Complaints Commissioner

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Dear Sir or Madam,

Your client's complaint against the Financial Services Authority (FSA)

Thank you for your letter of 13th February 2017, on behalf of your client. Following the correspondence between you, me and the FCA, described in my letter of 13th April, and having carefully considered all the documents including your letter of 28th April 2017 in response to my preliminary decision, I am now able to issue my final decision. The FCA did not comment on my preliminary decision.

How the complaints scheme works

Under the complaints scheme, I can review the decisions of the FCA 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.

Because your client's complaint relates to the FSA, it is covered by the transitional arrangements of the Complaints Scheme (paragraph 8.1), although in practice the provisions for complaints under the transitional arrangements are identical to those of the substantive Scheme.

Your client's complaint

On 14th December 2016 you complained to the FCA on behalf of your client. The complaint was summarised by the FCA as follows:

> *...your client's complaint relates to a restraint order preventing the disposal of, dealing with, or diminishing the value of assets and connected matters. I set out below each element in turn.*
>
> *Element One*
> *Your client is unhappy that the Order required the closure of all open positions in specified assets. He says that the closure of his large positions…caused an "effective fire sale" on his assets, resulting in significant financial loss… He is unhappy that the FSA does not appear to have brought these facts and matters to the attention of the Court.*
>
> *Element Two*
> *Your client is unhappy with the way in which issues raised by brokerage firms during their compliance with the Order were dealt with by the FSA. In particular, he is unhappy with a decision to modify the effect of the Order.*
>
> *Element Three*
> *Your client is unhappy that he was not provided the opportunity to make representations on the operation of the Order.*

The FCA rejected your client's complaint on the following grounds:

> *Element One*
>
> The Order was an Order of the Court, not of the FSA. It could have been challenged under the provisions of the Proceeds of Crime Act 2002 (POCA); and POCA includes a provision by which an acquitted defendant (as your client is) can seek compensation. Those provisions, rather than the Complaints Scheme, were or are the appropriate means of challenge. Furthermore, the complaint is out of time.
>
> *Element Two*
>
> This, too should have been challenged through the courts, and is also out of time
>
> *Element Three*
>
> Again, your client should have challenged this through the courts.

In your letter of 13th February 2017, you dispute the FCA's reasons for rejection. In summary, your grounds for disputing them are:

a. In practice, your client was unable to use section 42 of the POCA to apply to vary the Restraint Order before the positions were closed;

b. In practice, your client could not use section 72 of the POCA to obtain compensation, because he did not meet the criteria;

c. The complaint was not out of time, because it was only in 2016 following your client's subject access request that he became aware that the FCA knew about the danger of disruption to the market price but allegedly failed to take adequate steps to mitigate it;

d. Your client was engaged with dealing with the criminal investigation and proceedings, it was reasonable for him to await the outcome of those before making his complaint, and in any event, even if had he complained earlier it is possible that the complaint would have been deferred until the outcome of the proceedings was known.

The FCA has challenged these points in the correspondence referred to at the start of this letter. What follows is my analysis of the position.

My analysis

The principal question I have to consider is whether the FCA were right to decline to investigate your client's complaint on two grounds:

a. That a more appropriate route was or would have been available for the complaint (paragraph 3.6 of the Scheme);
b. That the complaint was out of time (paragraph 3.3 of the Scheme).

I deal with the second ground first, since it is more straightforward.

Out of time?

Paragraph 3.3 of the Complaints Scheme states:

> *Complaints should be made within 12 months of the date on which the complainant first became aware of the circumstances giving rise to the complaint. Complaints made later than this will be investigated under the Scheme only if the complainant can show reasonable grounds for the delay.*

The FCA's position is that your client should have complained around the time the Order was made, presumably on the grounds that that was when he became aware of the loss.

Your position is that it was not unreasonable for your client to review his position on the conclusion of the criminal proceedings (which led to his acquittal), and that the extent of what you allege to be the FSA's serious failings only became apparent upon the disclosure of further documents relating to the restraint order. You also comment that, had he complained during the criminal proceedings, the complaint might well have been deferred under paragraph 3.7 of the Scheme.

Both positions are arguable. In my view, given that your client faced long-drawn-out criminal proceedings at the end of which he was acquitted, his grounds for delay are not unreasonable, and discretion should be exercised in his favour. I therefore consider that the complaint should not be deemed out of time.

Is the POCA a more appropriate means of challenging the Regulator's actions?

This is a more complex question, on which both you and the FCA have written extensively.

