FIRST-TIER TRIBUNAL

GENERAL REGULATORY CHAMBER

Appellant: We Fight Any Claim Ltd	**Tribunal Ref CMS/2010/0003**
Respondent: Claims Management Services Regulator	

DECISION NOTICE

1. The "Yes Loans" group operates as credit brokers from a call centre in South Wales. It arranges loans for people who are already in financial difficulty. The appellant, We Fight Any Claim Ltd, is part of the group. The company's original name was Beneficial Claims Ltd but it is convenient to refer to it throughout as "WFAC".

2. From 2008 WFAC assisted its clients with claims in respect of defective credit agreements. Some agreements entered into before April 2007 were not enforceable if formalities had not been observed correctly. For a fee of £245, WFAC was prepared to arrange for a credit agreement to be checked for flaws that might make it unenforceable. The terms of business provided that if these were found, WFAC's customer was liable to pay 15% of the debt to WFAC. In return, WFAC provided a guarantee from a firm of solicitors to defend any proceedings brought by the creditor. It does not appear that WFAC ever arranged for positive action to be taken in the courts to declare a debt unenforceable. A customer who stopped paying on the agreement was liable to have their credit rating affected.

3. In May 2010, WFAC ceased this kind of business and started to deal exclusively with claims for refunds of payment protection insurance (PPI). It is notorious that many credit providers have sold inappropriate insurance policies of no use at all to the debtor, who is entitled to a refund. For this kind of work, WFAC charged a fee of 30% of the prospective claim. The service provided was that WFAC checked whether a claim might be successful. If yes, then they would write to the creditor. If the creditor did not make a refund then WFAC referred the issue to the Financial Services Ombudsman.

4. WFAC (but not "Yes Loans") falls to be regulated under the Compensation Act 2006 by the claims management regulator, hereinafter "the regulator". The Act contemplates that the regulator will set standards of professional conduct; promote good practice; promote competition and protect claimants. WFAC became authorised under the Act in 2008. All authorisations are subject to a condition that the authorised person complies with some rules on conduct. These are the Conduct of Authorised Persons Rules 2007. Although the document must be read as a whole, it is convenient to mention here the rules which received most attention at the hearing.

5. The first set are described as "general rules" and contain the following principles:-

" **3**. A business shall be directed by people with the necessary competence.
4. A business shall ensure that any staff or other people working on its behalf have the necessary training and competence to perform their duties."

6. Others are called "client specific rules" and rules 1, 3 and 11 are relevant:-

" **1**. A business shall –
a) Act fairly and reasonably in dealings with all clients.
b) Ensure that any service offered is one that meets the needs of the client and satisfies the requirements of these Rules.
c) Ensure that all information given to the client is clear, transparent, fair and not misleading.
d) Avoid conflicts of interest.
e) Where advice is given, advise the client unambiguously of ombudsman schemes or other official means of obtaining redress.
f) Where advice is given, advise the client to pursue cases only if it is in the interests of the client to do so.
g) Preserve the confidentiality of the claimant unless disclosure is required or permitted by law or by the claimant."

3. A business must not engage in high pressure selling.

11.A business must provide the client with the following information in writing or electronically before a contract is agreed –
a) Honest, comprehensive and objective written information to assist the client to reach a decision including the risks involved in making a claim, in particular the possibility of losing money and, in the case of legal action, appearing in court.
b) The services that will be provided, in a way that does not misrepresent, either by implication or omission, any term or condition or by whom the service will be provided.
c) The procedures that will be followed.

d) Contracts, including for insurance or loans, that the client will be asked to agree to.
e) Any charge the business makes. Where this is a percentage of compensation payable the percentage must be indicated together with a typical example of the actual cost in pounds, or more than one example if the business makes differential charges.
f) Any referral fee paid to, or other financial arrangement with, any other person in respect of introducing the claim.
g) Any costs that the client may have to pay, including repayments on a loan taken out for any purpose and the purchase of a legal expenses insurance policy, and whether the client will be liable to pay any shortfall in recoverable costs or premiums from the losing defendant party.
h) Documentation needed to pursue the claim.
i) Any relationship to a particular solicitor or panel of solicitors.
j) Procedures to follow in the event of a complaint.
k) How the client may cancel the contract and the consequences of cancellation including the reimbursement of any costs paid during the cancellation period and any costs or penalty that has to be paid after the 14 day cooling off period.
l) The statement that the business is "regulated by the Ministry of Justice in respect of regulated claims management activities" and the authorisation number of the business. This requirement applies one month after the date of authorisation of the business.

