Complaints Commissioner

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Final report by the Complaints Commissioner

Complaint number FCA00447

The complaint

1. You wrote to me on 9 May to complain about the FCA's alleged failure to take action in response your request that it should intervene in cases which you had, on behalf of a large number of clients, sent to the Financial Ombudsman Service (FOS).

What the complaint is about

2. In its letter of 26 April 2018, the FCA described your complaint as follows:

> *Part One*
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> You allege FOS is not meeting the requirements set out in paragraph 6(d) of Schedule 3 to the Alternative Dispute Resolution Directive for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (ADR Regulations). [Your firm] has some 24,000 unresolved cases with FOS, 15,000 have received a response from an adjudicator, but only four final decisions have been issued by an ombudsman. Most of the 15,000 cases fall well outside the 90 day timeframe for decision making as set out under the ADR Regulations. You assert that FOS has failed to comply with the 90 day requirement as a provisional assessment is not an outcome for the purposes of the ADR Directive and that the FCA has permitted FOS to fail.
>
> *Part Two*
>
> Paragraph 3(c) of Schedule 3 to the ADR Regulations requires the FCA to be satisfied that FOS shows no bias as regards either a party to a dispute or a representative of a party. Given that FOS is stockpiling [your firm]'s cases and not doing so for other CMCs it is self-evident that FOS are deliberately treating [your firm] differently and worse than other CMCs. The FCA has misdirected itself in concluding that there is no unjustified bias.
>
> *Part Three*
>
> Under paragraph 3(a) of Schedule 3 to the ADR Regulations, the FCA is obliged to ensure that FOS has the appropriate knowledge of the law and the knowledge and skills to discharge its duties competently. FOS has been circulating spreadsheets of customer names despite this being unlawful and inappropriate. In addition, FOS is not dealing with these cases in accordance

with the law (particularly s140A of the Consumer Credit Act 1974) and the relevant FCA rules in DISP App 3.

Whilst it is agreed that FOS is 'operationally independent', when there is evidence of incapability to perform their functions, the FCA is under legal duty (pursuant to both Schedule 17 to FSMA and the ADR Regulations) to investigate, rigorously and objectively and consider any evidence presented of FOS's alleged incapability of performing its functions. Where the failings prevent FOS from properly discharging its duties, the FCA is obliged to intervene. [Your firm] provided clear evidence that FOS was not properly considering either the law or relevant FCA rules.

Part Four

Instead of providing information on what the FCA intends to do to ensure FOS is complying with both FSMA and ADR, it has been distracted by, and accepted, a number of self-serving and untrue statements made by FOS. The FCA has failed to fulfil its regulatory functions by allowing FOS to deny redress to half a million people, rather than supervising it appropriately.

What the regulator decided

3. The FCA decided that parts one and two of your complaint did not fall within the Complaints Scheme. It argued that the Scheme was limited to complaints arising in connection with the FCA's relevant functions, and that those functions were only ones "conferred by or under" the Financial Services and Markets Act 2000 (FSMA).

4. The FCA added that the Scheme also provided 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…". The FCA's said that, had parts one and two fallen within the Scheme, it would not have investigated them since Judicial Review (JR) would have been more appropriate.

5. The FCA said that it would investigate parts three and four of your complaint (though it has, at your request, deferred its investigation while I consider this matter).

Why you are unhappy with the regulator's decision

6. In your letter of 9 May to me, you:

    a. Contest the FCA's argument that parts one and two of your complaint are not covered by the Scheme, saying that the "FCA's functions under FSMA have been expanded specifically to include ensuring '*at all times'* that the scheme operator meets the requirements of the ADR Directive;

    b. Contest the FCA's argument that, even if parts one and two fell within the Scheme, it would not investigate them because JR would be more appropriate: you say that JR is "an action of last resort", and that the mere fact that your complaint involves questions of law and whether specific legal tests are met" is not sufficient reason to decline to investigate.

Preliminary points

7. As you know, the Complaints Scheme does not encompass the actions of the FOS. For that reason, this report is solely concerned with the actions, or inactions, of the FCA.

8. My role is not to make legal findings. I am, of course, informed by the legal provisions, and this report inevitably comments on the legal arguments which you and the FCA have made; but it does not purport to rule on them.

My analysis

9. In your letter of 19 January 2018 to the FCA (in which you requested its intervention, and which preceded your complaint against the FCA under this Scheme), you alleged that the FOS:

> "(1) Are failing to make decisions on a timely basis (or indeed at all) for [your firm];
>
> (2) Are stockpiling [your firm's] cases despite resolving identical cases submitted by other CMCs and unrepresented clients. That is bias, according to the Regulations;
>
> (3) Apparently do not have the level of knowledge of the law (including **DISP**) required to discharge their duties."

