

12 September 2022

Final report by the Complaints Commissioner**Complaint number 202201089***The complaint*

1. On 22 April 2022 you asked me to investigate a complaint about the FCA.

What the complaint is about

2. The FCA summarised your complaint as follows:

You had submitted a VREQ application for firm [X] Ltd (your firm) whilst you were also working on recommendations from an independent review. Prior to the determination of your VREQ application, you provided a written notice to withdraw your VREQ application on 9 March 2021. You then stated that shortly afterwards you received a letter from the FCA explaining that there was no process in place to withdraw your application, which you believe to be a contravention of 55V (4). You also mentioned that 20 hours after you had written the request you received notice of the approval of your application. Your view is that the VREQ was illegally imposed on the firm because notice of the approval was served after your written request to withdraw the application. To resolve your complaint, you are seeking: • An apology, • The VREQ to be removed, • Your Appointed representatives to be compensated with the fees they have paid to your firm (circa £150k) • Compensation for lost revenues to the firm (circa £250k).

What the regulator decided

3. The FCA initially accepted your complaint under the Scheme, however, on 1 April 2022 it wrote to you as follows:

After carefully considering the information, you have provided, we have concluded that this is not a complaint we would investigate under the Complaints Scheme. In our letter of 4 February 2022, we provided a

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summary of our understanding of your complaint and indicated that we would be potentially investigating your concerns. Please accept our apologies for this oversight as the incorrect letter was issued. 2 Paragraph 3.6 of the Complaints Scheme provides that we will not investigate complaints that we reasonably consider could have been, or would be, more appropriately dealt with in another way. Your complaint relates to the removal of the VREQ and the allegation of bad faith against the FCA. We consider this would be more appropriately dealt with by appealing to the Upper Tribunal or by instituting legal proceedings. This is because you are seeking significant compensation and only a court can determine allegations of bad faith.

4. The FCA then wrote that notwithstanding that your complaint had not been investigated, the Complaints Team have liaised with the area of the FCA most closely connected to your complaint in order to provide you with a general response to the matters raised. It said:

A Voluntary Requirements Notice (VREQ) was first offered on 8 Dec 2020 due to concerns with your firm's lack of control over Appointed Representatives (AR's). The VREQ was to close AR's to new business and to cease appointing new AR's. On 10 December 2020, emails were exchanged between yourself and the FCA, giving more detail on VREQ process. On 15 December 2020, your firm declined the offer of a VREQ and indicated that your Board would consider the matter further in January. However, you confirmed that actions had been taken to suspend AR business in line with the content of the VREQ. On 26 February 2021, your firm submitted a VREQ application which was acknowledged on the same day and advised that a decision would be made the proceeding week. For context, the wording on the VREQ included "the requirement which Firm X applies to be imposed upon it with immediate effect." On 5 March 2021, a decision was made by the FCA to publish the VREQ on the FS Register. For context, the VREQ was determined on 26 February 2021, pending a decision to publish or not on the FS Register. On 9 March 2021, you emailed the FCA requesting the withdrawal of the VREQ application due to difficulties appointing Non-Executive Directors and

noting that your firm had taken action to suspend ARs. On the same day, the FCA responded to your email confirming that the VREQ application had been accepted, with effect from 26 February 2021, and that the FS Register had been updated. On 25 March 2021, the FCA emailed your firm advising that the VREQ application could not be withdrawn – but explains “The firm must be able to demonstrate that it can meet the relevant regulatory requirements before we can consider any request by it to have the restrictions removed. From our own review we concluded that the firm could not demonstrate that it could do so, and the firm’s own RSM-commissioned report also found serious failings.” Your firm were advised of the process for removing a VREQ by the FCA in their emails of 10 December 2020 and 25 March 2021. The firm must demonstrate that it can meet all relevant regulatory requirements before the FCA can approve an application to remove the VREQ. And so, I would strongly suggest seeking independent legal advice on your options.

