

7 November 2019

**Final report by the Complaints Commissioner****Complaint number FCA00642***The complaint*

1. On 5 September 2019 you complained to me on behalf of your client about the FCA.

*What the complaint is about*

2. In its decision letter on your client's complaint, the FCA described the complaint like this:

*[Your client] claims that the FCA failed to inform her of, or abide by, the statutory time limit for considering her application. Despite responding promptly to requests for information from the FCA, [your client] received no response to her questions regarding the statutory timeframe. [Your client] feels that the FCA has deliberately failed to keep her informed, manipulated the process and failed in its regulatory responsibility.*

*What the regulator decided*

3. The FCA upheld this complaint, and apologised. In essence, the FCA said that there had been a very high volume of cases being dealt with by the relevant team, and 'the failure to provide details of the statutory timeframe was the result of human error'. The FCA 'cannot find any evidence' that the omission was deliberate, but the omission was 'not acceptable'.
4. The FCA also said that the Authorisations Team 'will look to improve discussions between case officers and their line manager regarding any statutory clock issues and increase focus during Quality Assurance to ensure details of the statutory clock are provided to applicants when appropriate and when requested.'

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*Why your client is unhappy with the regulator's decision*

5. On behalf of your client, you have made the following main points:
  - a. The Decision Letter provides a date on which the statutory time limit was breached, but no explanation as to how the date was calculated;
  - b. The conclusion that the failure to provide details of the statutory time limit was due to human error is 'irrational and insupportable', and based upon a misreading of the evidence;
  - c. It 'may be' that the FCA was deliberately delaying its consideration of your client's application in the hope of obtaining further adverse evidence

*Preliminary point*

6. For the avoidance of doubt, you have not asked me to consider the merits of your client's application, nor of the FCA's decisions about that application: this complaint relates solely to the issue of the FCA's responses to your requests for information about the operation of the statutory clock.

*My analysis*

7. Most of the facts in this matter are uncontentious, but there is one factual issue which I need to deal with first. You contend that you made seven email requests, asking for the FCA's calculation of the statutory time limit position in the case. The FCA told you that it has only three email requests recorded on its system. (There is no dispute that you repeated the request during a telephone call with the FCA on 21 February 2019.)
8. I asked the FCA to check the email records, and it confirmed that it only had records of three, adding *Please note that we were not supplied with the 4 missing emails when we investigated this complaint.* I think that is incorrect, since it appears from documents which you have supplied to me that copies of all seven emails were attached to your original email of complaint. I have looked at all seven.
9. On the balance of probabilities, it seems to me likely that the FCA received seven emails in advance of the telephone call. While seven ignored emails would be worse than three, I am not sure that very much hangs upon it, since the

FCA does not dispute that it should have, and did not, respond to multiple requests from you.

10. I can describe the events concerning this complaint briefly. Your client was applying to the FCA for authorisation. As you have accepted, the application was not straightforward, and the FCA had to make a number of inquiries. It is clear to me from the confidential papers which I have studied that the FCA was active during the period in question – this was not a case in which an application was overlooked.
11. You became your client's representative in December 2018, and urged speed in the processing of the application.
12. From 2 January until 21 February you persistently asked the FCA for its calculation of the amount of time left on the statutory clock (applications of this type have a three-month statutory time frame, although the clock can be paused while the FCA is waiting for the applicant to supply additional information). You were not given that information until the Complaints Team's decision letter of 7 June 2019.
13. It is important to note that each of your requests was contained in a clear and reasonably concise email. Taken in turn, the relevant extracts read:
  - a. 2 January: *In the meantime I am mindful of the time limit imposed upon the FCA for considering an application for approval. As the application has been subject to a number of requests under s60 (3) and subsequent time stoppages under s 61(4), please would you clarify precisely how much of the time available has been used (together with a breakdown of the same) and how much remains?*
  - b. 11 January: *I should also be grateful if you could let me know the position re the timetable.*
  - c. 15 January: *Finally, I look forward to receiving your calculation of the time that has elapsed since the original application was submitted.*
  - d. 28 January: *As it stands there is a clear risk of running up against the deadline for determination of the application; it cannot be said that informing [your client] that an interview may or may not be required is a sufficient to*

*constitute a request for information sufficient to pause the time for determination. I note that despite my request that you do so, you have not clarified the extent of the time remaining. Please do so.*

