

Final Report

Complaint No FCA 00824/RSB 001

My Position as Independent Investigator

1. Under the provisions of the Complaints Scheme (Complaints against the Regulators: the Scheme), the Regulators, having been informed of a conflict of interest on the part of the Complaints Commissioner (Amerdeep Somal), requested the President of the Law Society to nominate a Solicitor to carry out the functions conferred on the Commissioner by the Scheme in relation to this complaint. I was so nominated by the President and my nomination having been approved by the Treasury, it now falls to me to carry out the functions conferred on the Complaints Commissioner by the Complaint Scheme in relation to this complaint. In so doing I have adopted the methodology of the Complaints Commissioner, although she has had no involvement in investigating this complaint.

The Complaint

2. You wrote to the Office of the Financial Regulators Complaints Commissioner (the OFRCC) on 20 November 2020 to complain that you were dissatisfied with the Financial Conduct Authority's (FCA) decision dated 25 September 2020 (the FCA's Decision) in connection with your complaint to the FCA dated 20 March 2020 (the FCA Complaint) about the manner in which the FCA had exercised its functions in relation to alternative dispute resolution services and failings in the FCA's exercise of those functions. The OFRCC passed your complaint to me on 29 October 2021.

What the FCA Complaint was about

3. The FCA summarised the FCA Complaint as follows:

“..you are unhappy with the FCA's approval of the Financial Ombudsman Service (‘the Ombudsman’). The FCA approved the Ombudsman as an ‘ADR entity’ under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (‘ADR Regulations’) in July 2015. Your view is that the approval was unlawful because you say that the Ombudsman has not (nor has it ever) met the quality requirements, particularly those relating to fairness and transparency. Further, you say that the FCA has not discharged its responsibility under the ADR Regulations to review whether the Ombudsman still meets the requirements in Schedule 3 of the ADR Regulations. In the event that the Ombudsman does not meet the requirements, you would like the FCA to remove its approval.”

and more specifically:

“You think that the FCA's approval was not in accordance with the requirement in regulation 9(4), which provides that an ADR entity may only be approved if the FCA (acting as a ‘competent authority’) is satisfied that the requirements in Schedule 3 to the

ADR Regulations have been met by the Ombudsman (or will be met within a reasonable period after the application is granted).

In your view, the transparency requirement in paragraph 5(n) of Schedule 3 and two fairness requirements in paragraph 8(c) and (d) have not been met by the Ombudsman at the relevant time and therefore the FCA should not have originally approved the Ombudsman as an ADR entity nor should the FCA have allowed the Ombudsman to retain its ADR status following a review of the Ombudsman's compliance with the requirements in Schedule 3."

What the Regulator Decided

4. The FCA decided that it would not investigate the FCA Complaint under the Complaints Scheme because it would be more appropriately dealt with by a court given the complex questions of law that it raised and the likelihood of there being competing reasonable legal interpretations of the scope and content of the various requirements that were the subject of your complaint. In this regard, the FCA noted that paragraph 3.6 of the Scheme explains that the FCA will not investigate a complaint which it reasonably considers could have been, or would be, more appropriately dealt with in another way.
5. The FCA also apologised for its delay in considering the FCA Complaint and offered you an ex- gratia payment of £75.

What the complaint is about

6. In your email to the OFRCC dated 20 November 2020, you said that you were dissatisfied with the FCA Decision and enclosed a document detailing the complaint together with supporting documents. In your complaint document, you raised 4 allegations:

Allegation 1- Dissatisfaction with the FCA's discharge of its functions in relation to the Financial Ombudsman Service (the FOS)

