Complaints Commissioner

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18th December 2015

Dear Complainant

**Complaint against the Financial Conduct Authority**
**Reference Number: FSA01596**

You wrote to us on 26th August and asked us to review the Financial Conduct Authority (FCA)'s investigation and decision not to uphold your complaint against both it and its predecessor the Financial Services Authority (FSA). I have now completed my review of the FCA's investigation. I am sorry for the time it has taken for me to do this.

**How the complaints scheme works**

Under the complaints scheme, I can review the decisions of the FCA's Complaints Team. If I disagree with their decisions, I can recommend that the FCA should apologise to you, take other action to put things right, or make a payment.

You can find full details of how I deal with complaints at www.fscc.gov.uk. If you need further information, or information in a special format, please contact my office at complaintscommissioner@fscc.gov.uk, or telephone 020 7562 5530, and we will do our best to help.

**What we have done since receiving your complaint**

We have now reviewed all the papers you and the regulator have sent us. I have also considered the additional comments you made when responding to my preliminary decision. My final decision on your complaint is explained below.

**Your complaint**

You allege that the action of the FSA (now the FCA and from here referred to as the "regulator") against Fyshe Horton Finney Ltd (FHF) resulted in a direct loss to you as it prevented FHF from selling your shares.

You say that the crux of your complaint is the statement released by the FSA upon FHF's voluntary variation of its permissions (VVoP). You say that your particular concern is that the restrictions intended by the VVoP were communicated by the FSA to FHF, and onward to clients including you, either erroneously, ambiguously or misleadingly via the FSA's Notice.

You add that FHF's Compliance Officer (Ms D), signposted you to the Financial Services Compensation Scheme (FSCS) who in turn stated that it would not be able to assist you "as [FHF] did not owe you a civil liability" and as the "losses were not incurred as a result of [FHF's] negligence, but that the inability to close out your positions was the FCA's fault". You are also unhappy with the information which members of the regulator's Consumer Contact Centre (CCC) provided to you after FHF had entered the Special Administration Regime.

**Background to the FSA's action**

As part of the regulator's monitoring of FHF it became aware that the firm had capital resource issues. On 15th March 2013, following discussions between the firm and the regulator, FHF informed the FCA that it was insolvent as it could not cover its liabilities. As a result of this disclosure, and the discussions which took place with the regulator later that day, FHF submitted an application to vary its Part IVA permissions (a VVoP).

The VVoP had the effect of freezing FHF's assets and preventing it from undertaking any further regulated activity other than allowing its customers who held open positions to close out these positions (which was only to be achieved by either selling or buying the stocks set out in the open positions rather than by allowing FHF's customers from opening or entering into further but offsetting positions).

I appreciate that you are unhappy with the way in which the VVoP and the FSA's statement was phrased. Both the VVoP and the FSA's statement were essentially the same with the FSA's statement stating that:

> "Fyshe Horton Finney Ltd ("FHF") must not carry on any of the regulated activities in FHF's Permission, except to allow the settlement of open transactions in and/or to close out open positions in designated investments with or on behalf of its customers (including any corresponding hedging positions) which have already been commenced prior to this requirement coming into force. For the avoidance of doubt this requirement does not permit new transactions to be entered into, or new positions to be opened."

I appreciate that the definition of closing out in the FSA handbook allowed the opening of further offsetting positions, but the inclusion of the phrase "this requirement does not permit new transactions to be entered into, or new positions to be opened" makes it clear that the only transactions FHF could undertake would be either the selling or buying the stocks set out in the open positions.

The FSA was monitoring FHF's activities as part of its normal practice. The FSA does this whenever a firm has been entered into by a VVoP as wants to ensure that the firm is complying with the terms of the VVoP. In the case of FHF the FSA wanted to ensure that FHF was only undertaking trading which complied with the terms of the VVoP and related purely to the closure of existing open positions, and FHF (and its traders) were not opening any new or offsetting positions which were in breach of the VVoP.

Although the Supervisory Notice allowed FHF to close out open positions held by its customers on 18th March 2013 the London Stock Exchange (LSE) independently decided to suspend (and subsequently, on 25th March 2013, to cancel) FHF's membership. Regrettably, the LSE's decision had the effect of preventing FHF from being able to complete any further trades on its own or its clients' behalf (including the closing out of any open positions).

I have noted your comments regarding the settlement of your open positions being made on the CREST system and that the LSE's decision to suspend FHF's membership would not directly affect your ability to make settlements in respect of your open positions, as your positions would be settled through CREST rather than through the LSE.

I have sought the FCA's views on your point, and the FCA has responded that the LSE is the trading platform and CREST is the settlement system for the dematerialised settlement of UK securities. Trades (contracts) are struck on the trading platform and settlement (transfer of property rights) will occur in CREST. However, although they are separate entities, if the LSE suspends a participant then CREST will generally freeze (suspend) that participant's account in the CREST system. Additionally, the settlement bank that provides liquidity for that participant in CREST will also typically withdraw the credit cap. Thus, even if the participant (FHF) had not had its account frozen by CREST, it would have lost its credit line and would therefore be unable to settle the trades.

On 20th March 2013, Administrator H was appointed as FHF's administrator and FHF entered the Special Administration Regime (which gave the regulator powers to direct the administrator's actions, specifically ensuring that the reconciliation of client assets and the reconciliation and return of client money took priority over interests of other creditors). Freezing the assets held by FHF was also necessary to allow Administrator H to complete a reconciliation exercise to ascertain FHF's financial position, to prevent further consumer detriment, and to ensure that all consumers whose assets were held by FHF were treated equally.

