Complaints Commissioner

Office of the Complaints Commissioner
23 Austin Friars
London EC2N 2QP

Tel: 020 7562 5530
E-mail: complaints@frccommissioner.org.uk
www.frccommissioner.org.uk

15th September 2017

Dear Complainant

Our reference FCA00062

Thank you for your emailed letter of 2nd June 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:

> 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 on 26 February 2014, partly in reliance upon one document 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 that document 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 15 August and 14 November 2014, you alleged that the Enforcement team failed to disclose information to the RDC about the limitation period and

consistently misrepresented the position on limitation in correspondence, in order to persuade the RDC to issue a Warning Notice.

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

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

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

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

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

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

In February 2016, you complained about the FCA's failure to keep you updated, as had been agreed. There was some further correspondence about the complaint, and related proceedings, in the summer of 2016.

The FCA's decision

On 3rd March 2017 the FCA wrote to you with its decision, in answer to the four questions set out above, and an additional question – *at what point should those investigating and bringing the proceedings have become aware of the limitation issue?*

The FCA partially upheld your client's complaint on the grounds that the FCA had failed to give adequate consideration to the limitation period, and therefore had not rescheduled the proceedings so that the limitation period was not an issue.

The FCA apologised, but said that it had found no evidence of deliberate withholding of information, or of any other bad faith.

What your client is seeking

In referring the case to me, your client seeks "an independent and rigorous investigation into the non-disclosure of information by the Enforcement team".

Preliminary points

a. The nature of your complaint

You have headed your complaint with references not only to the FCA as an organisation but also to three identified members of staff. I should make it clear that this Complaints Scheme does not deal with complaints against individuals, but complaints against the regulators. This report does not identify individuals in the FCA.

Your letter of 2nd June asks me to consider the complaint under seven headings: these headings are not consistent with your original complaint, and include matters which were not alleged in your original complaint nor specifically investigated by the FCA. In this report, I have followed the approach which was agreed in November 2015, and around which the FCA decision letter is structured. Nonetheless, I have attempted to address the principal points raised in your letter of 2nd June.

b. 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 uncertainties about the circumstances in which such periods are triggered;

c. *The nature of my investigation*

I have had access to the extensive documents considered by the FCA in its investigation, and I have studied these carefully.

My analysis

The FCA's complaints investigation

The FCA's complaints investigation was thorough: it set out in considerable detail the sequence of events which culminated in the decision to discontinue 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

In essence, your response to the FCA's decision letter is that you consider that the facts demonstrate something which goes beyond the error which the FCA has admitted – in your view, the events suggest a deliberate suppression of information which amounts to bad faith. In your response to my preliminary decision, you urge me to consider whether, even if I do not find evidence of bad faith, there is evidence that the FCA acted with a lack of integrity.

The five questions

The FCA in its decision letter has provided a detailed response to the four questions which I posed eighteen months ago, and the additional question identified above. 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 early in the investigation, your client's name (together with a few other key 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.

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, and in April 2013, there is a note which specifically makes the point in relation to your client. 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 at the 16 May 2013 discussion, at the latest". 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. 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 43) reads "The Enforcement team's letter of 9 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. 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.

Your representations in response to the PIR were a further opportunity for the FCA to reconsider its approach, but the focus appears to have been upon the meetings between the FCA and the CFTC, rather than upon the document productions themselves. I consider that this explains (although does not excuse) the fact that it was not until late March 2014 (when the queries about the limitation in the related case were raised) 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 the requests for further information on limitation and undermining material from March 2014. Once the team had – belatedly – reached the conclusion that there was a potential problem, the decision to drop the 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. 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. This conclusion also applies to the issue of early settlement discussions, which you raise in your letter of 2nd June and again in your response to my preliminary decision, and the FCA's reply to your response to the PIR – in the latter case, the FCA were commenting on the description of the liaison with the CFTC, not the receipt of the documents from Bank X.

I accept that the consequences – particularly in relation to the early settlement discussions – could have been very serious, but it does not follow that the FCA were acting in 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 these were serious errors. 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.

In your response to my preliminary decision, you have urged me to find that the FCA's actions amount to a lack of integrity, even if they do not amount to bad faith. You have cited a number of legal cases throwing light upon the definition of lack of integrity. This Scheme is not the forum to determine those matters. I have found that the FCA made serious errors – errors which had significant consequences for your client and could have led to even more serious consequences. I set out below the FCA's acceptance of this, the steps it has taken to avoid a repetition, and the apology which it has issued. I do not consider that, for the purposes of the Complaints Scheme, there would be any merit in a further debate on the description of those shortcomings.

Conclusion

The FCA has already 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.

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.

I have found no evidence of bad faith – 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 accepted my analysis (subject to two points which I have corrected), and my conclusions. In particular:

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

c. It says 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. 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. A board of senior members of staff now regularly reviews the progress of all investigations;

f. It will now consider whether there are any further lessons to be learned;

g. It 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 matter were considerable, but I have concluded 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