This is in essence the same complaint as the FCA Complaint under Stage 1 of the Scheme. The background is that you allege that at the provisional assessment stage of the FOS's attempt to resolve a complaint that one of you was handling for the other two complainants (who are the first complainant's parents) in 2017, the FOS failed effectively to discharge its legal duties to disclose the legal effect of the stage 1 dispute process with the result that your family lost property worth thousands of pounds. You allege that the FOS's dispute resolution procedures do not comply with certain requirements of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (the ADR Regulations). In particular, you claim that key information about the FOS's dispute resolution procedures is not available on the FOS's website, some information on the website is inaccurate and that the FOS does not comply with the fairness provisions of the ADR Regulations because the parties to the FOS's dispute resolution procedures are not correctly informed of the legal effect of agreeing to a stage 1 outcome. You make clear that you do not seek to challenge in this complaint the FOS or the FCA's public law ADR approval decisions which you describe as the FCA's grant of approval in July 2015 and reapproval in September 2017 and December 2019. Instead, you say that the failings of the FOS about which you complain establish the total regulatory failure by the FCA to discharge relevant functions.

Allegation 2- Failure by FCA staff to record a virtual meeting

This head of complaint arises out of events following the FCA Complaint which resulted in the FCA Decision. In essence you complain that the FCA's conduct in relation to a confidential without prejudice meeting to discuss the FCA Complaint fell below professional standards because the facility to record the virtual meeting was not switched on.

Allegation 3-FOIA Request Handling

This head of complaint was not included the FCA Complaint. In essence, you are dissatisfied that the FCA took longer than suggested guideline limits published by the Information Commissioner's Office to make decisions in response to your FOIA requests to the FCA.

Allegation 4 -Complaint Scheme Handling

This head of complaint arises from the FCA's handling of your FCA Complaint. You say that the FCA's handling of that caused unreasonable delays and lacked integrity when looked at it in context and taking account of your previous correspondence with the FCA. You refer to an email dated 11 September 2020 that you sent to the OFRCC for the background to this allegation.

Preliminary Points

7. The actions and inactions of the FOS fall outside the scope of this Complaints Scheme which is concerned with the actions and inactions of the FCA and other financial regulators. As I understand it, you are not seeking by your complaint to challenge directly or collaterally the FOS, rather your Allegation 1 relates to the performance by the FCA of its functions relating to the FOS.
8. My role is not to make legal findings. I am, of course, informed by the legal provisions, and this report comments on the legal arguments which you have made but I do not purport to rule on them.
9. I note that you explained in your draft judicial review challenge included in the FCA Complaint that you are both a direct and an indirect victim of alleged failings of the FCA in its discharge of its functions in relation to the dispute resolution sourcebook (DISP) and its oversight of the FOS. You are aggrieved because your complaint to the FOS was settled under the informal FOS stage 1 procedure. It was not appreciated by you at that time that the solution proposed by the FOS was binding and your attempt to challenge the settlement in the court was unsuccessful. This has led you to conduct a detailed analysis of the ADR Regulations and the consumer protection functions of the FCA in relation to the ADR Regulations.

My Analysis

Allegation 1

Jurisdiction

10. I start by setting out my understanding of the jurisdiction of the Complaints Scheme.

11. Section 84(1) of the Financial Services Act 2012 requires the FCA to make arrangements for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of the FCA's relevant functions.

12. Section 85 defines the "relevant functions" of the FCA as being

(a) Its functions conferred by or under the Financial Services and Markets Act 2000 (FSMA) other than its legislative functions, and

(b) such other functions as the Treasury may by order provide.

The list under Section 85 does not expressly include the FCA's functions under the ADR Regulations and it does not seem to me that the functions of the FCA contained in the ADR Regulations are within the statutory remit of the Scheme. Further, I do not think there is any question of there being a statutory instrument under Section 85 specifying the particular functions of the FCA about which you make complaint. However, the legislative functions of the FCA (which are excluded from the Scheme) are listed in Section 85 (4) as including the making of Rules under FSMA 2000.