My analysis

5. I do not agree, in the first instance, that the FCA is right not to investigate your complaint on the basis that you ‘you are seeking significant compensation and only a court can determine allegations of bad faith’. I have referred to your complaint to the FCA in paragraph 2 above and it does not appear to me that you are alleging bad faith on the part of the FCA. Nor does the quantum of compensation sought automatically exclude the complaint from the Complaints Scheme.
6. The FCA’s response to my points above is that the ‘complainant made an allegation of bad faith in his email to the FCA on 10 February 2022, which was in response to our email of 4 February 2022, confirming our understanding of his complaint. We therefore consider the information provided in that email to form part of his complaint’.
7. I can see that you did make an allegation of bad faith in your email to the FCA dated 10 February 2022. However, that email is part of a large bundle of correspondence between you and the FCA. The FCA Complaints Team should distil the correspondence into a clear identification of what precisely it is

investigating, and what evidence it is referring to. The FCA's decision letter dated 1 April 2022 specified your complaint as I have quoted in paragraph 2 above. This summary of the complaint does not refer to 'bad' faith. Nor does the FCA's decision letter refer to your email dated 10 February 2022 and its consideration that an allegation of bad faith forms part of the complaint. This has only been clarified as a result of my preliminary report.

8. In my view the FCA decision letter lacks clarity and cohesion on this point. I do not think it explains cohesively how the Complaints Team reached the decision to consider the information provided in that email to form part of the complaint.
9. The FCA also said that ' the point regarding the quantum of compensation, you are correct that the quantum of loss alleged or compensation sought is not a reason to exclude a complaint automatically. However, considering the losses alleged in this particular complaint, this would require a detailed assessment of quantum which the Complaints Scheme is not designed or equipped to carry out, and is more appropriate for a court or tribunal'.
10. Although allegations of bad faith can be determined by the courts, this does not mean that the substance of the complaint should not be investigated under the Complaint Scheme within that constraint, the substance being that due process was not followed in the handling of your VREQ application.
11. I do not agree with the FCA's interpretation of ex gratia payments. This is not how compensation should be assessed under this Complaints Scheme. The FCA does indeed have immunity from legal proceedings unless bad faith or a breach of human rights can be shown. These are matters which would have to be decided by a court. However, there is provision under the Scheme for ex gratia payments of compensation in respect of a complaint that is found to be justified. It is not necessary to establish bad faith or a breach of human rights by the FCA before such payments are offered.
12. Neither is there an arbitrary threshold of compensation above which only a court can determine quantum. Each case would have to be decided on its own merits to determine if an ex gratia award is appropriate: but this has not happened here. Instead, the FCA has applied an arbitrary (unknown) threshold on quantum to not investigate your complaint. The issue ex gratia compensation is

one which I continue to discuss with the FCA and is currently subject to the Complaints Scheme Consultation which has not yet been finalised.

13. Therefore, in summary I do not agree with the FCA that your 'complaint would be more appropriately dealt with by appealing to the Upper Tribunal or by instituting legal proceedings. This is because you are seeking significant compensation and only a court can determine allegations of bad faith.'
14. Although the FCA has said it will not investigate your complaint, for all intents and purposes it has provided you with the information relevant to your complaint.
15. The crux of the complaint centres around process. Paragraph 4 describes the circumstances of your case and the relevant dates. You have pointed out the following provision of Section 55V FSMA:

55V Determination of applications

(1) An application under this Part must be determined by the regulator to which it is required to be made ("the appropriate regulator") before the end of the period of 6 months beginning with the date on which it received the completed application.

(2) The appropriate regulator may determine an incomplete application if it considers it appropriate to do so; and it must in any event determine such an application within 12 months beginning with the date on which it received the application.

(3) Where the application cannot be determined by the appropriate regulator without the consent of the other regulator, the other regulator's decision must also be made within the period required by subsection (1) or (2).

(4) The applicant may withdraw the application, by giving the appropriate regulator written notice, at any time before the appropriate regulator determines it.

(5) If the appropriate regulator grants an application—

(a) for Part 4A permission,

(b)for the variation or cancellation of a Part 4A permission,

(c)for the variation or cancellation of a requirement imposed under section 55L or 55M, or

(d)for the imposition of a new requirement under either of those sections, it must give the applicant written notice.

(6) The notice must state the date from which the permission, variation, cancellation or requirement has effect.

(7) A notice under this section which is given by the PRA and relates to the grant of an application for Part 4A permission or for the variation of a Part 4A permission must state that the FCA has given its consent to the grant of the application.

