

Final Report by Roger Best

Complaint No FCA 206401476/002

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 Complaints 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 to the FCA

2. You wrote to the Financial Regulators Complaints Commissioner (the Complaints Commissioner) on 7 October 2020 to complain about the Financial Conduct Authority's (FCA) decision dated 17 July 2020 (the Decision Letter) in connection with your complaint to the FCA dated 12 January 2020 about the FCA's oversight of the Financial Ombudsman Service (the FOS). Your communication of 12 January 2020 was supplemented by you on 3 March 2020 by an email to the FCA Complaints Team requesting that the details of an email of the same date to the Independent Assessor of the FOS be added to your complaint to the FCA of 12 January 2020 (I shall refer to these two communications together as the "FCA Complaint"). The Office of the Financial Regulators Complaints Commissioner (OFRCC) passed your complaint to me on 29 October 2021.

What the FCA Complaint was about

3. In the Decision Letter, the FCA summarised the FCA Complaint as follows:

“..You believe that there are systemic failings in the FCA's oversight of the Ombudsman, which you say is resulting in biased and unfair decisions by the Ombudsman because it is not adhering to the FCA's rules including the Consumer

Credit sourcebook ('the CONC rules') and in particular the Dispute resolution: Complaints sourcebook ('the DISP rules'). Your specific allegations are summarised below.

Part One

You state that the Ombudsman has refused to respond to your right to rectification requests under Art.16 of the General Data Protection Regulation (GDPR). You state that the Ombudsman has not provided you with a reason for not correcting the inaccurate information it holds which was used as the basis of its decision making in your complaint. As such, you say the Ombudsman's decision on your complaint is incorrect because it is based on inaccurate information. You also state that under the FCA's oversight, the Ombudsman has fallen short of adhering to its guiding principle of fairness as stated in the document - Our Strategic plans for 2019/2020.

Part Two

You state that the 2018 / 2019 Annual report and accounts, reveals the Ombudsman's bias towards businesses because of the variance in the customer satisfaction targets and the business satisfaction targets. Your view is that this variance shows bias, and given the FCA's oversight role and aims to protect consumers, you consider the FCA's acceptance of this variance as a sign of bias and failure in its oversight role. You query why the FCA is satisfied that the satisfaction levels at the Ombudsman are generally low and, in particular, why the customer satisfaction is of significantly less importance than the business satisfaction. You believe this to be clear evidence of institutional bias which is incompatible with the objectives of the FCA and the Ombudsman.

Part Three

You state that the Ombudsman is contravening the FCA Handbook rules by making decisions on what is 'fair and reasonable' without taking into account 'the relevant law and regulations, regulators' rules, guidance, and standards, and codes of practice as it is required to do'. You say this is apparent from reviewing the final decisions on the ombudsman's decisions website. In relation to your individual complaint, this included the Ombudsman refusing to refer to the law or any industry guideline, but also to the CONC and DISP rules. In addition, you say that the

Ombudsman, in matters relating to your complaint, failed to comply with its own published guidelines

Part Four

You state that the FCA has failed in its oversight role by not ensuring that the Ombudsman adheres to the terms and agreements as stated in the Memorandum of Understanding ('MoU') between the FCA and the Ombudsman. You state that there appear to be significant failings in the requirement to share information between the various agencies (the FCA, the Ombudsman, the LSB [Lending Standards Board] and the ICO [Information Commissioner's Office]) in accordance with the memoranda of understanding between these organisations. The FCA's oversight role of the Ombudsman should require thorough compliance with the terms of agreement in all MoUs. In relation to your complaint, you state that your bank has 'unlawfully' failed to correct information under Art.16 GDPR and the Ombudsman should have advised the FCA of this failing given its obligation to highlight its concerns about a firm's behaviour. The actions of the bank should have led the Ombudsman to share this information with the ICO and the LSB in accordance with the MoU agreements. Further, in relation to your complaint, the bank failed to follow the CONC rules and the Ombudsman failed to enforce or even acknowledge this.

Part Five

You state that the Ombudsman, in failing to properly respond to GDPR requests, shows that it does not meet the quality requirements necessary to be considered an Alternative Dispute Resolution entity ('ADR'). The FCA in its oversight role has failed to ensure that the Ombudsman adheres to the ADR requirements.

Part Six

On 3 March 2020 when you emailed the FCA Complaints Team stating that since raising your complaint with the FCA, you had discovered that the office of the Chief Ombudsman and CEO of the Ombudsman, have willfully [sic] misled you with regard to the actions taken by the Ombudsman assigned to your complaint. You say that the office of the Chief Ombudsman informed you that, "*the Ombudsman has reiterated that the information provided then, as well as the attachments you sent alongside your letters to [*****], do not change the outcome of your case in any way*". You say that the Ombudsman (who had conduct of your case) has

confirmed that he has not communicated with anyone in any way in the office of the Chief Ombudsman about this. You have raised this complaint with the Independent Assessor.”

