

18 May 2020

Final report by the Complaints Commissioner

Complaint number FCA00627

The complaint

1. On 17 February 2020 you asked me to look at a complaint which you had made to the FCA, and which had not been upheld. You made your complaint outside the usual three-month time limit, but I accepted it on the basis that it raised a significant point, that you had been faced with a complex set of circumstances which involved making choices about what action to pursue, and that the FCA had delayed answering your complaint.

What the complaint is about

2. Your complaint arises from a dispute which you have with a charitable mutual society (Society X), of which you are a shareholder member. The FCA described your complaint in these words:

Part One

You allege that the *Financial Conduct Authority* (**the 'FCA'**) and its staff have failed to implement Parliament's wish as expressed in the *Co-operative and Community Benefit Societies Act 2014* (**'the Act'**) in respect of [*Society X*] (**the 'Society'**) (society number XXXXX)

Part Two

You think the FCA has failed in its responsibilities, and covered up unacceptable behaviour at the Society. You think the FCA has intervened very one-sidedly in the dispute, unjustifiably favouring the Society's management and discriminating against the members, by failing to act in a fair, just and equitable manner. All of this is in breach of the Civil Service Code.

You think it's misleading to submit an application for a *Special Meeting* ('SM') knowing that it would be refused and there have been repeated delays and procrastination.

You allege the FCA's staff have refused to provide advice and guidance on an SM. You allege this appears to be a deliberate effort to conceal this right from members of Mutual Societies.

That the FCA staff directed that you must send the application to the Society's management, but refused to disclose the Society's response or allow any comment on that response despite clear evidence of their previously making misleading or untrue statements.

You allege a criminal court style cross examination was conducted in secret and there was no opportunity for a re-examination and you think this is clearly grossly inequitable.

That the outcome of your application was the sole direction that the FCA staff made, refusing to issue such obvious directions as that members should be informed that an unapproved (by the FCA) Rulebook had been issued.

What the regulator decided

3. The FCA did not uphold your complaint, but sent you a detailed response to each part.
4. On Part One, it said that it was satisfied that the Mutuels Team at the FCA had considered the evidence which you had supplied alleging misbehaviour by officers of the Society, and the evidence sent by the Society, and had exercised its discretion under the Act appropriately.
5. On Part Two, the main points made by the FCA were:
 - a. There was no evidence to suggest that the FCA covered up matters, or was biased;

- b. There was no evidence to support your allegation that the FCA's decision not to agree to direct a Special Meeting of the Society was 'predetermined';
- c. The FCA was under no obligation to provide you with guidance on your application for a Special Meeting;
- d. The FCA could not disclose to you the confidential information which it had obtained from the Society, because of the restrictions placed upon it under the Financial Services and Markets Act 2000 (FSMA);
- e. The FCA did not accept that it ought to have started criminal proceedings against the Society;
- f. The FCA did not deliberately delay considering your application for a Special Meeting. It needed to obtain further information, which it considered properly;
- g. It was not within the FCA's remit to ask the Treasury Select Committee to consider appointing a principal regulator for mutual societies which are exempt charities;
- h. Disputes about the interpretations of rules could only be settled by the courts.

Why you are unhappy with the regulator's decision

- 6. In your letter to me, you list a series of remedies which you wish to be put in place. These range from specific actions in relation to the Society (eg the holding of a Special Meeting), through requests for the FCA to provide greater clarity about the way in which it exercises its powers in relation to charitable mutual societies, to major reform of the regulation of the sector. You also listed a series of more general complaints arising from information obtained in the course of your dealings with the FCA. These included the fitness for purpose of the Mutual Societies Register and a statement from the Head of Accountancy Services, Investigation Monitoring and Enforcement Directorate at the Charity Commission that the exemption from audit allowed by the FCA for charitable mutual societies is invalid.

Preliminary points

- 7. I need to set out the scope of this Complaints Scheme, and therefore my role.

8. This Scheme deals with complaints about the actions, or inactions, of the regulators (in this case, the FCA). It excludes the making of rules and policies, and the legislation within which the FCA operates. It also excludes complaints about those whom the FCA oversees (in this case, the Society).
9. Some of your concerns relate to the behaviour of the Society, and some relate to the statutory framework within which the FCA operates, including questions about auditing requirements. This Scheme cannot deal with those matters. This report therefore focuses on what the FCA did, or did not do, within the constraints imposed upon it by the legislation.