13. As I have noted above, the FCA's functions under the ADR Regulations are not within the Scheme. By way of example, the FCA's function under the ADR Regulations to assess the application of the FOS to become an ADR entity is only found in the ADR Regulations. However, some of the FCA's functions under the ADR Regulations overlap with the FCA's functions under the FSMA so, in that respect, could be within the Scheme. One example of this is the function of the FCA under Section 227 of FSMA to approve the FOS's voluntary jurisdiction rules. This appears to overlap with the provision in Regulation 12 of the ADR Regulations that the FCA must be satisfied that the requirements relating to the FOS' dispute resolution procedures set out in Schedule 3 are still met and the requirement under paragraph 14 (7) of Schedule 17 FSMA that the consent of the FCA is required before any scheme rules may be made.

14. Applying the above analysis, I am not satisfied that the FSA's function of initially approving the FOS as an ADR entity under the ADR Regulations is within the scope of the Scheme. I note that the FCA's Complaints team notified you in their email of 6 April 2020 that this part of your complaint was not eligible to be dealt with in the Scheme and you appear to concede this in your statement that you do not seek to challenge the "FCA public law approval decisions" which you say includes the FCA's decisions to re-approve the FOS. I find it more difficult to determine whether the other matters which you identify as examples of evidence of failures by the FCA in the discharge of relevant functions are in fact within the scope of the Scheme. The examples you cite are allegations that the FOS's dispute resolution procedures do not meet the requirements of the ADR Regulations and/or the ADR Directive, either in respect of their terms or their transparency. In my view these examples require detailed legal analysis of the particular functions in respect of which the FCA is alleged to have fallen short and their statutory basis (ie whether they are functions under FSMA or under the ADR Regulations or both, and, if under FSMA, whether they are legislative functions). For reasons which I will explain, I am not minded to embark on that detailed analysis under the Scheme.

Is the Complaints Scheme the appropriate means to consider the issues relating to the FCA's oversight of the FOS?

15. I have summarised above the basis upon which the FCA decided not to investigate the FCA Complaint. In short, the FCA thought it would be more appropriate for it to be dealt with by a court. I note that when putting together the FCA Complaint you prepared it as a letter before action in relation to an intended judicial review of the FCA. It therefore appears that you also had in mind that an application for judicial review was the most appropriate route for resolving the issues raised by Allegation 1, albeit that your intention at that time appears to have been to pursue the FCA Complaint in parallel with an application for judicial review.
16. I am mindful of the fact that because you filed an application for judicial review, the FCA took the position that your complaint about the FCA's ongoing approval and oversight of the FOS was excluded from the Scheme but offered to reconsider the matter if, as indeed happened, you agreed not to pursue the court proceedings. I recognise that having terminated the court proceedings in the expectation that your FCA Complaint would be considered by the FCA's Complaints Team, you will have found it frustrating to be told that the FCA decided not to investigate your complaint because it is more appropriate that it be investigated by a court. I have no reason to think that this turn of events is anything other than the result of the staged approach taken by the FCA Complaints Team of deciding, firstly, whether to look at a complaint which is the subject of active Judicial Review proceedings, and then, having made the decision not to look at the complaint unless the proceedings were withdrawn, looking at the complaint more closely in the context of Scheme.
17. I note that in your complaint you do not address the FCA's argument that Allegation 1 is more appropriately dealt with by a court than within the Scheme. Having carefully considered all the detailed submissions and arguments in the FCA Complaint and your complaint (together with the 279 pages of material submitted with your complaint), I agree with the FCA Decision that court proceedings would have been a more appropriate route to take. My reasons for this are as follows:
- This complaint raises issues that potentially impact a large number of consumers who use the FOS's dispute resolution procedures. The issues include significant questions of legal interpretation and questions about where the balance lies between the FCA's oversight functions in respect of the FOS and the FOS's independence from the FCA.
- The complaint seeks to engage laws of broader public importance beyond FSMA such as the Enterprise Act. Further the FCA Complaint asserted that the FCA were acting illegally, and that their approval of the ADR Regulations was ultra vires and an interference with your rights under the European Convention on Human Rights. This Complaints Scheme cannot make legal findings. I cannot, therefore, rule on whether or not the FCA's practices are lawful.
- In my view your Complaint raises complex issues of law and fact that are not suited to a Complaints Scheme of this nature. Court procedures are far better suited to investigating and determining the factual matrix underlying such issues and can decide issues of law and interpret statutes after submissions from skilled advocates.
18. I note that the FCA's Decision informed you that the FCA has been holding discussions with the FOS about your concerns and will continue to keep them under review. I hope

that through this assurance you will feel that your concerns are being addressed even if you are disinclined to embark on litigation.