What the Regulator Decided

4. By its letter of 17 July 2020, the FCA Complaints Team notified you that it had decided that Part Four and Part Five of your FCA Complaint were outside the scope of the Complaints Scheme and that Part Two and Part Six were excluded from the Complaints Scheme. Part One and Part Three of your FCA Complaint were dismissed.

Why you are unhappy with the regulator’s decision

5. In your email to the Complaints Commissioner of 7 October 2020 you said your complaint to the Commissioner was in three parts:
 - a. The FCA took too long to investigate the FCA Complaint because it did not provide a complete response for more than 7 months (I will call this the Delay Complaint).
 - b. The FCA has not properly or adequately investigated the FCA Complaint and failing to do so has meant that it has not fulfilled its oversight obligations with regard to the FOS (I will call this the Investigation Complaint). You identified what you regard as errors and omissions in the “Background” section of the Decision Letter and made points on the FCA Complaints Team’s decisions in Part One, Part Three, Part Four and Part Five of the Decision Letter but did not make any points on the decisions on Part Two or Part Six.
 - c. The FCA had failed in its oversight of the FOS because the FCA had been aware from your email of 3 March 2020, to which I have referred in paragraph 2 above, that you had made a complaint to the Independent Assessor of the FOS, yet the Independent Assessor had refused to investigate the complaint you had made to her (I will call this the Independent Assessor Oversight Complaint). You described your complaint to the FOS’s Independent Assessor in your email to the FCA dated 3 March 2020 as a complaint about:
 - (i) the way the FOS had handled two complaints that you had made to the FOS about your bank, (ii) the FOS’s compliance with data protection and privacy laws, and (iii) statements made to you by the FOS in correspondence relating to the outcome of one of your complaints to the FOS.

6. You also drew my attention to:
 - a. An email you sent the Complaints Commissioner on 17 December 2020 asking that your complaint is considered in the context of your understanding that your former bank was under investigation by the FCA for failures in their collections and recoveries department; and,
 - b. An email that you sent the FCA Complaints Team on 6 May 2021 giving notice of the fact that you had raised a further complaint with your former bank on 22 March 2021 and referring to a number of published decisions of the FOS relating to the applications of defaults by your former bank which you asked be considered in the context of regulatory action against your former bank.
7. I have also seen your email to the FCA dated 25 August 2021 that you asked be considered by the solicitor appointed to consider your complaint.
8. On 18 January 2022 you wrote to me to reiterate the impact of the conduct of your former bank, the FOS and its independent assessor, and, most recently, the FCA, have had on your financial and personal wellbeing. You also asked whether I had any information about any ongoing investigation of your former bank's recoveries and loan department and reminded me of your request that I include this in my consideration of your complaint. You also asked for confirmation that I would review and comment upon your former bank's compliance with important data protection laws and their membership requirements of the Lending Standards Board (LSB)
9. The remedy you are seeking is the exercise by the FCA of its oversight responsibilities over the FOS by (a) requiring the FOS to (i) provide a proper response to your request for rectification under Article 16 of General Data Protection Regulation (GPDR) and (ii) revisit your complaint to the FOS (which I understand to be a reference to your first complaint to the FOS against your former bank), (b) ensuring the FOS (i) reports to the Information Commissioner the bank which you requested to rectify your personal data and (ii) acts in accordance with its MoU with the LSB. You also seek a compensatory payment for the delay in dealing with your FCA Complaint.

Background

10. You have explained that you believe that your bank acted unfairly to you more than six years ago when your account was in arrears by sending you inaccurate and

misleading correspondence and registering a default against you after failing to agree a repayment plan. You believe that this action by your bank was a direct consequence of its failure to follow the CONC rules. This led you to refer two complaints against your former bank to the FOS for resolution. The first of those complaints was not upheld and the second was dismissed under DISP rule 3.3.4 without considering its merits.

11. You have also explained that you made a “complaint and request for rectification under the GPDR, to the CEO and Chief Ombudsman of the FOS on 23 October 2019” and that “The FOS have failed to respond to right to rectification requests under article 16 of the [GPDR]”.
12. In relation to the Independent Assessor Oversight Complaint, you said in your email to the Complaints Commissioner dated 7 October 2020, that the Independent Assessor’s “response referred to my original complaint and not my new, and very serious, complaint about impropriety and malfeasance. The response stated ‘Further, [The Independent Assessor] cannot consider any addition [sic] concerns if they are raised more than three months after the Service has provided an answer on a case. This is a policy decision so it does not fall within the [Independent Assessor’s] remit, as [they] cannot comment on any of the Service’s wider processes and procedures”.
13. You have told the FCA that in the period since the FCA Complaint was first raised on 12 January 2020 you have also raised complaints with (i) your former bank regarding their treatment of you and their compliance with GPDR; (ii) the LSB regarding your former bank’s compliance with the LSB’s membership standards, and (iii) with the FCA regarding your former bank.