Background

10. The FCA's [Guidance on the FCA's Registration Function under the Co-operative and Community Benefit Societies Act 2014](#) ('the 2014 Act') explains the framework within which the FCA publicly registers societies such as the one which features in this complaint. The FCA explains its role like this:

We are the registering authority for societies. This role is different and separate from our role as a regulator of financial services. We do not regulate these societies. Societies are regulated by the Act. Our role relates to a society's compliance with the Act. We do not regulate the business, financial stability or conduct of societies. Our role involves:

- *assessing applications from new societies for registration*
- *assessing and registering rule amendments, resolutions and other documents*
- *checking that societies are complying with the Act*
- *taking action against societies that do not comply with the Act*
- *deregistering societies*
- *keeping a public register of societies*

11. The powers which the FCA has in relation to societies of this kind are of the nature used by regulators, and in exercising those powers it needs to consider questions of risk and proportionality in much the same way as other regulators do. In my view, the FCA *does* regulate these societies, since it has been given regulatory powers and duties.

12. In broad terms, societies of this kind are required to register with the FCA and to provide certain information, such as rulebooks and accounts. Where the FCA has concerns that a society is not meeting the requirements of the legislation, it has certain powers. It can:
 - a. require the society to give it information and documents;
 - b. require the society to get its accounts audited by a qualified auditor;
 - c. appoint an inspector;
 - d. suspend or cancel a society's registration;
 - e. prosecute for certain events.
13. However, it is also true that the powers under the Act are more limited than the very wide regulatory powers which the FCA has in respect of financial services, and do not include the more pre-emptive tools used in financial services supervision, nor the ability to make rules. The FCA has also pointed out that the overarching regulatory objectives under which it operates in the regulation of financial services are specifically disapplied to its functions in this area.
14. The FCA has explained to me that it is concerned not to give the impression that the societies which it regulates under the 2014 Act are regulated to the same extent as financial services companies regulated under the Financial Services and Markets Act 2000. I have sympathy with the FCA's argument on this point, but I consider that it would be more helpful if the FCA described its functions under the 2014 Act as limited regulation, rather than giving the impression that it is not regulating at all – particularly since the statement 'we do not regulate' could appear to be an excuse not to use the powers it has.
15. The Guidance referred to in paragraph 10 above makes it clear that ordinary disputes between members and their societies are not matters in which the FCA intervenes, but that 'if members are concerned that the society is not being operated in accordance with the relevant registration requirements for a society, they can complain to us. This would be on the basis that we should exercise our statutory powers and we will consider the information provided by the member'. The Guidance goes on to explain that:

Members are shareholders of the society. They have voting power and can exercise democratic member control together with other members. They should try and resolve any issues they have through these processes.

As well as any rights given in the rules of a society, the Act gives members a right to:

- receive a copy of the annual return and accounts of the society*
- receive a copy of the society rules. If the member has already been provided with a copy (e.g. on joining) and requests another copy then the society may charge a fee*
- inspect the society's register of members at reasonable hours in the society's registered office. The society should not disclose a member's financial holding*
- request that the FCA appoints inspectors to look at the accounts of the society. This request must be made by at least 10 members of the society, who must deposit money with us as security for the costs of the process*
- request that the FCA orders an inspector to look into the society's affairs or to call a Special Meeting. This request must be made by at least 10% of members, or 100 members if that is a smaller number. The request must be supported by evidence that there are good reasons to do this, and that the request is not malicious.*

16. These are the powers and functions which are at the heart of your complaint.

My analysis

17. While the history of the matters leading to your complaint is quite complex, and while there are many strands to your complaint, it seems to me that the core of your complaint is this. In March 2019 you submitted a petition to the FCA asking it to use its powers to direct the Society to call a Special Meeting to deal with a number of concerns you and some of the other members of the Society had about the way in which the Society was being run.

