

17 August 2017

Dear Complainant,

Complaint against the Financial Conduct Authority

Reference Number: FCA00229

Thank you for your email dated 8 September 2016. I am sorry that it has taken some time to resolve your complaint. As you know we had to request additional material from the FCA and it has taken some time to get to the bottom of the issues raised.

In order to reach my decision, I have reviewed all the papers you and the regulator provided my office with. Neither you nor the regulator commented on my preliminary decision, so my final decision on your complaint is explained below.

How the complaints scheme works

Under the complaints scheme, I can review the decisions of the FCA's Complaints Team. If I disagree with their decisions, I can recommend that the FCA should apologise to you, take other action to put things right, or make a payment. You can find full details of how I deal with complaints at www.frccommissioner.org.uk. If you need further information, or information in a special format, please contact my office at complaints@frccommissioner.org.uk, or telephone 020 7562 5530, and we will do our best to help.

Your complaint

You set out your complaint in a number of bullet points, so I will deal with each point as you set it out.

1). Approved Persons, Passporting and Mutuels Department have deliberately delayed applications, asking vexatious questions regarding applications the firm has made in respect of the appointment of Mrs V as CF3 to the firm. They have determined that they have insufficient information to approve this application. However, at no stage did they indicate that our responses were in any way deficient until determining that she was not considered fit and proper. They have referred to Mrs. V's non-attendance at a voluntary interview, at no stage did they advise us that this might cause the application to be declined. (You are asking this office to require the FCA to approve Mrs V to conduct the role of CF3 for the firm.)

Under paragraph 3.6 of the Complaints Scheme, the regulators and the Commissioner do not investigate complaints which could or would be more appropriately dealt with in another way, for example by referring the matter to the Upper Tribunal. The appropriate route for challenging the FCA's decision would have been to refer the issue to the Upper

Tribunal, but your firm decided not to do so. For that reason, I consider that the FCA was right not to investigate your complaint.

Nonetheless, I have read through documents that relate to Mrs V's application and I cannot find any evidence to suggest that the questions asked were vexatious. The firm were asked a series of questions and informed of the regulator's concerns in relation to her application both in writing and in a telephone call on 26th August 2014, when it was stated to the regulator that "[the firm] did not think that Mrs V would come across particularly well during an interview".

The regulator did not act unreasonably in trying to establish whether she would be suitable to carry out the duties of CF3, and the fact that she was approved for a different function some years before does not and should not mean that she is fit and proper for carrying out any other controlled functions.

2). The applications for myself to be appointed CF10 and CF11 and subsequently CF1 were also subject to many vexatious questions.

Having reviewed the documents relating to your applications for the above Controlled Functions, I can see that the regulator "stopped the clock" on the statutory time limit it has for approving such applications in an effort to establish whether these appointments should be made. Your CF10 and CF11 applications were received in November 2012 and approved in June 2013 and your CF1 application was received in April 2014 and approved in July 2015. While I appreciate the uncertainty you may have felt in the period it took the regulator to approve your applications, I have found no evidence to suggest that categorising the applications as non-routine and asking detailed questions to ensure your fitness and propriety for the roles was unreasonable or vexatious.

The regulator had a number of concerns about the firm, which resulted in two s166 reviews and protracted negotiations for compensation for consumers (which still has not been paid, some six years since the outcome of the first review concluding that compensation is due to consumers). It was not unreasonable for the regulator to take additional steps to scrutinise the firm's applications and satisfy themselves that the appointment of individuals to controlled functions was appropriate in all the circumstances.

3). Supervision Department has caused us to commission a second s166 review. One of the primary reasons given is the firm's lack of progress in resolving issues arising out of the first s166 review. The firm was prevented from progressing the resolution of the primary issue (payment of redress to clients) by the Supervision Department's failure to approve the redress letters that we wished to send to the clients.

Having reviewed the relevant records, my understanding of how the second s166 review came about is as follows. On 14th February 2011 the firm was issued with the report from the first s166 review, which set out three sets of actions which the firm was expected to carry out immediately. Over a year later the regulator found that the firm was not making sufficient progress with these actions and issued a letter to the firm to this effect on 20th July 2012.

Following some further correspondence and provision of information by the firm, the regulator remained concerned about the apparent lack of progress and issued a formal s165 information request to the firm. The firm was given several opportunities to provide satisfactory evidence of their progress with the implementation of the three immediate

actions, but the regulator remained unconvinced that sufficient progress was being made, and found that the information provided by the firm was inconsistent and demonstrated failings by the firm in carrying out what was required of them in the first s166 report.

The regulator was concerned about the responses received from the firm and the fact that consumers were still not compensated some two years after the recommendations of the first s166 report. As a result of these concerns, which in the FCA's view amounted to the firm failing to deal with the regulator in an open and co-operative manner, the regulator decided that the best way forward would be the commissioning of a second s166 report to design a suitable redress methodology and compensate consumers as a matter of urgency. Based on the information I have seen, I do not believe it was unreasonable for the regulator to choose this course of action in order to progress matters.

4). Supervision Department has, it would appear, approved the sending out of letters to clients, by the skilled persons employed to conduct the second s166 review, offering compensation without having received any delegated authority from the directors of the firm to do so.

