FINANCIAL OMBUDSMAN SERVICE

Guidelines to the Financial Ombudsman Service Terms of Reference (Investments, Life Insurance and Superannuation) Clause 16 - Dismissal of complaints as Frivolous, Vexatious or Lacking in Substance

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("Complaint" refers to a dispute, with a Financial Ombudsman Service or FICS member, which the Financial Ombudsman Service can deal with in accordance with the relevant Terms of Reference or Rules).

1. The rationale for dismissing complaints

We are required to deal with complaints on their merits. If a complaint falls within our jurisdiction under the Terms of Reference, it should not lightly refuse to deal with that complaint, as to do so would be to deny the consumer access to a forum to resolve that complaint.

The fact that a complaint appears to have little merit will not normally be enough to justify dismissing it without giving the complainant their opportunity to have it resolved through our normal processes.

However, there will be exceptional cases where the complaint is so clearly lacking in any merit – even on the complainant's version of events – that it would be an abuse of process to allow the complaint to proceed. In those cases, dismissing a complaint will save the parties and us the time and resources required to pursue a complaint which is clearly without merit through the whole Financial Ombudsman Service process.

Clause 16 of the Investments, Life Insurance and Superannuation Terms of Reference allows us to dismiss a complaint if it is "frivolous, vexatious or lacking in substance". This can be initiated either at the request of the member, or on our own initiative.

2. The dismissal process

Normally, the dismissal process is as follows:

The complainant is given an opportunity to argue why the complaint should not be dismissed. The Investments, Life Insurance and Superannuation Ombudsman (or her delegate) must then be satisfied the complaint should be referred to the Panel Chair to consider its dismissal.

Both parties are then given the opportunity to make further submissions on the issue. The complaint will only be dismissed if the Panel Chair is satisfied that it is frivolous, vexatious, or lacking in substance.

3. "Frivolous or Vexatious"

"Frivolous" has been defined as meaning 'insupportable in law'; 'disclosing no cause of action'; or 'groundless': see *Dey v Victorian Railways Commissioners* [1949] HCA 1.

A complaint is vexatious rather than frivolous if it has been brought maliciously rather than in good faith. However, the complaint must also be unmeritorious for it to be vexatious, and it may be difficult to establish the motives of the complainant.

At law, a complaint will be frivolous or vexatious if:

- it is 'so obviously untenable that it cannot possibly succeed', 'manifestly groundless', or 'so manifestly faulty that it does not admit of argument': Butterworths Australian Law Dictionary (1997).

- 'useless expense' would be involved in allowing it to proceed: *L Grollo Darwin Management Pty Ltd v Victor Plaster Products Pty Ltd* (1978) 19 ALR 621.

- it 'discloses a case which the court is satisfied cannot succeed': *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69 per Barwick CJ.

From a practical point of view, if we accepted everything the complainant asserted about the facts of their complaint, and the complainant still couldn't establish that they had a valid complaint and were entitled to redress, then their complaint would be frivolous or vexatious.

4. "Lacking in substance"

The threshold for dismissal as "lacking in substance" is lower than the test for "frivolous or vexatious". Therefore, any complaint which might be dismissed as frivolous or vexatious is more likely to be dismissed as lacking in substance. The courts have defined "lacking in substance" as follows:

- "…a claim which presents no more than a remote possibility of merit and which does no more than hint at a just claim..." (*GVR v Department of Health, Housing and Community Services*, unreported decision of the Human Rights and Equal Opportunities Commission 23 August 1993)

- "…the complainant has no arguable case which should be allowed to be resolved at a full hearing." (*State Electricity Commission of Victoria v Rabel* [1998] 1 VR 102 at 109-110)

- a case depending on "an untenable position of law or fact" (*State Electricity Commission of Victoria v Rabel*)

5. How the relevant test should be applied

Whether the allegation is that the complaint is frivolous, vexatious, or lacking in substance, the burden is on the financial services provider to establish (and on the Panel Chair to be satisfied) that the complaint should be dismissed.

If a complaint is frivolous, vexatious or lacking in substance on the available evidence, it is not enough for the complainant to argue that further enquiries through us may elicit further evidence, particularly if it appears the complaint is nothing more than a "fishing expedition".

However, we must take into account all evidence available to it (not just the evidence supplied by the complainant), and must take the most favourable view of that evidence (to the complainant) possible.

If the outcome of the complaint depends on facts which themselves are in dispute, then it should not normally be dismissed as lacking in substance unless the facts asserted by the complainant are completely unsupported by the available evidence.