**My position**

As part of my investigation into your concerns I have obtained and reviewed the FCA's investigation file. I have also considered the comments you have made when corresponding with the FCA.

Before I make any comment on the details of your complaint I must say that I am disappointed at the time it took the FCA to complete its investigation. In my opinion, whilst I accept that some of the issues that you raised were complex, it should not have taken the FCA over 18 months to complete this investigation. However, I do welcome the fact that the FCA has acknowledged that it has not handled the matter as well as it should have done. I also welcome the regulator's decision to offer you an ex-gratia payment of £500 to reflect its shortcomings. Whilst I accept that the regulator's offer does not address the losses you have incurred, it does reflect the FCA's errors during the investigation of your complaint.

Where firms have capital problems and/or are trading whilst insolvent, as was the case here, the continued trading of the firm is likely to result in considerable consumer detriment. I can understand why the regulator felt it needed to work with the firm to stop or at least limit the impact its capital position could have on the markets and its customers. Had the regulator not frozen FHF's assets, there was the strong possibility that further trading would have resulted in a greater number of consumers experiencing losses. The fact that the freezing of assets may, as in your case, have had adverse consequences is very unfortunate, but it does not follow that the regulator acted inappropriately.

I appreciate that you feel that the instructions the regulator issued to FHF were incorrect as they did not allow you to close out positions in the manner which you wished (as you were unable to place offsetting trades). Whilst I have noted your comments, the fact is that it was the placing of further trades which the regulator was trying to prevent. Had the regulator allowed further, albeit offsetting, trades to have been placed this could have resulted in FHF having further exposure to the markets. This could have made FHF's capital position worse.

I am also aware that you have referred to the action the regulator took in a different case. Whilst I can understand your frustration that the regulator may not appear to adopt a consistent approach, the regulator judges the action it needs to take against each firm according to the prevailing circumstances. This may result in the regulator adopting a differing approach for good reasons.

While there may be an argument that the wording of the VVoP could have been better, I do not consider that the detailed wording of the VVoP had the effect upon your losses which you suggest. Once FHF had entered into the VVoP arrangement with the regulator (which it did on the evening of Friday 15th March 2013), this led to the LSE suspending (before later cancelling) FHF's membership, which it did on the morning of Monday 18th March 2013 (the next working day). This meant that, regardless of how the regulator had drafted the trading restrictions it had agreed with FHF (and how it intended FHF to close any open positions it or its clients held), the LSE's actions would have resulted in FHF (and/or its customers) being unable to enter into or place any offsetting transactions through FHF and the CREST system, for the reasons explained above.

I also appreciate that you are unhappy with the advice which you say the regulator provided to both you and FHF in March 2013. Whilst it is clear that you, both directly and through FHF, were looking for specific guidance, any guidance the regulator gave could potentially have been construed to be advice on the disposal of positions you held. The FCA was therefore unable to provide specific guidance over and above that which was set out in the VVoP notification.

I know that you are also unhappy with the information you were given by the regulator's CCC after FHF had entered the Special Administration Regime. I appreciate that you contacted the CCC on a number of occasions and asked for clarification of what the regulator understood to be closing an open position. This is clearly a technical question which relates to the detailed nature of the VVoP.

I recognise that the advice which you were given by the CCC was general in nature, but I think that was inevitable. Furthermore, the LSE's decision to suspend FHF's membership prevented the closing (by the purchase or sale of stock or the entering into of offsetting positions), and therefore made the CCC's advice academic from your point of view.

**Conclusion**

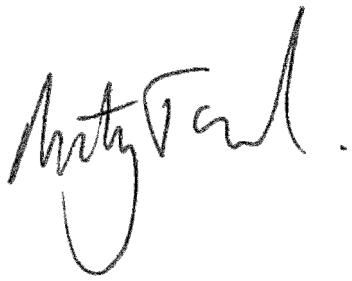
I have sympathy for the position you find yourself in, but from the information presented to me by both you and the FCA, it is clear that the regulator's concerns about FHF's financial position meant that it had to take action to prevent further and wider consumer detriment occurring. The limitations the regulator imposed upon FHF reflected these concerns and were taken to allow it to undertake a reconciliation exercise to establish what client assets FHF actually held and, due to the solvency concerns, whether any client assets had been misused by FHF. Such an exercise would not have been possible if FHF had been allowed to continue trading (either on its own or on any of its clients' behalf).

There is nothing to suggest that the regulator acted inappropriately: the fault lies clearly with FHF which had failed to comply with its capital requirements and allowed itself to become insolvent. Furthermore, the LSE's action on the working day following the VVOP meant that the detailed wording and application of the VVOP ceased to be relevant to your position. The regulator has already apologised for the protracted time it took to assess your complaint, and has offered you a payment. It is therefore my Final Decision that the FCA has reached the correct decisions when assessing your complaint.

While I do not find that the regulator was at fault, I do consider that your case raises a wider issue about the interactions between the FCA, the London Stock Exchange (together with its interactions with CREST), and the FSCS when dealing with firms which are in default and which are about to enter the Special Administration Regime. This case is not unique, and there may be a case for considering whether, as a matter of policy, people who are – through no fault of their own – caught in your position should in future be eligible for compensation. I am afraid that that is a policy issue which goes well beyond the scope of this Complaints Scheme and is unlikely to provide you with what you are seeking, but you might wish to consider asking your Member of Parliament to take this matter up.

In addition, while I do not consider that the precise terms of the VVoP have been the cause of your loss, I am inviting the FCA to consider whether there is a need to review the wording used in cases such as these to avoid any possible ambiguity.

Yours sincerely



Antony Townsend
Complaints Commissioner