Allegation 2

19. My understanding is that this allegation has been referred to me without first having been referred to the FCA Complaints Team under stage 1 of the Scheme. I am not therefore aware of how the FCA would respond to this complaint. I have considered in accordance with paragraph 6.12 of the Scheme whether it would be desirable to allow the FCA the opportunity of conducting its own investigation. My view is that this allegation should be pursued as a complaint with the FCA in the first instance because I am not aware of its response to the allegation that professional standards require that virtual meetings be recorded or whether the fact that there was no recording was due to the exercise of a discretion or an omission.

Allegation 3

20. I was not able to identify in the bundle you submitted with your complaint the communications relating to FCA FOI references 7051 and 7104 that are the subject of this allegation. Accordingly, I have not been able to establish the dates of those requests or the timing of FCA's responses. In any event, this allegation does not appear to have been referred to the FCA's Complaints Team. However, I expect that if it were so referred the FCA, will relying on paragraph 3.6 and say it would be more appropriate for it to be referred to the Information Commissioner. It is clear to me that this would be the more appropriate course for you to pursue your complaint. I am not therefore minded to investigate this allegation.

Allegation 4

21. You raise two separate issues:(i) delay, and (ii) lack of integrity, in the handling of the FCA Complaint. The FCA took from 20 March 2020 until 25 September 2020 to decide your complaint under stage 1 of the Scheme and offered you an ex-gratia payment of £75 for the delay. I understand that the amount offered is line with amounts offered to other complainants for delays of similar periods under stage 1 of the Scheme. Whilst I recognise that the time taken to deal with your complaint under stage 1 caused you annoyance, I am not aware of your having suffered any exceptional distress or inconvenience due to the delay. I therefore consider the FCA's offer of £75 to be reasonable and will recommend to the FCA that it be repeated if it was not accepted by you within the deadline set by the FCA.

22. On the issue of the FCA's integrity in handling your complaint I have already commented in paragraph 16 above that I have no reason to conclude that the approach that the FCA's Complaints team took was anything other than a result of the steps in decision making to be followed under stage 1 of the Scheme. I have considered in accordance with paragraph 6.12 of the Scheme whether it would be desirable to allow the FCA the opportunity of conducting its own investigation. I have not seen any information on which I could uphold your complaint that the FCA's Complaints Team lacked integrity in their dealings with you but my view is that this allegation should be pursued as a complaint with the FCA in the first instance

Conclusion

My conclusions are as follows:

- a. Some of issues raised in Allegation 1 of your complaint potentially fall within the Scheme;
- b. Allegation 1 and Allegation 3 should not be investigated under the Scheme, since they could have been, or would be, more appropriately dealt with by the Courts in the case of Allegation 1 and the Information Commissioner in the case of Allegation 3;
- c. You should pursue Allegation 2 of your complaint under stage 1 of the Scheme;
- d. The FCA's offer of an ex-gratia payment of £75 in respect of the delay complained about in Allegation 4 is appropriate and the FCA have confirmed that it is still available to you should you wish to accept it. Your claim of a lack of integrity by the FCA in its handling of the FCA complaint should be pursued under stage 1 of the Scheme.

I appreciate that you have waited a long time for this decision and that it will not resolve the dissatisfaction you have felt at the manner in which the FCA have exercised the oversight of the FOS. I hope that you take some comfort from the FCA's statement that they have been in discussions about improving the clarity of certain information on the FOS's website.

Roger S M Best

22 December 2021