Complaints Commissioner

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Final report by the Complaints Commissioner

Complaint number FCA00376

The complaint

1. On 23rd July 2017 you asked me to investigate a complaint about the FCA. I carefully reviewed the papers sent to me by you and by the regulator, and made a series of further inquiries.
2. On 27th October 2017 I produced a preliminary report on which I invited you and the FCA to comment. The FCA shared the preliminary report with the Financial Ombudsman Service (FOS), and the FOS sought the right to comment.
3. For that reason, having carefully considered your comments and those of the FCA, I produced a second preliminary report on which I sought further comments from you, the FCA, and the FOS. This was an unusual course of action, but I considered it appropriate since, although this Complaints Scheme explicitly excludes the Financial Ombudsman Service from its remit, it was not possible to consider your complaint without reference to the FOS.
4. You sent me substantial additional comments. I have referred to some of them below, but the large majority of your comments relate to the actions of the FOS, and go well beyond the scope of this Complaints Scheme.
5. The FOS has not commented on the substance or merits of my conclusions, but only on matters of my jurisdiction and complaints handling process.
6. The FCA did not comment on my second preliminary decision.

What the complaint is about

7. Although you have made a number of complaints to the FCA, the element you have asked me to consider is your allegation that the FCA illegally influenced FOS in its handling of its complaints against a firm which you represent (and which I shall call "the firm").

What the regulator decided

8. In its decision letter of 13th July 2017, the FCA did not uphold this element of your complaint. The decision letter stated:

> *In respect of the FCA's discussions with the Financial Ombudsman Service…..I have considered the information-sharing powers and the memorandum of understanding between the two organisations and have reviewed the relevant correspondence between them to conclude that there was no improper influence of the ombudsman service in respect of its decisions. The correspondence was proper in all respects, so I do not uphold the third element of your complaint.*

Why you are unhappy with the regulator's decision

9. Your view is that the FCA was wrong to conclude that there was no improper influence, and was wrong not to award the firm compensation.

10. Your key contentions are that:

    1) It is clear from documents which have been disclosed to you under the Freedom of Information Act that there were meetings between the FOS and FCA to discuss individual cases;

    2) It is wrong in principle, and in law, for the FCA to examine or comment upon any case that is currently before an Ombudsman;

    3) The Memorandum of Understanding which the FCA cites as justification for its practice does not justify the examination of a case which is before an Ombudsman;

    4) Section 232A of the Financial Services and Markets Act 2000, also cited by the FCA, similarly does not justify the practice;

    5) No party other than those involved in the dispute is allowed to see a provisional decision by the FOS;

    6) If the FCA seeks to give an interpretation of guidance, rules or otherwise or to influence Ombudsmen's decisions then it must be done openly and in a fully published manner so that all parties can see what is going on.

Preliminary points

11. This Complaints Scheme cannot make legal findings. I cannot, therefore, "rule" on whether or not the FCA's practices are lawful. I have addressed your complaint within that constraint.

12. The analysis of this case inevitably refers to the actions of the FOS as well as the FCA. However, the actions of the FOS fall outside the scope of this Complaints Scheme.

13. Some of the material supplied to me by the FCA is confidential. I have, however, referred to as much as I can to enable you to understand my conclusions.

My analysis

14. Although the background to this complaint is very complex, and involves regulatory proceedings and litigation, your complaint is focused on a narrow issue: whether the FCA became improperly involved in a decision of the FOS which affected the firm.

15. I shall divide my analysis of the issue as follows: first, whether there are constraints *in principle* on the extent to which the FCA should know about or become involved in, decisions made by the Ombudsman; and second, whether *in this particular case* the FCA's actions were defensible.

(i) In principle

16. It is common ground that the FCA must not seek to influence a decision by the FOS on a particular case.

17. Beyond that, you and the FCA have divergent views. I understand your view to be:

1) The FCA should not see provisional decisions of the FOS – it is unlawful;

2) The FCA should not comment on cases before an Ombudsman;

3) "If the FCA seeks to give an interpretation of guidance, rules or otherwise or to influence Ombudsmen's decisions then it must be done openly and in a fully published manner so that all parties can see what is going on."

