

22 June 2021

Final report by the Complaints Commissioner**Complaint number FCA00894***The complaint*

1. On 20 February 2021 you complained to me about the FCA's investigation of your complaint. Both you and the FCA have had the opportunity to provide your comments to my preliminary report.

What the complaint is about

2. In its decision letter to you dated 12 February 2021 the FCA described your complaint as follows:

You are unhappy that your application to the FCA has been withdrawn due to an email you sent on 13 August 2020. You consider that you sent the request in haste following a telephone call with the case officer and tried to retract the message, but you were not allowed to.

The remedy you are seeking is to have the application considered in full and for you to be able to challenge any refusal of your application.

What the regulator decided

3. The FCA did not uphold your complaint. The FCA Complaints Team stated there was no provision in the relevant legislation to allow the FCA to re-consider the original application. The Complaints Investigator did not think that the Senior Associate applied any undue pressure to you other than to impress upon you the need to meet the FCA Threshold Conditions for the application to be approved. They also stated they did not find any evidence to support your allegation that you were pressured to withdraw the application.
4. The Complaints Investigator looked at whether you were given information about the application process and the implications of withdrawal of the application. The

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Complaints Investigator could see the Senior Associate provided you with examples of areas where the firm did not meet the Threshold Conditions and gave you links to the relevant rules and requirements. The Complaints Investigator believed you were made aware of the rules that applied and as the Senior Associate explained the onus was on your firm to meet the conditions prior to authorisation approval. They also highlighted that the Senior Associate made it clear to you that if the application was withdrawn the fee could not be refunded which was also clearly stated on the FCA website.

5. The Complaints Investigator also highlighted that the email to withdraw your application was still sent and the Senior Associate followed the process in line with the relevant legislation.

Why you are unhappy with the regulator's decision

6. You have mentioned the background of your complaint in your email to me and I have considered your key points. You also highlight, '...The issue in contention that form the basis of the complaint...' as follows:

Element One

The CMC representative sent an email of withdrawal of the application the same day Thursday 13 August 2020 because of the 'Heat of the Moment' and seen as a message not well considered and therefore in error, not deliberate or unintended. On Sunday 16th just after one working day (which was Friday 14th) the message was retracted or recalled after 24 hours. The FCA stated they accepted the withdrawal same day. The CMC did not see the acceptance message until the FCA referred to it around 19th August 2020.

The FCA insisted that they will not accept the retraction or recall request because the FCA will go on to treat the application as withdrawn. The CMC stated that their application is still pending and the FCA should assess the CMC (firm's) Part A4 application, however, the FCA noted that they will treat the application as withdrawn.

Element Two

7. You also believe that the, '...outcome of the complaint as harsh, irrational, unreasonable...not in consonance with the societal norms.'

Element Three

8. You believe the FCA's findings, '...are faulted both in conventional legal practice and even contrary to how FCA approach or their principles of regulating businesses...'

Element Four

9. You have mentioned that the,

FCA officer/staff put pressure on the CMC applicant when he stated that his application was not open for refusal as they met the threshold and has the right to challenge any wrong decision in the Tribunal... The contemporaneous notes the applicant made during the conversation (and the complaint against the FCA) suggest that he was pressured to withdraw the application.

Element Five

10. You also state,

It is also important to point out that the FCA's approach in regulation of the CMCs is that of regulating financial companies and their rules were more or less drafted in line to financial companies rather than specifically to CMCs - there is weaknesses suggesting that they have no prior experience of regulating CMCs.

Preliminary points (if any)

11. It is important for me to highlight, matters which are excluded from the Scheme which I am unable to investigate.
12. Section 3.4 (c) of the Complaints Scheme provides:

Exclusions to the Scheme

- 3.4 Excluded from the Scheme are complaints:

- c) in relation to the performance of the regulators' legislative functions as defined in the 2012 Act;

My analysis

13. In your complaint under Element Three you mention the FCA's legal practice. In Element Five you have mentioned the FCA's rules and how these were, '...more or less drafted in line to financial companies rather than specifically to CMCs...' Under the Scheme I am unable to investigate issues connected to the FCA's legislative functions. As such I will not be investigating part of Element Three and the entirety of Element Five under the Complaints Scheme.

Element One

14. It appears to me that the crux of the issue stems from your communications with the FCA regarding the CMC application, leading up to your email to the FCA on 13 August 2020.

15. Starting from the beginning I can see you had been in liaison with the FCA regarding the CMC application by telephone and email. On 7 July 2020 a Senior Associate contacted you to arrange a telephone call to discuss your application. A telephone call took place on 15 July 2020 between you and the Senior Associate.

