

Final Report by Roger Best

Complaint No FCA 206423143/003

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

2. On 16 February 2021, you wrote to a senior officer of the FCA about the handling of a complaint against the FCA that was determined under stage 1 of the Scheme by a letter from the FCA Complaints Team dated 29 January 2021 (the “FCA Decision Letter”), responding to a complaint you had made to the FCA in January 2020 (the “FCA Complaint”).

What the Complaint is about

3. In the FCA Decision Letter, the FCA summarised your FCA Complaint on the basis of information that they had set out in an earlier written summary that they had provided to you on 24 August 2020, and on which you had provided comments. The summary in the FCA Decision letter was as follows:

Part One

You told us you are unhappy with what you allege is a lack of clarity within the DISP rules - You said there is a lack of prevention of inappropriate interpretation as to what is fair and reasonable. You also said there is a lack of clarity about the obligation to investigate thoroughly, to verify a thought process, to document evidence, to ensure

accountability and to allow a decision to be reviewed again when new evidence is presented.

Part Two

You also said you are unhappy with the way in which the FCA ensures the board of the Financial Ombudsman Service (FOS) has the necessary skills to certify the FOS is properly run, 'including accountability to prevent repetition of unnecessary errors and instigating an effective training and support system'.

You said you would expect the FCA to seek justification [from the FOS] as to why their training systems allow new material evidence, dated 3 July 2017, to be excluded from consideration after a previous ombudsman decision.

You also allege the FCA failed to address that regulated business are abusing the lack of due diligence within the FOS.

You also said 'the FCA and HM Treasury [should] liaise as to whose responsibility it is to ensure the FOS is fulfilling its role... On previous occasions the FCA have stated it is the responsibility of HM Treasury and vice versa, indicating no one wants to own the issues arising'

You allege the FCA failed to take effective action to your earlier submissions after having indicated your concerns had been noted and passed on to the relevant departments.

Part Three

You also told us you want to complain about how the FCA has been supervising a pension provider since 2016. You said that the pension provider has been allowed to misbehave and abuse its consumers because it knows its behaviour will go unchallenged. You said [the FCA] 'ignoring the FOS is allowing regulated businesses to flout the guidelines when avoiding "technical arguments" and effectively encourages misconduct to avoid a liability.'

You also said the FCA should 'review the contents of the correspondence that confirms [the pension provider] is concealing a known error behind the lack of due diligence within the FOS'. You requested the FCA investigate a number of issues concerning the pension provider and said 'If the FCA ignore then, like the FOS, [we]

are effectively encouraging misconduct to avoid a liability and that a large number of clients may have suffered or will suffer similar injustices.'

....you came back with further points

You contend the FOS has an inadequate assurance framework that permits deficiencies identified in the Independent Report July 2018 to remain prevalent.

.....

You also said the FCA is responsible for signing off the FOS budget, and you question what verification was undertaken prior to approving as your FOS complaint indicates the Board is wasting significant resources, including having failed to:

'ensure the cost of running the IA's office provides appropriate value to the assurance framework to prevent repetition of deficiencies identified in the IR July 2018 and the need for further costly outside intervention to highlight such issues. - ensure complaints are handled in an appropriate manner to aid resolution at the earliest opportunity preventing unnecessary costs arising.

*The Financial Ombudsman Service's Board is responsible for the IA, and for addressing deficiencies noted in the Independent Report July 2018, including (P3)
"This review of the Financial FOS was prompted by concern that some of its staff were not behaving appropriately and fulfilling the organisation's legal duty as they should."*

What the Regulator Decided

4. By its Decision Letter the FCA Complaints Team notified you that it could not consider Part One of your FCA Complaint about lack of clarity in the DISP Rules because it relates to the performance of the regulators' legislative functions. It did not uphold Part Two of your FCA Complaint about FCA's oversight of the FOS or Part Three of your FCA Complaint about the FCA's oversight of a pension provider.

Why you are unhappy with the regulator's decision

5. Your letter of 16 February 2021, to the senior FCA officer was treated by the FCA as a complaint under stage 2 of the Scheme and was referred to me in December 2021. I informed you of my appointment to investigate your complaint on 14 December 2021,

and on 21 December 2021, you sent me an expanded and amended version of the letter to the senior FCA officer dated of 16 February 2021 marked "Attachment A".

