

02 September 2022

Final report by the Complaints Commissioner**Complaint number FCA001702***The complaint*

1. You asked me to investigate a complaint about how the FCA treated your co-operative X.

What the complaint is about

2. You complained to the FCA on 21 December 2021 and it issued a decision letter on your complaint on 10 February 2022.
3. The FCA summarised your complaint in five parts and partially upheld one part but not the rest.

Why you are unhappy with the regulator's decision

4. You have said to me that:
 - a. 'The extensive delays on the part of the FCA Mutuals Team in dealing with the matters disputed (and already admitted in part within the FCA Investigator's letter of 10 February 2022) show a fundamental lack of fairness and natural justice towards X. Despite regular and lengthy delays in the Mutuals Team's own responses, short deadlines were consistently imposed on X. This resulted in significant costs and pressures on X and a sense that X was being bullied into an unfavourable outcome. Most notably, there was 13½ months of near-silence from the Mutuals Team in response to our 17 December 2018 Rules Amendment application, prior to the Notice of Proposed Cancellation being issued on 30 January 2020 out of the blue. During this period, unknown to us, the Mutuals Team adopted what we believe was an intrinsically flawed and unfair approach, and gave

no decision on our Rules changes, but instead prepared their case for cancelling X's registration'. (Element One)

- b. 'Documents that were fundamental to X's case were not included in the lever-arch file ('Annexure') sent by the FCA Mutuals Team to the FCA's RTC on 21 January 2020. Nor were these documents (the draft and submitted versions of our 17 December 2018 Rule Amendment Application) referenced in the narrative of the 21 January 2020 Enforcement Submissions Document (the 'RTC Document') prepared by the Mutuals Team for the RTC. This crucial omission supports the key narrative of the RTC Document that the Notice of Proposed Cancellation should be issued because of a lack of "any progress" by X since 2015. We believe this is a totally misleading representation of the situation and constitutes gross misconduct on the part of the FCA Mutuals Team. This aspect of our complaint to the FCA was dismissed by their investigator'. (Element Two)

Preliminary points (if any)

5. Under the Complaints Scheme to which both the regulators and I operate, paragraph 3 provides as follows:

3.6 The regulators will not investigate a complaint under the Scheme which they reasonably consider could have been, or would be, more appropriately dealt with in another way (for example by referring the matter to the Upper Tribunal or by the institution of other legal proceedings).

6. With respect to Element Two of your complaint, the FCA granted X an opportunity to make representations to the RDC which would have decided on the merit of your case and any concerns you had about the documents presented by the FCA Mutuals Team. X declined to do this. I understand you would like me to undertake a review of the FCA Mutuals Team's file to the RTC, however, the Complaints Scheme is not an alternative to the RDC and is not a suitable forum for determining matters of that kind, for which there are established processes. Therefore, I agree with the FCA's decision not to investigate this complaint element. You have said to me that you disagree and

that ‘We had believed from our understanding of the FCA Complaint Scheme document that we could raise all the issues in our complaint through the Scheme after we had converted to a company. The wording of Section 3.6 mentions the external legal processes of the ‘Upper Tribunal’ or ‘other legal proceedings’, but not the FCA’s own internal regulatory processes including those of the RDC. That we are barred from raising the issue in Element Two now is, in our view, not what the wording in Section 3.6 conveys. Had it been made clear to us in the wording of Section 3.6 that the FCA’s own internal regulatory processes were also included, this would certainly have influenced our decision-making in May 2020.’

7. Paragraph 3.6 of the Complaints Scheme provides that :

‘ The regulators will not investigate a complaint under the Scheme which they reasonably consider could have been, or would be, more appropriately dealt with in another way (for example by referring the matter to the Upper Tribunal or by the institution of other legal proceedings)’.

8. The paragraph gives some examples of how complaints may be dealt with elsewhere, but not an exhaustive list. I am sorry but I do not agree with your interpretation that the Complaint Scheme is an alternative to the RDC, and it is my view that the matters you raise here are more appropriately dealt with by the RDC.