18. I understand the FCA's view to be:

1) It is not improper for the FCA to have sight of FOS provisional decisions, if that is for the purpose of enabling or assisting the FCA to discharge its regulatory functions – the sharing of information is provided for in the Financial Services and Markets Act 2000 and in the Memorandum of Understanding between the two bodies;

2) It is not improper for the FCA to advise the FOS on the interpretation of rules and guidance;

3) It would be improper for the FCA to suggest a course of action in relation to any particular complaint, or to give an opinion about the merits of a particular complaint.

19. For the reasons given earlier in this report, I cannot rule on the question of the legality of the FCA seeing a provisional decision from the FOS.

20. I can, however, comment more generally upon the practice. I understand the FCA's argument that there may be circumstances in which an FOS decision may have repercussions upon the wider financial services sector and its regulation. I also understand that there may be circumstances in which it is sensible for the FCA to respond to a request from the FOS for an opinion of the FCA on the interpretation of guidance and rules, given that the FCA may have considerably more expertise in such an area. However, where the FCA does provide information to the FOS, it is important to consider whether the parties should be informed, particularly where the FCA is involved in other proceedings involving the complainant.

21. In summary – and setting aside the question of legality – it seems to me clear that the FCA has a legitimate interest in ombudsman decisions (including forthcoming decisions); that there may be circumstances in which the FCA can properly respond to requests to give advice on interpretation of rules and guidance to inform decisions; but that care must be taken – and must be seen to be taken – to avoid improper influence, or the perception of improper influence, by the FCA.

(ii) In this particular case

22. I now turn to the circumstances of this particular case. The following chronology is important by way of background:

1) From January 2014 the FCA and the firm had protracted and often contentious discussions arising from the FCA's concerns about the firm's approach to elements of its investment business, and whether or not the firm should restrict its activities (this was the subject of a separate complaint which I considered – the detail of that complaint is not relevant here, save to say that it hinged upon whether the FCA had powers to require the firm to restrict some of its activities);

2) In May 2014, the FOS published a decision in which a complaint against the firm was upheld. That decision was directly relevant to the matters which the FCA was discussing with the firm;

3) In August 2014, the firm threatened judicial review of the ombudsman's decision, and the matter was compromised by an agreement to have the case reconsidered by a different ombudsman;

4) In October 2014 the FCA began an enforcement investigation into the firm;

5) In March 2015 the FCA discontinued its enforcement investigation into the firm, but began an investigation into two individuals within the firm;

6) In June 2015, the FOS issued a new provisional decision rejecting the complaint against the firm;

7) In March 2016 the ombudsman issued a second provisional decision, which this time found in favour of the complainant;

8) In May 2016, the FCA investigation into the two individuals was discontinued;

9) In September 2016, you sent a pre-action protocol letter to the FOS asking the ombudsman to recuse herself from further consideration of the case because of what you considered to be improper influence by the FCA;

10) In February 2017 a third ombudsman issued his decision, upholding the complaint against the firm.

23. The background here is particularly important, because a number of significant processes were in play in parallel. One was the FCA investigation into your client's firm and its principals; the second was the FOS consideration of the complaint; the third was the challenge to the FCA's investigation; and the fourth was the challenge to the FOS's handling of the complaint. Underpinning all this was the fact that, depending upon the outcome of the complaint, the FCA's policy of tightening its regulation of non-standard investment business might be undermined. It is also significant that the outcome of these various processes might have repercussions for the regulatory regime, and for the parties.

24. It was against that background that you sought disclosure of documents under the Freedom of Information Act. The documents which were disclosed, many of which were redacted, showed that there had been some sharing of information and discussion between the FCA and the FOS while the ombudsman complaint was under consideration. In particular, it was clear that:

1) The FCA had received a preliminary decision from the FOS;

2) There had been some correspondence and meetings between the FOS and FCA, including a high-level meeting, at which it appeared that the firm and the complaint had been discussed.