6. Examples of complaints that might be dismissed

The question of whether a complaint will be dismissed will always depend on its individual facts and circumstances. However, there have been a number of decisions interpreting and applying Clause 16 of the Investments Life Insurance and Superannuation Terms of Reference (and its predecessors, including Rule 16 of the FICS Rules). These rulings may shed some light on when a complaint might be dismissed as frivolous, vexatious or lacking in substance. Please note:

- The following are summaries of the reasons for decision. The detailed reasons for the rulings in each case can be found on our website at www.fos.org.au by searching using the complaint number.
- As decisions on individual complaints must be made on the basis of their individual facts and circumstances, the following examples are not, and should not be seen as, binding precedents.

Examples – "frivolous or vexatious"

Complaints have been dismissed as frivolous or vexatious in the following circumstances:

04-14367: The complainant was receiving ongoing benefits under an income protection policy. The vast bulk of his complaint had been dealt with previously by FICS' predecessor and various tribunals. The one remaining issue – a requirement by the member that he communicate in writing rather than by phone – appeared justified in the light of the complainant's past conduct. Despite repeated explanations that FICS could not deal with any other issues, the complainant refused to limit his complaint to the issue within FICS' jurisdiction.

03-13413: The complainant directed the member to cancel a lump sum recovery policy, then changed his mind and directed the member to reinstate the policy. The

member initially failed to reinstate the policy, but offered to do so with no penalty. The complainant refused to accept this resolution and demanded payment of the sum insured, even though he had not sustained a condition in respect of which any claim could be made under the policy.

14450: A complaint by two individuals (A and K) in respect of advice given to A by a stockbroker was dismissed as it related to K as the broker had not provided any advice to K, and K had bought the shares in question through a different broker.

16693: The complainants took out a loan cover policy in connection with a home loan. That home loan was paid out in 2001, and the policy was discharged. The complaint was about the member's refusal to maintain the policy after that date. However, the complainants had admitted they were aware the cover applied to repaying the original loan. They failed despite a number of invitations to explain why they believed the policy could continue past the discharge of that loan.

Examples – "lacking in substance"

Complaints have been dismissed as lacking in substance in the following circumstances:

15929: A complainant wished to resist a demand that he return shares to the member. The member's records showed the shares had been held by another person with the same first and last name, but as a result of a mistake in recording a change of address, all correspondence had been sent to the complainant for a number of years, and the complainant had subsequently transferred them to his account with another broker. Despite repeated requests, the complainant failed to provide any evidence of how he had acquired the shares, or any evidence to support his allegation that the member's records had been tampered with.

16431: The complainant asserted an employee of the member had told him his order to buy shares at a set price had been filled. The order was good for that day only, and the member had advised the complainant in writing some days after the order was placed that it could not be filled. The complainant sought compensation equivalent to the current value of the shares (some 5 years after the order was made). A recording of the conversation did not support the complainant's version of events. The complainant then asserted the statement had been made in a subsequent phone conversation, but failed to provide any evidence of that conversation when requested.

17634: The complainant had invested in a Westpoint promissory note in June 2003; the note expired on 31 December 2005. The company responsible for the advice to invest was no longer a FICS member. The complainant was a client of another FICS member for about 3 months in late 2004. They complained against that member on the basis that it should have reviewed their portfolio and recommended an early redemption at that time. Leaving aside any other issues, there was no evidence that the issuer of the note would have agreed to an early redemption, and without its agreement the complainant could not have redeemed the investment.

17973: The complainants purchased an annuity to commence from 5 December 2005. The terms of the annuity provided (a) on each anniversary of the commencement date the amount of the annuity payment would increase by CPI, and (b) payments were

made quarterly in arrears. The member made payments under the annuity, and increased the amount of those payments commencing with the payment made on 5 March 2007. The complaint related to the member's failure to increase the payment made on 5 December 2006. The policy wording was clear and unambiguous, and the complainant's argument as to how it should be interpreted was completely unsupported by any of the available evidence.

18817: Positions taken out by the complainant on a CFD account with the member resulted in the account being in deficit on 26 July 2007. The member contacted the complainant by email on 26 and 27 July seeking payment of the margin call. Early on 30 July, it gave him the option of paying $15,000 to maintain the deposit requirements, which he was unwilling to do. The positions were closed out at opening of trade on 30 July.

The following allegations were all dismissed as lacking in substance:

a. The member gave no notice of its intention to sell (this was clearly contradicted by the emails between them).
b. The member's employee had agreed to let the consumer keep the positions open (this was disproved by the member's recording of the conversations).
c. The member undertook to close out the positions at the best possible price on 30 July, then sold when the market opened, at a very low price (again, recordings of the conversation did not support this).
d. The member should have closed out the positions on 27 July rather than 30 July (this was inconsistent with the consumer's requests, and the member had no obligation to close out the positions immediately upon default).
e. The member relied upon the son's authority to the consumer to trade except on 15 and 16 July when it refused to allow the father to trade, which constituted bullying (there was no evidence of this, and no connection to any loss suffered on the account).
f. The member should have allowed the consumer to work off his debt by working unpaid in the member's back office.
g. The member should not be allowed to rely on the PDS and client agreement to support its actions (the complainant did not explain why this should be so; the PDS – which had been provided to him - set out, in clear enough terms, the right of the member to close out positions).

