Complaints Commissioner

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15th September 2017

Dear Complainant

Our reference FCA00097

Thank you for your email of 31st May 2017, complaining about the FCA on behalf of your client.

I wrote to you, and to the FCA, on 1st August 2017 with my preliminary decision. In the light of your comments, and those of the FCA, I have now produced my final decision.

The background to your client's complaint

Your client's complaint has a long history, which was summarised by the FCA in its decision letter of 3rd March 2017 as follows (with some details omitted for the purpose of anonymising this report):

> An investigation by a team in what was then the Financial Services Authority's (FSA's) Enforcement and Financial Crime Division (the Enforcement team) into your client's conduct started on 29 November 2012.
>
> The Regulatory Decisions Committee (RDC) issued a Warning Notice to your client in 2014, in reliance upon several documents which formed part of productions requested by the US Commodity Futures Trading Commission (CFTC) and received from Bank X by the FSA over a period of several months starting from 2 November 2010.
>
> The Enforcement team did not raise with the RDC, before the Warning Notice was issued, that receipt of those documents had the potential to undermine the s.66 case against your client set out in that Warning Notice, for reasons of limitation.
>
> The limitation issue came to light after the Warning Notice was issued and the FCA notified you on 25 July 2014 that it was not pursuing its s.66 case against your client, solely for reasons of limitation.
>
> On 3 October 2014, the FCA wrote to you to explain its decision, and accepted that "*the change in our position at this stage in the proceedings is unsatisfactory. We accept that we did not give adequate consideration to the potential impact of the content of the CFTC productions in our analysis of the limitation period. We apologise for this*."

Your client's complaint

The FCA's decision letter went on to describe your client's complaint as follows:

> In your letters of 20 November 2014 and 14 July 2015, you alleged that the Enforcement team deliberately withheld and/or failed to disclose material relevant to the question of limitation in order to persuade the RDC to issue a Warning Notice. By way of remedy, you have asked for a declaration that Enforcement has acted in the manner alleged, an apology for the conduct, and damages.

What happened after your client's complaint was submitted to the FCA

In July 2015, you approached me to complain about the FCA's decision to defer investigating your client's complaint pending some related proceedings. Following extensive correspondence between you, me, and the FCA, it was agreed in December 2015 that the FCA would proceed with its investigation on the basis of addressing five questions which I posed:

> a) At what point did those investigating and bringing the proceedings become aware of the limitation issue?
>
> b) At what point should those investigating and bringing the proceedings have become aware of the limitation issue?
>
> c) What consideration was given to the significance of the issue?
>
> d) What consideration was given, and when, to the need to disclose the limitation issue to the RDC and the complainant?
>
> e) Were the actions of those responsible for these matters fair and reasonable?

In the summer of 2016, the FCA proposed a further deferral of the complaint because of related proceedings. You sought my intervention, and in August 2016 I wrote to say that I was unpersuaded by the FCA's arguments, particularly given the length of time which had already elapsed. In September, the FCA agreed to continue with the investigation.

The FCA's decision

On 3rd March 2017 the FCA wrote to you with its decision: it partially upheld your client's complaint on the grounds that:

a. The FCA had failed to reschedule your client's case so that the limitation issue would not be an issue;
b. The FCA had failed to disclose an issue which potentially undermined the case against your client.

The FCA apologised, but said that it had found no evidence of deliberate withholding of information, or of any other bad faith, and concluded that an apology was a sufficient remedy.

What your client is seeking

In referring the case to me, your client seeks:

a. An apology;
b. A compensatory payment for distress and inconvenience;
c. A "full, independent and detailed explanation of what went wrong…..One is left with the impression that [our client's] investigation was mishandled at an early stage, but there was and remains an entrenched institutional reluctance within the FCA to admit its own mistakes."

While your client "welcomes the increased transparency from the FCA surrounding [the FCA's] discussions concerning limitation", you consider that the Complaints Team's conclusions fall short in significant ways. You asked me to consider this.

Finally, you ask me to consider the delays which have occurred in the FCA's handling of your client's complaint.

Preliminary point: triggering the limitation period

For the avoidance of doubt, in this investigation I have taken no view as to when the limitation period was actually triggered. My concern is with the reasonableness of the actions taken by the FSA/FCA (which I shall refer to as the FCA), in the context of their knowledge of the importance of limitation periods and of the doubts about the circumstances in which such periods are triggered.

My analysis

The FCA's complaints investigation

The FCA's complaints investigation was thorough: it has set out in considerable detail the sequence of events which culminated in the decision to discontinue s66 proceedings against your client, and it has acknowledged and apologised for shortcomings.

The principal facts are not in dispute: it is common ground that the FCA should have acted earlier in response to the information and warning signals it had that suggested that there was a potential limitation problem in its proceedings against your client.

