Complaints Commissioner

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24th November 2014

Dear Complainant,

Complaint against the Financial Conduct Authority
Reference Number: FCA00015

Thank you for your email of 2nd July 2014. I am sorry for the delay in responding, but your complaint has raised complex issues on which it has been necessary to make further inquiries.

As the rules of the scheme under which I consider complaints can be found on our website at www.fscc.gov.uk, I do not intend to set them out fully below.

Your complaint

From your email and the papers you have submitted to me and the FCA I understand that your concerns relate to the fact that:

- the FCA allowed Firm O to cancel its Part IV Permissions in the knowledge that a number of complaints remained outstanding and as a result you believe that the FCA acted negligently and in a manner which was to your clients' detriment.
- you are acting for a number of consumers who received advice from Firm O (11 at the time you complained to the FCA with the number now rising to around 40) and that many of them have claims for sums in excess of £50,000 which you have indicated mean that adequate redress cannot be claimed from the Financial Services Compensation Scheme (FSCS). As you have been told that Firm O's Part IV Permissions cannot be reinstated you are looking to me to recommend that the FCA should make a compensatory payment to the affected consumers.

Legislative background

In your complaint to the FCA you indicated that you were seeking a compensatory payment on the grounds that the regulator had acted "negligently". Negligence is a legal concept and a matter for the courts, but before I comment on the regulator's conduct, I would like to draw your attention to Section 25 of Part 4 of Schedule 3 of the 2012 Act which contains some important provisions in relation to the FCA's liability for damages:

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25 Exemption from liability in damages

(1) None of the following is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the FCA's functions—

(a) the FCA;

(b) any person ("P") who is, or is acting as, a member, officer or member of staff of the FCA;

(c) any person who could be held vicariously liable for things done or omitted by P, but only in so far as the liability relates to P's conduct.

(2) Anything done or omitted by a person mentioned in sub-paragraph (1)(a) or (b) while acting, or purporting to act, as a result of an appointment under any of sections 166 to 169 is to be taken for the purposes of sub-paragraph (1) to have been done or omitted in the discharge, or as the case may be purported discharge, of the FCA's functions.

(3) Sub-paragraph (1) does not apply—

(a) if the act or omission is shown to have been in bad faith, or

(b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998.

From this you will see that the FCA has a statutory immunity from claims for damages arising from its alleged negligence unless there is evidence of either bad faith or a breach of Section 6(1) of the Human Rights Act 1998. If you were to take the view that Schedule 3 referred to above was relevant in the context of the Human Rights Act 1998 I should explain that Section 6(1) of that Act provides as follows:

> It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

The only Convention rights that I consider may be relevant are contained in Article 1 of the First Protocol set out in the Human Rights Act of 1998.

Article 1 of the First Protocol provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Having reviewed all of the papers presented to me I am unable to find any allegation (or supporting evidence) to suggest that the regulator acted in bad faith or that its conduct in any way either amounted to a breach of or was incompatible with the duties and obligations placed upon a public body by the provisions of Section 6(1) of the Human Rights Act 1998. I have therefore not seen anything to suggest that the provisions of sub-Section 25(3) of Part 4 of Schedule 3 of the 2012 Act should come into play, though if you wish to pursue this issue it is one on which you should seek legal advice.

However, notwithstanding the fact that the regulator has a statutory immunity from claims for damages (in relation to claims for negligence), the rules of the complaints scheme do allow for a recommendation of a financial award in the event of an upheld complaint.

My inquiries

As part of my investigation into your complaint I have obtained and reviewed the FCA's complaint file.

History

The file shows that the FSA (the predecessor of the FCA) authorised Firm O to conduct regulated activity to intermediate, now referred to as professional, investors on 5th September 2007. Firm O was not provided with permissions which enabled it to conduct regulated activity with retail investors. The FCA's investigation file also shows that Firm O applied to the FCA to cancel its Part IV Permissions on 13th June 2013 and that the FCA granted this request and removed them on 31st July 2013.

