Financial Regulators Complaints Commissioner
23 Austin Friars
London
EC2N 2QP

BY EMAIL

9 August 2021

Dear Amerdeep Somal

Second Letter of Support: London Capital & Finance Plc ("LC&F") in administration (FRN: 722603)

Complaint regarding:

(i) lack of compensation to LC&F investors for regulatory failures and
(ii) the Financial Conduct Authority's incorrect reliance upon a purported "solely or primarily responsible" causation test for ex gratia compensation payments, which has no basis.

Introduction

We write further to our correspondence relating to the Letter of Complaint from certain investors in London Capital & Finance Plc (in administration) dated 25 June 2021; and the letter from Charles Randell (copied to you) dated 29 June 2021.

As you will recall, we wrote to you to communicate our support of the central tenant of the LC&F Investors Complaint, namely, the unlawful introduction by the FCA of a "*solely or primarily responsible*" test of causation.

We now write to you to update you on our position.

Mr Randell's Letter of 29 June 2021

Our concerns with the FCA's attempts to adopt its revised version of the Scheme Rules (set out in CP20/11: "Complaints against the Regulators") through the back door have never been adequately and comprehensively addressed to date by the FCA.

On 29 June 2021, we received a response to our correspondence with the FCA from Mr Randell.

You were copied in this correspondence. We have no doubt that you will agree that it is unfortunate – although perhaps not surprising – that this correspondence raised more questions as regards the FCA's approach than it answered and creates further uncertainty in the already complex and difficult issue of compensation.

Our grounds for concern are as follows:

1. **The "solely or primarily responsible" test of causation**

Once again, the FCA's asserts that the "*solely or primarily responsible*" test is the correct starting point.

We have already established that this purported test first emerged in 2020 in CP20/11: "Complaints against the Regulators" and has absolutely no basis in law.

The FCA's inability to coherently explain the genesis of this test confirms our belief that the true rationale for the introduction of this test is that the FCA is concerned to avoid the proper payment of compensation to consumers because of its own failings, which have started to become increasingly apparent in the string of recent catastrophic cases including LC&F.

We note that the previous Complaints Commissioner shared similar concerns as regards the application of this test and this will no doubt be an issue that you will be live to and will be considering carefully as part of the development of your own policy position.

2. **Justification for the "solely or primarily responsible" test**

In an attempt to justify introducing the test, the FCA previously implied that it had to do as a result of a request from the Complaints Commissioner. The FCA now appears to justify the introduction of the test as necessary in order for it to process complaints more efficiently.

The time taken for the FCA to process the complaints made on behalf of the LC&F investors, where the solely or primarily responsible test was adopted, proves that this test will not make the FCA more efficient.

In any event, a potential benefit of efficiency does not justify the introduction of a mechanism which is contrary to law.

We urge you to clarify your position and whether it is correct that the FCA was obliged to adopt this test as a result of a request from the Complaints Commissioner for the FCA to either clarify the grounds for and/or to speed up the processing of complaints.

3. Repositioning

Interestingly, we note that the FCA now appears to be repositioning when the solely or primarily responsible test will be deployed.

From previously stating "*complainants would need to evidence that they have suffered a quantifiable financial loss caused solely or primarily by the actions or inaction of the FCA*" as a prerequisite for the FCA to consider making an ex gratia payment. The FCA has softened this firm principle and now states "*where the FCA is the sole or primary cause of a consumer's loss, it is likely to be appropriate to make an offer of ex gratia compensation*". To clarify, "*The FCA accepts that there may be circumstances in which it is appropriate to make an offer of ex gratia compensation even where the loss is caused solely or primarily by a third party*."

If Mr. Randell's letter is correct, then we are concerned that customers now face greater uncertainty and confusion as to when they can expect to receive compensation for the failings of the regulator.

As you have articulated previously, there is a longstanding lack of clarity about the circumstances in which the FCA will accept it has been at fault and will offer an ex gratia payment of compensation. This apparently contradictory approach of the FCA further muddies the waters and we urge you to communicate your position on this issue so as to provide some certainty for consumers.

Action

It is clear to us that the FCA appears to be:

1. happy to pursue its attempt to introduce legislation with a blatant disregard for the law and due process,
2. unconcerned with the legitimate expectations and interests of consumers; and

3. content to capriciously fetter your role and responsibilities as Complaints Commissioner, which are set out in statute.

In these circumstances, we urge you to take this newest development into account when considering and responding to the Letter of Complaint and when considering your policy position.

Yours faithfully,

Gina Miller *Alan Miller*

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The True and Fair Campaign was launched in 2012 by Gina and Alan Miller to increase transparency, consumer protection and competition in UK Financial Services, and is wholly funded the Millers.