10. The FCA's response to your letter, dated 16 March 2018, explained the FCA's oversight duties under FSMA and the ADR Directive, and told you that it had discussed your allegations with the FOS. It went on to explain to you why it did not consider that "any of the allegations in your letter or email stand up to scrutiny".

11. In response to that letter, you wrote to the FCA on 29 March, saying "I have copied in the Complaints Commissioner and would ask that this be considered as our referral to him for the purposes of the relevant three month time limit". That was, in fact, premature, since until that point you had not made a complaint against the FCA (as distinct from the FOS). Your letter set out in detail why you disagreed with the points made in the 16 March letter, and complained that the FCA "accept uncritically, and without investigation, statements made by FOS".

12. The 29 March letter resulted in the FCA Complaints Team's letter of 26 April, which described your complaint as containing four parts, and rejected the first two. On the same day, you received a letter from the FCA's General Counsel, containing further information to justify the arguments which he had originally set out in his letter of 16 March.

(i) The jurisdictional issue

13. I start by setting out my understanding of the jurisdiction of the Complaints Scheme.

14. Section 84(1)(a) of the Financial Services Act 2012 requires the FCA to "make arrangements ("the complaints scheme") for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions (see section 85)."

15. Section 85 defines the "relevant functions" of the FCA as being

(a) its functions conferred by or under FSMA 2000, other than its legislative functions, and

(b) such other functions as the Treasury may by order provide.

16. I do not think that there is any suggestion that sub-paragraph (b) applies, nor that we are dealing with "legislative functions". The argument therefore turns on whether parts one and two of the complaint relate to "functions conferred by or under FSMA 2000".

17. It seems clear to me that the functions contained in the ADR Regulations are not themselves covered by the Scheme. I agree with the FCA's argument that "The FCA's function of recognising the FOS as an ADR entity under the ADR Regulations (or removing such recognition)" does not fall within the Scheme.

18. That is not, however, the end of the matter. The Regulations significantly amend Schedule 17 of FSMA, and my understanding is that the FCA's functions under the amended Schedule 17 are caught.

19. Sub-paragraph 2(2) of the amended Schedule 17 states that "The FCA must exercise any function falling within sub-paragraph (3) in a way which is consistent with enabling the scheme operator, at all times, to qualify as an ADR entity and to meet the quality requirements in Chapter II of the ADR Directive."

20. One of the functions under sub-paragraph (3) is taking steps under sub-paragraph (1), i.e. "such steps as are necessary to ensure that the body corporate established by the Financial Services Authority under this Schedule as originally enacted is, at all times, capable of exercising the functions conferred on the scheme operator by or under this Act".

21. The FCA has argued that paragraph 2(2) does not bring any ADR functions into the Schedule, but acts as a control on what it calls the "domestic" functions under paragraph 2(3). In the FCA's view, this means that the only complaint under this Scheme which could be brought would be that the FCA has failed to act in a way which is consistent with allowing the FOS to be a qualifying entity under the ADR Regulations. The FCA says that that is not your complaint.

22. I agree with the first part of the FCA's argument, but not the second. It seems to me that the FCA is basing its argument on a very narrow view of your complaint. My view, therefore, is that while a complaint directed at the FCA's functions under the ADR regulations themselves is not within the Scheme, a complaint alleging that the FCA is not fulfilling its duties under paragraph 2(2) of Schedule 17 – which might amount to much the same thing – would be caught.

(ii) *How the jurisdictional issue applies to your complaint*

23. On the basis of that analysis, I have looked again at your complaint to the FCA, and the FCA's letter which excludes parts one and two. It seems to me that the FCA's decision to exclude parts one and two are a product of the way in which it has characterised your complaint, though that is in turn partly a product of the way in which you expressed it. While it is true that your complaint cited the ADR Regulations, my view is that the points you make about delay and bias relate not simply to the requirements under the ADR, but more broadly to the FCA's duties under sub-paragraphs 2(1) and 2(2) – as set out in your letter of 19 January, quoted in paragraph 9 above.

24. For that reason, I am not convinced that the decision to exclude parts one and two of your complaint is correct – it seems to me that there is a good argument that those parts (interpreted consistently with the thrust of your complaint) could fall within the Scheme, albeit with the explicit exclusion of those ADR provisions which are not incorporated in the amendments to FSMA.