Preliminary Points

14. The Complaints Scheme was established for the investigation of complaints against Financial Regulators arising in connection with the exercise of, or failure to exercise, their relevant functions. In the case of the FCA, the relevant functions are its functions under the Financial Services and Markets Act 2000 (FSMA) other than its legislative functions. The Complaints Scheme cannot resolve complaints or claims by customers against firms that the FCA regulate. Further, complaints about the actions, or inactions, of the FOS are excluded from the Complaints Scheme.

15. The FOS is the operator of the alternative dispute resolution (ADR) scheme established by FSMA for complaints against regulated firms by their customers. The ADR scheme provides for the resolution of certain types of disputes quickly and fairly with minimum formality by an independent person on the basis of what they believe is fair and reasonable in all the circumstances of the case. The FOS has its own board of independent non-executive directors who are responsible for the oversight of the FOS's day-to-day operations.
16. The Ombudsmen, who are appointed by the Board of the FOS on terms that guarantee their independence, must determine complaints by reference to what in their opinion is fair and reasonable in all the circumstances of the complaint. In considering what is fair and reasonable, the matters they must take into account include relevant law and regulations, regulators' rules, guidance and standards and codes of practice.
17. The FOS is operationally independent from the FCA. In practice, this means that the FCA has no remit to intervene in decisions the FOS and its Ombudsmen make in individual cases submitted for resolution under the ADR scheme operated by the FOS.
18. The FSA's functions in relation the FOS under FSMA include taking such steps as are necessary to ensure that the FOS is, at all times, capable of exercising the functions conferred on the FOS by or under FSMA as operator of the ADR scheme established by FSMA. The FCA describes this function as its oversight function, but it is significant that this is not a general oversight function; rather, it is focussed on the FOS's capability to perform the functions conferred on the FOS by FSMA. Shortcomings in the FOS's performance in a particular case or cases, even if established, do not equate with evidence to the kind of systemic failure which might require the FCA's intervention, or support a conclusion that the FCA has failed in its duties. Further, the FCA's oversight role is distinct from responsibility for the FOS's day to day operations which remains with the FOS's Board. It does not extend to giving the FOS directions on handling particular complaints or the making of operational decisions. The FCA also has certain specific functions relating to the FOS which are listed in paragraph 2(3) of Schedule 17 of FSMA but these are not the subject of your complaint.

19. The FCA sets out on its website that the Oversight Committee provides support and advice to the FCA Board on carrying out the FCA's oversight role in respect of the FOS and lists what the Oversight Committee does as follows:
- reviews and challenges the Ombudsman's annual budget, and recommends to the Board whether it should approve the annual budget
 - advises the Board on the Ombudsman's qualification as an Alternative Dispute Resolution (ADR) Entity under the Alternative Dispute Resolution Regulations 2015
 - advises the Board on appointing and removing the directors (including the chairman) of the Ombudsman (in the case of the chairman, this is done with the approval of the Treasury)
 - advises the Board on ensuring the directors are appointed on terms that secure their independence from the FCA in the operation of the Ombudsman Scheme
 - provides any other advice and support the Board requires to satisfy the FCA's legal obligations, and exercise its powers, in relation to the Ombudsman.
20. Not only are the FCA not able to interfere in the decisions which independent Ombudsman make in relation to complaints submitted for resolution under the ADR scheme operated by the FOS, the actions and inactions of the FOS fall outside the scope of the Complaints Scheme. This is because the Complaints Scheme is concerned with the actions and inactions of the FCA and other financial regulators. Accordingly, I cannot consider a complaint to challenge the FOS or a decision of an Ombudsman on an individual complaint.

My analysis

The Investigation Complaint

21. At the outset, I note that you characterise the Investigation Complaint in your complaint to the Commissioner of 7 October 2020 as a complaint about the FCA's performance of its oversight function in respect of the FOS. I consider that this characterisation is incorrect. The FCA's investigation of complaints under the Complaints Scheme is not an oversight function in respect of the FOS. Rather, it is a requirement of the FCA under the Complaints Scheme. The Scheme does, however, provide that you may refer a complaint to the Commissioner where you

are dissatisfied with the FCA's investigation of that complaint. Accordingly, I proceed on the basis that your Investigation Complaint is a complaint that you are dissatisfied with the outcome of the FCA Complaints Team's investigation into your complaint about the FCA's oversight of the FOS and wish me to investigate and review it.

