

## REGULATORY INTELLIGENCE

## FCA calls vulture fund QC's use of its legal arguments against vulnerable customer "irresponsible"

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The UK Financial Conduct Authority (FCA) said a vulture fund QC's attempt to use of one of its cases as a precedent in a case against a vulnerable customer was "irresponsible".

London-based QC Jamie Riley, working on behalf of Cerberus Capital Management's Irish subsidiary Promontoria, attempted to use a recent development in [Financial Conduct Authority v Avacade Ltd](#), in which the court rejected a request made by two Avacade directors for a stay of proceedings due to stress-related illness.

The court found in June that the Avacade directors, whom the FCA accuses of carrying out regulated activities without authorisation and taking part in swindling £70 million in customer pension pots, had failed to provide enough evidence of diagnosis and prognosis.

On July 22 Riley presented the FCA v Avacade case to the Manchester Mercantile Court as an argument against Scott Simpson, a small-business owner diagnosed with clinical depression. Simpson had requested a six-month postponement of proceedings on ill-health grounds.

In an [email](#) to the judge, Riley argued the case was "comparable to the Avacade case and that the medical evidence submitted on behalf of Mr and Mrs Simpson is similarly insufficient to justify an adjournment of this trial".

The court rejected Riley's argument, because Simpson had submitted a full medical report to the court. Nor is the Avacade case "comparable" to Simpson's. Unlike the Avacade directors, Simpson is not charged with criminality. Cerberus' Promontoria has already bankrupted him and is now trying to recover a relatively small personal guarantee. In addition, Promontoria rejected Simpson's offer to settle out of court.

"While we have not followed the legal arguments used by counsel for Cerberus, we understand that the court rejected the link made to an unrelated case involving the FCA. It would be irresponsible of counsel to misuse our case," an FCA spokesman said.

Riley declined to comment. A Cerberus spokesman also declined to comment.

### Financial services firms must ensure their representatives treat customers fairly

The fair treatment of vulnerable customers is one of the FCA's flagship policy objectives, however the Simpson case and others demonstrate the challenges facing vulnerable clients in court and when dealing with financial services firms' legal representatives. It is a particular problem for small- and medium-sized enterprise (SME) customers because often their loans are not covered by UK consumer credit rules.

Andrew Bailey, FCA chief executive, has said, however, that very small SME customers can be considered vulnerable: "Those firms at the smallest end of the SME market may therefore not have easy access to legal or other professional advisors to assist them in making complex legal and financial decisions and can therefore be at a disadvantage, and potentially vulnerable, when dealing with large financial institutions."

Very small SME customers can get short shrift from firms' legal representatives, however, who may not be aware they have certain obligations toward vulnerable customers.

One Danske Bank customer wrote to the bank's lawyers, Belfast-based King & Gowdy, in 2013 to inform the law firm of their medical problems. Danske claims the King & Gowdy failed to pass on that letter. The bank started bankruptcy proceedings against the customer without considering their vulnerable status. That is prohibited by [FCA consumer credit rules](#) (chapter 7), but it is unclear whether an SME loan would be covered.

A Danske Bank spokesman declined to comment on that case, but said: "We can, however, confirm that the bank does expect its legal advisors to treat vulnerable customers fairly."

Stephen Gowdy, who acted for Danske at the time, did not respond to a request for comment.

The FCA's new [guidance consultation on the fair treatment of vulnerable customers](#) does not specify that banks should ensure agents such as debt collectors and lawyers follow their policies and procedures. The Senior Management Arrangements, Systems and Controls section of the FCA Handbook, however, explains at [SYSC 3.2.4 G](#): "A firm cannot contract out its regulatory obligations ... [and] should take reasonable care to supervise the discharge of outsourced functions by its contractor."



### **Bailey: CYBG should sort it out, whatever the regulatory framework**

At the FCA's annual public meeting, Bailey addressed a Clydesdale/Yorkshire Bank (CYBG) SME customer whose loan was also sold to Cerberus. John Guidi had been bankrupted by the U.S. firm, which is still pursuing him for a personal guarantee despite his ill health. His case is nearly identical to that of Simpson, who was also a CYBG customer before his loan was sold to Cerberus.

"I very much regret the situation here and I hope, as you remember, I did intervene on your behalf with Clydesdale because I recognise that your personal situation was such that there was no question that whatever the — to be honest with you — whatever the regulatory framework, you know, the bank needs to sort this out," Bailey [told Guidi](#), who had been on hunger strike to raise awareness of his case (pages 19-20).

Bailey told Guidi he believed his case ought to be heard through the planned Business Dispute Resolution Scheme (BDRS) along with those of other CYBG customers.

The FCA press office referred Thomson Reuters Regulatory Intelligence to Bailey's response to Guidi when asked whether Simpson's original lender bore any responsibility for his current situation.

A CYBG spokesman declined to comment.

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