6. In Attachment A you addressed the three parts of your FCA Complaint covered by the FCA Decision Letter in considerable detail and referred to other documents submitted with Attachment A running to more than two hundred pages. I will briefly summarise the main points made in relation to the findings in the FCA Decision Letter
7. In respect of Part One (the DISP Rules complaint), you did not accept that your concerns about lack of clarity in DISP Rules were excluded from consideration under the Scheme. In respect of Part Two (which you describe as a "failing to ensure that the FOS Board has the necessary skills") you added to a long list of alleged deficiencies of the FOS and its board of directors that you say make the FOS incapable of exercising its public functions. These include alleged failings relating specifically to the handling of your complaints to FOS and more generally. You said that they were matters which the FCA should acknowledge and not ignore and that, in failing to do so, the FCA is failing to take such steps as are necessary to protect consumers, and ensure the FOS is capable of carrying out its role. In respect of the FCA's finding on this part, you said the FCA either failed to take your concerns seriously or the FCA Complaints Team failed to investigate your complaint appropriately or "wishes to conceal [the FCA's] own negligence". You also allege that action taken by the FCA when approving the FOS's annual plan and budget, was wholly inadequate. In Attachment A you requested that I conduct a very wide-ranging investigation into any involvement or lack of involvement of the FCA in the detail of the operations of the FOS and its governance and control framework. You singled out the function of the Independent Assessor of the FOS (who investigated complaints you made about the service provided to you by the FOS) and the FOS's legal department (which handled a complaint you submitted for determination by the FOS and also handled pre-action correspondence that you addressed to the FOS). In respect of Part Three, you allege that there is no evidence that the FCA has taken appropriate steps to protect consumers in relation to its supervision the pension provider that was the subject of complaints you made to the FOS.
8. Attachment A identified three heads of complaint not addressed by the Decision Letter
Part Four - Lack of due diligence by the FCA when appointing the Financial Regulators Complaints Commissioner and failing to identify that the role of the Independent Assessor was the epitome of unfairness. You had identified concerns over FCA's due

diligence in a memorandum to the FCA's Complaints Team dated 31 December 2020, but these concerns had not been addressed in the Decision Letter.

Part Five - Lack of care and fairness by a department of the FOS.

Part Six-Alleged failings by the FCA in its handling of your FCA Complaint.

You also added a new complaint under Part One that the FCA refused to provide general guidance to the FOS under DISP 3.5.12 when requested. I shall refer to this complaint as Part Seven.

9. In your letter to me submitting Attachment A you asked for recompense for (i) the time you had spent over a five year period "pursuing the FCA's role of consumer protection", and (ii) "the value of my intelligence in identifying the crux of the problem that if acted upon immediately, may prevent the 'regulatory family' being brought into serious disrepute".

Background

10. You say that you submitted a complaint to the FOS in 2015 (The First Complaint) relating to a claim for a pension loss and consequential losses arising from the encashment of a fund under the new Pension Freedoms Act 2015. You allege that when this claim was reviewed in 2016, the FOS case handler refused to investigate concerns over withheld information or the effect on pension benefits of unnecessary delays of two months. The claim was then taken to the Ombudsman who you tell me disagreed with the case handler but, repeated statements made by the pension provider and made assumptions without validating their accuracy and displayed a lack of appropriate knowledge and awareness of pensions and the related regulatory guidelines.
11. As the FOS claimant's personal representative, you understood that DISP 3.3.4BG (3) permits cases to be reviewed afresh where material new evidence has become available to the complainant and therefore, in October 2017, you submitted to the FOS's legal department a new complaint against the pension provider (the Second Complaint). You complain about the manner in which the Second Complaint was handled and determined by the FOS. Specific points you raised include that it was passed to an inexperienced case handler, that it was dismissed in 2019, without consideration of its merits and that the dismissal decision omitted key facts and did not reference material new evidence. You say the Dismissal Decision was not fair and reasonable because it implied the Second Complaint had no substance.