22. In detailing your Investigation Complaint to the Commissioner, you raise two specific criticisms of the FCA Complaints Team's description in the Decision Letter of the "Background" to the FCA Complaint before asking that the Decision Letter be reviewed with the comments that you set out on Part One, Part Three, Part Four and Part Five of the Decision Letter taken into account. I will start by setting out my analysis of the criticisms of the background section of the Decision Letter.
23. Your first point on the background section, which you described as a "critical inaccuracy" in the Decision Letter, relates to the circumstances giving rise to your first complaint to the FOS about your former bank. You say that the description in the Decision Letter is not correct and misrepresents that complaint. Your second point was to clarify the circumstances of your second complaint to the FOS about your former bank and to explain why you were aggrieved by the manner in which the adjudicator and the Ombudsman determined that complaint.
24. I recognise that having made three complaints to the FOS and been dissatisfied with the decisions on those complaints, you had high expectations that the FCA Complaints Team would fully investigate the FOS's handling of your complaints. I have not sought to access the FOS's files relating to your two complaints to the FOS against your former bank because I cannot investigate decisions of the FOS or an Ombudsman on an individual complaint. For this reason, I am not able to determine the correct description of your complaints to the FOS or, how the adjudicator or the Ombudsman dealt with them prior to decisions of the relevant Ombudsman. I can also see from the FCA's Complaints Team's file that they also decided that they should not seek access the FOS's files describing your complaint. That is not something that was required of the FCA Complaints Team under the Scheme because, as the FCA Complaints Team explained in the Decision Letter, its role is to investigate complaints against the FCA and it cannot investigate complaints about the actions or inactions of the Ombudsman. Further, I cannot see in your correspondence with the FCA in relation to the FCA Complaint before the FCA Decision Letter a description of your complaints to the FOS containing the detail set out in your complaint to the Commissioner. For these

reasons, I am not satisfied that there was any lack of care by the FCA Complaints Team in its drafting of the background section of the FCA Decision Letter.

25. However, proceeding on the basis that the FCA's description of your complaints to the FOS was not completely accurate and the description was not as complete as you suggest it should have been, I do not consider that your criticisms of the background section of the Decision Letter undermines the decisions of the FCA Complaints Team set out in the Decision Letter. I have formed this view because the passages of the background section of the Decision Letter which are alleged to contain inaccuracies were not referred to in the reasons given by the FCA Complaints Team in the Decision Letter for its decisions on any of the separate parts of the FCA Complaint.
26. I now turn to consider the points you make on the Decision Letter's reasoning on particular parts of the FCA Complaint.

Part One

27. You said that you were dissatisfied with the decision not to uphold Part One of the FCA Complaint that, under the oversight of the FCA, the FOS have refused to respond to rectification requests under Article 16 of GPDR. The points you made are that the FOS were refusing to act in accordance with the law which you described as unfair, and that you believe that the FCA's oversight responsibilities together with the FCA's MoUs with the FOS and the Information Commissioner mean that this part of the FCA Complaint should have been taken seriously.
28. The FCA's primary reasons for not upholding this part of your complaint was stated to be that: "it is outside the FCA's remit to intervene in the Ombudsman's complaints process or how it makes its decisions on complaints." Whilst I consider this statement to be correct, it does not in my view address your point that the FOS has refused to respond to your rectification requests under Article 16, GPDR.
29. I accept the point you make that in some cases failure by the FOS to comply with laws applicable to it in its operations, such as GPDR, could engage the FCA's oversight role in respect of the FOS. This is because those failures could be so serious or frequent that they could impact the capability of the FOS to administer the ADR Scheme or to carry out other functions conferred on the FOS under FSMA. However, compliance by the FOS with GPDR is a legal obligation imposed on the FOS by the GPDR itself, rather than a function conferred on the FOS under

FSMA. An allegation by one complainant to the FOS that it is not complying with the GPDR in its dealings with that person would not ordinarily appear to impact the capability of the FOS to continue to provide dispute resolution services or perform the other functions of the FOS under FSMA. Further, it is not my role under the Complaints Scheme to determine whether either the FOS or an Ombudsman is complying with the GPDR in individual decisions they make on complaints or on rectification requests under Article 16, GPDR. For these reasons I consider that the FCA Complaints Team was correct in not upholding Part One on grounds that it was outside the FCA's remit. It does not seem to me that your allegations of the FOS's non-compliance with GPDR in relation your complaints and rectification requests establish that there has been a failure by the FCA in its oversight role.

30. In Part One of the FCA Complaint you did not refer to the point that you now make in relation to this part that various MoUs to which the FCA and/or the FOS are party mean that this part of the FCA Complaint should have been taken seriously. Your point that the FCA's oversight failed because it failed to ensure that the FOS complied with various MoU's is Part Four of the FCA Complaint and seems to me to be a separate point from Part One which I will consider below.
31. You do make the additional point in relation to the FCA Complaints Team's reasoning in relation Part One that the MoU between the FCA and the Information Commissioner's Office (ICO) mean that your complaint about the FCA's oversight of the FOS's compliance with the GPDR should be taken seriously. The MoU between the FCA and the ICO provides as follows: "The shared aims of this MoU are to enable closer working between the parties, including the exchange of appropriate information, so as to assist them in discharging their regulatory functions." There is nothing in the MoU to suggest that the FCA's regulatory functions extend to ensuring that the FOS complies with the GPDR, so I do not consider that the terms of the MoU between the FCA and the ICO have any impact on the FCA's oversight role in relation to the FOS.