Process

As I am sure you are aware, when a firm applies to cancel its Part IV permissions, there is a process which takes time to complete. As the FCA included in its decision letter of 7th April 2014 details of the statutory obligations imposed upon the FCA together with further details contained within the FCA's handbook, I shall not repeat those details here.

However, what I would say is that under this process the FCA undertakes a review of the information it holds directly, the information it has obtained from the firm and information it obtains from a number of other sources. Once it has received and reviewed this information, it makes a decision on whether the firm's application for the cancellation of its Part IV permissions should be granted.

In relation to Firm O, I can confirm that following receipt of the cancellation application, the FCA obtained and reviewed all of the relevant information it believed it required before deciding that Firm O's request to cancel its Part IV permissions should be granted. When assessing an application, one of the checks the FCA undertakes is to establish whether the firm has any outstanding complaints. Where the FCA is aware that a firm has outstanding complaints it will use its judgement to decide whether the cancellation should be delayed until such time as any outstanding complaints have been resolved. The existence of outstanding complaints does not automatically prevent the cancellation.

In making this judgement, the FCA will assess the Part IV Permissions the firm holds, the type of regulated activity it undertakes/undertook, and the potential level of consumer detriment which may occur as the result of allowing the firm to cancel its Part IV Permissions before all of the outstanding complaints have been resolved. Where a firm can only deal with professional customers the FCA may take the view that the level of consumer detriment is likely to be considerably lower than if the firm held permissions allowing it to deal with retail customers.

It is clear from the file that, in late June 2013, the FCA contacted the Financial Ombudsman Scheme (FOS) as part of its checks before cancellation, and was informed that the FOS had two unresolved complaints. The FOS also stated that both of these complaints were awaiting an Adjudicator's decision. As Firm O only held Part IV permissions allowing it to provide advice to professional clients, the regulator appears to have concluded that this should not prevent the firm's Part IV Permissions being cancelled. As a result, the cancellation proceeded on 31st July 2013.

You have drawn attention to the fact that you raised a number of complaints with Firm O on behalf of your clients on 17th July 2013, and alerted the regulator to the complaints on 30th July 2013.

My position

In considering this case, I have posed the following principal questions:

a. Should the FCA have made further inquiries before deciding to permit cancellation?

b. Was the decision to permit cancellation unreasonable?

c. Was the FCA at fault in not acting upon the information about complaints which you supplied?

d. Did the FCA's decision to permit cancellation lead directly to avoidable detriment to your clients?

Should the FCA have made further inquiries before deciding to permit cancellation?

The FCA's letter of 7th April 2014 states:

> "An applicant firm [i.e. one applying for cancellation] should have:
>
> ……
>
> - resolved any complaints against it; and
> - put in place suitable arrangements to deal with any subsequent complaints…..
>
> It is essential that these conditions are met."

This wording might be taken to mean that a cancellation could not proceed if there were any outstanding complaints, though it is fairly clear from what follows in that letter that the FCA interprets the handbook as requiring the firm to *disclose* any outstanding complaints. It is relevant that, while SUP 6.4.19 states that the regulator "will not usually" cancel permissions until the firm can demonstrate that it has "discharged, satisfied or resolved complaints against the firm", SUP 6.4.22 states that "in deciding whether to cancel a firm's Part 4A permission", the regulator will "take into account all relevant factors…..including whether…there are unresolved, unsatisfied or undischarged complaints" – demonstrating that the regulator has the discretion to grant cancellation notwithstanding such complaints.

The FCA letter goes on to say:

> "Authorisations explained that there is no other way of obtaining this information and so they have to rely on the information provided by the firm. This in itself is not unreasonable as the Authority is entitled to expect firms to be honest in providing information. We are unable to reveal the details of Firm O's application to have its permissions removed. That is because FSMA[1] restricts the Authority from disclosing confidential information[2] about a firm. The information Firm O provided on its application would be confidential information under FSMA."

I find the above explanation unsatisfactory. To claim that there is "no other way" of obtaining information about complaints is incorrect, since (as the letter goes on to make clear) the FOS is an alternative source (though only in respect of complaints that have been referred to it); and stating that the Authority is "entitled to expect firms to be honest" ignores the Authority's ability to test the evidence which firms supply.