18. The FCA sought the views of the officers of the Society and decided not to call a Special Meeting. I can confirm from looking at the FCA's confidential papers that

the FCA gave thorough consideration to the matters which you had raised, and pursued a number of concerns with the Society. It did not, therefore, ignore the matter. It is important, however, to consider the reasons which the FCA gave for declining your request.

19. The FCA concluded that you had met most of the statutory tests for requesting a Special Meeting, but that you had not shown 'good reasons' for holding a Special Meeting. The FCA drew attention to the existence of a dispute resolution mechanism in the Society's rules, and said:

It appears to us that a dispute exists between you and the Society. We are debarred from determining disputes... We do not consider it reasonable or proportionate to exercise a statutory power for what would in effect be an intervention in a dispute on behalf of one party over another.

20. I was concerned about this statement. It seems to imply that, because the origin of your application for a Special Meeting was a dispute between members and the Society, it was therefore inappropriate for the FCA to exercise its statutory powers. But that cannot be right: it is hard to envisage any circumstances in which a Special Meeting was being requested and there was *not* a dispute of some kind. Furthermore, I think that the FCA is simply wrong to say that the exercise of the power 'would in effect be an intervention in a dispute on behalf of one party over another' – your application sought the FCA's agreement to a mechanism to enable members to determine the dispute: it was not asking the FCA itself to determine the dispute.
21. I had considerable sympathy with your view that, on the FCA's reasoning, almost any request for a Special Meeting would automatically be disbarred; and that that cannot have been Parliament's intention.
22. In a report on another complaint which I published in December 2019, and which you can find at <https://frccommissioner.org.uk/wp-content/uploads/FCA00654-final-report-041219-for-publication.pdf>, I drew attention to weaknesses in the FCA's response to information about another society. There seemed to have been an assumption that the FCA's role was more passive and restricted than, in my view, the statute intended. The FCA accepted my criticisms in that earlier case, and undertook to review its processes.

23. Your case can be readily distinguished from that one. The Mutuals team at the FCA did take action in response to your complaint, and did make significant inquiries. However, I can see why it is not clear to you how the FCA reached the conclusions which it did, and I do not consider that the reasons which it gave you were sufficient: indeed, the reasons imply that the power to grant a Special Meeting would in practice almost never be used.

24. I have put this point to the FCA. It has conceded that it could have expressed its reasons more clearly. It has said:

We do not consider that it would be appropriate or proportionate for the FCA to use the power to call special meetings to intervene on individual disputes where the dispute resolution mechanisms set out in a society's own rules have not either been used or exhausted. Whilst we agree that the existence of a dispute does not prevent the calling of a special meeting and indeed that some form of dispute is often likely to play some part in the reason that a special meeting is requested, we think that special meetings should occur sparingly and where it is clear that the dispute resolution mechanisms of the society are incapable of achieving a reasonable outcome.

25. This explanation seems to me more helpful than the earlier one. The FCA might **consider** including such an explanation in its published guidance. It makes it clear that the FCA does not rule out the calling of a Special Meeting simply because there is a dispute, but that it would only do so where the society's own dispute resolution mechanisms are incapable of achieving a reasonable outcome.

26. I consider that the FCA's position is a reasonable one. I recognise that you may not share the FCA's assessment of the ability of the Society's dispute mechanisms to reach an acceptable outcome, but from the information which I have been supplied by the FCA, I am satisfied that its conclusion was a rational one. I do, however, **invite** the FCA to consider whether it would be possible to give you a slightly fuller explanation of the grounds for its decision, though I recognise there may be difficulties in doing so.

27. I turn now to other matters which you raised in your complaint to the FCA, and in your complaint to me. I can deal with these relatively simply, drawing upon the analysis above:

