Complaints Commissioner

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Final report by the Complaints Commissioner

Complaint number FCA00689

The complaint

1. Your complaint is about the Financial Conduct Authority's (FCA) handling of the situation which arose when your firm was denied professional indemnity insurance (PII) cover for Defined Benefit (DB) pensions transfer business.

What the complaint is about

2. Your complaint has three elements. *Element one* is that as the FCA declined to provide clear information about its position on the status of "pipeline" clients and whether your firm was permitted to complete their pension transfers when you had to give up your DB pension transfer permissions. This resulted in your firm having to instruct solicitors to assist to get clarity and incurring legal costs of £9,720.

3. *Element two* of your complaint is that in the course of removing your DB permissions through a Voluntary Requirement (VREQ), the FCA also removed your permissions to give advice on Guaranteed Annuity Rates (GARs), and it had done so in error. Furthermore, you complain that the FCA is wrongly refusing to reinstate this permission stating that it appears your Professional Indemnity Insurance (PII) does not cover this activity. You say that PII policies do not list the activities covered, rather they list the exemptions. You had provided your PII policy documents to demonstrate that you are covered for such activities and the FCA should reinstate the relevant permissions.

4. In *Element three* of your complaint you raise concerns that the FCA gave you an unreasonably short deadline to provide it with information, in the knowledge that you were away on holiday and would have even less time to comply with its request. You believe this conduct amounts to harassment.

What the regulator decided

5. The FCA did not uphold any element of your complaint.

6. In relation to *Element one* it stated that

> *I am satisfied it was pointed out to you, shortly after you queried the matter, that the FCA would expect [your firm's] fee to be refunded if [your firm] was unable to provide the service for which the fee was taken. As such I feel it was made clear to you, within a reasonable timescale, that [your firm]'s clients should not be adversely affected by any reduction in [your firm]'s permissions…I find the FCA provided [your firm] with an answer on whether its clients were in pipeline within a reasonable timescale from when it was given sufficient information to reach an informed decision. In summary, I understand you consider the FCA caused [your firm] to incur legal costs. I am not persuaded that was the case. I say this because:*
>
> - *The FCA is not obliged to provide advice to firms on matters of compliance. Its primary function is to protect consumers and as [your firm] was without PII I feel the FCA acted appropriately.*
> - *[your firm] chose to employ legal counsel.*
> - *[your firm] did not cooperate fully with the FCA (which in my opinion drew matters out).*

7. In response to *Element two* of your complaint, the FCA stated 'I find the FCA gave [your firm]'s PII policy sufficient consideration and that it was right to ensure any ambiguity was clarified before amending the VREQ'.

8. In response to *Element three*, the FCA stated

> *I realise the Associate knew you were on holiday until 31 October 2019 when they sent the email of 16 October. However, the timescale provided still gave you more than one week, from your planned return from holiday, in which to respond. Moreover, the email was very clear - you could request further time from the Associate if you felt it necessary. In the circumstances, I am satisfied the Associate treated you and HFSL in a professional and courteous manner – the timescales provided were reasonable and open to negotiation. I also understand the deadline was later extended, with your agreement, to 15*

November. I am not persuaded you were treated unreasonably or harassed in any way.

Why you are unhappy with the regulator's decision

9. You believe 'the FCA acted unreasonably and their actions were heavy handed & offered the clients involved no protection whatsoever. Their actions have caused us untold stress and significant legal fees and I feel their complaints handler has simply swept the majority of my complaint under the carpet.'

Preliminary point

10. I should start by setting out that your complaint is not the first complaint I received from a firm which was providing DB transfer advice but had to withdraw from this market as a result of being unable to renew its PII cover.

11. I have sympathy for the strength of feelings that arise when through no fault of your own or that of your firm you are suddenly unable to carry on doing a type of business which amounts to a significant portion of your firm's work (39% in your case) and consequently may lead to income reduction and job losses. I also note that you are not satisfied with the outcome of my investigation and you chose not to comment substantively on my preliminary report.

12. There have also been concerns raised by the Personal Finance Society about the growing number of policy exclusions, the serious delays in advisers being provided with PII quotes and the exponential premium growth affecting firms. Apparently as a result, a number of advisers are seemingly being forced out of the DB market. Your complaint raises the same general concerns and I suggest the FCA considers these and others in its work in the areas of DB transfers and PII requirements.

My analysis

Element one

13. On 30 August 2019 you notified the FCA that you were unable to secure the renewal of your PII to cover DB transfer activities and stated that you would either need to cease this type of work or sell your business. In your SUP 15 Notification Form you also stated that you hoped to carry on as normal for three

to six months, for the benefit of your customers and staff, while you were looking for a solution.

