Complaints Commissioner

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Final report by the Complaints Commissioner dated 23 November 2017
Complaint number: FCA0364

The complaint

1. On 3 October 2017 you asked me to investigate a complaint about the Financial Conduct Authority (FCA). I have carefully reviewed the papers sent to me by you and by the FCA. I have also considered the comments you made in response to my preliminary report (your emails of 26th October and 21st November) and the FCA's response. I have referred to them below.

What the complaint is about

2. In its decision letter of 2 October 2017, the FCA described your complaint as follows:

> *You have said that the FCA did not perform their supervisory role satisfactorily when you were instructed to pay redress to customers and apply to set aside a County Court Judgment (CCJ). You have alleged that the FCA should not have told you to do this.*

What the regulator decided

3. The FCA did not uphold your complaint because your firm had carried out unauthorised regulated activities. The FCA considered "the actions Supervision asked your firm to take were reasonable for a regulator due to the circumstances".
4. The FCA did, however, offer you a payment of £150 because of the time which it had taken to respond to your complaint.

Why you are unhappy with the regulator's decision

5. In your email to me, you say that

> *I wish you to award me an amount of money to place me back to the position I would have been if the FCA had not breached FSMA 2000, various other regulations, and their own governance.*

You go on to say about the FCA:

> *I have on many occasions asked them to confirm where it states they have the legal power to tell me to cease trading and repay all monies and not to pursue collections of debts owed to me.*
>
> *They have never once responded I believe because I have provided them with evidence from FSMA 2000, HRA 1998, the FCA handbook DEPP and EG and their own governance proving quite clearly that they had no authority to force me to cease trading, repay the money and to stop chasing outstanding debts.*

My analysis

6. I have looked carefully at your complaint, and the FCA's documents.

7. The FCA sent a letter to your firm on 18th August 2016 which detailed the actions your firm was expected to complete. This letter followed discussions between you and the FCA in which it had been identified that you were charging interest on credit agreements. The FCA pointed out that your firm's authorisation stated:

   > *This permission is limited to lending under a regulated credit agreement, other than a hire purchase agreement or a conditional sale agreement, under which no charge (by way of interest or otherwise) is payable by the borrower in connection with the provisions of credit under the agreement.*

   The letter went on to say that the FCA expected the firm to recompense any customers who had been charged interest, and to apply to set aside any County Court Judgments (CCJs) which had been made against such customers.

8. Your firm undertook a number of actions to comply with the FCA's expectations until December 2016, when you decided you did not wish to conclude the process to set aside a county court judgment against a client. In responding to your decision in a letter of 22nd December 2016, the FCA said: 'As we have discussed, our view remains that, because the Firm did not have the correct permissions at the time of writing the loan, the agreement is unenforceable. However, we note that this will be a matter for the Court to determine'.

9. You chose not to enforce the judgment for commercial rather than regulatory reasons, so a court determination was never made.

10. It is not in dispute that your firm was carrying out unauthorised regulated activities. The firm was acting outside the scope of its limited permissions by offering home credit loans and charging interest on them. The dispute at the heart of the complaint is that the FCA considers that the loan agreements which attracted interest were unenforceable – and that it was therefore right for the FCA to tell you that it expected you to remedy matters in the way which it set out - whereas you consider that the agreements were enforceable and that you were misled by the FCA.

11. The FCA's interpretation of the Financial Services and Markets Act 2000 was set out in the email of 30th September 2016 which the FCA sent to you. In essence, the provisions which the FCA cited state that credit agreements which are made outside of a firm's permissions are unenforceable.

12. You remain unconvinced by the FCA's position and consider that the contracts are enforceable. You have a different interpretation of the rules and guidance and you have referred to some of them above.

My decision

13. The FCA has set out to you its interpretation of the relevant rules, principles and guidance. I do not agree, therefore, with the point which you made in your complaint, and which you have repeated in your response to my preliminary report, that the FCA has not explained to you on which rules it based its decision to write to you that it expected you not to enforce the firm's contracts. I appreciate you disagree with that interpretation, but it is not my role to interpret the law: that is the role of the courts.

14. In your response to my preliminary report, you have suggested that my statement that the interpretation of the law is a matter for the courts is inconsistent with a statement in my Annual Report that the FCA is protected (in most circumstances) from being sued for damages. The two statements deal with different matters. If you wish to pursue this point further, I suggest you take legal advice.

15. When the FCA realised you were conducting unauthorised regulated activity, it was understandably concerned and sought to regularise the position. It had the choice of trying to bring the firm's activities voluntarily within the firm's permissions or taking regulatory action against the firm.
16. In your case, the FCA decided to set out its expectations, rather than taking formal action. It seems to me that that was reasonable. The letter is technically correct. However, I can see how a recipient might attribute a different significance to the FCA's "expectations".
17. In another case (see case study 5 in my 2016-17 annual report at http://frccommissioner.org.uk/wp-content/uploads/OCC-Annual-Report.pdf), I highlighted the importance of the FCA being explicit about what powers it was using and whether or not a firm was required to do what the FCA had set out. That case was different from yours, since in your case the FCA did not state that it was "requiring" you to act in a particular way. Nonetheless, I consider that in writing to you it would have been preferable if the FCA had stated explicitly:
    a. That its expectations were not formal requirements;
    b. That, while the FCA had set out its interpretation of the law, you might wish to take your own legal advice (not least because there are some – though limited – circumstances in which an agreement made outside permissions can nonetheless be enforced by a court. In saying that, I have to say that I have no reason to think that those circumstances would have applied in your case). The FCA has pointed out that the letter to you did state that you could share it with your legal representatives, though that does not go quite as far as I am suggesting.
18. Although I consider that the FCA could and should have set out the position more explicitly in its "expectations" letter of 18th August 2016, its actions seem to me to have been reasonable. Furthermore, I think it is doubtful that, even if the FCA had done what I have suggested, the outcome would have been different in your case.
19. For these reasons, I do not uphold your complaint, although I have made a recommendation to the FCA below.

Recommendation

When asking firms to take action in response to the regulator's concerns, the FCA should:

a. Be clear that what is being set out is a request, not a requirement;
b. If it appears that the firm is not responding to the request, explain what action may be taken, under what powers, if the firm does not comply with the request;
c. Where appropriate, draw the firm's attention to its right to seek independent advice, particularly on matters where the FCA has interpreted the law.

Additional complaints

Finally, you state that the FCA took eight months to approve your application to vary your permissions which affected your business. This element did not form part of your original complaint and is one neither the FCA nor I have investigated. If you wish to pursue this matter, I suggest that you refer it to the FCA to consider, as that is usually the best way of resolving issues under the Complaints Scheme.

You have also asked me to look at your complaint from December 2016, submitted to the FCA but not referred to me, in which you allege that the FCA provided guidance to you in applying for permissions which resulted in what you allege to be 'the wrong license being issued', namely a limited permissions licence rather than a full licence. If you wish me to consider that complaint, you will need to explain why I should deal with it out of time, taking account of the fact that you were told by the FCA in December 2016 that you should refer it to us within three months, but did not do so until June 2017. If you did refer this complaint back to me, I would deal with it separately.

Antony Townsend 23 November 2017