- e. 29 January: Firstly, I note that you have not responded to my query on the time remaining for the determination of the application. There is a statutory deadline for the consideration of applications for approval and [my client] is entitled to know where she stands in this regard. I am somewhat concerned that you have not provided me with your position in respect of this. I initially raised it with you in my email of 2<sup>nd</sup> January and have repeated the request since then but you have steadfastly refused to acknowledge the question, let alone answer it. The passage of almost an entire month between the provision of information in my email of 2<sup>nd</sup> January and your most recent request for information of 28<sup>th</sup> January makes this a pressing issue. It may well be the case that the statutory deadline has now expired. Please respond on this matter by return.*
- f. 6 February: given the already extensive passage of time in the consideration of this issue and despite your absolute refusal to engage with my repeated queries in respect of how much time remains on the clock, it seems certain that the time limit for determining the application has now been reached;*
- g. 8 February: you still have not provided me with any insight into where we are in respect of the statutory timeframe.*

14. Even if one accepts the FCA's case that four of these emails did not arrive, the three which the FCA recorded – 2, 15 and 29 January – can have left the FCA in no doubt that it was being asked for important information and that, by the last one, it was being accused of withholding information. It should also be noted that other matters in some of these emails were responded to, so it cannot be argued that the correspondence was overlooked.

15. On 21 February you had a telephone call with the FCA. According to the notes which you have supplied and which – as far as I am aware – have not been challenged by the FCA, you pressed the point that your requests for the statutory clock calculation had not been met with a response. The FCA declined to answer

your request during the telephone call, but undertook to write to you about it 'by return'. It did not.

16. The FCA's position is that you ought to have been given the explanation but that

*this case was being processed during a period of very high volumes of complex cases and that the failure to provide details of the statutory timeframe was the result of human error...I cannot find any evidence to suggest that the Case Officer has deliberately failed to keep her informed or manipulated the process.*

17. Your position in summary is this:

*It is not accepted that either error or pressure of work was behind the Authorisations team ignoring the requests. Their failure to respond must have been deliberate. Despite corresponding with [your client] and her representatives on other matters related to the application, Authorisations not only failed repeatedly to respond on this point, they did not even acknowledge those seven requests. As a consequence, [your client] believes that the Authorisations team were aware that the deadline had elapsed and deliberately withheld that information from her. An impartial viewer, appraised of all of the relevant facts, would be driven to reach the same conclusion.*

*We also observe that the FCA may have considered that it was in its interests to delay a decision in respect of [your client's] case [on the basis that further evidence might emerge to bolster its case].*

18. Both your and the FCA's positions inevitably involve inferences. Short of written evidence or an admission of impropriety, it is not possible to prove conclusively that motivation was improper: and an absence of evidence of impropriety does not prove propriety. I am faced with the same problem.

19. Looking at the facts as analysed above, I reach the following conclusions:

- a. It is hard to believe that a Case Officer would be unaware of the danger of breaching the statutory deadline – indeed, the records suggest that those involved in the case were well aware of it;
- b. It is hard to believe that a Case Officer would be unaware that a repeated emailed request from a solicitor (certainly three times, probably seven) for

information about the statutory deadline was a serious matter, particularly when some of these emails suggested that the FCA was failing to disclose information which it clearly had a duty to disclose;

- c. It is hard to believe that, following the phone call on 21 February, the Case Officer and others were not very aware of the requirement to answer the request immediately – indeed, they had undertaken to do so.

20. In the light of those conclusions, I consider that the FCA's explanation that the matter was 'human error' is wholly inadequate. If the FCA knew what the statutory deadline position was during the 21 February phone call – and if it did not know, how was it managing the application to the deadline? – it should have disclosed it then. The fact that – according to the note of the call – the FCA declined to cover the matter during the call (despite having been put on notice of the issue for over six weeks) inevitably leads me to one of two conclusions: either it was reluctant to disclose the position, or it was reluctant to admit that it did not know the position. Neither conclusion does the FCA any credit.

21. You invite me to go further and speculate that the withholding of the information was a deliberate attempt to prolong the process to secure additional evidence. I do not consider that the facts enable me to make that inference.

#### *My decision*

22. Statutory deadlines are set for a purpose. The FCA has a duty to abide by them as far as possible. Given that the FCA is in effect in charge of the mechanism by which the statutory clock can be paused, it has a clear duty to explain to applicants how it is applying the statutory deadline.

23. In this case, despite repeated, clear and polite requests from a solicitor acting on behalf of his client, the FCA failed to supply important information. As I have explained above, this was more than an oversight. That is unacceptable in a statutory regulator.

24. I **recommend that:**

- a. The FCA offers your client a further £250 (in addition to the £50 already offered for the delay in dealing with your complaint) to reflect the seriousness of the shortcomings in the handling of the statutory deadline issue;

- b. The FCA gives you the explanation which you have requested of its calculation of the statutory deadline in your client's case within 10 working days of this decision;
- c. The FCA expands the improvement actions referred to in paragraph 4 to include emphasising the importance of monitoring and abiding by statutory deadlines (the FCA has undertaken to do this).

Antony Townsend  
Complaints Commissioner  
7 November 2019