

On 7 February 2005 the Complaints Commissioner issued a final report on complaint GE-L0161 to the complainant and the Financial Services Authority. The introduction and summary to that report is published below.

CONFIDENTIAL

FINAL REPORT AND FINDINGS

1. Summary

1.1 This is the report of an investigation by the Complaints Commissioner of complaint reference number GE-L0161 against the Financial Services Authority (FSA). The complaint falls to be considered under the Main Complaints Scheme.

1.2 The complainant is a director of X Ltd, which is an organisation that helps appointed representatives obtain direct authorisation from the PIA/FSA. One of its clients, Y Investment Services (an appointed representative), submitted such an application to the FSA, together with the appropriate fee, on 18 July 2001.

1.3. The Financial Services and Markets Act 2000 stipulates that no firm can have *dual authorisation*, namely become directly authorised whilst running down its exempt status as an appointed representative. Therefore, once Y Investment Services was advised of this problem, it decided to rescind its earlier application in March 2002 and change its submission to a new one for a Limited Liability Partnership [LLP]. This was submitted to the FSA at the end of May 2002.

1.4. The FSA were generally sympathetic to the problem caused by firms not being able to have *dual authorisation* and were aware that this could be overcome by the firm making a fresh submission. The FSA indicated that the requirement (or otherwise) to pay a further application fee with the new submission would be dealt with on a case-by-case basis, subject to the new application complying with a number of parameters. In the case of Y Investment Services the FSA did request a further fee as, in their view, the specified parameters had not been met. The complainant, on behalf of Y Investment Services, wrote to the FSA Corporate Authorisation Department on 11 June 2002 to ask that the matter be reviewed and received a reply by letter dated 13 June 2002 explaining that the first application fee had been *spent* in view of the work which had been undertaken by the FSA on the application and therefore a fresh fee was required to process the LLP submission.

1.5. On 27 August 2002, the complainant on behalf of Y Investment Services wrote again to the FSA stating that it was their intention to lodge a formal complaint. Not having received a reply, a reminder was sent to the FSA on 16 October 2002. The FSA Company Secretariat, which is the department that is responsible for the administration of the formal Complaints Scheme within the FSA, responded on 9 December 2002 apologising for the delay but stating that they upheld the earlier response from the Corporate Authorisation Department and indicated that such a complaint would not normally be entered into the formal Complaints Scheme. It was confirmed that a copy of their letter would be sent to the Complaints Commissioner.

1.6. On 27 January 2003 the Complainants Commissioner wrote to the FSA Company Secretariat questioning as to why the FSA believed that the complaint fell outside the formal Complaints Scheme. The Commissioner also wrote to the complainant to ask whether he would wish to have a Stage 2 investigation and the complainant responded by letter dated 31 January 2003 stating that he did wish to have such a review. The investigation was commenced and documentation was requested from the complainant. However, the Commissioner did not receive a response to that request, despite reminders, and the file was closed in June 2003. Subsequently, copy documentation was received in June 2004 and the case reopened.

1.7. In the course of the investigation, the Commissioner has obtained and has considered written representations from the complainant and documents and correspondence provided to him by the complainant and by the FSA. One interview has been held with a member of the FSA staff. No information was withheld by the FSA for confidential reasons.

1.8. The Commissioner has analysed the complaint as being an allegation by the complainant that a concession, seemingly offered by the FSA to waive a further application fee for Y Investment Services when it made its second application in the name of a LLP, was subsequently not applied.

2. Findings

2.1 The Commissioner has considered the following -

(a) On 18 February 2002, Officer A at the FSA's Corporate Authorisation Department spoke to a compliance consultant at X Ltd on the subject of converting an application from a sole trader to that of a LLP. A note on the FSA file of the telephone conversation states –

"..we would need:

"- confirmation that all aspects of the original app. remained unchanged

*- confirmation that the firm agrees to FSA considering it "incomplete".
[incomplete anyway as originally network app + no financial info provided]*

- cert of incorporation for LLP.

-how it meets financial requirements (i.e. same as limited co)

-PI?

-within 2-3 weeks"

(b) On 19 February 2002, Officer B from the FSA's Corporate Authorisation Department wrote to Y Investment Services and stated –

"At present your application is continuing through the usual processing procedures and we hope to be able to refer it to the relevant Committee for consideration in the very near future. In the meantime, my reason for writing to you is to draw your attention to an important issue that may affect the manner in which your application will progress."

The letter then goes on to explain the problem of *dual authorisation* in that direct authorisation could not be granted until the firm had ceased to be an appointed representative.

(c) On 21 February 2002, the same compliance consultant at X Ltd sent a facsimile message to Officer A. It requested confirmation as to whether three named clients of X Ltd would be permitted to switch their application to LLP status in order to bypass the dual authorisation rules in force. He asked for guidance as to what the outstanding requirements would be at the present stage of the applications. One of these firms was Y Investment Services.

(d) On the same day, 21 February 2002, the complainant wrote to Y Insurance Services-

"I am pleased to confirm that you are at the very final stages of authorisation. The FSA is inundated with applications now and you "got in just in time!"