12. You raised a number of concerns over the handling of the complaints you had submitted to the FOS for determination by the FOS's Independent Assessor appointed by the FOS's Board to consider complaints about the standard of service provided by the FOS. These service complaints were submitted both prior to, and after, the issue of the Ombudsman's final decisions. You are unhappy with both the manner in which the Independent Assessor responded to your complaints and the conduct of the Independent Assessor. You also wrote a letter to the FOS threatening legal action under the pre-action protocol for civil actions and were unhappy with the FOS's legal department's response to that letter.
13. From 2017 onwards you wrote numerous letters to the FCA expressing your concerns about the FOS, the revisions that you feel are required to the DISP Rules and the role played by the FCA in relation to the FOS. Some of your letters to the FCA also addressed your concerns about the pension provider. In its responses to your letters, the FCA explained to you that the FOS is operationally independent from the FCA such that the FCA has no remit to intervene in the decisions it makes in individual cases or the day to day running of the FOS. The FCA did, however, explain to you the nature of its oversight role in relation to the FOS.
14. After the FCA told you in December 2018, that they had provided you with their final response on the matter, your Member of Parliament pursued similar questions of the FCA on your behalf. The FCA responded in similar terms to that they had used in their direct correspondence and suggested that you may wish to consider seeking independent legal advice. Your MP also wrote to the Chief Ombudsman at the FOS asking that ownership be taken of the FOS's Provisional Decision of July 2019 and that a full response be provided to your rebuttal of the Second Provisional Decision. You have also repeatedly written to the Chairman of the FOS Board to complain that it has failed to ensure that the FOS is fulfilling its public functions.

Preliminary Points

15. 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.

16. 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.
17. 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.
18. 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.
19. The FCA's functions in relation to 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 Part II of Schedule 17 of FSMA. These include making the compulsory jurisdiction rules specifying the activities which are subject to the FOS's compulsory jurisdiction, appointing and removing members of the FOS's Board and consenting to the FOS's rules setting out the procedure for the reference of complaints and for their investigation, consideration and determination by an Ombudsman (the FOS Scheme Rules).

20. 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.
21. 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.
22. Paragraph 3.2 of the Scheme enables complaints to be made by anyone who is directly affected by the way in which the regulators have carried out their functions. However, to be eligible the complainant must be in respect of some inconvenience, distress or loss which the complainant (or the person on whose behalf they are acting) has suffered. The Scheme is not intended to consider more general complaints about the regulatory system in respect of which the complainant is not directly affected. I cannot therefore investigate more general complaints about FCA's performance of its role of consumer protection where the complainant is not directly affected. Further, the Scheme provides for a focussed paper-based investigation, rather than permitting wide ranging investigations that are more in the nature of public enquiries or statutory investigations. I have not therefore investigated many of the allegations you make about the FCA having failed to protect consumers and issues inherent in the system that you say require a change in structure, organisation or policies under its control. I do of course appreciate your concerns and your interest in consumer protection and recognise that you have

made considerable efforts to make very detailed suggestions to the FCA. However, these are matters you can raise, and have raised, with the FCA, HM Treasury and your Member of Parliament. In this connection, you may find it useful to keep an eye open for relevant consultations by the FCA and the FOS which may provide an opening for you to contribute your views.

23. My role is not to make legal findings. I am, of course, informed by legal provisions, and this report comments on the legal arguments which you have made but I do not purport to rule on them.

My analysis

Part One -Lack of Clarity within the DISP Rules

24. The FCA has explained to me that Part One your complaint was not investigated because, as an expression of dissatisfaction with DISP rules (which is part of the FCA Handbook), the FCA deemed it to be excluded from the Complaints Scheme under paragraph 3.4 (c) which provides:

“Excluded from the Scheme are complaints:

.....

(c) in relation to the performance of the regulators legislative functions as defined in the 2012 Act”

The reference to the 2012 Act is to the Financial Services Act 2012 which specifies in Section 85 (4) that the following are the FCA’s legislative functions:

(a) making rules under the [Financial Services and Markets Act 2000 (FSMA)].

.....”