16. This was followed up by email when you emailed the Senior Associate. You summarised the discussion that took place on the telephone on 15 July 2020. It appears you were of the impression that the FCA take-over was a, '...mere transitional of control...' You also confirmed that the Senior Associate had, clarified that the take-over by FCA is a complete change of regulatory rules to that of FCA and that it is expected that all companies that made application under FCA regime, to have been familiar and compliant with FCA rules by April 2019

17. You then informed the Senior Associate that you had seen their notes and understood their content. You also stated that you would work to update the documents within the timeline.

18. Whilst I have not been provided with a copy of the call recordings or a call transcript, it's clear to me from the email, that during your discussion with the

FCA, it informed you of the rule changes, provided notes regarding your application and you were aware of what you needed to do next to update your documents, in respect of the application. So I think at this stage, the FCA had made it clear to you what was required for the CMC application going forward and that it was the responsibility of your firm to be familiar with the new rules and therefore compliant.

19. Shortly after on 29 July 2020 it appears a telephone call took place between yourself and the Senior Associate. This was followed up by an email from the Senior Associate on 30 July 2020. In this email the Senior Associate noted their concerns which were discussed during the call and in the email itself. The concerns were:

- The application and your responses to the FCA's queries
- Not being able to demonstrate the firm met the threshold conditions
- Not being able to demonstrate competence ensuring your firm was compliant with the FCA rules
- Eligible forms of prudential resource
- The firm's vulnerable persons procedure
- A compliant copy of a one-page summary document
- Two opportunities that had been made to demonstrate the ability of the firm to meet the threshold conditions which were still not satisfied.

20. The FCA also highlighted that the expectations of a firm and its senior managers were clear on their website and they did not regulate the market the same way that you yourself would deal with applications, where you stated you, '...provide them with feedback on everything that is wrong and work with them to correct it...'

21. The FCA also stated in their email that when submitting an application to them, As previously explained, when submitting an application, the FCA's expectation is that the firm should be ready, willing and organised to comply, on a continuing basis, with the requirements and standards under the regulatory system. The rules and regulations are different to those that were

in place when the firm was regulated by the CMR, the FCA's expectations of a regulated firm and its senior managers are also different.

22. The refusal process, approach to authorisation and a public final notice was shared with you. The Senior Associate included examples of their concerns, and at the same time highlighted that these were, '...merely examples of where the firm is not compliant and it is not an exhaustive list...' I can see in the email that the Senior Associate stated the following in relation to the application fee, '.... As stated in my email yesterday, the application fee is non-refundable...' You were also given other options such as withdrawing the application and re-applying when you were ready.
23. Looking at the FCA's liaison in this email, I think it was being resourceful and helpful, by providing you with further information and means to enable you to be in the best possible position for the application. I am satisfied that the FCA gave you the information that it should have done, in a constructive and accommodating manner.
24. On 12 August 2020 you provided your firm's pre-contract information, vulnerable customers document and the firm's account submitted to the Companies House. At this stage it appears you acted only on the 'examples' that the FCA noted in their concerns.
25. In its response to your email of the 12 August 2020 the FCA called you on 13 August 2020 citing further concerns with your application. The Senior Associate mentioned that you had still not met the threshold conditions which had been explained to you previously on a number of occasions. It appears you focused on the examples that the FCA gave to you previously which were problematic and the Senior Associate explained that these three areas were still non-compliant. It was also mentioned that the prudential resources requirements had still not been met.
26. I can see you disagreed with some aspects of what the Senior Associate discussed, particularly the prudential resources requirement and the three example areas that you focused on. There were also concerns raised during the call with regards to how you thought you could satisfy the prudential resources requirement by taking out a loan from Bank A. The Senior Associate highlighted

that this again raised issues around your competence by not being able to demonstrate an understanding of the rules. The FCA set out the reasons why they would proceed with recommending a refusal of the application and the refusal process. It also explained that if the Regulatory Transactions Committee agreed with the recommendation, you would receive further documentation in relation to this. I can also see you informed the Senior Associate that you would take it to the tribunal, did not think the FCA was different, did not think the FCA would take the money and refuse the application, you were happy to challenge it.

27. Later that day on 13 August 2020 I can see you emailed the FCA stating your opinion on the threshold and its website regarding the rules and guidance. You also stated, '... There is no way, the firm could not have met the threshold...'. Later in the email you formally withdrew your application and stated the following:

Firm A has decided to withdraw its application.

Thus, take this message as a formal withdrawal notice. I am authorised to make this withdrawal.

28. On 16 August 2020 you emailed the Senior Associate again and described your previous email as a, '...proposed withdrawal was wrongly taken because of your pressure...'. You also mentioned,

I have also discussed with my practicing colleagues and Solicitors on all the documents submitted against the relevant rules in the FCA website; the conclusion is that the application is not open as it is to refusal and at least meet the threshold.

29. You then stated,

I am therefore formally retracting the email message sent on 13th August 2020, which the deadline to submit further documentation as a proposal to withdrawal made in error.