Your concerns about the investigation

I would summarise your concerns about the FCA's conclusions as follows:

a. Has the FCA been sufficiently open and candid about what it knew and discussed when?

b. Were the Complaints Team's conclusions too generous in terms of the motivation and behaviour of the Enforcement Team?

c. Were the delays in handling the complaint justifiable?

The five questions

Both the FCA (in its decision letter) and you (in your complaint to me) have provided a detailed response to the five questions which I posed eighteen months ago, and I deal with them below in turn.

(i) At what point did those investigating and bringing the proceedings become aware of the limitation issue?

This is a more complex question than might at first appear. This is partly because the focused investigation into your client's conduct followed a more general investigation into Bank X. However, what is clear from the documents is that a number of people involved in the oversight of, and advising on, the investigation into your client had also been involved in the earlier more general investigations and in the investigations of other individuals. It is also worth noting that the team included people who were legally qualified, and who could therefore be particularly likely to understand the significance of limitation issues.

It is also clear that, from the outset, your client's name (together with a few key other individuals) featured in the investigations which were being undertaken: this is significant because, while the focused investigation into your client's conduct did not start until 2012, the potential significance of your client's involvement was clear from early on.

The FCA's decision letter explains that in 2011 "the team considered that those productions [the CFTC productions starting in 2010] might contain material relevant to limitation but no firm view was reached at this early stage….." From my review of the documents, it is clear that:

a. In February 2011 the possibility that the receipt of the CFTC productions might have triggered the limitation period had been identified;

b. In May 2011 limitation issues were again identified as a key issue in managing the investigations, with the possibility that information obtained in 2008 could be relevant;

c. In June 2011 a note emphasised the importance, when reviewing documents, of flagging up the identification of individuals, for the purpose of considering limitation issues.

What this demonstrates is that, in the first half of 2011, there was considerable awareness of the potential significance of the limitation issue, and an awareness of the need to undertake further reviews of the documents to establish the position in relation to individuals – of whom your client was potentially one.

The internal documents also show that in autumn 2011 there was a view that the limitation period for some individuals *might* start from October 2010. The existence of the 2009 letter – to which you drew attention in the run-up to the discontinuation of the proceedings – does not appear to have been acknowledged or discussed. This was clearly a significant oversight, though I have seen nothing to suggest that its existence was suppressed.

As the FCA's decision letter explains, in March 2012, the view appeared to be forming that the limitation period was likely to have been triggered by a meeting in May 2011, but that view was explicitly made subject to any evidence arising from a review of the material received from Bank X.

It was against this background – i.e. repeated reminders of the potential limitation issues, and the need for document reviews to establish the position - that the investigations into individuals were launched. As the FCA decision letter (paragraph 22) states, "it was considered that the limitation period would end in March 2014".

The Bank X investigation team appears to have identified 9th May 2011 as a likely start for the limitation period for some individuals, since that was the date on which a meeting had taken place with Bank X at which individuals were mentioned, and in September 2012 the same view was taken in respect of another individual – though this provisional view was explicitly subject to a review of the encrypted material which had been received between November 2010 and February 2011 – i.e. it was recognised that it was possible that the limitation period might start earlier.

The investigation into your client began in November 2012, and the papers confirm that at that stage the assumption was that the limitation period started from March 2011, when there had been a meeting with Bank X in which your client had been mentioned.

Further meetings in December 2012 and February and April 2013 continued to confirm March 2014 as the end of the limitation period. In March 2013, a note makes the point that the provisional limitation dates are subject to a review of the material received from Bank X in response to international requests for assistance. It is significant that, at the April 2013 meeting, the team were aware that other teams were taking a different approach to limitation, although the focus of that discussion was on requests from CFTC, rather than the receipt of material from the bank.

Nonetheless, a meeting in May 2013 reached a firm conclusion that the CFTC requests did not trigger the limitation period. The team seems to have been concentrating upon the *requests* from the CFTC rather than the receipt of information from Bank X. The need to review the Bank X material seems to have been forgotten.

The conclusion in the FCA decision letter is that the case team members "should…..have become aware of the limitation issue by 16th May 2013". Although my reading of the documents confirms the factual accuracy of the FCA's chronology, in my view the team (even defining that in the narrowest sense to preclude the work done before November 2012) were aware in broad terms of the limitation issue from the outset of the investigation, and were clearly aware of potential doubts about the approach in April 2013 (albeit that those doubts focused upon CFTC requests rather than bank productions). More broadly, the Enforcement Team (including members who were later involved in the investigation into your client) had been well aware of the potential limitation issues from 2011, and of the importance of a review of the CFTC productions. In my view, the facts show that the problem was *not* lack of awareness, but the product of a decision – the basis of which is unclear - to treat the unread CFTC productions as not relevant to limitation.