25. Although you did not identify in your FCA Complaint the chapter of DISP which is the subject of Part One, it was implicit from documents you sent to the FCA in support of your FCA Complaint that that it was the provisions of DISP Chapter 3 that set out the procedures of the FOS and the basis on which the Ombudsman make decisions. The FCA Decision letter records that it understood your complaint related to DISP rules relating to what is is “fair and reasonable” and “the obligation to investigate thoroughly”. In Attachment A, you identify the following provisions of DISP 3 you say the FCA should amend:

- DISP 3.3.4BG (which only applies to complaints referred to the FOS on or after 9 July 2015 and sets out guidance examples of types of complaint which could be dismissed by the Ombudsman without considering their merits under DISP 3.3.4A on the basis that they would otherwise seriously impair the effective operation of the FOS);
- DISP 3.5.4R (which applies when the Ombudsman decides that an investigation is necessary and requires that they give the parties an opportunity to make representations, send them a provisional assessment and proceed to determine the complaint if either party indicates disagreement with that assessment); and
- DISP 3.6.4R (which 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).

In order not to unduly lengthen this preliminary report I shall refer to these three provisions of DISP as the “Disputed Rules” even though DISP 3.3.4BG is only “guidance” on DISP 3.3.4 A and should not be taken as a complete or definitive explanation of a provision's purpose.

26. DISP 3 largely comprises rules made by the FOS (with the FCA’s consent) pursuant to its powers under paragraph 14, of Part II of Schedule 17 of FSMA which provides:

“The scheme operator must make rules, to be known as “scheme rules”, which are to set out the procedure for reference of complaints and for their investigation, consideration and determination by an ombudsman”.

The Disputed Rules are all made by the FOS. As I have pointed out in paragraph 19 above, the FCA is, however, required by paragraph 2 of Part II of Schedule 17 of FSMA to perform a specific function in respect of “scheme rules” made by the FOS contained in DISP 3. This function is that of providing its consent to the Rules before they are made. This function must be exercised in a way that is consistent with enabling the Scheme Operator to qualify as an ADR entity and to meet the requirements in Schedule 3 to the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (the ADR Regulations). The nature of the FCA’s role is also confirmed by in paragraph 14(3)(7) which provides “The consent of the [FCA] is required before any scheme rules may be made.”

27. I was minded to conclude that the FCA were wrong to exclude your complaint against the FCA in relation to the lack of clarity in the Disputed Rules on the basis that it relates to the FCA’s legislative functions. It was the FOS that “made” the Disputed Rules in Chapter 3 of DISP about which you complain. The FCA’s only role in relation to the

Disputed Rules would be that of providing consent to the FOS making them. This is clear from the fact that paragraph 14 of Part II of Schedule 17 draws a distinction between the FOS's role (being to "make" rules) and the FCA's role (being to "consent" to those rules before they are made by the FOS). It is the making of rules by the FCA which is a legislative function and therefore excluded from the Scheme. I do not understand the role of consenting to rules made by the FOS to be a legislative function of the FCA, but it is a specific function of the FCA under FSMA, and therefore my understanding is that it is within the scope of the Scheme.

28. In view of my preliminary conclusion that the FCA was wrong to say Part One is not within the scope 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 to conduct its own investigation into Part One. I concluded that I should proceed to investigate it myself because I do not consider that I need more information from the FCA in order to determine this part of the FCA Complaint.
29. Part One of your FCA Complaint about Disputed Rules is put in two ways; firstly, that they lack clarity, and secondly, that the FCA should amend them to provide the clarity that is necessary. Addressing the allegation, that FCA should amend the Disputed Rules, it seems clear that the responsibility for proposing amendments to the FOS made rules in DISP 3 lies with the FOS, rather than the FCA. The real issue, therefore, is whether there was any lack of care by the FCA in consenting to the Disputed Rules when they were made.
30. The origins of DISP Chapter 3 date back to the establishment of the FSMA regulatory regime at the turn of the century. Joint consultation papers published by the Financial Services Authority (the FSA) and the FOS in 1999 (CP 33 and CP 49) set out to provide a new alternative dispute resolution scheme for consumer disputes with financial services firms that will provide a free, simple, informal and accessible alternative to the courts. The scheme of ADR rules that the FOS was required to make by FSMA have been developed and refined through a series of consultation processes over two decades. DISP 3.5.4R and DISP 3.6.4R are amendments that date back to 2008, before the establishment of the current Scheme or the FCA. For this reason, I consider that any complaint about the regulator's consent to these two of the Disputed Rules would lie against the FSA (rather than the FCA). You have told me that your complaint is not against the FSA and that you do not intend to submit a complaint against the FSA. You disagree with my conclusion that the FCA did not consent to the making of these Disputed Rules, and have added that it should be considered that DISP Chapter 3 has been approved by the FCA under its Brexit and gender-neutral reviews. I cannot find any

evidence that the FCA gave its consent or approval to the making of the two of the Disputed Rules in the reviews to which you refer.