7. Since 2008 the regulator has received a very large number of enquiries and complaints from WFAC's customers. The data do not satisfactorily distinguish between complaints and enquiries. By way of example, from 1 January 2010 to 28 February 2011 the total number of consumer complaints/queries received by the regulator, from a total of 1272 authorised businesses, was 17,729. Of those, WFAC accounted for 1,225 or 7%. In the month of February 2011 a total of 705 consumer complaints/queries were received of which WFAC accounted for 63 or 8.9%. In the autumn of 2009 the regulator had correspondence and meetings with WFAC. Amongst the regulator's concerns was the live transfer of telephone calls from customers of "Yes Loans" when information gathered by Yes Loans suggested a potential claim. The practice of taking fees up front led the regulator to fear that these were being taken without informed knowledge and consent, the customer having no opportunity to read details of the contract before the fee was taken. There was a risk that callers were unaware that they were dealing with a different company and that they would associate the payment of the fee to WFAC with the loan which they were seeking.

8. More correspondence followed in the spring of 2010. It then emerged that in none of the cases concerning consumer credit agreements taken on by WFAC had there been a court judgement or settlement in the customer's favour. This was despite WFAC having concluded that over 6,500 agreements received in the past year contained flaws which would render them legally unenforceable. The regulator decided to investigate WFAC's professional conduct under Regulation 35 Compensation (Claims Management Services) Regulations 2006.

9. It is convenient to refer here to those regulations. Regulation 35 sets out the circumstances in which an investigation can be started and explains the factors to be taken into account before doing so.

10. The Regulator's power to cancel, suspend or vary a person's authorisation is dealt with in Regulation 46. If after a Regulation 35 investigation, the regulator is satisfied that the authorised person has failed to comply with a condition of authorisation then the regulator may cancel, suspend or vary the person's authorisation as appropriate. This last word is deceptive because Regulation 46(3) states that an action is appropriate only if:-

> "The nature and seriousness of the person's failure to comply with a condition is such that to protect the public it is necessary to cancel the authorisation, suspend it for the proposed period or vary it in the proposed way as the case may be."

11. Regulation 46 also explains the procedure which the regulator must follow. Written notice of the regulator's proposal, setting out the reasons for the decision and a summary of the evidence on which the regulator relies, must be given to the authorised person who, in turn, must be given a reasonable period in which to respond in writing.

12. As part of the investigation the regulator notified WFAC that it intended to conduct an audit of its business. WFAC responded by saying that it had decided to withdraw from the unenforceable credit agreement market altogether and to concentrate on PPI work. The audit did not take place. The regulator did ask WFAC to supply recordings of a number of sales conversations. Three such recordings, those relating to a Ms Kidd, a Ms Gooding, and a Mr Gemida were supplied. In consequence, on 25 June 2010 the

regulator wrote to WFAC indicating that he was minded to suspend their authorisation. WFAC exercised their statutory right to make a written submission to the regulator. Having considered that submission the regulator retreated from the proposal to suspend and instead, on 20 July 2010, gave notice to WFAC that he was minded to attach two conditions to their authorisation. One would prohibit them from charging an advance or "upfront" fee; the other required them to keep copies of call recordings for six months. WFAC again made submissions which caused the regulator to modify his position.

13. The condition in respect of call recordings was imposed with effect from 17 September 2010. That condition is no longer in dispute.

14. The regulator did not impose a condition prohibiting advance fees. Instead, he wrote to WFAC on 16 September with another proposal. He was minded to vary the authorisation by extending the period for which call recordings had to be kept from six months to twelve months. He also proposed prohibiting the transfer of live calls from Yes Loans group to WFAC. It was live transfers only that were targeted. Yes Loans employees would remain free to seek their client's permission for WFAC to contact them at some later stage concerning WFAC's services.

15. Further representations followed. As a result, in respect of call recordings, the regulator decided to accept an undertaking from WFAC that they would retain for twelve months recordings with consumers who subsequently raised a complaint. He proceeded, however, by letter dated 19 October 2010, to vary WFAC's authorisation to prohibit it from taking live consumer calls transferred from any other member of the Yes Loans group. It is against the imposition of this condition that WFAC now appeals to the Tribunal.