Part Three

32. You say that the FCA's response on your point that the FCA should ensure that the FOS is following the DISP section of the FCA Handbook was inadequate. You point out that the Decision Letter does not recognise that the FOS failed to consider CONC guidelines in their preliminary and final decisions on your complaints. You also referenced example case studies on the Ombudsman

website that do not refer to law or industry guidelines and inconsistencies that you had identified between the Ombudsman's decisions on your complaints and decisions on other complaints. You said that if FCA oversight is allowing the FOS to avoid following the law that oversight is not effective.

33. Like Part One of your FCA Complaint, Part Two is based on the premise that the FOS is not following the law. Again, it is not the role of the Complaints Scheme to determine whether or not the FOS either considered or applied the law or relevant provisions of the FCA Handbook in determining your complaints or in the other decisions to which you have referred. The FCA Complaints Team explained in the Decision Letter the reasons why general conclusions cannot be drawn from the decisions in individual cases. They said:
- *“Final decisions cannot be viewed in isolation. In order to decide whether a final decision is appropriately determined and reasoned, the whole case file needs to be reviewed and considered.*
 - *Full reasoning may be contained within a provisional decision, which is then not reflected fully in the published final decision.*
 - *Nuances (including all matters taken into account when reaching a decision) may not be reflected in a final decision”*
34. The explanation set out above seems to me to be a reasonable explanation for the position taken by the FCA Complaints Team on this part of the FCA Complaint. I also note that while DISP 3.6.4 requires that the Ombudsman take into account the law, regulations and codes of practice when determining what is fair and reasonable in the circumstances of the case which is the subject of the complaint, it does not require the fact that those matters were taken into account or how they were taken into account to be explained in the reasons in the written provisional or final decision. Accordingly, I do not consider that the fact that relevant law, regulations, or codes of practice are not mentioned in Ombudsman's decisions puts the FCA on notice that they were not taken into account in determining the complaints. In circumstances where the FCA say that they consider it important that the Ombudsman use the flexibility provided by the case law to explain the reasons for their decisions, I do not consider that the FCA's response to this part of your FCA Complaint is inadequate.

Part Four

35. You maintain that the FCA's oversight role in respect of the FOS includes an obligation to ensure that the FOS acts in accordance with all its MoUs with other organisations and its MOU with the FCA. The FCA decided that this part of the FCA Complaint was out of scope of the Complaints Scheme because "The FCA's oversight role of the Ombudsman under FSMA does not extend to ensuring the Ombudsman observes MoUs it holds with other organisations."
36. Addressing firstly the issue of whether the FCA's oversight role under FSMA extends to ensuring the FOS complies with its MoU's with other organisations, I agree with the FCA's conclusion that it does not. The reason why I agree is that the FOS's compliance with the arrangements under those MoU's is clearly for the benefit of those organisations that are the FOS's counterparties to the MoUs rather than something that benefits the FOS's dispute resolution capabilities or the other functions conferred on the FOS under FSMA.
37. I do accept that the Decision Letter failed to address your complaint that the FCA's oversight role extends to ensuring that the FOS complies with its MoU with the FCA. It does not seem to me that the FOS/FCA MoU is unrelated to the FCA's performance of its oversight functions. On the contrary, there is express reference to the FCA Oversight Committee in the MoU and paragraph 19(a) provides that the FOS will give the FCA the information the FCA reasonably requires to enable it to discharge its statutory obligations with regard to the ADR Scheme. Further, Section 232 of FSMA provides that the FOS must disclose information that, in its opinion, might be of assistance to the FCA in advancing one or more of its operational objectives. This is a function conferred on the FOS under FSMA and is therefore subject to the FCA's oversight role. Accordingly, I am of the view that a complaint that the FCA has not pressed the FOS to meet its commitments to the FCA under Section 232 of FSMA which are recorded in the FOS/FCA MoU does appear to be within the scope of the Complaints Scheme. I have therefore investigated this aspect of Part 4.
38. The particulars you have provided of your complaint about the FCA's failure to perform its oversight role in relation to FCA/FOS MoU are that the FOS routinely fails to inform the FCA of firms breaching the standards set by the FCA that regulated firms must meet. You draw an inference from this that the FOS's failure must be due to a failure of the FCA's oversight of the FOS. The only instances you

identify of failure by the FOS to inform the FCA of breaches of standards relate to the alleged failings by your former bank which are identified in the FCA Complaint; namely, the alleged failure of the bank to correct information under Article 16 GPDR, follow CONC, or to refer to, or take into account, the Lending Code in its dealings with you. These instances all relate to one firm's dealing with a single customer. In my view, they are not sufficient to establish your case that the FOS routinely failed to inform the FCA of firms breaching standards. Further, under Section 232A FSMA and, as confirmed in the FCA/FOS MoU, the FOS is only required to disclose such information to the FCA if the FOS is of the opinion that it would or might be of assistance to the FCA in advancing its operational objectives. I have not seen anything in the material you have provided to suggest that the FOS was in fact of the opinion that the information from your complaints to the FOS about your former bank might be of assistance to the FCA or that the FCA was aware that the FOS was withholding such information in these circumstances. The fact that the FOS did not uphold your complaints against your former bank could be said to suggest otherwise.

