

2 July 2020

Final report by the Complaints Commissioner**Complaint number FCA00731***The complaint*

1. On 29 April 2020 you wrote to me, on behalf of your client, asking me to review the FCA's decision not to investigate your client's complaint.

What the complaint is about

2. Your client has been the subject of an FCA enforcement investigation for over three years. The FCA described your client's complaints as follows:

Part One

Part One of the complaint relates to the merits of the Enforcement investigation. [Your client] has raised questions as to whether the investigation should have been commenced and, to resolve the complaint, has requested that it is now discontinued.

Part Two

Part Two of the complaint relates to the lack of information provided to [your client] throughout the investigation. [Your client] claims Enforcement failed to provide requested documents prior to the interview, which took place in April 2018, and failed to explain which aspects of his prepared statement were not understood. [Your client] believes this contributed significantly to delays in the investigation.

Part Three

Part Three of the complaint relates to the FCA's interaction with and approach to [your client] throughout the course of the investigation. [Your client] believes the interview was aggressive and confrontational and feels that his attempts to work collaboratively with Enforcement have been rejected. [Your

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client] believes he was provided incorrect information regarding the trades focused on by the FCA and is unhappy that he was not allowed to answer additional questions in writing, and was instead asked to attend another interview.

Part Four

Part Four of the complaint relates to the length of the investigation and the lack of communication from Enforcement regarding the reason for the delays. [Your client] feels that very little meaningful progress has been made since the investigation began and is unhappy with the decision to instruct an expert at a late stage in the process. The investigation has had a significant impact on [your client]'s career, health and finances.

What the regulator decided

3. The FCA made the following decisions about the complaint:
 - a. The FCA decided not to investigate Part One, in accordance with paragraph 3.6 of the Complaints Scheme, on the grounds that questions about the merits of the investigation, including whether it should be discontinued, were better dealt with by the Regulatory Decisions Committee (RDC), or through Judicial Review;
 - b. The FCA decided to defer investigation of Parts Two, Three, and Four. It cited paragraph 3.7 of the Complaints Scheme which says that a 'complaint which is connected with, or which arises from, any form of continuing action by the regulators will not normally be investigated by either the regulators or the Complaints Commissioner until the complainant has exhausted the procedures and remedies under FSMA...'

Why you are unhappy with the regulator's decision

4. In your letter on your client's behalf to me you 'request that the Complaints Commissioner review the flawed decision of the FCA Complaints team to defer its decision making and that the Complaints Commissioner reach his/her own view regarding the matters complained of (including if it feels able on those matters set out in Part One of the Complaint).' I examine your detailed arguments below.

Preliminary point

5. At this stage, I am reviewing the FCA's decisions not to investigate and to defer elements of your client's complaint. I have reviewed the helpful material which you have sent me, and the FCA's complaints file, but I have not reviewed the FCA's enforcement files since I do not consider that necessary unless and until there were an investigation into the substantive issues.

My analysis

6. I start with Part One of the complaint. I sympathise with your client's concern to have these very protracted proceedings resolved as soon as possible, and I recognise that the alternative of Judicial Review may be an unattractive one, but I make the following points:
 - a. You are inviting me to make recommendations on the merits of an investigation which may yet come before the Regulatory Decisions Committee (RDC) and the Upper Tribunal;
 - b. This Complaints Scheme (unlike Judicial Review) is not a suitable forum for determining matters of that kind, for which there are established legal processes;
 - c. While the delays in this case may be regrettable, I do not consider that that would be a sufficient reason to insert a complaints resolution process into statutory proceedings.
7. I therefore uphold the FCA's decision not to investigate Part One of the complaint.
8. Parts Two, Three and Four of the complaint are different in nature from Part One. They relate to the FCA's handling of the investigation, and in principle are matters which would be suitable for consideration under the Scheme.
9. In its letter to you, explaining its decision to defer these elements of the complaint, the FCA said '[your client] must exhaust the FSMA mechanisms available to him, such as making representations to the RDC, before a complaints investigation can be considered.' The FCA's statement is incorrect. What the Scheme actually says is that while proceedings are continuing the

regulators 'will not normally investigate' – in other words, there is a discretion to investigate if the circumstances justify it.