31. In case I am wrong on the issue of the FCA's role in relation to the two Disputed Rules, I have considered your criticisms of them. I note that your criticisms of DISP 3.5.4R and DISP 3.6.4R are that:

- DISP 3.5.4R should have been amended to include a clear obligation for 'any inaccurate recollection of facts/events' to be fixed.
- DISP3.6.4R should have been amended to reflect 'complaints that involve departing from the law, regulators' guidance, codes of practice or good industry practice, it must give reasons and they must be clear, proper and legitimate.'

32. DISP 3.5.R provides that both parties be given an opportunity to make representations and may also indicate disagreement with the Ombudsman's provisional assessment. It does not seem to me that express provision for a further opportunity to fix inaccuracies or recollections is necessary in an ADR procedure that is meant to provide for the resolution of certain types of disputes quickly and fairly with minimum formality.

33. DISP3.6.4R builds on S.228 (2) FSMA which provides "A complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case" by requiring the Ombudsman to take into account the matters to which you refer. S.228 and the words now to be found in DISP 3.6.4, have been considered on a number of occasions by the courts. My understanding is that case law has established that the Ombudsman is free to depart from the relevant law, but if he does so he should say so in his decision and explain why. The amendment you require, which in many respects makes considerable sense, is in my view unnecessary because it is provided for by case law. Further, when considering equivalent wording to that now found DISP3.6.4, Burnton LJ commented that the rule was sufficiently predictable and that all the matters listed in it are formulated or ascertainable with sufficient precision (R (Heather Moor & Edgecomb) v FOS [2008] EWCA Civ 642).

34. Turning to your complaint about lack of clarity in DISP 3.3.4BG, I have established that this paragraph of guidance was added to DISP 3 in 2015 following an FCA consultation paper CP 14/30 published in December 2014 which explained that changes to DISP 3 were being made for the purposes of implementing the EU ADR Directive (the Directive). This consultation paper explained under the heading:

"Grounds for dismissal:

5.30. As mentioned above, Article 5 (4) of the Directive sets out a list of grounds on which an ADR scheme may refuse to deal with the merits of a complaint.

5.31. DISP 3 sets out the grounds on which the ombudsman may dismiss a complaint without considering its merits and these currently go further than the grounds set out in the Directive. To ensure that we comply with the Directive, we propose to reduce the existing grounds for dismissal to seven grounds on which the ombudsman may decide to dismiss a complaint without considering its merits. The effect of the revised grounds is not materially different to what currently exists and only one of the grounds is new. We propose to introduce this in line with the grounds set out in Article 5(4).

5.32 We have also introduced guidance in the form of some examples of what could be considered as “seriously impairing the effective operation of the ombudsman service” under the new dismissal ground in DISP 3.3.4 AR(5).

5.33 These examples include where it would be more suitable for the complaint to be dealt with by a court; where the subject matter of the complaint has already been dealt with by a comparable dispute resolution scheme or has previously been considered or excluded by the ombudsman service (unless material new evidence which the Ombudsman considers likely to affect the outcome has subsequently become available to the complainant); and where there are multiple eligible complainants to one complaint, ensuring that the appropriate consent is obtained before investigation”

35. Schedule 3 of the ADR Regulations implemented Article 5 (4) of the Directive in the UK, so it seems clear that in consenting to the FOS making DISP 3.3.4BG, the FCA was exercising its function of consenting to this new provision in a way that was consistent with enabling the FOS to be able to qualify as an ADR entity and to meet the requirements of Schedule 3 of the Regulation. In view of this, and the fact that the FCA consulted before consenting to the FCA Handbook guidance that became DISP 3.3.4BG and explained that it was being introduced, I cannot uphold a complaint about any lack of care by the FCA in consenting to this guidance being made by the FOS.