39. Finally, I do not consider that the fact that information did not flow from the FOS to the FCA in the particular circumstances of this case was sufficient to raise issues about the capability of the FOS to perform the functions conferred on it by FSMA such as to engage the FCA's oversight function in respect of the FOS. The FCA's investigation file on your complaint does not indicate that such information blockages are a systemic issue, and you have not provided evidence that they are systemic issue. For these reasons I am not minded to uphold your complaint under Part Four relating to the FCA/FOS MoU.

Part Five

40. The FCA decided that this part of the FCA Complaint was out of scope of the Complaints Scheme because the FCA is unaware of any provision in the quality requirements in the ADR Regulations that requires the Ombudsman to respond to GDPR requests. You responded that compliance with the GDPR is a legal requirement and is also a requirement under the EU Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes (the EU ADR Directive).
41. I recognise that chapter II of the EU ADR Directive does provide that member states shall take steps to ensure that ADR entities comply with national legislation implementing the EU Data Protection Directive. You have not suggested that this

commitment has been implemented in the quality requirements transposed into UK law through the ADR Regulations or that they require the FOS to comply with the GDPR or the UK GDPR. Likewise, you have not identified any provisions of FSMA requiring the FOS to comply with GDPR. Accordingly, whilst I accept your claim that the FOS had to comply with the GDPR (now the UKGDPR), that is not a function conferred on the FOS by FSMA. It is not therefore within the FCA's oversight role in respect of the FOS that is imposed on the FCA by FSMA to ensure that the FOS complies with GDPR. It follows that this part of your complaint is not a complaint about a failure of the FCA to exercise a relevant function. For these reasons I agree with FCA Complaints Team's conclusion that this part of the FCA Complaint is outside the scope of the Complaints Scheme.

Part Two and Part Six of the FCA Complaint

42. You did not comment in your communication to the Complaints Commissioner of 7 October 2020 on the findings by the FCA Complaints Team in the Decision Letter that Part Two and Part Six of the FCA Complaint are excluded from the Scheme by paragraph 3.4 (e) as they relate to the actions, or inactions, of the Ombudsman.
43. Your communication to the Independent Assessor of 3 March 2020 which you asked be added to the FCA Complaint was stated on its face to be a complaint about the FOS's service in handling your complaints and the conduct of an Ombudsman and an officer of the FOS. For this reason, I agree with the conclusions in the Decision Letter that the matters of complaint in Part Six of the FCA Complaint are excluded from the Scheme by paragraph 3.4 (e). Nevertheless, the FCA Complaints Team stated in the Decision Letter that they had forwarded your allegation relating to the Office of the Chief Ombudsman and CEO of the Ombudsman to the Oversight Committee to inform their work. The FCA have confirmed to me that your allegation was brought to the Oversight Committees' attention.
44. Part Two of the FCA Complaint is less straightforward because, although you state that your complaint is with the variation in reported levels of satisfaction of users of the FOS's ADR Scheme, you also say the FCA's acceptance of these levels is a clear illustration of bias and therefore a failing in its oversight of the FOS. The fact that you have not expressly challenged the findings in Decision Letter relating to Part Two has led me to conclude that this part of your FCA Complaint is also excluded from the Complaints Scheme. Again, the FCA Complaints Team

suggested that, as a result of your comments on the FOS's satisfaction targets, it would provide feedback to the Oversight Committee that it might be helpful to report satisfaction separately for upheld and rejected complaints. Again, the FCA have confirmed to me that this feedback was provided to the Oversight Committee, and it was established that the FOS already had complainant satisfaction targets for upheld and non-upheld (rejected) complaints. The FOS targets for 2021/22 are reported at <https://www.financial-ombudsman.org.uk/who-we-are/future-strategy> and performance against the targets is now reported to the Oversight Committee.

Conclusions on the Investigation Complaint

45. My conclusions in relation to the Investigation Complaint are that I cannot uphold Part One and Part Three of the FCA Complaint, Part Two and Part Six are excluded from the Complaints Scheme and that Part Five and all but one of the matters of complaint in Part Four are outside the scope of the Complaints Scheme. In relation to that one Part Four matter, I do consider that the FCA's oversight functions in respect of the FOS extend to looking at the FOS's compliance with the FCA's MoU with the FOS but I am not minded to uphold your complaint on this ground because the matters to which you refer do not establish that the FCA has failed in its oversight of the FOS.