(iii) *Is the Complaints Scheme the appropriate means to consider this issue?*

25. In its decision letter of 26 April, the FCA said this:

> *The circumstances in which the FCA is required to take action in relation to FOS's recognition as an ADR entity are set out in the ADR Regulations. This involves questions of law and whether specific legal tests are met, which is less of a focus in the case of the FCA's role under Schedule 17 to FSMA. . I note that paragraph 3.6 of the Scheme says 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 legal proceedings)."*
>
> *In light of the above, I consider that [parts one and two] of your complaint would be more appropriately dealt with in another way, that is, by way of judicial review proceedings and I would not investigate parts One and Two of your complaint under the Scheme had they fallen within it. I understand my colleagues in the FCA's General Counsel Division (GCD) will respond separately to you on these points.*

26. In your letter of 9 May to me, you responded to the FCA's argument as follows:

> *[The FCA] ignores the point that JR is, legally, an action of last resort. To be blunt, if the right initial step were JR, there would be no reason for the Scheme at all. Furthermore, the idea that JR is suitable – and the Scheme not – because the issues here involve "questions of law and whether specific legal tests are met" is inane. Complaints about the performance of its statutory functions by FCA will always involve these questions.*

27. I agree with you that the mere existence of JR as a potential remedy, and the fact that questions of law are involved, are not of themselves arguments not to investigate a complaint under the Scheme. The wording of paragraph 3.6 is very clear - *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)* – the regulators have to *consider* (i.e. make a reasonable judgement) whether the complaint would be *more appropriately* dealt with in another way.

28. In your response to my preliminary decision, you say:

> *We remain firmly of the view that it has been a feature of this dispute that matters have been complicated by everyone involved in it (including ourselves). At its heart is not a complex issue……our principle [sic] request was…..that FCA should facilitate an agreed plan with FOS to address our backlog……..*
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> *FOS are allowing FOS to deliberately frustrate Article 6 of ECHR (by stockpiling cases)……..*

FCA (and you) have been given clear evidence that FOS are not discharging their current functions (in terms of making timely decisions) and admitted evidence that they are stockpiling cases. And FCA and you think it is reasonable that that is not addressed…….

Judicial review is a remedy of last resort……It is utterly craven and self-serving for the FCA to claim it is reasonable for them to insist on JR rather than them just to proceed to exercise their clear functions and legal obligations. In allowing them to do so it can only appear as an abdication of your responsibilities.

FCA simply need to tell FOS to treat [our client] the same as everyone else and/or as we originally suggested agree a plan with our client.

29. In my view, the FCA has not adequately articulated its reasons for not investigation your complaint, but I agree with its conclusion that JR would be a better avenue for the following reasons.

30. This complaint is not one limited to a few consumers, nor is it one in which there has been a one-off error (or series of isolated errors) in administration. It concerns major issues of legal interpretation (eg is a provisional assessment an outcome?) and systemic questions about how the FCA exercises its oversight function in respect of FOS. It is clear from the correspondence between you and the FCA's General Counsel that there is a major difference of view both about how the FOS interprets the law and handles complaints (not a matter for this Scheme), and about whether in the circumstances the FCA is or is not failing in its statutory duties (which could fall within the Scheme).

31. You have characterised the FCA's position as refusing to exercise straightforward functions, but I do not think that that is an accurate portrayal of the situation. I have no doubt that everyone involved in the matter would agree that the delays in resolving these complaints are very unsatisfactory, but – as set out above – there is clearly a major dispute about how these cases should be handled. This is not a simple matter of a complaints handler failing to cope with its caseload, or of an oversight body refusing to take an interest in a performance issue.

32. In my view, issues of this size, complexity and implications are not suited to a Complaints Scheme of this nature. I am reluctant to direct complainants towards JR, for reasons which you have articulated, but I have concluded that this issue is one which could have been, or would be, more appropriately dealt with through Judicial Review. The review of the FOS, and any subsequent changes, may also be an appropriate way of addressing concerns.

Conclusion

33. My conclusions are as follows:

a. Parts one and two of your complaint potentially fall within the Scheme;

b. The FCA have not fully articulated the reasons why, if they do fall with the Scheme, they should not be investigated under it, but

c. Parts one and two of your complaint should not be investigated under the Scheme, since they could have been, or would be, more appropriately dealt with through Judicial Review, and

d. You could continue to pursue parts three and four under the Scheme, as the FCA have accepted them for investigation.

Antony Townsend

Complaints Commissioner

28 August 2018