- a. I do not consider that the FCA has 'failed to implement Parliament's wishes';
- b. I do not think there is evidence that the FCA has been one-sided, or covered up for the Society. While I understand why you gained the impression of one-sidedness, my study of the FCA's records leads me to the conclusion that it was the FCA's explanations, and considerations of confidentiality in its dealings with the Society, which gave rise to that impression;
- c. I do not consider that it was 'misleading' for the FCA to accept your application for a Special Meeting. I am satisfied that there were circumstances in which the FCA would have been prepared to call such a meeting;
- d. I do not consider that it was the FCA's role to provide you with advice and guidance on your application;
- e. I do not consider that the FCA was under an obligation to disclose to you the Society's response to its inquiries. The FCA has already explained to you why it considers that the confidentiality provisions of s348 of the Financial Services and Markets Act 2000 apply to its functions in relation to mutual societies. I recognise that you disagree with that explanation, but I cannot rule on disputes about the interpretation of the law. I have, however, **invited** the FCA to consider whether it might be able to give you a slightly fuller explanation of its reasons;
- f. I do not agree that the FCA's processes failed to meet the proper safeguards of cross-examination and re-examination. This was not a criminal investigation, and I am satisfied that the FCA made thorough inquiries;
- g. I do not agree that the FCA should have given further information to other members of the Society;
- h. I do not consider that the FCA unreasonably delayed consideration of your application, nor do I consider that it should make you a payment for any expenses you incur in arranging a meeting of the Society. The fundamental

cause of your difficulties arises from your relationship with the Society, not with the FCA. It is correct that it took some time for some of the issues which the FCA pursued with the Society to be resolved, but that does not make the FCA liable for the consequences of them;

- i. The matters relating to your Freedom of Information request fall under the remit of the ICO, and are better dealt with through the ICO's own processes;
- j. The FCA's response that it was 'not within its remit' to ask the Treasury Select Committee to consider the appointment of a principal regulator for mutual societies seems to me misguided. As the registrar of such societies, there is nothing to stop the FCA from asking Government and Parliament to consider such an appointment, if it considers that the current arrangements are unsatisfactory – indeed, it would have a responsibility to do so;

28. In your email of 31 March 2020, you have raised a new matter alleging that the FCA may have deliberately delayed (from February 2019 to March 2020) approving an amendment to the Society's rulebook which would have enabled you to call an Emergency General Meeting with the support of only 10% of the members. This was not a matter raised in your original complaint with the FCA. I invited the FCA to comment on the reasons for the apparent delay, and it has done so. From the records, it is clear that during 2019, and into early 2020, there was considerable correspondence between the FCA and Society about rule amendments. I can see that the FCA was active in trying to ensure that the amendments were proper. It took some time for these amendments to work their way through the process, but I do not see evidence that the FCA was responsible for significant delays.

29. In your complaint, you listed 22 matters which you were seeking to have resolved. I have annexed that list to this report, with my responses to those points.

My decision

30. I can see why you have raised this complaint. A combination of the way in which the FCA explained its actions, and considerations of confidentiality, led you to conclude that the FCA had failed to exercise its statutory duties effectively.

31. My further inquiries of the FCA have satisfied me that the FCA's actions were defensible: indeed, it is clear that it took steps to pursue matters, although this took some time, and those steps are not fully evident to you. I recognise the FCA's proper concerns with confidentiality, but I have **invited** it to consider whether it could provide you with a slightly fuller explanation.
32. The FCA's role in registering and regulating societies under the 2014 is more limited than its more general regulatory role in financial services. There is clearly a debate to be had on whether its powers should be extended, or whether there should be another 'principal regulator' of such societies. As with all the powers it exercises, I would expect the FCA to keep under review whether those powers are adequate. That, however, goes beyond the remit of this Scheme.
33. I recognise that you will be disappointed that I have not upheld your complaint, but I hope that the results of my investigation have at least enabled you to understand the position more clearly.

