

FOS backs down and agrees: award limit applies in avoidance cases

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In *R (on the application of Aviva Life & Pensions (UK) Limited) v Financial Ombudsman Service [2017]*¹ Aviva judicially reviewed a Financial Ombudsman Service decision that required them to reinstate a life insurance policy they had avoided for non-disclosure.

Aviva were successful in quashing the FOS' decision. The Court reaffirmed that, whilst the Ombudsman had to consider relevant law when reaching her final determination, she did not have to apply the law if in her view a conclusion contrary to the law would be fair and reasonable in all the circumstances. On the facts of the case the FOS **might** have been able to conclude on a fair and reasonable basis that Aviva should reinstate the policy, notwithstanding that strict application of the law supported Aviva's avoidance. However, in this instance the Ombudsman had not provided sufficient reasoning for departing from the law, hence the matter was passed back to the FOS for reconsideration.

The decision is of most interest because one of the arguments used by Aviva was that the FOS' decision requiring them to reinstate the policy should be quashed because the effect of reinstatement was tantamount to a decision that Aviva should pay the complainant the full amount due under the life policy, which was £500,000 – well in excess of the £150,000 award limit.

Aviva pointed to the case of *Bunney v Burns Anderson plc [2007]*, which is authority for the principle that final determinations made by FOS can only oblige firms to make payments up to the FOS monetary award limit (currently £150,000) regardless of how the FOS might dress the award up. (In *Bunney* the FOS argued that their award was not a monetary award but a directional award, which just happened ultimately to require payment of redress in excess of the award limit. The Court concluded that the form of award made by the FOS mattered not; what mattered was the substance of the award and to the extent an award would result in payment by the firm of redress exceeding the award limit, it was not binding.)

Notwithstanding the, frankly very clear, authority of *Bunney*, the FOS has continued to maintain that if it directs an insurer to reinstate a policy that has been unreasonably/unfairly avoided, the claim under the policy has to be reconsidered and any valid claim paid in full, regardless of the monetary award limit. (See our previous blog, when we highlighted this issue back in October 2013.²)

Any comments or queries?

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1. [Click here for full case details.](#)
2. [Click here for previous article.](#)

The FOS' technical guidance on "Misrepresentation and non-disclosure" on its website, until at least early February this year, stated:

"If we decide that cover should be reinstated ..., our £150,000 award limit does not apply – because we are telling the insurer to re-instate a policy and then deal with a claim. The award limit applies only where compensation is a money award for financial loss the consumer has suffered – not as a limit to any future amount that is paid only if the insurer accepts the claim."

Faced with Aviva's argument in this case, it seems that the FOS finally recognised the untenable nature of its position on this issue and it conceded that any determination reinstating the life insurance policy would have to be read subject to an implied limitation that Aviva's liability under the policy is confined to the £150,000 award limit.

Unsurprisingly in view of this concession, the Judge held that if the policy were required to be reinstated Aviva's liability, actual or contingent, would be limited to £150,000. (The Judge also commented that in his view "it is good practice to spell this out in Ombudsmans' decisions, rather than leaving the matter implicit".)

Interestingly, the FOS's technical guidance on "Misrepresentation and non-disclosure" cases on their web-site is currently marked "under review".

This decision is clearly good news for insurers. The FOS' previous stance created the unjustifiable anomaly that if an insurer refused cover due to a breach of policy terms, or the application of an exclusion, the FOS would only make an award of £150,000; whereas if an insurer avoided a policy, the FOS would require the policy to be reinstated and thus require a claim under the policy to be paid in full, even if that exceeded the award limit. Hopefully the concession made by the FOS in this case, and the Judge's findings on this point, will bring an end to such anomalies in future.

In addition to the issue above, the Judge also made some interesting (albeit non-binding) comments about the FOS' overall jurisdiction. The Judge was bound by the Court of Appeal decision in *R (Heather Moor & Edgecomb) v FOS* [2008] which held that the FOS has to consider, but is not obliged to apply, the law when reaching a decision that is fair and reasonable in all the circumstances. This means that the FOS can reach a conclusion that is contrary to that which would be found on strict application of the law, albeit the FOS has to provide clear reasoning to justify such a departure. The Judge said:

- "...some weight must be given to the argument that fairness and reasonableness is not just about the interests of the [complainant], but must also accommodate the commercial interests of the [firm]."
- "...I do have personal concerns about a jurisdiction such as this which occupies an uncertain space outside the common law and statute. The relationship between what is fair and reasonable, and what the law lays down, is not altogether clear I am not wholly satisfied that [the current law] adequately bridges the gap, or gives sufficient definition to the norms under scrutiny..... [but] it is ... my duty to follow Court of Appeal authority."

Numerous other issues relating to the scope of the FOS' jurisdiction remain unresolved by the Courts, such as:

- whether the FOS is able to split complaints in order to enable individuals to recover multiple awards of up to £150,000 each, but which collectively exceed the limit
- whether the FOS is able to award interest (applied at the judgement rate of 8% p/a) on losses crystallised at a date in the past, resulting in an award inclusive of interest at the date of final determination that exceeds the award limit.

The FOS asserts it is able to do both of these things, but as yet they have not been tested in the Courts. Perhaps the comments of the Judge in this case will give some encouragement to those who believe the FOS is continuing to expand its jurisdiction in a way not permitted by statute.

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