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Mr Martin Popham

By post & email: martin@fsauklegalaction.com

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Your ref:

Dear Martin

Cameron Farley Action Group

It was a great pleasure to meet you again and the members of your committee at our Birmingham office on 29 July. I am writing to you to summarise our discussions.

Summary

1 Investors in Cameron Farley after April 2007 probably have a good claim against Gain Capital and the British Government for their losses. Further investigation is needed with specific reference to individual investors.

2 Investors should not attempt to make claims which are the responsibility of the liquidators of Cameron Farley Ltd.

3 Further investigations should be undertaken using a sample of between 10 and 20 "pathfinders", probably drawn from those with legal expenses insurance, or willing to pay a fee. We are happy to help with applications to insurers without charge at this stage.

Background

Cameron Farley Limited was a company run by Stephen Farley and his wife Fiona from an office in Edinburgh. His business model appeared to be to solicit investment through personal contacts. Since his business was entirely unauthorised (of which more below) it should have been impossible for him to solicit business through properly regulated independent financial advisers.

The proposition he put to his investors was called a “capital injection”. The terms of the one contract I have seen were that money was “injected” into Cameron Farley which promised an interest rate return of 9.25%. In addition he promised a profit share. There was a “letter of intent”, regarding profit share which suggests a share in the profit on the sale of Cameron Farley Limited.

None of the documentation which I have seen refers to foreign exchange trading. I understand however that Mr Farley was completely open about his intention to trade the capital advanced to him by investors on the foreign exchange market. I understand that he in fact did so through Gain Capital, a foreign exchange platform based in New Jersey but with a UK authorised subsidiary in London. In practice capital advanced by investors was pooled with that of other investors in Cameron Farley’s accounts with the Royal Bank of Scotland and/or Natwest. Those pooled funds were then gambled through Gain Capital’s platform on movements in the values of sterling, the euro and the United States dollar. I anticipate that further investigation will show that Mr Farley did not always tell the same story to his investors and those representations may have varied to some degree between individual investors.

The FSA undertook some investigation into Mr Farley’s business in June 2005 but I am not aware of what it was or how far it went. In April 2007 they “visited” (the word “raid” might be more appropriate) Cameron Farley’s premises in Edinburgh. From this it will have become apparent to the FSA what Mr Farley was doing. It should also have been apparent to the FSA that he was a dishonest man because, apart from anything else, he was making promises, implied or express, that his trading through Gain Capital was producing sufficient profits to sustain the 9.25% return. In fact we now know that he was using incoming investor’s money to pay the returns to the initial investors. In other words this was a Ponzi fraud.

There appears to have been an attempt by Mr Farley to get his business authorised under the Financial Services Markets Act 2000. My preliminary view is that such an attempt would never have succeeded. His business model necessarily involved borrowing capital and using it to cover derivative trading. This I do not believe to be permitted. There may well be other reasons why his business would never have been authorised, in particular I understand he had no qualifications for what he was doing, and had convictions for dishonesty.

In between the visit in April 2005 and the legal proceedings taken by the FSA in September 2008 Cameron Farley Limited continued to receive money from the public and to gamble it through Gain Capital. The FSA’s attempts to stop him were sporadic and ineffectual. In particular the e-mail exchanges that I have seen between Mr Farley and Rachael Selby (also Hallett) seem to disclose that the FSA never asked him to stop taking money from the public, and never took effective steps to secure the client balances.

In the period between April 2007 and September 2008 a number of members of your group made investments into Cameron Farley after having spoken to the FSA. No doubt each of them will have a slightly different account of what the FSA said but the impression I have from my discussions with you and your committee members is that most of them were not given warnings that they risked losing their money and should definitely not make the investment.

On the making of the injunction (I believe in Scotland called an interdict) in September 2008, Mr Farley apparently continued to trade through Gain Capital so that the money standing to the credit of Cameron Farley Limited in the United States (some $17.5m) was lost in a few days.

Cameron Farley Limited is in liquidation and two partners in Grant Thornton are appointed as liquidators. Preliminary reports indicate that there will be a shortfall.

Naturally the members of your group are looking for redress to make up their losses. My preliminary views on their prospects of doing so are these.

Grant Thornton

Grant Thornton as liquidators have significant powers to investigate the affairs of Cameron Farley which creditors individually do not have. They also have a reputation as tough liquidators. This suggests that they will go to considerable lengths to do their very best for creditors.

However, members of your group should bear in mind the limitations to what they can do. They stand in the shoes of the company and seek to recover assets of the company. This is likely to include cash at the bank and with Gain Capital. This sometimes includes the recovery of payments wrongly made shortly before liquidation. A liquidator has considerable powers to go back and undo transactions. I would expect Grant Thornton to be looking very carefully at the trades through Gain Capital immediately following the order in the Scottish proceedings.

Grant Thornton cannot pursue matters for individual creditors as such.

For this reason I believe that your group should look at claims that members can make which lie outside the scope of what Grant Thornton can do, in other words claims in respect of duties owed directly to investors.