"There is only one issue remaining. To explain; the original Financial Services Act 1986 introduced a prohibition whereby a firm could not be an authorised and an exempt person at the same time; ie. as a Network member, you are exempt and cannot, therefore, be authorised directly at the same time. The PIA previously ignored this rule, however, the FSA are applying it rigidly. This has only recently come to light as FSA process their first applications. By creating a separate entity, we can bypass this rule as the FSA will view it as a completely different applicant."

The correspondence then continued to explain how such an application could be made.

(e) A file note made by the compliance consultant for X Ltd dated 4 March 2002 following a telephone conversation with Officer B stated –

"(Name of Officer B) called from the FSA's Corporate Authorisation Department regarding ...application for (name of Y Investment Services).

"Advised that a meeting had taken place regarding clients requesting a transfer of application status.

"FSA are willing to waive any new application fees but require the new application forms to be completed."

(f) On 11 June 2002, the complainant wrote to Officer C at the FSA's Corporate Authorisation Department concerning the requirement for Y Investment Services to pay an additional application fee. He stated –

"I write in connection with the above firm's application for direct authorisation and your department's decision to levy an additional application fee.

"The PIA application for (name of Y Investment Services) was originally forwarded to your offices on 18 July 2001. Financial information in support of the application did not reach your offices until 24 January 2002.

"During this time, with the implementation of N2, it emerged that the previously disregarded "dual authorisation" rules would now be enforced. After much correspondence and delay between our office and the FSA, it emerged that (name of Y Investment Services)'s application, like a handful of other applications already with the PIA for processing, would have to be altered to reflect a revised legal status.

"Confirmation was then sought that the PIA applications already lodged for various (name of X Ltd)'s clients could be altered to by-pass the restrictive dual authorisation rules as at 21 February 2002. (Name of Officer B) advised on 4 March 2002 that a meeting had taken place regarding clients wishing to alter their legal status on their applications and that new application fees would be waived if revised application forms were received. (Name of Y Investment Services)'s application was one of a handful of (name of X Ltd) clients' applications on which we were enquiring at that time (please see enclosed fax correspondence).

"As a result, we revoked the sole trader application on 21 March 2002 and ultimately the former PIA application on 5 April 2002.

"Since then, an FSA application has been sent to your offices and acknowledged on 30 May 2002. This was the earliest practical date for this firm due to the various hindrances encountered: the provision of additional information required in support of the FSA application; the application to register a Limited Liability Partnership; and dealing with banks and accountants who, hitherto, have been unfamiliar with the operation of a Limited Liability Partnership.

"Whilst I appreciate that the levying of an additional application fee was subject to the amount of work that had been undertaken on the former PIA application and the length of time before a revised FSA application was received (as per a conversation with (name of Officer A) in the Corporate Authorisation Department): I would stress that (name of Y Investment Services)'s application under PIA rules was revoked as soon as practical after the dual authorisation rule enforcement was established and our client notified. Additionally, the revised application and its associated enclosures and supporting information were forwarded to your office as a matter of urgency on our behalf.

"I would very much appreciate if you could review this case and determine whether it appears fair to implement a further application fee in this firm's case where a precedent would appear to have been set for other firms in a like position."

(g) Officer A replied to the complainant on 13 June 2002 acknowledging his letter to Officer C who was on leave. He explained the background to the FSA's view on the subject of an alternative application and continued –

"...All such requests would be considered on a "case-by-case" basis. FSA did not accept that any precedents had been or would be set. For the application fee to be waived, certain broad pre-conditions were required:

"

- The new FSA application had to be substantially the same e.g. same permission profile, same persons performing controlled and approved functions.*
- The applicant needed to confirm in writing its wish to withdraw its PIA application.*
- The new application had to be received within 3 weeks of the decision to withdraw, and had to include evidence of the existence of the new legal entity. This was to ensure any checks or references which had already been carried out remained valid, and that the work carried out would be fresh in the case officer's mind.*
- Progress on the old PIA application should not be too far advanced. For example, where an application had been progressed up to Committee recommendation stage, the application fee could be considered to be "spent" and thus it would not be appropriate to waive the new application fee.*

"In respect of the application by (name at Y Investment Services), (name of compliance consultant at X Ltd) contacted me by fax on 21 February to enquire whether FSA would entertain an application from the firm in the name of a new LLP, with the application fee being waived. As each request is dealt with on a case-by-case basis, this was referred back to the case officer for comment.

"It transpired that the application for (name of Y Investment Services) was well advanced, with the case officer already preparing the committee paper. In view of this it was agreed that, in this case, FSA would not be willing to waive its application should the firm withdraw and reapply as a separate corporate entity, due to the amount of work that had already been undertaken.

"The application was subsequently withdrawn in March and the new FSA application not received until the end of May.

"Taking both these points into account, and considering that the original application was received in July 2001, FSA would have to take up fresh references (both individual and corporate), thus incurring extra expense.