Part Two-Failings by the FCA in relation to the FOS Board

36. The FCA considered this part of your FCA Complaint to be a complaint about the FCA’s oversight of the FOS. It explained that:
- the day-to-day operation of the FOS is a matter for the FOS's board, which is appointed by the FCA. Except for the Chair, whose appointment and removal is a matter for the FCA and the Treasury, the FCA also has the ability to remove FOS board members from their positions.

- Under Schedule 17 Paragraph 3(2), the chairman and other members of the [FOS] board must be persons appointed, and liable to removal from office, by the FCA (acting, in the case of the chairman, with the approval of the Treasury).
- Under Paragraph 3(3), the terms of their appointment (and in particular those governing removal from office) must be such as to secure their independence from the FCA in the operation of the scheme. This means that the FCA cannot get involved in allegations relating to the appointment or oversight of ombudsmen.
- Regarding the process for ensuring people with the necessary skills are appointed to the FOS board, board appointments result from a robust recruitment process supported by executive search agencies and advertised across a number of other online fora to ensure a diverse and inclusive search across a wide field.
- The FOS board members are appointed by the FCA on terms which secure their independence. They are appointed in the public interest and do not represent any conferred or stakeholder interest. As non-executive directors, board members are not responsible for the decision-making functions of the FOS and no board member may be involved in any individual dispute brought to the service.
- Regarding allegations about the FOS acting unreasonably or arbitrarily, the FOS - like any other public authority - is subject to the court's supervisory jurisdiction which is engaged by commencing an application for Judicial Review. Complainants are not bound by an ombudsman's decision and complainants can choose to reject such a decision and take the matter to court. This is not a matter into which the FCA would intervene. The FOS also has its own complaints scheme that can be utilised by those unhappy with how it has dealt with a particular case by recourse to the Independent Assessor.
- The FCA has no oversight of the Independent Assessor, which is not a statutory role and was created by the FOS's board. When approving the FOS's overall budget, the FCA looks to ensure that the budget is sufficient to help the FOS deliver its statutory objectives whilst delivering value for money. In the first instance, it is for the FOS board to consider whether the proportion of its budget assigned to the IA is delivering value for money. However, the Oversight Committee, which advises the FCA board on the approval of the FOS's budget, receives copies of all complaints about the FCA's oversight of the FOS. As such, the Oversight Committee will have the opportunity to explore with the FOS board the cost of the Independent Assessor function and any potential impact it has on the FOS board delivering its statutory functions.

37. I am in agreement with the FCA's clear explanation of its role relating to appointments to the Board of the FOS, the role of board members and their terms of appointment. You have not pointed to any evidence that suggests that the FCA does not follow a robust recruitment process prior to appointing new members to the FOS's Board or that the terms of their appointment are not as portrayed by the FCA. Likewise, for the reasons set out in my preliminary points above, I am in agreement with the FCA's explanation of the independence of the FOS board members from the FCA in the operation of the FOS's ADR scheme and the role of the FCA in relation to the FOS's budget. I also agree with the FCA's comments on the control of the FOS through the court's supervisory jurisdiction and the fact that the FOS has its own complaints scheme which provides for recourse to the Independent Assessor in respect of which the FCA has no oversight role.
38. I acknowledge you have alleged failings by both the FCA and the FOS relating specifically to the handling of your complaints to FOS. However, as the FCA has made clear, it cannot become involved in complaints that have been handled by the FOS's ADR scheme or the day- to-day operations of the FOS. Final Determinations of the Ombudsman may be challenged through the courts by Judicial Review and you have been able to pursue your complaints against the FOS's service levels through the Independent Assessor.
39. I have also considered your comments on Richard Lloyd's Report of the Independent Review of the FOS and the FOS's response to its recommendations which you drew attention to in your FCA complaint and note that the FCA has explained that these have been discussed regularly at the FCA's Oversight Committee meetings since the report was published. You also directed me to the 2021 Periodic Review of the FOS commissioned by the FOS from Oaklin Consulting. I note this presents an overview that:
- "The FOS is widely respected and viewed as reaching fair and impartial outcomes in the majority of cases, a balance which is difficult to strike, but emphatically achieved."
 - "The FOS has an impressive pool of talent. Staff are committed to the cause and keen to help the organisation improve. Throughout the review, the team were struck by the thoughtful and constructive way in which all Financial Ombudsman Service staff engaged in the process, discussed problems and contributed ideas."
- Neither of these statements suggest to me that there is a systemic problem with the FOS such that the FCA must take steps to ensure that it is still capable of exercising its functions as operator of the FOS Scheme or its functions under FSMA.
40. Having considered all the comments you have made about the FCA's oversight of the FOS, in both the FCA Complaint and the large volume of material submitted to me, I