14. On 5 September 2019 you received a response from the FCA, stating that 'As the firm no longer has PI insurance covering defined benefit pension transfers, the firm must immediately stop writing this business. Any pension transfer work that is currently in progress will need to be transferred to another authorised firm [my emphasis] who has the correct permission and adequate PI insurance in place."

15. You replied on 6 September 2019 expressing your disappointment with the course of action the FCA had chosen to pursue, and stated that you wished to appeal the decision asking you to stop writing business with immediate effect, including any 'pipeline' work. You did not make a specific reference to the nine clients who were the focus later on; you were speaking in general terms about the impact on the business and your clients.

16. A number of emails and letters then followed between you and the FCA, as set out in detail in the FCA's response to your complaint. Notably, the FCA sent you a letter dated 17 September 2019, in response to the information you had previously sent to it, and asked you to provide information in relation to each of your pipeline clients so that it could assess their situation, what the impact of having to transfer to a different adviser would be, and asked you to set out how and why this would cause a detriment to each client.

17. The legal advisers you appointed responded on your behalf on 19 September 2019 and stated that your firm was concerned about providing all the information the FCA had asked for in case it wished to rely on this in enforcement proceedings against your firm. They asked for a waiver to confirm this would not be done. They did, however, confirm that the minimum cost to each client would be the advice fee of £1,250, and that the situation could be worse for those who missed their transfer deadline date with the result that their transfer value offer expired.

18. It was at this point that your representatives expressed your willingness to undertake not to take on any new DB business, so long as you were permitted to complete your pipeline work.

19. Following further correspondence on 23 September 2019, you provided the required information about the pipeline pension transfers on 25 September 2019.

20. The FCA's case to issue an Own Initiative Requirement to vary your firm's permissions (OIREQ), in order to stop it doing DB pension transfer work, was considered by the Regulatory Transactions Committee (RTC) on 1 October 2019.

21. The RTC approved the OIREQ on the condition that the FCA tried to resolve the issues through a Voluntary Requirement (VREQ) first. Importantly, it also highlighted that earlier communications with firms in such situations would be good practice.

22. On 2 October 2019 you had a telephone call with the FCA in which you were told about the RTC's decision and that, as it was not your fault that you could not obtain PII, it was still open to the firm to sign a VREQ, rather than the FCA issuing an OIREQ.

23. You again raised the issue of the pipeline clients and asked if the FCA would cover their fee costs, should they need to pay for advice a second time around.

24. You were told that the FCA would not cover the costs and that the requirements would be going ahead one way or another.

25. Following two days of correspondence, on 4 October it was agreed that your firm could complete the transfers of nine DB pensions, 'that have already been submitted to trustees of the ceding arrangement and/or the provider'.

26. You state that this change of direction by the FCA was as a result of you having to employ 'an advocate to go to court & threaten them with an interdict'.

27. Having reviewed the correspondence and considered the timeline of events, it is clear to me that you were initially hoping to carry on with your DB business until a solution to the lack of PII (such as a new policy) could be found. When it became clear that this would not be possible, you expressed clear concerns about ensuring that the consumers in your pipeline did not suffer a detriment.

28. Firms holding compliant PII at all times for the regulated activities they carry out is a fundamental requirement of being authorised and holding permissions for specified types of activities: the rules are very clear about this. It is the FCA's

duty to take action in relation to firms that do not meet the threshold conditions for carrying out regulated activities, and that is what it did in relation to your firm. It did so in a way that was consistent with other firms in this position.

29. You have made a valid point that it cannot be guaranteed that a firm that has PII cover in October will still have that cover in January the following year, so the holding of valid PII at a particular moment is no guarantee of cover at the point a claim may be made. However, the fact of the matter is that firms are required to have compliant PII cover in place in order to carry out regulated activities, such as DB pension transfers, which your firm did not at a time when you were looking to complete the DB transfers.

30. The FCA also clearly recognised that you were unable to obtain the relevant PII cover through no fault of your own and did not press ahead with issuing an OIREQ when it could have done so from 1 October 2019. Instead, it tried to persuade your firm to agree to a VREQ, which would spare your firm from having a First Supervisory Notice issued and published against it.

31. I consider that it was not unreasonable for the FCA to have requested information from your firm about the pipeline business you were undertaking and were hoping to complete before signing the VREQ, in order to analyse each case on its merits and be able to make an informed decision about allowing your firm to complete the transfers or not, as the case might be.

32. It was also not unreasonable for the FCA to suggest that one way you could mitigate your clients' losses without breaching FCA rules would be to refund the fees they had paid you for the services up to date. It is not the FCA's role to comment on contractual agreements and what fees were earned, and whilst I note your comments in your complaint letter to me about your firm's charging structure, even if this may not have been the most desirable outcome for you, it would have been one way of mitigating potential losses for your customers.