Antony Townsend
Complaints Commissioner
18 May 2020

Responses to the 22 matters you seek to have resolved, with my responses in red

1. The application for a Special Meeting is approved immediately **It is not my role to direct the FCA to approve applications. The FCA has provided me with an explanation of why the request for a Special Meeting was not approved, as stated in my report**
2. Proper consultation with me over the date and details of the Special Meeting is undertaken **Not a matter for me**
3. A copy of the Society's response to the application for a Special Meeting is supplied to me. **Not a matter for me**
4. The policy on blanket refusals for Special Meetings is removed and a public announcement made to that effect **The FCA's response to my preliminary report makes it clear that there is not a blanket refusal**
5. The guidance in 15-12 is updated to include full details of Special Meetings, and the criteria for their approval by the FCA. **I have covered this in my report**
6. The full list of applications for Special Meetings and their outcomes is published, along with the briefing that led to the FCA CEO stating that 150 years history of refusal was evidence that this a satisfactory decision. **Not a matter for me**
7. A full and detailed explanation of the behaviours highlighted in Areas of Complaint 5, 6 and 8 above is provided. **See 1 above**
8. The [Society] is directed to make clear the full circumstances of the issue of the unapproved Rule Book to all members, including their mistakes and unwillingness to comply with the 2014 Act **This is a matter between the Society and its members, and not a matter for me**
9. An accurate response over what information can be shared during a complaint over Mutual Societies is provided **Within the constraints of the legislation, the question of what information can be shared is a matter for the FCA's discretion, although I have invited the FCA to consider whether it can provide you with a slightly fuller explanation**
10. A proper response to my latest request for guidance on the scope of the [Society] Rule Book is provided **Not a matter for me**
11. The Society is directed to fully inform members over all of the actions taken by all parties over the amendment to the Rule Book, including the risks incurred by its unapproved issue to members. **Not a matter for me**
12. A culture change programme, including retraining, is instituted within the Mutual Societies Team to highlight their role in protecting consumers, ie members. **I am satisfied that the Team did consider your complaint carefully**
13. Confirmation is provided that the FCA will act as Regulator for Charitable Mutual Societies as required by the 2012 Order and the 2011 Charities Act. Alternatively a submission is made within the next 6 monthly FCA report to the Treasury Select Committee on how to resolve the continuing absence of a Principal Regulator for Charitable Mutual Societies, copied to the DCMS Select Committee and the Charity Commission. **See 1 above. I cannot direct the FCA to make submissions to the Treasury Select Committee, although I have commented on this question in my report.**

14. Any delay in implementing remedy 3 above will require the introduction of a temporary principal regulator within 6 months of the date of this letter. The legal framework already exists for the FCA to do this as described above. **Not a matter for me**
15. A sample survey of recent annual accounts for charitable mutual societies to be conducted to match the Charity Commission's work under Area of Complaint 12. The results of the survey to be published and follow up action to taken with Societies, auditors or professional bodies as necessary. **Not a matter for me**
16. A proper summary of complaints received, their subject matter and their resolution is published by the FCA. The format to be at least as comprehensive as the Complaints Commissioner Report plus a numerical summary of types and outcomes of complaint. **Not a matter for me, although the FCA may wish to consider this matter**
17. A change to the FCA's process of handling complaints made on behalf of multiple complainants is instituted or it is made clear that such complaints have to be explicitly made by all of the individuals concerned. The latter will, of course lead to lengthier timescales and larger claims for compensation. **I invite the FCA to consider this in the context of the long-delayed consultation on changes to the Complaints Scheme**
18. If the FCA retains any role for Charitable Mutual Societies then a full risk assessment is undertaken, the risk model is published and a summary of trends is included in the FCA annual report. This will also require the identification of charitable societies within the Mutual Public Register or the establishment of a separate publically available register. **Not a matter for me**
19. Urgent action is taken to resolve the apparent lack of legal status for independently examined accounts as reported in Area of Complaint 13. A formal risk assessment to be undertaken and published. **Not a matter for me**
20. In view of the complete ineffectiveness of the current system relying on action through the courts the Introduction of the General Regulatory Chamber First Tribunal system for appeals against FCA decisions for charitable and probably all Mutual Societies. **Not a matter for me**
21. An urgent review is undertaken of the understanding of current Corporate Governace within the senior management of the FCA is undertaken to understand how prevalent the inappropriate use of 150 year old precedents is in its decision making. Appropriate remedial action to be taken on the findings. **Not a matter for me**
22. Refund of the following costs incurred in scheduling an Extraordinary General Meeting:
 - a. Cost of sending a letter to all shareholding members - £264.12
 - b. Cost of setting up Freepost address for responses - £118.80
 - c. Cost of Freepost letters returned to date - £32.93
 - d. Total = £415.85
 - e. There may be further costs that will be covered in an additional submission if appropriate.
 - f. I can provide copies of the invoices and evidence of their payment if necessary.

I have explained in my report why I do not consider this appropriate.