To start with, it is important to emphasise that the test which I need to apply is not whether an alternative means of challenge exists, but whether the FCA's conclusion that the POCA was a *more appropriate* means was *reasonable.*

It is common ground that section 72 of POCA provides a mechanism by which an acquitted defendant may in certain circumstances seek compensation. The first issue is whether, in the particular circumstances of your client's case, the mechanism applies. Your argument is that it does not apply, because the condition in s72(4)(b) is not met, i.e.:

> *the investigation would not have continued if the default* [i.e. the default which you allege against the Regulator] *had not occurred*

From the letter of 17th March 2017, it appears that the FCA take the same view. As they have expressed it, even if a serious default had occurred (which they do not concede), "it is very unlikely that '*the proceedings would not have been started or continued had the default not occurred'.*"

The question which then arises is whether, *notwithstanding the fact that there is a common view (which I share) that a claim under s72 POCA would not have succeeded,* s72 could nonetheless be considered to be a more appropriate means of resolving the issue.

I can set out the opposing views of the FCA and you quite simply. The FCA contends that

> "section 72 is clearly the route provided for by Parliament where an acquitted defendant seeks, as does your client, compensation for the sort of misconduct he alleges, not least given that section 72 expressly specifies that applications under it are to be made to the Crown Court, a Judge of which will be in a much better position to determine the matter, given their experience, than an FCA complaints investigator".

Your opposing view is that

> "We disagree that it was Parliament's intention for section 72 of POCA to be the relevant route provided by it to an acquitted defendant in all circumstances. It is the relevant route provided in circumstances of misfeasance by a regulator in the course of underlying criminal proceedings to which restraint and detention of a subject are ancillary."

In my preliminary decision, I set out my view as follows.

Parliament has set criteria by which claims for compensation under the POCA can be considered by the courts, and has specifically restricted them to cases in which the serious default has resulted in proceedings which would otherwise either not have been brought or would have been discontinued. The explanatory note, to which you refer, explicitly acknowledges the fact that there will be cases (as in other forms of proceedings) where compensation will not be available despite an acquittal. While that does not exclude the possibility of compensation being available from another source, it seems to me that it would be perverse if this Complaints Scheme (which is principally designed to deal with matters not the subject of other statutory provisions) were used to circumvent the limitations imposed by Parliament in other statutory procedures dealing with essentially the same issue (as is the case here).

In your response to my preliminary decision, you asked me to reconsider my position on four grounds, which I summarise as follows:

1. Given that it is agreed that your client's complaint would not satisfy the criteria required by section 72, "the FCA cannot reasonably believe it provides a better remedy for this complaint";
2. Section 72 deals with the situation of an acquitted defendant. Your client's complaint is on a wider basis, and could have been pursued under the Scheme even if he had been convicted;
3. Your client's complaint "falls squarely within" the category of complaints about mistakes and lack of care, for which Parliament has legislated for a complaints scheme.
4. Section 72 only provides the remedy of compensation. Only the Complaints Scheme can provide an apology or public recognition of error

On your first point, the test to be applied is whether the complaint would more appropriately be dealt with in another way, not whether it "provides a better remedy". The fact that a complaint may be doomed to fail under a statutory procedure should not, of itself, mean that the Complaints Scheme must therefore entertain it.

On your second point, while it is true that a convicted defendant might pursue a similar complaint under the Complaints Scheme, in practice the limitations on compensation applied to acquitted defendants under section 72 would apply with even greater force to a convicted defendant.

Your third point, while correct, does not affect the question of whether or not the regulator was right to exercise its discretion not to investigate. That discretion relates to the existence and appropriateness of an alternative mechanism, not to the subject matter of the complaint.

Your fourth point raises a different question – does the Complaints Scheme offer remedies of a kind not available under the POCA provisions and, if so, would that make an investigation under the Scheme appropriate? It might be argued that, even if the FCA were right to decline to investigate a case where compensation was the issue, it would nonetheless be appropriate to investigate that complaint if the potential remedies were limited to exclude any form of compensation.

The FCA's decision not to investigate your complaint was – I infer – on the basis on which that complaint was put – i.e. that your client was seeking an apology and *ex gratia*

compensation. That seems to me to have been a reasonable position. I do not think that is would be appropriate for me, at this stage, to reconsider the complaint on a different basis.

Conclusion

I conclude that the FCA's decision not to investigate your client's complaint was reasonable, on the grounds that it would be more appropriately dealt with by another means. For that reason, it has not been necessary for me to consider the detailed information about the actions of the FSA and your client, including the issue of whether or not your client could, in practice, have sought to suspend or vary the restraint order before it took effect.

Yours sincerely

Antony Townsend

Complaints Commissioner