agree with the FCA's conclusion that, based on the explanations given above about how the oversight generally works, they do not provide evidence which shows that the FCA's oversight of the FOS is currently deficient in the way that you suggest it is. Likewise, I cannot see that they provide evidence of a lack of care by the FCA in relation to its function of appointing and removing board members or in its approval of the FOS's annual budget.

41. I should add that in its FCA Decision Letter, the FCA told you that the Oversight Committee are aware of your concerns about the FOS's board and about the Independent Assessor delivering value for money as all complaints about the FCA's oversight of the FOS are communicated to the Committee. I asked the FCA to confirm that both the FCA Complaint and your letter 16 February 2021, did in fact reach the FCA's FOS Oversight Committee. The FCA responded that, having reviewed all of the reports that were provided to the Oversight Committee over the last 2 years, some cases had been identified that were missed from the regular reports, including your FCA Complaint. I am told that this was because the regular report was prepared on 5 February 2020, which was before your FCA Complaint in January 2020 had been fully assessed and confirmed as a FOS oversight complaint. However, the FCA tell me that their complaint file shows that the Oversight Committee secretariat was separately provided with details of your FCA Complaint. Further, on establishing that there was a systemic issue in relation to the compilation of reports of complaints about the FCA's oversight of the FOS, your complaint was included in a list provided to the Oversight Committee in the first half of 2021 of the cases that were missed from the regular reports to that committee.

Part Three- Failings by the FCA in its oversight of the pension provider

42. The FCA considered this part of your FCA Complaint to be a complaint about the FCA's oversight of the pension provider. It explained that:
- The FCA was set up by the government to regulate most financial services in the UK. The FCA protects consumers by setting standards that FCA regulated firms must meet.
 - The FCA does not investigate complaints against the firms it regulates; this is the role of the FOS. The FCA does, however, take seriously the information provided about firms it regulates. For example, it requires firms to categorise all the complaints they receive and to report this to us regularly.
 - It uses this, along with information from other sources, including any information that the FOS may share with the FCA, to build a picture of where firms may be failing to

meet the required standards. The FCA will then take appropriate action if necessary, however, it remains the case that the FCA is unable to tell you what was done with the information due to the confidentiality restrictions the FCA operates under. It directed you to details about what information the FCA can share at <https://www.fca.org.uk/freedom-information/information-we-can-share>.

43. In my view the FCA was correct to tell you that it does not investigate complaints by customers against the firms it regulates but may use this information to help build a picture of where firms may be failing to meet the required standards. I can see from the FCA Complaints file that the FCA's Supervision Hub (customer contact centre) has explained how it dealt with the information you sent relating to the pension provider. As recounted in the FCA Decision Letter, your first contacts related to pension activity but did not disclose the name of the firm. Only in later communications did you disclose the name of the firm involved. The FCA has explained that these contacts were assessed and marked in a way which meant they were visible for the "relevant Supervisory team" to view as part of its ongoing supervision of the firm.
44. I can see that at least one of your complaints against the pension provider was marked as of "potential supervisory interest" by the Supervision Hub, which meant that it was visible to the relevant supervisory team. However, from my investigation of the FCA's internal communications, it is not clear to me that the FCA supervision team for the pension provider were aware of the information that you had provided. This may be because the complaints in many of your communications were understood by the Supervision Hub to relate to the FOS alone, rather than both the FOS and the pension provider. Alternatively, it may be because the judgment of the individuals in the Supervision Hub who reviewed your contacts was that they were not matters that needed to be referred to the pension provider's Supervision Team. However, on 26 September 2017 (which was shortly after the FCA had logged a complaint from you that had been routed through the Supervision Hub and identified as a complaint about the pension provider and the FOS) an FCA staff member in the Supervision Hub wrote to you specifically stating: "I've made the information you've provided to us about [the pension provider] available to the relevant teams...".
45. It may be suggested in retrospect that, the communication of 26 September 2017, looks to have been potentially misleading because, although the information appears to have been placed on a system and marked in such a way that it could be seen by the pension provider's Supervision team, there is no record that it was fact seen by that team. In my view, the communication was not misleading. I say this because the FCA was not able