The FCA decision letter (paragraph 46) reads "The Enforcement team's letter of 6 June 2014 disclosed to you that material in the Part A list had been received in the CFTC productions. The internal correspondence I have reviewed at this time indicates that those investigating and bringing the proceedings became aware of the limitation issue very shortly before this letter was sent."

I do not agree with the FCA's conclusion.

The potential significance of the limitation issue had been known at this point for three years; it had been discussed several times by the team investigating your client; and you had raised the general issue of limitations on your client's behalf from October 2013. The problem here was not that the team became aware of a problem for the first time at a late stage, but rather that they had discounted the problem at an earlier stage and came late to the conclusion that they might have erred.

ii) At what point should those investigating and bringing the proceedings have become aware of the limitation issue?

As I have explained above, I do not consider that the problem was one of awareness. The team had sufficient awareness of the limitation issue; scheduling decisions were explicitly made taking limitation into account; and the team knew that their interpretation of the trigger-point was not the only possible one. So my answer to this question is that the team were aware of the *potential* limitation issue from the outset.

iii) What consideration was given to the significance of the issue?

There was plenty of consideration given to the significance of the limitation issue in the early stages of the inquiry into Bank X, but the focused inquiry into your client decided at an early stage to discount what became the key consideration – the receipt of the first CFTC productions.

While the letters which you sent to the FCA from October 2013 challenged the FCA's approach to calculating limitation, your initial challenge was not focused on the productions. I consider that this explains (although does not excuse) the fact that it was not until your letter of 28th March 2014, and your request for potentially undermining material, that the FCA began to review their approach to the calculation of the limitation date for your client.

iv) What consideration was given, and when, to the need to disclose the limitation issue to the RDC and the complainant?

The FCA's consideration of this issue was driven by your requests for further information on limitation and undermining material. Once the team had – belatedly – reached the conclusion

that there was a potential problem, the decision to drop the s66 proceedings brought the matter to a close.

I have considered the relevant documents very carefully, but I have seen no evidence that people in the FCA deliberately withheld information from the RDC. You have argued that absence of evidence is not the same as evidence of absence: that is true, but it does not change my position. Nonetheless, it is a matter of considerable concern that, in preparing statements for the RDC about the limitation question, no one appears to have considered whether or not the RDC should be made aware of an alternative argument about limitation – an argument which had been discussed within the FCA for over three years.

v) Were the actions of those responsible for these matters fair and reasonable?

Because I have found no evidence in the documents to suggest a deliberate concealment of material from either your client or the RDC, I agree with the FCA's conclusion that this was a serious mistake, rather than evidence of bad faith. I accept also that there might have been a genuine issue of legal opinion about whether or not the limitation period had been triggered by the productions.

Having said that, I consider that this was a serious error. This was a major series of investigations, on which a significant number of people, including relatively senior people, were employed. The issue of limitation periods, and their potential effect upon the investigations, was flagged from the beginning, including the question of the initially unread productions. I can see no adequate explanation in the documents for why, on such a serious matter, a conclusion that the unread productions *could not* trigger the limitation period was reached with apparently very little examination, particularly when it was clear that others within the Enforcement Team were taking a different view.

The fact that your client's challenge on the question of the calculation of the limitation period, in the lead-up to the RDC, did not prompt any further reflection on the approach, despite the fact that at least some team members must have been aware of the doubts which had been expressed at an earlier stage, and particularly given the FCA's duty to supply any undermining material, is suggestive of a closed-minded attitude.

You have commented on the delay between the discontinuation of the proceedings and the letter of explanation from the FCA: given that the FCA must have known the grounds for its discontinuation when it initially wrote to you on 25th July 2014, I agree that the fact that it did not issue its explanation or apology until 3rd October was unsatisfactory; and that, in the light of the analysis in the FCA's decision letter and in this report, that apology did not go far enough. Furthermore, I agree with your comment, in response to my preliminary decision, that the statement in that letter that "from 2011 some limited consideration had been given to whether productions……could impact on section 66 limitation periods" was – in the light of my analysis above - misleading. I comment on this further below.

The impression I gain from reading the documents is that the team responsible for the proceedings against your client reached a hasty conclusion that unread production material could not trigger the limitation period, and then stuck to that conclusion. This suggests a lack of rigour in what were important proceedings.

Delays in dealing with your client's complaint

This complaint has a long history, which is well documented in the table you attached to your letter of 31st May. The delays fall into two categories: delays caused by arguments about whether or not the complaint could proceed before the conclusion of connected legal proceedings; and delays in the investigation of the complaint.

The first substantive period of legal argument about the complaint arose in August 2015, when the FCA deferred consideration of one part of the complaint pending completion of proceedings against another related individual. This was referred to my office, where it was delayed because of consideration of another related complaint, but in November 2015 I asked the FCA to agree to undertake an investigation based upon four questions. This was agreed in December 2015. In the spring of 2016, the FCA were chased by you for updates, and in March the FCA agreed to produce an indicative timetable. In May, the FCA indicated that it hoped to produce a response by the end of July.