I am also unconvinced by the statement that "there is no obligation on [Authorisations] to enquire about awards that have been made but not yet paid. That is because, the appropriate route to enforce such payments is through the courts". The issue is not whether there is a formal obligation, nor whether enforcement is ultimately through the courts, but rather whether information about an outstanding payment is relevant to consideration of a cancellation request. Given that the FCA's Handbook requires information about outstanding complaints to be considered in such circumstances, it is hard to see why Authorisations appear to consider that there was no onus upon them to inquire into outstanding awards.

I have put these matters to the FCA. The FCA's position is that, because the firm's permissions did not include retail customers, the issue of unresolved FOS complaints was not a sufficient reason to refuse or defer cancellation, and indeed that cancellation was a better means of avoiding future harm. In those circumstances, it seems to me that the FCA's decision was defensible. The essential policy objective is to ensure that complaints are dealt with effectively and promptly. The cancellation of permissions does not, of itself, prevent the resolution of complaints, nor would a refusal of cancellation ensure that complaints were resolved. I therefore consider it reasonable that the FCA should require firms to certify that they have no outstanding complaints, or to declare any that are outstanding, on the basis that the FCA can then make a judgement about whether any outstanding complaints are relevant to the cancellation application. However, it is unfortunate that this was not articulated as clearly as it might have been in the 7th April letter, nor is it sufficiently explicit in the Handbook. I shall return to these points in my recommendations.

It is also clear from my inquiries that the FCA could have undertaken some further work in relation to understanding whether or not Firm O had any outstanding complaints against it. While I do not consider that this ultimately had any effect on the cancellation decision, it is troubling that no further work occurred, and may be symptomatic of a lack of clarity about how to deal with information about unresolved complaints.

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1 Section 348 FSMA.

2 Section 348 (2) FSMA 'confidential information' means information which relates to the business or other affairs of any person; was received by the Authority and is not prevented from being confidential under subsection (4).

Was the decision to permit cancellation unreasonable?

Firm O was not conducting any regulated activity at the time of cancellation, and only had Part IV Permissions allowing it to deal with professional investors. As I have explained above, I consider that the FCA was entitled to conclude that in those circumstances the existence of outstanding complaints at FOS (and more generally) was of less relevance than if it had been dealing with retail customers.

Furthermore, the removal of Permissions only has the effect of preventing the firm from conducting regulated activity in the future. Their removal does not provide a firm with any exemption from its requirement to continue to investigate any complaints it receives from unhappy clients with whom it had conducted regulated activity. In those circumstances, I do not consider that the FCA's decision to permit cancellation was unreasonable.

Was the FCA at fault in not acting upon the information about complaints which you supplied?

Whilst I appreciate that you sent an email informing the FCA of the existence of these complaints on 30th July 2013 (the day before the cancellation was approved), I believe that you sent this email to the FCA's general contact centre email address (consumer.queries@fca.org.uk) and that you received an automated response indicating that, although it had received your correspondence, it could take up to 12 working days to consider it and respond to you. The other FCA email address you used (fca@fca.org.uk) is not a valid email address.

As I have indicated above, before cancelling a firm's Part IV Permissions, the FCA undertakes numerous checks before deciding whether to approve the firm's request. Given the number and manner of checks which are required, it is not possible for the FCA to complete these and complete the cancellation on a single day. In this case, I can confirm that the regulator completed its checks several weeks before the cancellation of Firm O's Part IV Permissions was approved and once the checks had been completed they were not revisited. While ideally your information would have been supplied to the Authorisations team as soon as it was received, I do not consider that the FCA was at serious fault in not processing your additional information within one working day, particularly since it was sent to a general inquiries address; nor is it clear that, even if it had done so, the outcome would have been any different. I note that there is no hard evidence that the FCA were notified before 30th July.

Did the FCA's decision to permit cancellation lead directly to avoidable detriment to your clients?