In their response to your complaint, the regulator asserted that *"We believe it was within the skilled persons [sic] remit to offer compensation and within the FCA's remit to approve this"*.

Having considered all the relevant information, including communications between the firm and the regulator and the wording of the second s166 Requirement Notice, it is clear that the regulator's intentions, apparently supported by the firm, were for the skilled person to devise a redress methodology, for this to be approved by the regulator and offers of compensation to be sent to the consumers affected so that the matter could be brought to an end as soon as possible.

However, the firm objected to the letters of compensation being sent out by the skilled person without their final "stamp of approval", as detailed in their email dated 10th March 2014: *"I am not happy with this action. I had offered to FCA before the institution of second S.166 report. This offer is not valid now. I am not ready to accept this action. FCA and you should first agree with me the outcome of Second Section 166 report. How can you act suo motto? We will have to discuss how FCA has authorized this, without the consent of our firm. I am not accepting this"*. The firm then went on to say:

"a. R [the skilled person] issuing letters to our clients without our consent

b. we do not agree to the actions of FCA and R to issue letters without even issuing a report on the outcomes of the report

c. We are not agreeing as if the FCA was to agree to my offer then why was the second review initiated; and

d. How come, the negotiations between FCA and R did not include W.

I am going to consult my solicitors and see if this action of R was correct, and did the FCA have the right to agree with R without consulting W, given the time passed since 2012 offer and also subsequent actions of FCA which has cost us over GBP30,000. We also want to see if this action will have to be revoked, and does W have the right to seek compensation.

I am still not accepting your explanation".

It is my understanding that while the regulator has regulatory powers to compel a firm to pay compensation to its customers, this cannot be enforced through the terms of a s166 Requirement Notice and contract with the skilled person. The skilled person can only commit a firm to pay compensation if the firm itself agrees to do so, which clearly was not the case here. From my reading of the files, the FCA should have been aware of this.

The FCA's final response to your complaint goes on to say: *"As to whether this agreement [s166 requirement notice and the contract with the skilled person] is enforceable by the FCA if W refuses to pay that redress the FCA's next step will either be to use its formal powers to compel W to provide the redress i.e. through Enforcement or for customers to refer their cases to the FOS."*

The regulator appears to accept that they may have to use their regulatory powers to compel the firm to pay compensation or refer consumers to the FOS if it refuses to pay the compensation as determined by the skilled person. This implies that their initial statement that it was within their remit to authorise the skilled person to offer compensation on behalf of the firm is incorrect.

5). Supervision Department have determined that we cannot rely upon correspondence, apparently approved by them exactly for this purpose, to exclude persons from the review process.

It is my understanding that this complaint point refers to the correspondence that was sent to customers of the firm in 2011 and 2012. The regulator and the skilled person reviewed and agreed the wording of the letters sent in 2010, stating that any non-respondents would be dealt with through a separate process, and this is not in dispute.

Having reviewed the records, I find that the regulator had concerns about the content of the 2011 / 2012 letters as they materially differed from the letters previously approved and the majority of them did not clearly state that if the customers did not respond within 14 days, they would be excluded from the process. Additionally, the letters did not include the wording prepared by the skilled person in 2010, which addressed the steps the firm would have had to take to deal with the non-respondents, a key part of the process.

I accept the regulator's reasoning that the letters in question were not the ones they approved for distribution and, as such, they could not be relied upon by the firm to exclude customers from the review in 2011/2012.

6). Supervision Department have determined that this firm should pay compensation to the clients at 8% p.a. simple for a period extended by delays caused by themselves.

I do not believe this is a complaint point which can be adjudicated through the Complaint Scheme as it would require me to review a decision in which the FCA was carrying out a statutory duty and exercised their judgement. However, I note that 8% simple is the industry standard interest applied to payments of compensation for consumers. This is the rate applied by the Financial Ombudsman Service.

7). A Freedom of Information Act request for copies of communications was denied we believe on spurious and self-serving grounds.

As you might be aware, any concerns about Freedom of Information or Data Protection Act requests or the responses to these must be raised with the Information Commissioner's Office. This issue does not fall within the remit of the Complaint Scheme.

Conclusion

In conclusion, for the reasons set out above I do not uphold your complaints set out in points 1, 2, 3, 5, 6 and 7. In my view, the regulator's overall actions in relation to the serious problems identified in the firm were reasonable and justified.

However, I agree that the regulator did not have the authority to approve the sending out of letters offering compensation to the customers of the firm without the express approval of the firm, regardless of the clear intentions expressed by W to compensate everyone who was due compensation. While the regulator does have the means to achieve the same outcome, using the s166 Requirement Notice and the terms of the skilled person contract is not one of them. The statement in the FCA's decision letter that *"We believe it was within the skilled persons [sic] remit to offer compensation and within the FCA's remit to approve this"* was made without a proper basis. I have commented in other cases about the importance of the FCA being absolutely clear about what powers it is exercising. This should not have happened.

I realise that you will be disappointed by my decision overall but I hope you will understand how I have reached it.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Antony Townsend', with a large, stylized flourish at the end.

Antony Townsend
Complaints Commissioner