In June 2016, the FCA wrote to say that it was intending the defer the investigation again, because of developments in the related proceedings, you made representations to the FCA in July and, following a chase, the FCA responded in August. I then wrote to the FCA querying their grounds for a deferral, and in September the FCA agreed to continue with the investigation subject to certain conditions. At the end of September, you said that the FCA should issue their decision by the end of October, and I invited the FCA to comment. Further correspondence continued in October and November 2016, with the FCA saying that it awaited a Tribunal decision which it hoped to have before Christmas. On 19th December, the FCA reported that it had received the Tribunal decision, and hoped to complete the investigation by the end of February. In the event, the decision letter was issued on 3rd March.

This chronology demonstrates two things. First, the FCA adopted a cautious – and in my view unnecessarily cautious – view about the effect of investigating your client's complaint while related proceedings were in train. I had to intervene on several occasions. Even allowing for that, there were considerable delays in the completion of the investigation, including the FCA missing its own deadlines.

Having said that, this was a particularly complex complaint, raising some particularly difficult issues, and the FCA's investigation was undoubtedly thorough. This is not a case in which long delays with no actions have culminated in a superficial outcome.

In the circumstances, I recommend that the FCA acknowledges that, even allowing for the complexity of this matter, the complaint was subject to a number of unnecessary delays, and apologises for the cumulative effect of the delays upon your client.

Conclusion

In its decision letter, the FCA acknowledged that there were shortcomings in its proceedings against your client, and has apologised. My analysis, above, does not contradict the FCA's factual findings, but is more critical of the organisation's repeated failure to act on an issue the significance of which had been flagged from the outset of its investigations. The FCA's decision letter says that

> *It was a genuinely held view that the CFTC productions were incapable of starting the limitation period because they were not read by anyone until after the FSA became aware of potential misconduct in a meeting with Bank X.*

While that may be true, it was a view which seems to have been taken despite contrary views having been expressed internally, and on an inadequate analysis. The view *may* have been arguable, but it was *certainly* not unarguable. Given that the limitation issue had important repercussions both for your client's rights and the public interest, the FCA's approach was not defensible.

The FCA's decision letter states:

Had the mistake at or around the 16 May 2013 meeting not occurred, I am satisfied the matter would have been scheduled such that limitation was not an issue

Whether or not the team would have been capable of completing its investigation to a tighter timescale must be a matter of speculation, but it is not an excuse. The FCA accepts this point. On any reading of the facts, the FCA failed to meet its duty to ensure that its proceedings were managed competently and fairly. The limitation issue had important potential repercussions both for your client's rights and the public interest which the FCA failed to address.

Furthermore, when the FCA (after a delay) wrote to your client to explain its reasons for discontinuation, its statement that "some limited consideration" had been given to productions and limitation periods in 2011 was misleading. While I have seen no evidence of an intention to mislead, the inadequate explanation letter was part of a pattern of behaviour in which – on an important matter affecting your client's rights and the public interest - the FCA demonstrated insufficient rigour. For a public authority entrusted with significant powers, that is not acceptable.

In your response to my preliminary decision, you invited me to reconsider my conclusion that I had found no evidence of bad faith. In essence, you suggest that the catalogue of failings lead to an inevitable conclusion that there was bad faith. Although I understand your point, I do not agree: while the absence of evidence of bad faith cannot preclude it, I remain of the view that nothing I have seen demonstrates it – had there been such evidence, that would have raised the question of damages, but in the circumstances I do not consider that a payment under this Scheme is justified. The FCA is generally immune from claims for damages, and the proceedings were discontinued.

In its response to my preliminary decision, the FCA:

a. Accepted its failings in relation to the way it handled potential limitation issues (while making the point that it does not concede that the limitation period was *in fact* started by the receipt of the production material);

b. Accepted that the letter of 3rd October 2014 did not adequately address the FCA's failure to address the limitation issues;

c. Said that, in the light of its own and my investigations, the relevant parts of the organisation now understand the full extent of what went wrong;

d. Said that it has improved its processes to ensure that when limitation is considered at the start of each Enforcement Investigation, the possibility of relevant international requests is considered;

e. Reported that a board of senior members of staff now regularly reviews the progress of all investigations;

f. Said that it will now consider whether there are any further lessons to be learned;

g. Has offered its sincere apologies both for the inadequacy of the 3rd October 2014 apology, and for the avoidable delays both in issuing that apology and in the subsequent complaints investigation.

I have upheld your client's complaint. The FCA's failings in this case were considerable, but I consider that the FCA's response is sufficient, although I recognise that your client has suffered considerably as a result of the serious shortcomings in the handling of the case.

Yours sincerely

Antony Townsend

Complaints Commissioner