16. In the early stages of the hearing of the appeal, Ms Walker, who appeared for WFAC, flagged up the possibility that the process followed by the Regulator was tainted by illegality. At the close of the hearing she abandoned this point and was, in our judgment, right to do so. At first sight it may seem that Part 10 of the Regulations envisages a series of separate stages: investigation, finding of non-compliance, notice, written submission and then imposition of sanction. Reading the regulation as a whole, however, it is in our judgement wrong to regard these stages as being distinct and linear

in time. Of course there must be an investigation. There must also be a conclusion by the regulator that the authorised person has failed to comply with a condition. That conclusion must be clearly expressed by the regulator; it must be reasoned and include a summary of the evidence on which the regulator relies. However, at this stage there is nothing final about either the investigation or the conclusion. This is implicit in the written notice given to the authorised person. The regulator must remain open to submissions, not just about whether any sanction should be imposed, but about his conclusion that there has been a failure to comply. The regulator must also remain open to evidence from the authorised person about both the conclusion and the remedy. While this is going on, the role of the regulator continues. Just as he must be willing to look at new evidence from the authorised person, so he cannot and should not shut his eyes to any new material which might arise from other sources and be relevant to his final decision. In that sense, the investigation cannot be regarded as closed.

17. The first question we have to ask is whether WFAC had failed to comply with the statutory condition on its authorisation that it should comply with the 2007 rules. Ms Walker conceded at the outset that there had been breaches of Rule 11. In her closing remarks she referred also to what she termed the "candid evidence" of Mr Wilmot, a director of WFAC making significant concessions that the telephone calls with Mr Gameda and Mr Patel did not comply with the rules. She submitted that the main question before us was whether it was correct to impose the ban on live call transfers.

18. Nevertheless, it is necessary, in view of the statutory test we have to apply for the variation of a condition, for us to be a little more specific about the failures to comply which have been proved.

19. First, there have been systematic breaches of Rule 11 which required WFAC to provide clients with certain information, either in writing or electronically, before a contract was agreed. These breaches continued even after the regulator intervened. Mr Wilmot told us in evidence:-

> "We understood Rule 11 as meaning that we only had to provide the information, not a chance to read it. The distance selling rules apply."

This was simply not good enough and betrayed an intention to flout Rule 11.

20. We are also satisfied from the telephone recordings and the complaints which we have read that WFAC routinely engaged in high pressure selling contrary to Client Specific Rule 3. This conclusion rests on more than enthusiastic sales patter. It is based also on the context. Unusually for this kind of business, WFAC took fees upfront. Moreover, the nature of the product being sold was somewhat complex. For those customers, transferred from other members of the Yes Loans group, there was the risk (in some cases realised), of confusion as to the nature of the transaction and whether the loan the customer was applying for in the same call might be affected. These customers, referred to as being in the "sub prime market" were potentially vulnerable people caught at a vulnerable moment in their lives.

21. These findings, together with the summary, which we accept, supplied by Mr Kellar, who appeared for the regulator, and headed "Respondents references to illustrative evidence" also justify our conclusion that WFAC was in breach of client specific Rule 1(a),(b) and (c) as well as general rule 4. In connection with this last rule, which deals with training and competence, it is significant, as the regulator pointed out in his letter dated 25 June 2010 that although only three full sales call recordings had been transcribed, all were handled by different members of staff (six in total).

22. We turned to consider whether the regulator's variation was appropriate within Regulation 46(3).

23. For WFAC, Ms Walker pointed out that until May 2010 the main focus had been on work in respect of credit agreements. Once the business had switched to PPI work it was unfair to use material that may have related exclusively to the credit agreement work in the investigation. We were unable to accept this contention. On an investigation into the professional conduct of WFAC, activity in connection with consumer credit agreements was relevant even though they had withdrawn from that particular market.

24. Ms Walker urged on us that WFAC had worked very hard to meet the regulator's recommendations and requirements. Comprehensive proposals had been put before the

regulator and they should have been given an opportunity to work before imposing any condition. We have carefully read the correspondence from 2009. The impression it gives us is different, one much closer to the comment made in oral evidence by Mr Abernethy, who works for the regulator, who stated:-

> "This did not come out of the blue. From August 2009 we had been imploring them to abide by the rules."

We formed the view that the regulator's variation, aimed as it is at the more vulnerable clients, was the minimum necessary to protect the public, given the nature and seriousness of WFAC's failure to comply with the 2007 Rules.

25. In this assessment, we did not overlook Ms Walker's point on proportionality. She argued that an authorised person with a very large number of customers would naturally attract a higher number of complaints than a smaller business. On the other hand, as Mr Kellar correctly pointed out, large well run businesses have the resources to train and monitor their staff effectively and thus reduce the scope for confusion and complaint. We were satisfied from the totality of the evidence that the more detailed material relied on by the regulator was not unrepresentative.

26. For these reasons we dismissed the appeal.

Signed: NJ Warren, Chamber President Date: 20 July 2011

CA Chapman

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