10. I agree with your basic approach to the tests in paragraph 3.7 (whether to defer a complaints investigation when there are continuing proceedings). The questions to be answered are:
 - a. Has the complainant exhausted the procedures and remedies? (If they have, the 3.7 ground for deferral falls away);
 - b. If the answer to a. is no, then the question is whether there are 'exceptional circumstances' under which it would 'not be reasonable' to expect the complainant to wait *and* the regulator's continuing action would not be 'significantly harmed'.
11. As I understand it, paragraph 3.7 makes deferral the norm in such circumstances for two reasons:
 - a. Because decisions under the Complaints Scheme might be seen to prejudice the statutory regulatory processes;
 - b. A complaints investigation run in parallel with enforcement proceedings might divert resources from those proceedings, which ought to take precedence.
12. You have argued against the Complaints Team's rationale for deferral on two principal grounds. The first is that 'The RDC does not provide [our client] with a remedy or procedure under FSMA to raise the subject matter of the Complaint.' You have said to me that 'The plain wording of the Rules is that the Complaints Team will normally consider a complaint where the complainant has no available FSMA remedies'. However, that is not what the Complaints Scheme rules say. What they say is that the regulator will not normally investigate a complaint arising from continuing action by the regulator *until the complainant has exhausted the procedures and remedies under FSMA... which are relevant to [the continuing] action*. Although the wording of the Scheme is not as clear as it might be, in my view the words 'procedures and remedies' (not just 'remedies') mean something wider than simply the particular remedy sought under the Complaints Scheme. The fact is that there *are* continuing statutory proceedings against your client which have not been exhausted, and your client will have

opportunities to make representations in the course of those (although I accept your point that it is possible that the RDC may decide not to entertain some of the matters your client is raising with me).

13. Your second argument is that there are exceptional circumstances requiring the complaints to be considered now. Those circumstances are that some of the elements of the complaint seek remedies which are only meaningful if they are implemented soon – for example the disclosure of documents – and that the continuing delay is subjecting your client to ‘serious and irreversible prejudice’.
14. I have some sympathy with this argument: the three years of investigation are likely to have been very difficult for your client, and I accept that they may have a significant impact upon his life and career. However, it is not my view that your client’s circumstances are ‘exceptional’. Unfortunately, it is in the nature of regulatory (and other statutory) proceedings that they frequently have a significant impact upon the respondent’s life and career while they are being brought. And it is far from unusual that concerns about the handling and pace of investigations are raised during hearings.
15. Furthermore, in my view the arguments against intervention here are much the same as they are in relation to Part One of the complaint: to purport to give directions (which could only be recommendations) under this Scheme would be to insert a complaints process into a statutory regulatory process, which seems to me to be improper, has the potential to disrupt and therefore harm those proceedings, and is a function which ought to be exercised through the courts. And while there may be some elements of the complaint – for example, particular delays in responding to requests – which might theoretically be investigated under the Scheme without prejudice to the conduct of the statutory proceedings, it seems to me that their resolution – even if it could be done without undermining the enforcement proceedings – would not materially benefit your client, since they would not achieve the fundamental outcome he seeks, which is bringing the proceedings to some form of conclusion promptly and fairly – an issue which in my view cannot be resolved through this kind of Scheme.

16. For those reasons, I consider that the FCA was right to defer Parts Two, Three and Four of your client's complaint, although its analysis of the rules was faulty (see paragraph 9).

My decision

17. I understand your client's desire to bring the protracted proceedings to a prompt conclusion, and I recognise the effect that the delays are having upon him. However, my view is that what you are seeking on his behalf is the intervention of a Complaints Scheme into statutory proceedings, something for which the Scheme was not designed.

18. I hope that the FCA will take all practical steps to conclude the proceedings as swiftly as possible, but my view is that the FCA was right not to investigate Part One, and right to defer Parts Two, Three, and Four.

Antony Townsend

Complaints Commissioner

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