".....As such, I regret that the application fee for (name of Y Investment Services LLP) cannot be waived."

(h) On 26 June 2002, the complainant wrote again to Officer A. He stated -

"...I am somewhat disappointed with the FSA's intention to charge the additional application fee and I would be grateful if you could reconsider the decision.

"Whilst, I do fully appreciate the fact that a significant amount of work was undertaken in respect of the PIA application, there still remains other material issues.

"The application was submitted in July 2001 and, due to delays in providing additional information, the application was not approved prior to N2. The delays were primarily due to our client being off ill for removal of a lump, having previously been treated for Cancer.

"The dual authorisation issue surfaced and we recommended that our client amend the application to that of a separate entity, ie LLP. As I am sure you will understand, few IFA's could survive with no income, whilst serving a three month notice period with their Network.

"At (name of X Ltd), all telephone conversations are noted within our client files and on computer. (Name of compliance consultant) spoke with (name of Officer B at the FSA) on 4 March 2002.....and advised (name of compliance consultant) that a meeting had taken place requesting a transfer of application status and that FSA were willing to waive any new application fees providing new application forms were completed.

"We proceeded to prepare the required forms and obtain fresh Accountancy information, incorporation certificate, revised PI details, etc for submission. Everything was forwarded on 23 May to ensure receipt prior to 31 May 2002. Nothing had emanated from Canary Wharf to contradict (name of Officer B)'s statements to (name of compliance consultant at X Ltd).

".....

"(Name of Y Investment Services) is a relatively simple organisation and I would ask you to reconsider. I do understand the additional workload involved only too well as we have historically not charged firms to deal with the FSA application process, on their behalf, on the provision that they use our Principal Compliance Service upon obtaining authorisation."

(i) Officer A replied on 5 July 2002. He stated -

"...Whilst I appreciate your assertion that (name of Officer B) gave a verbal indication that FSA would be willing to consider waiving a new application fee in certain cases, (name of Officer B) maintains that no such indication was in fact given for this specific case. There was indeed a meeting held to discuss transfers of application status but, as I stated in my letter of 19 June, these were subject to certain pre-conditions and any such requests considered on a case-by-case basis.

"As we have already established, these pre-conditions, including that which required new applications to be submitted within three weeks,

were advised to (name of compliance consultant at X Ltd) before his conversation with (name of Officer B). As these pre-conditions were known by all the case officers in the team, I am not convinced that a different message would have been conveyed to (name of compliance consultant at X Ltd) in respect of (name of Y Insurance Services).

“Unfortunately, after careful review of the circumstances of this case, including the additional information contained in your letter of 26 June, we cannot agree that the application fee should be waived.”

(j) Subsequently, on 27 August 2002, the complainant wrote to the FSA on behalf of (name of Y Investment Services) to make his complaint.

(k) Y Insurance Services LLP was directly authorised approximately one year later on 8 May 2003.

2.2 In summary the Commissioner finds as follows -

(a) The complainant relies on a conversation between Officer B at the FSA and one of his colleagues on 4 March 2002 when he alleges that the former indicated that the fee would be waived for Y Investment Services' second application as a LLP. Officer B is not available to be interviewed, however, her manager, Officer C who has been interviewed, indicates that she was an experienced case officer of some thirteen years standing and would have given guidance on the issue in a cautious manner specifying the need for Y Insurance Services to meet all the criteria discussed. Officer A also states in his letter of 5 July 2002 *“..(name of Officer B) maintains that no such indication was in fact given for this specific case.”*

(b) From the records of both parties, it appears that on 18 February 2002 a conversation took place between personnel at X Ltd and the FSA that outlined the criteria for a firm to have any further application fee waived for a fresh submission for a different legal identity. In essence, this was that the application was considered “incomplete” and that the new submission would be submitted within a timescale of two to three weeks. This conversation occurred prior to the conversation with Officer B that took place in early March 2002. On the balance of probabilities, it would appear unusual for an experienced member of the FSA staff to guarantee in advance that no fee would be required as, even if she ignored the stage at which the application had reached in the process, she would not be aware of when the fresh submission would be made, this being one of the important requirements.

(c) In the case of Y Insurance Services, the FSA state that its application had been progressed to committee stage for review when in March 2002 the submission was withdrawn. This appears to be confirmed by Officer B's letter to Y Insurance Services of 19 February 2002 which stated *“..we hope to be able to refer it to the relevant Committee for consideration in the very near future”* and the complainant's letter to Y Insurance Services of 21 February 2002 that commences with the expression *“I am pleased to confirm that you are at the very final stages of authorisation.”*

(d) It is a matter of fact that for various reasons, the new application for the LLP was not submitted until the end of May 2002 some seven to eight weeks later, not the stipulated two to three weeks, and that authorisation was not granted until one year later.

(e) It is for these reasons the Commissioner, on the evidence before him, accepts the FSA's view that the original application fee had been *spent* and a new fee was required to support the application for LLP status. He does not, therefore, uphold the complaint.

2.3 The Commissioner has decided to publish the above Summary and Findings.

February 2005