Stephen Farley

Plainly a crook[1], this man has a personal liability at least for representations he made to investors to get them to invest. They were almost certainly false in every case, since, if the truth had been told, nobody would have invested. Like other fraudsters, he doubtless presents well and may well still appear plausible. His liabilities will almost certainly exceed his assets, and so he is probably not worth pursuing. Insolvent, he may become formally bankrupt.

Other advisers

It seems unlikely that any investor invested on the advice of an authorised financial adviser or other professional, like an accountant, bank official or solicitor. But if any did, they should consider a claim. Depending on the circumstances and amount, such a claim could be brought via either the Financial Ombudsman Service or the courts. We are happy to advise. Claims like these are the bedrock of our everyday practice. This could be an easy route to redress in some individual cases. Such claims would not, however, be suitable for group proceedings unless one particular adviser advised many investors.

Gain Capital

It is very unlikely that Gain Capital did not know what Cameron Farley was up to. We need to investigate the regulatory regime to which was subject in the United States and learn as much as we can about the relationship between Stephen Farley and Gain Capital. Based on what is available to

[1] Apart from anything else, it is an offence to carry on a regulated activity (which this was) when not authorised, punishable with up to 2 years' imprisonment under S.23 of the Financial Services and Markets Act 2000.

me at the moment, it seems to me that Gain Capital is probably liable to each individual investor for the money lost through Cameron Farley's trading through Gain Capital. Whether proceedings should be taken against Gain Capital in the United States or here in England, and whether the relevant law to be applied is that of New Jersey, New York or England is a matter yet to be considered. I am confident Gain Capital has a liability in respect of money that has passed through its accounts. I would not expect it to have a liability in respect of money which did not reach it i.e. which was diverted by Stephen Farley and used to pay investors their "returns".

Royal Bank of Scotland/Natwest

It is possible that the Royal Bank of Scotland/Natwest is liable to investors as well as to Cameron Farley Limited. I have not looked at this in any great detail, as I would expect Grant Thornton to take the lead here. I intend to review this position in due course.

FSA/British Government

Investors' anger is largely directed at the FSA who seem to have known what Stephen Farley was doing and failed both to stop him and to warn investors, even those who specifically enquired about investments it knew were unlawful for Cameron Farley to have accepted.

There is a second justified cause for anger in that the $17.5m which should have been secured in the same way as the balances at the bank in Scotland were. To me this looks just sloppy and it falls well below what one would normally expect from litigation of this kind involving sums of this order.

The FSA as such has a statutory immunity from liability. Whilst I would wish to look at the matter more carefully, my preliminary view is that the FSA is free from legal liability. I note however that some investors have put in formal complaints to the FSA complaints procedure. This may yield redress. My experience so far is that voluntary schemes of this kind very seldom prove satisfactory.

As to the British Government, I believe that it is liable for the FSA's failings and it has no statutory immunity. Under various European directives, the most recent of which has been the Markets in Financial Instruments Directive (MiFID) the British Government is required to take measures to protect investors from unauthorised financial businesses such as Cameron Farley Limited. There was, certainly from November 2007 and possibly before that, a positive obligation on the British Government to stop infringements that it knows about.

It is a feature of European law (to which of course British law is subject) that in certain circumstances an individual may claim against a state for failing to properly implement a European directive designed to confer rights on private citizens. My preliminary view is that all the conditions for such liability by the British Government are present.

Recoverable loss

I must now consider how losses are to be assessed. As I take the view that Cameron Farley should never have been in business I believe losses should be assessed on a "no transaction" basis. This means that each individual investor's position will be considered against the alternative transaction that he or she would have undertaken absent the Cameron Farley investment. This is a very individual question. It is impossible to devise a “one size fits all” alternative to the Cameron Farley deposit. It is difficult not to conclude that investors in Cameron Farley had a risk appetite, although their risk was tempered by the Cameron Farley promise of a minimum 9.25% pa return.

Perhaps the best “broad brush” approach to the alternative transaction is to consider the source of the money invested before it was put into Cameron Farley and use that as a comparator for the time being. So, for example, if the money was in a building society account, use that account as the alternative. Credit against the loss assessed on this basis will have to be given for receipts from the liquidation via Grant Thornton.

Limitation

I must mention that legal proceedings in England are subject to a 6 year limitation period, that is to say, you only have 6 years from the transaction complained of in which to sue. The rules are quite complicated but in practice, in cases like this, time starts to run 6 years from the date of the transaction.

I anticipate that very few investors who invested before April 2007 will have suffered much of a loss. This was certainly the view of you and your committee when we met on 29 July. If there are investors reading this letter, however, who invested 4 or 5 years ago, and who suffered a loss, they ought to consider their position and not allow time to run out.

The way forward

Of course any individual investor can make a claim in his or her own right. My team has acted for many private clients with claims in the field of financial services. However, victims of financial scandals often like to band together. I anticipate that many of Cameron Farley’s investors want to share their experiences and burdens with others.

We have acted for groups of investors, so far always Equitable Life investors. These have been organised in one of two ways. The first way is the “managed list” whereby individual investors consult us individually and without reference to each other, but we corral them into a single list which is placed in front of a single judge. The second is a group action conducted as a group.