The Independent Assessor Oversight Complaint

46. This allegation has been referred to me without first having been referred to the FCA Complaints Team under stage 1 of the Complaints Scheme. I am not therefore aware of how the FCA would respond to this part of your complaint. I do of course recognise that you could not include it in the FCA Complaint because the response to your complaint to the Independent Assessor was not received until after you had supplemented the FCA Complaint on 3 March 2020.
47. In accordance with paragraph 6.12 of the Complaints Scheme, I have considered whether it would be desirable to allow the FCA the opportunity of conducting its own investigation. I have decided that I can make a decision on the Independent Assessor Oversight Complaint without an FCA investigation because, in essence, it is a complaint about a decision made by an individual appointed by the FOS to handle complaints about the service levels provided by the FOS. It is therefore excluded from the Complaints Scheme by paragraph 3.4 (e).

48. For completeness, I note that you do say that the Internal Assessor's refusal was under the oversight of the FCA, but do not go so far as to allege that there was a failure by the FCA in its oversight. For the reasons I have explained in the preliminary points above, the FCA's oversight of the FOS under FSMA does not extend to intervening in the day-to-day operational decisions of the FOS. Accordingly, in so far as your inclusion of this part in your complaint under Part 2 of the Scheme was intended as a complaint against some action or inaction of the FCA in relation to your complaint to the Independent Assessor, I am of the view that it would be outside the scope of the Complaints Scheme.

Other Matters

49. I emphasise that in my analysis above, I have reviewed the communications identified in paragraphs 6 and 7 above. However, I do not consider the investigations and the further complaints about your former bank you have described in those letters to be relevant to the decisions that I am minded to make.
50. Likewise, I have considered the points that you make in your email of 22 January 2022 referred to in paragraph 8 above. I appreciate that you feel that your financial and personal wellbeing has been impacted very significantly by the conduct of your former bank, and that your complaints and requests to the FOS and its independent assessor, and, most recently, the FCA, have exacerbated these feelings. I should make it clear that I have not sought any information from the FCA about any ongoing investigation of your former bank because I do not consider such matters would be relevant to the FCA's oversight of the FOS. You also asked for confirmation that I would review and comment upon your former bank's compliance with important data protection laws and their membership requirements of the LSB. This Complaints Scheme is concerned with the actions or inactions of the FCA. It cannot deal with complaints against banks, individual firms, or the FOS, nor is it a redress service for individual consumer complaints. Accordingly, I cannot seek information for you about the FCA's investigations into a firm or comment on the conduct of a firm in order to assist you to seek redress from the firm.
51. As will be apparent from my analysis, although the FCA's oversight of the FOS is raised in relation to each part of the FCA Complaint, and two of the three parts of your complaint of 7 October 2020, underlying most references to the FCA's oversight is a complaint about actions or inactions of the FOS. In most of those

cases, your complaint is with decisions, actions, or omissions of the FOS on complaints or requests that you have made to the FOS. Further, all but one of the remedies you are seeking are for the FCA to require the FOS to take actions which relate to your underlying complaints against your former bank. It is not open to me under the Complaints Scheme to recommend that the FCA take steps which would interfere with the operational independence of the FOS or decisions that individual Ombudsmen make on individual complaints.

52. I set out in paragraph 19 above what the FCA says on its website about how it performs its oversight role in relation to the FOS. In this regard, the Complaints Commissioner suggested to the FCA in 2019 that:
- a. It reviews its approach to monitoring and collating the information it receives about the performance of the FOS independently of the FOS's own reports.
 - b. The FCA develops a system whereby both its Regulatory Affairs Team and Oversight Committee receive and review a regular summary of any complaints received about the FCA's oversight of the FOS, to inform their work.

The FCA accepted these suggestions and began using this system to monitor issues which it has been alerted to about the FOS.

53. I have investigated whether the FCA Complaint was included in a regular summary of complaints provided to the Oversight Committee and have established that, due to a failure in the FCA's system for preparing the regular summaries, the FCA Complaint was not included. Having now identified this omission, the FCA are preparing an update to the Oversight Committee of all cases that were not summarised in the regular reporting. The FCA Complaint will be included in that update report and I was told that the report would be included in the papers for the Oversight Committee's February 2022 meeting. However, even though the FCA Complaint was inadvertently omitted from the regular summaries that were produced to assist the FCA's oversight of the FOS, the Oversight Committee was aware of the FCA Complaint. This is because it was brought to its attention before the FCA Decision letter and, also, as a result of FCA Complaints Team passing the Decision Letter to the Oversight Committee to inform their work and provide feedback on the reporting of customer satisfaction statistics (see paragraphs 43 and 44 above). Although this will not benefit you directly in the resolution of your

case, I hope it alleviates your concern and that of others about the FCA's general oversight of the FOS.

The Delay Complaint

54. You complain that the FCA took too long to provide a response to the FCA Complaint. You also complain that the FCA did not send you details of the how Complaints Scheme worked and that at no time did it set out a reasonable timescale within which it would plan to deal with the FCA Complaint as required by paragraphs 5.1 and 6.4, respectively, of the Complaints Scheme.