33. You only made an offer to compromise, specifying that you had clients in mind who were in the pipeline and could be adversely affected by the VREQ, on 19 September 2019. You only provided all the necessary information requested by the FCA on 25 September 2019, after you were issued with a section 165 FSMA 2000 request for information. The agreement for the nine cases to be excluded

from the VREQ was reached on 4 October 2019, within six working days of you providing all the relevant information.

34. In my view this was not an unreasonable amount of time to have taken to reach a position on this question. Ultimately, you achieved the outcome you were hoping for, which was protecting the interests of your clients and preventing them having to incur further costs.

35. As it stands, I do not believe the time taken, from 5 September to 4 October 2019, to reach a position both you and the FCA were satisfied with was unreasonable, and I do not believe that you should be reimbursed for the legal expenses you incurred for obtaining professional advice at a difficult time. Instructing a lawyer was ultimately a decision for your firm. I therefore do not uphold *Element one* of your complaint.

36. I do however believe that there may be some lessons to learn about the way in which the FCA deals with pipeline cases, and how early in the process it makes decisions about which transactions can be completed and which have to be referred to a different firm, to save time both for itself and the firms it is dealing with. The FCA has a difficult balance to strike in providing robust protections for consumers – which may require it to proceed with some caution – while moving with sufficient speed to try to avert unintended consequences (for example problems with pipeline clients). For that reason, I invite the FCA to consider whether there are ways of further tightening the timescales in which such matters are dealt with.

Element two

37. Following the VREQ being agreed between you and the FCA, and your firm signing it, it was brought to your attention by a third party that the VREQ appeared to restrict your firm's ability to give advice about GARs.

38. You asked the FCA to rectify this problem, as the only excluded activity on your PII policy, and therefore affected by the VREQ, was DB pension transfers, and your permissions should therefore show that you were allowed to advise on GARs.

39. The FCA informed you that it found that some of the terms in your PII policy were not defined sufficiently well for it to be persuaded that advice on GARs was

in fact covered by the policy. You were asked to contact your insurance provider and obtain explicit confirmation that this sort of advice was covered.

40. You found this request unreasonable as in your view it is obvious what the exclusion covers, and that your firm should be permitted to give advice on GARs.

41. It is not my role to interpret and adjudicate insurance policies, therefore I cannot comment on whether GARs are covered by your PII policy. I consider, however, that it was not unreasonable for the FCA to request that you provide clarification from your provider about the exact terms, inclusions and exclusions of the policy to enable the FCA to be satisfied that GARs are covered.

42. In light of the difficulties your firm had experienced as a result of not being able to obtain compliant PII cover for DB transfer work, I understand why you might have found this request exasperating. However, a simple request to your insurance provider to confirm whether GARs were included under or excluded by your policy would have resolved this situation. This option is still open to you and the FCA has undertaken to amend the VREQ to make it clear that GARs are not included if your PII provider confirms that such advice is not excluded.

43. I cannot uphold your complaint that the FCA was unreasonable in not amending the VREQ until your firm provided confirmation that this type of work was not excluded under your PII policy.

Element three

44. This element of your complaint is connected with the correspondence and information requests, specifically an email sent to you on 16 October 2019, when you were on holiday.

45. You believe that the FCA's request for a significant amount of information, sent to you in the knowledge that you were on holiday and therefore would not be able to deal with it until your return two weeks later, was unreasonable and amounted to harassment, as it was sent to you with the sole intention of causing upset.

46. It is accepted that the FCA sent you its request at a time when it was known you were on holiday. The email did not acknowledge this fact and whilst the timeline

given for you to respond was three weeks, it was also known that you would not be available to deal with the request for two weeks of those.

47. However, the writer did conclude the email by saying ‘but please let me know if the timeline causes you any difficulties’. This shows that the deadline set by the FCA was not set in stone and there was room for extending it, should the need arise. An extension to 15 November was in fact granted at your request.

48. I do not consider that the FCA’s email was unreasonable or that it was sent with the intention of causing stress and amounted to harassment, because it specifically stated that the timeframe for providing the requested information might be changed if it causes the firm difficulties. For this reason, I do not uphold this element of your complaint.

My decision

49. Having considered all the information available to me, as set out above, I do not uphold your complaints. However, I have invited the FCA to consider whether there are ways of further tightening the timescales in which such matters are dealt with..

50. I have also suggested that the FCA considers, in the context of its work on DB transfers and the PII market, the concerns raised by you about the impact of the shrinking PII market and withdrawal of cover from reputable, professional firms such as yours. This is clearly a serious issue, causing problems for clients, firms, and the regulator.

51. The FCA has told me about its continuing work in this area, including large data based reviews, the persistent concerns about unsuitable advice being given to consumers, and the fact that it is monitoring the provision of PII by insurers. It intends to publish its findings in due course. I welcome these steps, since there is clearly a significant issue here which needs to be addressed.

Antony Townsend
Complaints Commissioner
22 April 2020