produce a return that would pay off the entirety of the increased mortgage. Her adviser told her that unless the variables and assumptions he had used proved to be “drastically incorrect” she would not be any worse off.

Of course, the variables and assumptions used by the adviser did indeed prove to be drastically incorrect. The Spanish property investment was virtually worthless and Ms Emptage was left with an outstanding

mortgage of £110,000 with no way of paying it off. Since the adviser firm involved was insolvent and had no professional indemnity cover available, Ms Emptage made a claim for compensation against the FSCS.

The FSCS provides a consumer compensation scheme of last resort in respect of regulated advice. However, whilst mortgage advice is regulated by the FSA, advice on the sale or acquisition of land (whether off-shore or in the UK) is not regulated. Ms Emptage’s claim to the FSCS therefore only related to the mortgage advice she received and not the advice on investment in the Spanish property.

The FSCS concluded that the mortgage advice Ms Emptage received was unsuitable for her and negligent. Accordingly, she was entitled to redress. However, it said that it could only compensate her for loss directly caused by the regulated mortgage advice and not for loss as a result of the unregulated property investment. As such, it awarded Ms Emptage just £12,000 redress.

Ms Emptage sought Judicial Review of the FSCS’s decision and the High Court ruled in her favour, finding that the FSCS misdirected

Any comments or queries

Jeremy Barnes Partner

jeremy.barnes@rpc.co.uk
D +44 (0)20 3060 6902

Simon Laird Partner

simon.laird@rpc.co.uk
D +44 (0)20 3060 6622

Robert Morris Partner

robert.morris@rpc.co.uk
D +44 (0)20 3060 6921

itself and acted irrationally in reaching the award that it did. The Court gave numerous reasons for reaching this decision, but in essence it found that when making an award of compensation the FSCS had to restore Ms Emptage to the position in which she would have been had she not received the negligent advice. The negligent advice at issue was the advice to redeem the existing £40,000 repayment mortgage and to take out the £110,000 interest only mortgage. This formed a “package” of advice, of which the advice on the Spanish property investment formed part. If that advice had not been received, Ms Emptage would have been in the position of having a reduced repayment mortgage of just £17,000, which she would have paid off in full by 2015. Instead, she found herself with an outstanding interest only mortgage of £110,000, which she had no prospect of being able to repay. Accordingly, the award of just £12,000 did not come close to putting Ms Emptage back into the position she ought to have been in.

The FSCS’s award was quashed and it was ordered to reconsider the compensation due to Ms Emptage, albeit we understand that the FSCS has been granted leave to appeal the Court’s decision.

If it stands, this decision will have an impact beyond future FSCS compensation payments and the increased levies this might have for firms. The principles involved are likely to apply equally to civil claims or FOS complaints made against mortgage advisers in respect of mortgage advice involving both regulated and unregulated elements, and could result in increased quantum or redress payments.