Unsurprisingly, turmoil in financial markets over the last few years has prompted a large increase in the numbers of claims made by investors and borrowers against financial services providers. The Financial Services Ombudsman scheme was set up to provide a swift and cost effective remedy for consumers with complaints about regulated financial services providers. In the judgment in Lyons¹ Mr Justice Hogan posed an ‘existential question’ as to the purpose of the FSO and how its functions differ from those of the courts. In this article we look at the Lyons judgment and at two other recent decisions of the High Court concerning the procedures of the FSO and limitation issues raised by claims for investment losses.

Fair Procedure and Oral Hearings

The FSO is a creature of statute, its jurisdiction and procedures being governed by the Central Bank Act 1942 as amended by the Central Bank and Financial Services Authority of Ireland Act 2004. The function of the FSO is:

‘to investigate, mediate and adjudicate complaints made … about the conduct of regulated financial services providers … and to enable such complaints to be dealt with in an informal and expeditious manner …’²

The FSO is:

‘required to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form.’

For reasons of efficiency and economy, the FSO normally deals with complaints on paper without a hearing. In Lyons, on an appeal from a decision of the FSO, the High Court considered (not for the first time), the circumstances in which the FSO should hold an oral hearing.

It should be noted that statutory appeal to the High Court against a decision of the FSO does not involve a full re-hearing of the dispute and is more akin to a judicial review. The test to be applied by the High Court was described in Ulster Bank Investment Funds Ltd³ as follows:

‘...the Plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the defendant …’ (i.e. the FSO)

¹ John Lyons and Patrick Murray -v- Financial Services Ombudsman and Bank of Scotland PLC [2011] IEHC 454
² S57BB Central Bank Act 1942
³ Ulster Bank Investment Funds Ltd -v- Financial Services Ombudsman & Others [2006] IEHC 323
Lyons concerned a series of loans totalling some €17m taken out by the appellants for property acquisition. In short, the appellants argued that they had agreed orally with the Bank that the loans would be interest only at agreed rates of 1.25% (or 1.5% or 1.8%) over the cost of funds, notwithstanding that the written loan documentation did not reflect those alleged oral agreements. The Bank denied the alleged oral agreements and asserted that the appellants were in default and, but for the referral to the FSO, would have issued proceedings to recover the amounts outstanding.

The judge remarked that at first blush it was surprising that such a dispute fell within the remit of the FSO. These were essentially commercial loans for business purposes. Nonetheless the definition of ‘consumer’ is drawn sufficiently widely to encompass this type of dispute, so much so that the judge said:

“In effect, therefore, the consequence of the 2005 Regulations is radically to expand the scope of the jurisdiction of the FSO to categories of cases beyond retail banking simpliciter to a point which, some might think, it might sensibly or appropriately bear.’

The FSO rejected the appellants’ complaint without an oral hearing and the question on appeal was whether he should have held an oral hearing given that the case turned on an alleged oral agreement that was denied by the Bank.

The Court was fully alive to the implications of imposing ‘some form of adversarial court-style model’; on the FSO and noted that ‘would mean in reality that the office simply could not function’. Nonetheless, the judge decided that the appellants should have been allowed an oral hearing in order that the disputed evidence of the witnesses could be tested by cross examination. The judge concluded that not to hold an oral hearing breached the appellants’ constitutional (and, doubtless, European Convention) rights to fair procedures.

**Two Bites at the Cherry**

In a judgment of Mr Justice Charleton, the Commercial Court considered the question of whether the Plaintiff Joseph O’Hara was entitled to litigate a dispute the substance of which had previously been determined by the FSO.

The dispute concerned an ironically named ‘Solid World Bond’. The Bank not only sold the bond to the Plaintiff but also lent him the money for the purchase. Unfortunately the bond turned out to be anything but solid. The interest on the loan considerably exceeded the return on the bond and the Plaintiff brought a complaint to the FSO alleging mis-selling and conflict of interest by the Bank and seeking the return of all interest paid to the Bank. The Plaintiff’s complaint was dismissed by the FSO.