For the reasons given above, I conclude that the answer to this question is "no". The fact that Firm O was allowed to cancel its Part IV Permissions did not, in my opinion, lead directly to the loss you have claimed. My views are supported by the fact that Firm O appears to have been in financial difficulty and been unable to meet its financial obligations. Where a firm is in financial difficulties, deferring the cancellation of its Part IV Permissions is unlikely to be of any practical benefit to a complainant (as there is nothing the FCA could do to ensure that any redress is paid if the firm does not have sufficient capital to meet its current and future liabilities).

The cause of your clients' apparent losses is attributable to the firm. The regulator's decision to approve cancellation does not appear to have had any effect upon that position.

As Firm O has now been dissolved any complaints you may have against it can no longer be referred to either it or the FOS. Whilst complaints about firms which are no longer trading or in existence are considered by the FSCS, this is only the case once the firm has been declared in default. From the information provided to me by the FCA it is unclear whether the FSCS has declared Firm O in default and it may not yet be able to consider the complaints your clients may have. Although I would recommend contacting the FSCS, if the FSCS is unable to assist you, liability for the actions of Firm O would rest with Firm O's principal(s). As such it may be possible for you/your clients to obtain compensation by making a claim through the courts (which would be at your or your clients' expense). I would however strongly recommend that legal advice on the likelihood of success is obtained before a claim is submitted to the courts (and again such legal advice would be at your or your clients' expense).

Conclusion

Having considered your complaint I have concluded there is nothing to indicate that the FCA's decision to cancel Firm O's Part IV Permissions was unreasonable, or that your clients suffered as a result of a flawed decision. For that reason, I do not uphold your complaint.

However, I do consider that your complaint has highlighted issues which, in other circumstances, might have had adverse consequences.

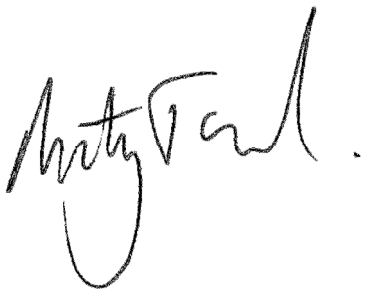
First, the FCA has informed me that, following your complaint, it identified a weakness in its procedures with regard to the manner in which it assessed conflicting information it received (such as that relating to the number of outstanding complaints) when considering an application for the cancellation of a firm's part IV Permissions. Although this did not have any impact on the outcome on the situation you have complained about, I welcome the fact that the FCA is currently reviewing its procedures to address this weakness.

Second, and more broadly, the FCA's approach to considering the effect of outstanding complaints on an application for cancellation is not, in my view, sufficiently clear. While I accept that there is inevitably a degree of subjective judgement in deciding the significance of outstanding complaints upon the outcome of an application, in my view there should be clearer guidance on the factors which will be taken into consideration. The absence of such guidance increases the risk of inconsistency and confusion. I therefore recommend that the FCA considers whether clearer guidance should be formulated on the significance to be attached to outstanding complaints in decisions about the cancellation of permissions. Again, I emphasise that in your case I do not consider that this lack of clarity had any effect upon the outcome. I am pleased to note that the FCA has informed me that it is currently reviewing its procedures to ensure that issues like this, particularly where inconsistent information is provided, do not arise in the future.

Finally, I also have a degree of concern over the FCA's procedures for when it requires a follow-up check to be conducted. Currently, where the FCA is unable to complete the cancellation of a firm's part IV Permissions immediately, its procedures do not require it to conduct a follow-up check unless two months have passed since the first check was completed. Again, I would emphasise that this period did not have any adverse impact upon the situation you have complained about but I do consider that the period of two months may be too long, and I would invite the FCA to review this part of its procedures in conjunction with the review of criteria which I have suggested above. I welcome the FCA's comments that this is something which Authorisations area will consider as part of its wider review of the cancellations procedures which I have mentioned above.

I appreciate that you will be disappointed with my decision but hope that you will understand why I have reached it.

Yours sincerely



Antony Townsend
Complaints Commissioner