25. It was the disclosure of this material that led to your pre-action protocol letter of September 2016 in which, amongst other things, you asked the ombudsman to recuse herself. Your particular concerns were that the ombudsman had (in your view improperly) allowed the provisional decision to be shared with the FCA, and the FCA had been allowed to advise the FOS without the knowledge of the parties.

26. I have had access to the unredacted material, which I have studied carefully. From my reading of the material, I draw the following conclusions:

    1) There is no evidence of direct contact with the ombudsmen who were making the decisions in the complaint;

    2) Most of the exchanges related to the timing of the release of decisions, and to the FCA's explanation of its position on the due diligence it expected from firms such as the one you represent;

    3) One exchange related to what the FCA considered to be a mistake in the interpretation of rules in the provisional decision dated 30 June 2015;

    4) In one exchange, the FCA requested a discussion of your client's firm, and the FOS said it would not be in a position to discuss it;

    5) In one meeting, it is clear that the FCA briefed the FOS on its interactions with the firm, and there was some discussion of the FOS and FCA positions.

27. The problem here is that it is hard to draw any firm conclusions from this material. Unless one takes the view that *any* interaction between the regulator and the ombudsman during a live case is improper, there are inevitably grey areas – particularly given the points I made in paragraph 23 above. Furthermore, given the issues between your client's firm and the FCA, it seems to me that any advice that the FCA was giving on the appropriate interpretation of its guidance was likely to be adverse to the firm's position.

28. The records I have seen do not establish the purpose behind the sharing of information, nor do they record any limitations on the use to which the information might be put. This does not, of course, mean that the sharing was improper in itself, but it does illustrate the dangers of information sharing in the course of multiple contentious proceedings.

The responses to my preliminary reports

29. In its response to my first preliminary report, the FCA made the following principal representation:

> *[you say] that the FCA has failed to prove that its contacts with the FOS about the complainant's case were not improper. That seems to us to be the wrong approach. The burden of proof should be on the complainant to evidence or persuade you that there was improper sharing of information, and in the absence of such evidence, a complaint should not be upheld.*

30. I have only limited sympathy with the FCA's argument. The FCA is right to say that I found no evidence of improper sharing of information, and that for that reason the complaint cannot be upheld; but it is also the case that I have found no evidence to prove the FCA's argument which they advanced which was that "there was no improper of the influence of the ombudsman service". To say that the burden of proof is on the complainant ignores the onus on a public authority to demonstrate the propriety of its activities.

31. Your response to my second preliminary report invites me to adopt the opposite approach – in the absence of full records, "clearly adverse presumption should justifiably be made". While I find the absence of adequate records unsatisfactory, I cannot treat that as evidence of impropriety.

My conclusions

32. My analysis leads me to the following conclusions:

    1) I am unable to endorse the regulator's finding as set out in paragraph 8 above, since the documents do not establish either the propriety or impropriety of the information sharing. The mere fact that there is statutory backing for information sharing between the two organisations, and the absence of any record of an explicit attempt to influence an ombudsman, do not of themselves establish the propriety of what occurred;

    2) I cannot uphold your complaint of improper influence by the FCA, because there is no clear evidence to demonstrate it; but I find the absence of a contemporaneous documentary explanation of the FCA's purpose in sharing the information unsatisfactory;

    3) I have concerns about the apparent absence of published information about how and in what circumstances information about live ombudsman cases may be shared between the FOS and the FCA, coupled with the apparent absence of information in this particular case about any limitations on the use of that information, bearing in mind the fact that, as described above, more than one set of processes were in train.

33. In the light of the points which I have made, I invite the FCA to consider discussing with the FOS whether there should be clear guidance about the circumstances in which information may be shared between the FOS and the FCA in advance of final ombudsman decisions, and about any limitations on information sharing between the two bodies, or within them; and whether, where the FCA is sharing information with the FOS, the norm should be that this will be made known to the parties, the reasons for any exceptions being recorded.

Antony Townsend

26th February 2018