Rather than appeal the FSO decision, Mr O’Hara brought entirely new proceedings and the Bank applied to have the proceedings struck out on the basis that the issues raised had already been determined by the FSO.

Mr. O’Hara asserted that he was not bound by the findings of the FSO which he said did not constitute a judicial tribunal. Even if the FSO was a judicial tribunal, he argued that there was no abuse of process such as could give rise to issue estoppel.

Charleton J set out in his judgment the differences in jurisdiction between the FSO and the courts. In many ways the FSO has a far wider jurisdiction since he is empowered not simply to provide a remedy for conduct that is contrary to law but also for conduct that is ‘unreasonable, unjust, oppressive, improperly discriminatory’ and so on.

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4 Joseph O’Hara -v- ACC Bank Plc Judgment 7 October 2011
The judge pointed out that, but for limited rights of appeal, a decision of the FSO is binding. Further that, although a consumer may choose whether to make a complaint to the FSO or to litigate, once a complaint has been made, the FSO is bound to deal with it. He cannot decline jurisdiction so long as it falls within the statutory scheme and there are not already legal proceedings in existence.

There is a long-established common law principle that the courts may regulate their own processes, not least so as to prevent an abuse of process. This includes the principle that a party will not be allowed to re-litigate an issue that has already been determined (res judicata or issue estoppel). Charleton J held that the claim Mr. O’Hara brought in the proceedings was in essence the same as that made before the FSO. And he had no hesitation in deciding that issue estoppel could apply to a decision made by a quasi-judicial body operating under a statutory jurisdiction such as the FSO in just the same way as it would to a decision of a court.

Bringing a complaint to a statutory body and then attempting to litigate the subject matter of that complaint before the Courts was an abuse of process. Mr O’Hara was entitled to bring his complaint to the FSO or litigate it but he could not do both.

**When Does the Clock Start Ticking?**

O’Hara and Gallagher –v- ACC Bank (another case involving a Solid World Bond which was the subject of a combined judgment⁵) also addresses the critical question of when time begins to run for the purpose of the Statute of Limitations in claims for financial loss.

In both cases, the Plaintiffs had issued proceedings more than 6 years after the date of their investments and the bank contended that they were time barred. In contract, time starts to run from the date of the breach of contract, regardless of when damage may occur. There was no question that claims in contract were time barred.

The Plaintiffs also alleged negligence. Unlike a claim in contract, a claim in tort is not actionable without proof of actual damage and the question was therefore when the Plaintiffs had suffered damage (loss).

To flesh out the issue, the judge posed two questions. Firstly whether a claim brought immediately on acquisition of the investment would succeed; and secondly whether a plaintiff suffers any immediate loss on entering into the transaction. The Plaintiffs in this case did not suffer an immediate loss on the purchase of the Solid World Bonds: they were not worthless at point of sale. The Plaintiffs faced a contingent loss. The investments could have turned out for better or worse depending on market conditions. Charleton J observed:

> ‘The quantification of damages in such a case was not simply difficult but was impossible because no loss had then [i.e. at the date of purchase] occurred and a buoyant performance over the lifetime of the bonds was still possible... if there was misrepresentation, the tort only became complete when a financial loss crystallised.’

The Court concluded that the claim was not statute barred.
Conclusions

All three decisions are likely to have major ramifications for claims against financial services providers.

The requirement of fair procedure on the part of the FSO and in particular the need to consider oral hearings highlighted in *Lyons*, becomes all the more important in the light of *O’Hara* which makes clear that, apart from limited rights of appeal, a decision of the FSO is final and binding and the same issue cannot subsequently be litigated.

The two decisions are likely to result in more oral hearings by the FSO which in turn can be expected to result in increasing delay in resolution of complaints to the FSO. At the same time, complainants and their advisors may be expected to consider more carefully than in the past whether they may be better served by the courts rather than the FSO.

The Gallagher judgment is likely to result in many claims being pursued which might previously have been thought to be time-barred. On the assumption that losses on many investments would not have crystallized until the collapse of worldwide financial markets from 2008 onwards, investors may now have until 2014 or later to pursue claims.

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