An allegation of misrepresentation about the likelihood of margin calls had not been rebutted by the member, and an issue arose as to whether the account required each CFD to contain a 'stop loss' position. These aspects of the dispute were not dismissed, but the complainant was directed to limit his submissions to those issues only.

18956: The complainants had joined the member some 30 years earlier, to obtain a bundle of benefits which included funeral cover. They had done so for the other benefits in the bundle. The member transferred parts of its business to another provider, retaining the funeral benefit.

The complainants alleged breach of contract, and sought to be paid out the funeral benefit. The policy wording stated this benefit was not redeemable or transferable, but was payable upon death of either consumer. No ongoing payments were required to retain the funeral benefit, and there was no suggestion that the consumers could not

obtain the other benefits previously provided by the member, on similar terms, from either the new provider or elsewhere.

Each insurance policy originally provided by the member formed a separate contract. The alleged breach of the member's obligations to offer the other policies was irrelevant to the funeral benefit.

19242: The complainant failed to pay the final installment for some partly paid units (stapled) in the member's schemes. The member sold the consumer's units at public auction, consistent both with the PDS and the legislation permitting such forfeiture of units. The complainant conceded he had received a notice of the due date for the final installment, but had misplaced it and taken no action to pay.

The following complaints were dismissed as lacking in substance:

a. The price the member obtained for the units at auction was too low, and the member could and should have set a reserve price (the legislation did not allow the member to set a reserve above the amount of the unpaid instalment plus interest costs and expenses, and ASX prices quoted by the complainant were no longer current when the member was trying to sell the units).
b. The member should have let the complainant forfeit half the units, on the basis that he had already paid the first 50% instalment, rather than selling all his units (this was inconsistent with the member's obligation to treat all unit holders equally).

19298: The complainant held an investment in a property trust. He lodged a written request for redemption (dated 12 December) on 12.28pm 18 December. The redemption request was processed on 19 December 2007, based on the then unit price. The PDS stated redemption requests would normally be processed within 2 working days, at the unit price current at the time of processing.

The following complaints were dismissed as lacking in substance:

a. The complainant lodged the request on 12 December and should have been paid the (higher) unit price for that date (CCTV footage showed the complainant had attended the member's office on 18 December).
b. The staff member he spoke to on 18 December failed to disclose there was a risk to unit price would continue to drop, resulting in a lower-than-quoted redemption value (this was contradicted by both a transcript of a phone conversation with staff and statements in an earlier letter by the complainant).

20596: The complainants held CFD accounts with the member and suffered trading losses. The following complaints were dismissed as lacking in substance:

a. The member allowed the female complainant to open an account linked to a credit card facility held with her husband, without first getting his authorisation (she was herself a signatory to the facility, so his additional approval was not required).
b. The member should have prevented the female complainant from trading (the facility was 'execution only', and the material provided to the consumer contained

numerous warnings about the risks of trading, which she admitted she did not bother to read).

c. The member failed to verify the consumer's identity as required under the *Anti Money Laundering and Counter Terrorism Financing Act 2008* (those obligations were not in force at the time, nor was there any link between failure to verify obviously correct information and the losses on the account).
d. The member breached privacy by discussing the female complainant's account with her husband (there was no link between this and the losses on the account). [**Note:** under the then ILIS Terms of Reference compensation could not be paid for non-financial loss such as breach of privacy; if such compensation can be awarded under the applicable Terms of Reference, this aspect of the complaint would not have been dismissed.]

20912: The complainants contacted the member on 21 November 2008 and requested that their investment portfolio be redeemed. The redemption was processed on 24 November 2008 using 21 November 2008 prices. The complainants were paid $17,767.91. The following claims, and the complaint, were dismissed as lacking in substance:

- They had been told to expect redemption of $18,454.00, and sought payment of the additional amount. A recording of the conversation provided by the member demonstrated they had been told the redemption value would be on 21/11/08 figures which were not yet known, and agreed to proceed on this basis.

- They claimed interest to 21 December 2008 on the basis they did not receive payment until then, when payment had been promised within 10 days. However, the available evidence suggested the member processed the redemption request within 3 days and mailed a cheque on 25 November 2008, 4 days after the request was made. The complainants provided no evidence to support their claim that any delay in payment was due to the member's conduct.

- They claimed an additional $11,951.00 (the drop in value in the investment from December 2007 until it was redeemed), alleging the member failed to advise them what to do when the market went down and concealed the drop in value of the investments. This claim was dismissed as the member had provided quarterly portfolio statements and monthly updates to them throughout this period.