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As FOS frustration grows, a judicial review offers hope

30 June 2025 Joanna Wallens

We frequently hear frustrations from insurers that the Financial Ombudsman Service (FOS) favours what it considers to be *'fair and reasonable'* over the clear language of policy wordings.

In this article we remind insurers of an interesting Judicial Review in 2020 in which FOS had sought not to apply clear contractual language.

Thinkmarkets

In the judicial review case of R (TF Global Markets (UK) Ltd (t/a Thinkmarkets)) v Financial Ombudsman Service Ltd [2020] EWHC 3178 (Admin) ("Thinkmarkets") (25 November 2020) the Administrative Court quashed three FOS final decisions. The judicial review concerned the correct construction of the terms and conditions which governed the relationship between Thinkmarkets and three of its customers.

Thinkmarkets was regulated by the FCA and subject to the compulsory jurisdiction of FOS. It operated an online platform for dealing in investments. The customers bringing the complaint had each accepted Thinkmarkets' client terms and conditions.

Prices displayed on the online platform could sometime lag fractionally behind the market due technological limitations. A clause in the terms and conditions referred to *"price latency and arbitrage opportunities"*, meaning the practice of using algorithms or robots to identify these differences in order to exploit them to generate profit.

Thinkmarkets suspended the accounts of the customers and withheld their profits, suspecting that they had taken advantage of price latency, engaged in market manipulation or arbitrage trading, and colluded with other accounts. The customers complained to FOS and their complaints were upheld.

In reaching its decision, FOS found that it was no more than a possibility that the customers had actually conducted abusive trading, applying a balance of probabilities test. The parties accepted the final decisions, which then became binding on Thinkmarkets. Thinkmarkets challenged the decision by way of judicial review, which was the only legal route available to it.

Construction of the terms and conditions

Thinkmarkets brought the judicial review contending that:

1. it had a reasonable suspicion that the interested parties had been exploiting a vulnerability in its platform.

2. its terms and conditions allowed it to exercise judgement as to whether arbitrage based on price latency had taken place (provided its discretion was not used arbitrarily, capriciously or unreasonably).

FOS decided that contractual discretion only arose if arbitrage based on price latency had in fact taken place, i.e. a determination of fact rather than an exercise of judgement by Thinkmarkets. FOS therefore held that in order for the discretion to be applied, there needed to be a finding on the balance of probabilities that arbitrage had taken place. Thinkmarkets argued that it had incorrectly construed the terms and conditions and exceeded the constraints of its role.

The clause in question stated:

> *"Transactions that rely on price latency or arbitrage opportunities may be revoked at our discretion."*

FOS focused on the use of the word *"that"* in its final decisions, when *"may have"* or *"possibly"* could have been used instead. This led to its determination that more than reasonable suspicion was required (and that Thinkmarkets would need to satisfied on the balance of probabilities).

However, the court held that FOS erred in its construction of the clause and giving the words a literal meaning as it did not read it in the context of the terms and conditions as a whole. A further clause reserved Thinkmarkets' contractual discretion to refuse trades it judges outside prevailing market price. Price arbitrage is a specific example of trading outside the prevailing market price.

The judicial review was allowed, and the Ombudsman's three final decision letters were overturned. The question of whether Thinkmarkets exercised its discretion reasonably was remitted to FOS.

What does this mean for insurers?

FOS makes its decisions based on what is *"fair and reasonable in all the circumstances of the case"*. In determining what is fair and reasonable FOS takes into account law, regulations, guidance, standards and codes of practice and what it considers to be good industry practice.

However, the Thinkmarkets case demonstrates that whilst the FOS does have a wide ambit to make decisions based on what is fair and reasonable, it must still do so against the backdrop of the contractual terms in place between the parties.

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