My analysis

Background

9. You have explained that X is a ‘community enterprise which was set up to construct and operate a solar farm on a former landfill site ...It was set up as a registered co-operative, is run by a volunteer Board and owned by its 484 members, who subscribed for shares in a public offer in 2014’.

10. The FCA is the registering authority for societies registered under the Co-operative and Community Benefit Societies Act 2014 (2014 Act), whereby it produces guidance on that registration function.

11. The FCA's engagement with your firm spanned several years starting in 2015. During that time there was a sizeable volume of communication both with your firm and its respective legal representatives.
12. The RTC issued a Notice of Proposed Cancellation of your firm's registration under the 2014 Act in a letter dated 30 January 2020. The FCA decision letter says this is because it had determined that your firm at the time was not meeting the statutory condition for registration. It provided a deadline of 1 May 2020 for any representations X wished to make.
13. Further correspondence ensued and the FCA granted a number of extensions to X (as requested by X) with the final one being 30 September 2020. The FCA says that 'A nine-month period to make representations is not in line with the timescales set out in the legislation, but the FCA afforded this length of time to your firm'. You have pointed out to me that the date the RTC sent you the notice of cancellation was 30 January 2020 and therefore it is eight months not nine months.
14. X did not avail itself of the opportunity to make representations at RDC and instead informed the FCA on 30 September 2020 that it had passed the relevant resolutions to convert to a company and would be submitting paperwork to effect the conversion to a limited company.
15. Your firm was deregistered as a society on 15 April 2021 following the FCA's issuance of a notice of cancellation, and the conversion to a company. The cancellation notice is available on the Mutuels Public Register. As you know, the company it converted to is X Limited, company number xxxxx.

My analysis

16. It is not in dispute that the FCA allowed X considerably more time than the rules and guidance provide to prepare representations for the RDC hearing.
17. The gravamen of your complaint seems to be that even though X was given a considerable amount of time to prepare for the RDC hearing, you allege the FCA itself took over a year to respond to X's 17 December 2018 Rules Amendment application, and you allege that the response was to proceed, without any warning, to a notice of proposed cancellation from the RTC.

18. I can understand your frustration that the FCA took a considerable amount of time to respond to the substance of your 17 December 2018 proposal, however, there was no statutory deadline for this response. Once the FCA had reached a view: which was to issue a notice of proposed cancellation, the matter was referred to the RDC. The RDC agreed to all of X's requests for an extension. In the event the time limit with the extensions requested and granted to X amounted to nine months, which I do not think was unreasonable. Nor do I think the fact that the FCA took over 12 months to reach a view on your 2018 proposal has a direct bearing on X's own deliberations, which took eight months. You have said to me you do not think that I should compare the delays on the part of each party in such a fashion, and I note your disagreement here, but I do not agree with it.
19. X ultimately made a decision on its proposed course of action on 30 September 2020 without asking for further extensions.

My decision

20. For the reasons given above I do not uphold Element One of your complaint and I will not investigate Element Two of your complaint.
21. You have told me you do not agree with my decision, and you have written extensively to me with comments on each paragraph of my report as well as additional comments to explain why. I have referred to some, but not all of your comments in my report, where appropriate. I appreciate the strength of your feelings on this matter, but my view is that despite the fact that the FCA partially upheld one part of your complaints, I can only review the complaint elements as you present them to me, and in this case I do not think that the FCA Mutuals Team showed a fundamental lack of fairness or natural justice in dealing with the cooperative, although I have acknowledged that the FCA Mutual Team did take a considerable time in its correspondence with you. And it remains my view that element two is best dealt with elsewhere.
22. You have said that the delays were extensive, and that the entire process was of a scale, complexity and cost which you say the directors of the co-operative 'have felt mentally and physically throughout our dealings with the Mutuals Team since 2015'. I am very sorry to hear that you have felt the proceedings

stressful, however, the proper resolution of issues surrounding the cancellation of the registration of the co-operative would have been best dealt with by the RDC to which the Complaints Scheme is not an alternative.

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Complaints Commissioner

02 September 2022