A managed list involves cases being managed individually but all at the same time and in front of the same judge. Some costs are shared and the single judge dealing with the matter gains a very good understanding of what each case is about because he is informed, not just by the one case, but by the many. The client stays in control of his own case.

In a group action the claim is managed on behalf of the entire group by someone else. In our Equitable annuitants’ case we had somewhat over 400 clients who banded together under the umbrella of a single limited company of which they were all members. They confided the management of the cases and the division of the damages at the end of the case to that company. In that case we had an individual relationship with each client but we took our instructions from the board of directors. It was, in effect, a co-operative.

There are other variations on managing collective litigation but the two just mentioned are those of which I have experience. In both cases the systems ran very well.

At our meeting on 29 July you and your committee wisely decided that they would leave questions about the shape of the action group and the way it should interact with individual members and their individual claims until the shape of the claims had been better defined than it is at the moment.

Assuming, however, for the purposes of this letter that your members decide in one way or another to band together to share costs and evidence, and indeed to have the comfort of not being alone, a collective endeavour will have some or all of the following features.

Sharing of information and evidence

Normally each client's affairs are confidential to the solicitor and client except so far as needs to be disclosed under the rules of procedure. When people get together to litigate part of the advantage is that they share each other's experiences. For example, in this case, if one member says that he rang the FSA and was given no warnings about Cameron Farley, he or she might not be believed. However if several all have the same story then individual investors are more likely to be believed. So it will help if individual investors allow us to use evidence from one set of papers to help other clients. This needs to be expressly agreed so that we are liberated from the normal ties of confidentiality as between solicitors and clients.

Pooling of claims management

A problem with groups of parties litigating is that there can be fragmentation i.e. if Mr A takes fright and settles for a needlessly low sum this has an impact on Mr B who has more courage. As cases settle the burden of costs on those remaining increases. If members agree to pool management of the cases that problem goes away and they approach the defendants as a solid unified block. Defence attempts to intimidate individuals (which often happen) become ineffectual.

Distribution of damages

Remember that most civil litigation in this country settles by agreement rather than determined by a judge at trial. If parties litigate as a group it may well be that a settlement is achieved for the group as a whole. A defendant may prefer to settle by paying a lump sum than have an individual assessment of each client's loss. It is not necessary in group litigation for there to be this sort of arrangement but if it is in place it makes it easier to do a deal.

Sharing costs

Running cases as a group dramatically reduces the costs. Although we nearly always conduct these cases on a conditional fee i.e. a no win no fee agreement there are always additional costs which need to be found as the case goes along

Funding a case

Private clients are always worried about fees and costs. Practically all of our work is for private clients who fund their cases either through legal expenses insurance or by a conditional fee agreement (i.e. a no win no fee) with us or a combination of the two. Those clients who are worried about the risk of being ordered to pay a successful defendant's costs can normally be found insurance against that risk on affordable terms but this cannot be guaranteed. In short we are usually able to put together a package which meets most people's anxieties about fees and costs.

It is too early for us to say if we would offer conditional fee agreements to any of your members. We do not have enough certainty about how the cases are to be progressed and against whom. I anticipate however that the steps I propose below will lead us to that point. For the time being I confirm that none of your members has any obligation to us for any fees for the work we are putting in at the moment.

Next steps

I need to have details of individual investors, their personal stories, all their documentation etc. in order to be able to start on an investigation of the losses and who is to be liable for them. In the first instance I think there should be a group of investors who are representative of the group, but a sufficiently small number to be easily handled within our existing resources. I have in mind about 10-20 files.

I propose to call this group the "pathfinder" group. These should be selected by you and me from your members who want legal advice on their situation, and who are willing to pay for it or who have legal expenses insurers who are willing to do so. There is also the possibility of legal aid for those of your members who are completely destitute.[2] I suggest you should invite your members to submit questionnaires to you, with sufficient details for us to pick the pathfinders.

Once we have these files we will study them and almost certainly discuss the individual facts with the individual members. We shall have the normal duties of a solicitor to a client. We will submit claims to any legal expenses insurers on their behalf and, if possible, apply for legal aid for any members financially eligible. All this will be undertaken without charge in the first instance although if the matter goes forward, and we are ultimately successful in recovering damages, we would expect that preliminary work to be taken into account in our final bill.

I anticipate that for this preliminary pathfinder group we will ultimately get counsel's opinion on the prospects of recovery. Once that is known we will be in a position to come back to the group with more concrete proposals. You can then consider in greater detail how the balance of your members would like their proceedings to be organised and funded.

I suggest we look first at those members of your group who have possible legal expenses cover and consider their papers and submit claims to the insurer where this has not been done already.

I hope that you have found this helpful and I look forward to hearing from your members, through you, in due course.

Yours sincerely

[2] We no longer have a legal aid franchise but preliminary enquiries have suggested that if we have one or more clients as part of this pathfinder group who are eligible for legal aid then it is possible we will be granted access to legal aid funds for this purpose.

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