55. I start by setting out the chronology:

12 January 2020: You submitted the FCA Complaint to the FCA.

17 January 2020: The FCA Complaints Team acknowledged your complaint and informed you:

“Recently we have experienced an unexpected increase in the number of complaints reported to us. Unfortunately, this means as a result, our reply to your complaint will take longer than we would normally expect. We are sorry this is the case, but please be assured that we are taking action to resolve the issue as a matter of urgency.”

12 February 2020: The FCA Complaints Team confirmed that your complaint can be investigated under the Complaints Scheme and referenced the increase in its workload but assured you that measures had been put in place to address this but that normal service may still be affected and said they would update you every 4 weeks.

3 March 2020: You sent the FCA Complaints team your complaint to the FOS's Independent Assessor and asked that it be added to your complaint about oversight of the FOS by the FCA.

16 March 2020: You were told that the FCA Complaints Team had assessed that your complaint can be investigated under the Complaints Scheme and would update you every 4 weeks.

9 April 2020: You received an update which gave you no more information about the status or timing.

11 May 2020: You emailed the FCA to complain about delay and ask for an update.

13 May 2020: You were notified by the investigator that your complaint had been allocated to them and they would revert with their understanding of the complaint and next steps within the next four weeks.

26 May 2020: You asked the investigator for details of the Complaints Scheme and how the FCA complaint would be dealt with.

17 June 2020: You complained to the FCA that you still had no indication of how long you could expect to wait.

15 July 2020: You were told by the FCA that the investigator would provide you with an update and timetable for resolution by the end of the week.

17 July 2020: You were sent the FCA Decision Letter which included apologies for the delay in responding to the FCA Complaint.

56. The issue of delays by the FCA at stage one of the complaints handling is one which a number of Complaints Commissioners have highlighted. I understand that the FCA has given the Commissioner assurances that the backlog has been cleared in the past year. Although the FCA warned you of delay when acknowledging the FCA Complaint and apologised for the expected delay, it did not offer an ex-gratia payment as is sometimes the case. Further, I could not see any communication in which the FCA had given you a timescale within which they planned to deal with the complaint or sent you the Complaints Scheme.
57. I do not consider that you can complain about any time taken by the FCA Complaints Team before 3 March 2020 because you supplemented the FCA Complaint on that date. Using the 3 March 2020 start date, the FCA Complaints Team took 19 weeks to complete its investigation.
58. I do uphold your complaint about delay and the FCA's failure to give you details of the Complaints Scheme in response to your request of 26 May 2020 (although the FCA had provided you with a link to the Scheme in several emails before that request) or a timescale in which it would deal with your Complaint. There seems to have been a failure to keep you updated throughout the period of the investigation. I am satisfied that this was due to the case load the FCA Complaints Team was dealing with at the time rather than any bias against you personally. The FCA has already apologised for the delay; however, in my preliminary report I recommended

that the FCA offer you an apology for failing to provide details of the Complaints Scheme and failing to give you a date on which they planned to complete their investigation. I did not consider that the length of delay in this case on its own would be sufficient for me to recommend the offer of an ex-gratia payment. However, because of the FCA's failure to provide you with a planned completion date or details of the Scheme notwithstanding the fact that you were pressing for these, exceptionally, I also recommended that the FCA offer you an *ex-gratia* payment for these failings and the delay. The FCA has informed me that it will apologise to you directly and proposed a payment of £75. This amount is in line with the FCA's recently published guidance on *ex-gratia* payments for complaints handling (<https://www.fca.org.uk/about/complain-about-us-pra-or-bank-england-regulators/ex-gratia-payments-complaint-handling-delays>) and therefore seems to me to be a reasonable offer.

My decision

59.

- (a) I uphold the Delay Complaint and recommend that the FCA offer you an apology for failing to provide details of the Complaints Scheme and failing to give you a date by which they planned to complete their investigation and also offer you an ex-gratia payment of £75.
- (b) I do not uphold the Investigation Complaint for the reasons I have given in paragraph 45 above.
- (c) It is not desirable that the FCA to be given the opportunity to conduct an investigation of the Independent Assessor Oversight Complaint first; it is excluded from the Complaints Scheme by paragraph 3.4(e).

60. In response to my preliminary report you drew my attention to two passages in the FCA's complaints file of documents which I have considered which you say contain inaccurate personal data about you. Both these passages relate to the FCA's description of your complaints to the FOS. I have not sought to establish the accuracy of that data for the reasons that I have set out in paragraph 24 above, but I have noted that you maintain that it is incorrect. For the reasons I have given in paragraph 25 above, I do not consider the alleged inaccuracies to be material to my determination of your complaint.

61. I appreciate that you have waited a long time for this decision and that it will not resolve your dissatisfaction with the conduct of your former bank or the FOS. I hope that you will accept that the Complaints Scheme cannot be used to investigate complaints about the conduct of firms that the FCA regulates or to intervene in complaints submitted to the FOS's ADR Scheme.

Roger S M Best

10 June 2022