30. I have looked at the actions of the FCA and their communications after you sent this email. Looking at the email evidence, the email you sent on 13 August 2020 was as you described in your email – a 'formal withdrawal'. I appreciate you may feel otherwise but I am unable to interpret this in any other way. I am sorry to

disagree with you, but I do not think this could be perceived as a 'proposed withdrawal.' Your email was unambiguous and think the FCA were correct to treat it as a formal withdrawal.

31. In terms of dealing with the retraction I can see the Senior Associate referred your matter to their manager and a Technical Specialist in the Legal Group working in the Enforcement and Market Oversight Division within the FCA. The Senior Associate responded to you after they had sought advice from a Technical Specialist. There were some email exchanges between you and the Senior Associate and on 19 August 2020 in the Senior Associate's email they referenced [Section 55V of the Financial Services and Markets Act 2000 \('FSMA'\)](#) and stated the following:

the Financial Services and Markets Act 2000 contains no provision enabling a notification to withdraw a Part 4A application itself to be withdrawn or retracted.

32. I have looked at the relevant legislation. Whilst there is no provision enabling a retraction of a withdrawal, there is nothing I have seen in the legislation that explicitly states it is not possible to retract such application. This does not mean that I think your application can be retracted, as it appears on the facts and evidence the FCA acted accordingly after you sent your formal withdrawal. I say this based on the FCA's numerous communications with you by email and telephone liaison. The FCA highlighted their concerns, expectations, change in the rules, options available to you, shared resources and answered the queries they were able to, to help with your application. By this point the onus was on you to ensure your application was compliant whilst taking on board the information the FCA gave to you. The area of retraction it appears, may be at the discretion of the FCA as opposed to being guided by FSMA legislation which seems silent on the matter.

33. In summary of Element One of your complaint, I think the FCA were right in following through with the withdrawal as you had formally instructed and am unable to see that they were wrong by not allowing a retraction of the application.

Element Two

34. You describe the outcome of your complaint as follows, ‘...outcome of the complaint as harsh, irrational, unreasonable...not in consonance with the societal norms...’ I understand you disagree with the outcome of your complaint and am sorry you feel it was harsh on you. I have looked at the actions taken by the FCA and feel satisfied that the FCA acted accordingly. It made you aware on more than one occasion, by telephone and email that there were concerns with your application and provided you with examples of the issues and resources that could assist further.
35. I can also see you were aware of the option to take your matter to the tribunal as you stated during your telephone call with the Senior Associate on 13 August 2020 that you would do this, however you did not take this option and instead later that day you chose to withdraw your application. I can also see that the FCA made you aware on 30 July 2020 by email that the application fee was non-refundable. I understand you disagree with the outcome for a variation of reasons; however, I am unable to see that the FCA was wrong overall in how it dealt with your application, specifically after you formally withdrew the application. As mentioned previously I can see that the Senior Associate sought assistance from their Team Manager and Technical Specialist in the Legal Group once you had submitted your withdrawal and subsequently requested it be retracted. I appreciate you feel differently and am sorry to disagree with you but based on what I have seen I think the FCA acted appropriately.

Element Three

36. In relation to the FCA’s findings you have stated they, ‘...are faulted both in conventional legal practice and even contrary to how FCA approach or their principles of regulating businesses...’ As mentioned in paragraph 13 of my report I will not be able to look at the legal practice element. However, I have looked at whether there were any faults in the FCA’s principles of regulating businesses as you have mentioned. Whilst reviewing your complaint I was unable to see any areas that caused me concerns as to the FCA’s application of principles of

regulating businesses. As such I do not think the FCA have done anything wrong in this regard.

Element Four

37. In your complaint to me you have stated,

FCA officer/staff put pressure on the CMC applicant when he stated that his application was not open for refusal as they met the threshold and has the right to challenge any wrong decision in the Tribunal... The contemporaneous notes the applicant made during the conversation (and the complaint against the FCA) suggest that he was pressured to withdraw the application.

38. I appreciate one may feel pressured once they are on the radar of the FCA specifically in an application such as yours where the FCA displayed concerns. However, in this instance from what I have seen it is difficult to see that the FCA in general, pressured you to comply with their measures. There may have been instances where the FCA needed to be straight talking, but this is the nature of their work as the Regulator and in essence to also manage expectations. After several telephone calls and emails I think the FCA were open about what their concerns were and from looking at the communications, I am unable to agree that it pressured you to act in relation to withdrawing the application. You stated previously that you would take the matter to the tribunal and the onus was on you to decide which option was best for you before you decided to formally withdraw the application.

My decision

39. I realise you may be disappointed with my decision but for the reasons outlined above I am unable to uphold your complaint.

Amerdeep Somal
Complaints Commissioner
22 June 2021