16. 55V(4) says 'The applicant may withdraw the application, by giving the appropriate regulator written notice, at any time before the appropriate regulator determines it'. And 55V (1) says, ' An application under this Part must be determined by the regulator to which it is required to be made ("the appropriate regulator") before the end of the period of 6 months beginning with the date on which it received the completed application.'
17. The FCA, however, said to you that the application was determined on the day you submitted it, on 26 February 2021, pending a decision on whether the VREQ should be published or not on the FS Register. You wrote to the FCA pointing out the provisions of s55V FSMA for withdrawing an application and the FCA wrote back to you saying that 'there is not a process for the firm to withdraw the application, as indicated in your email'.
18. The FCA's correspondence with you on this matter, including its reference to it in its decision letter to you dated 1 April 2022, has been insufficiently clear. This prompted my invitation in my preliminary report to the FCA to provide further commentary. It has now done so, and I relay my own comments below.
19. The FCA said that ' the VREQ was acknowledged on the same day it was submitted. A reasoned decision-making process on whether to accept or not was then followed and a determination reached. This process resulted in a determination to accept the application and to publish on the register being

reached on Friday 5 March 2021, i.e. before the request to withdraw was sent. The effective date was backdated to date of submission as the firm requested the imposition to be 'with immediate effect' (from the date of application). Further, the FCA do not take the approach that receipt of the VREQ alone constitutes automatic acceptance'.

20. I have looked at the file (I have not conducted a full review of the internal determination process as this is not part of an investigated complaint) and I can see that the application was discussed internally by FCA staff on the day it was received, and that a decision was taken to publish the VREQ on 5 March 2021. So by the time you wrote to the FCA on 9 March 2021 to withdraw your application, the FCA say it had already determined it.
21. What the FCA did not do, however, is keep its promise to you to write to you and inform you that it had determined the application.
22. Turning briefly to Section 55V FSMA : the FCA says S. 55V uses the language of 'determined' in (1) and (4) with reference to time limits, but refers in section (5) to the fact that "If the [FCA] grants an application....it must give the applicant written notice". In other words it is clear the sequencing suggests that the granting of an application comes first, followed by the giving of written notice'.
23. It is not clear, however, if there is a specific time limit for giving this written notice. With respect to section 55V(4), this allows the applicant to withdraw the application only before it has been determined, which the FCA says happened on 26 February 2021.
24. I have already said that it is not clear how soon after the determination the FCA ought to give written notice, but in your case, it had not done so eight working days later, and it was only when you prompted it by requesting to withdraw your application that it told you it had already determined the application, and already published notice of the VREQ on the Register.
25. The FCA has not yet apologised to you for not providing you with notice that the application had been determined both as it had promised you, and as required by section 55V(4). I recommend the FCA do so.

26. You have told me you are of the view the VREQ was illegally imposed on the firm because notice of the approval was served after your written request to withdraw your application.
27. It is clear the FCA delayed advising you that it had determined the application until you submitted a request to withdraw it. This is a careless omission at the very least on the part of the FCA for which I recommend it apologise to you. I appreciate there may be a debate to be had as to what the legal repercussions are from this delay in providing you notice of the approval of the application, but I am afraid that such matters are best dealt with elsewhere, namely by the courts who can determine legality, which the Complaint Scheme cannot.
28. Since you submitted your complaint to me, you have kept me abreast of other developments on this case. Notwithstanding those, my role is to decide on your complaint as outlined here, as it is this complaint and the matters raised here which have been reviewed by the FCA. If you have other matters you wish to be reviewed under the Complaint Scheme, I suggest you refer these first to the FCA for an initial review, and subsequently to me if you are not satisfied with the outcome.

My decision

29. I do not think your complaint about the process of how your firm's VREQ was handled by the FCA should not be investigated under the Complaints Scheme for the reasons the FCA gives. I have explained why above.
30. Although there has been no formal review of your complaint about the process of how your VREQ was handled under the Complaint Scheme, the FCA has nevertheless provided information regarding this. My view is that
 - a. The FCA has not communicated with you sufficiently clearly throughout to explain exactly how it handled your application for a VREQ.
 - b. The FCA has confirmed that your application was determined through FCA staff discussion on the day you submitted it. However, the FCA did not inform you of its decision until you submitted a request to withdraw your application. I recommend the FCA apologises for this.

- c. The legal repercussions of the delay described above, if any, cannot be determined by the Complaint Scheme, and are best dealt with elsewhere, namely the courts.
31. If you have other matters you wish to be reviewed under the Complaint Scheme, I suggest you refer these first to the FCA for an initial review, and subsequently to me if you are not satisfied with the outcome.

Amerdeep Somal
Complaints Commissioner
12 September 2022