to share information relating to firms it supervisors such as whether information had been formally referred to Supervision. On 26 September 2017, the FCA staff member who wrote to you did not know that the information made available would not be accessed. However, in my view, the statement in the FCA Decision Letter that your communications were “marked in a way which meant that they were visible for the relevant Supervisory Team to view as part of its ongoing supervision of the firm” was not full and frank in circumstances where the FCA Complaints Team had established that the pension provider’s Supervision Team were not in fact aware of your complaints about your pension provider. I am not able to establish whether the intelligence that you provided on the pension provider in September 2017 was in fact information that should have been referred to the Supervision Team. This is because I am told that the Supervision Hub did not then have a definition of the criteria for referral, so, it was left to the judgment of the individuals in the Supervision Hub who reviewed your communications and there does not appear to be any record of their reasoning for not referring your information.

46. Whilst I am not minded to uphold Part Three of your FCA Complaint, it was unfortunate that the FCA failed to make it clear to you in the FCA Decision Letter that the information relating to the pension provider you sent the Supervision Hub in September 2017, did not appear to have been seen by the Supervision Team. I have considered whether to recommend that the FCA review its procedures around recording decisions whether to refer intelligence received from consumers about firms the FCA regulates to supervisors but understand that since 2017 the Supervision Hub has developed referral criteria.

Part Four- Lack of due diligence by the FCA when appointing the Financial Regulators Complaints Commissioner and the role of the Independent Assessor

47. You raised your concern about a failure by the FCA in relation to the Complaints Commissioner with the FCA Complaints Team for the first time in a memorandum you sent the FCA on 31 December 2020. It was considered by the FCA Complaints Team shortly before it finalised the FCA Decision Letter. They decided that the matters raised in your memorandum did not necessitate any changes to the draft of the Decision Letter. It appears that the FCA Complaints Team failed to appreciate that your expression of concern about the FCA’s involvement in the appointment of the Complaints Commissioner was a new head of complaint. For this reason the FCA has not considered whether it is within the scope of the Scheme and, if so, whether to conduct or complete an investigation. I am satisfied that this head of complaint is not within the scope of the Scheme. The current Complaints Commissioner was appointed by the regulators under powers given to them by S.84. of the 2012 Act, rather than by the FCA

in performance of its functions under FSMA. Further, as I have mentioned above, paragraph 3.2 of the Scheme provides that complaints can be made by anyone who is directly affected by the way the regulators have carried out their functions or anyone acting directly on such person's behalf. Since the current Complaints Commissioner has had no involvement in the determination of your FCA Complaint or the additional three heads of complaint you have asked me to investigate, it does not seem to me that you are directly affected by the FCA's performance of its functions in relation to the appointment of the current Complaints Commissioner. This is an additional reason why I consider that Part Four of your complaint is outside the scope of the Scheme such that I cannot investigate it.

48. In Part Four you also complained about the role of Independent Assessor. I have already addressed the role of the Independent Assessor in my analysis of Part Two of your FCA Complaint. The Independent Assessor is appointed by and accountable to the Board of the FOS. As the FCA explained in the FCA Decision Letter, the FCA have no oversight role over the Independent Assessor. Accordingly, this separate limb of Part Four of your complaint is excluded from the Scheme by paragraph 3.4 (e).

Part Five -Lack of care and fairness by a department of the FOS

49. You summarise this new head of your complaint as "Lack of care and fairness by the FOS Legal and Jurisdiction department ..., including ceasing to liaise and effectively demanding formal legal action to resolve concerns over its Pre-Action Protocol response."
50. Again, the FCA have no oversight role over the FOS' legal department who are accountable to the FOS's senior management and board, so this part is complaint is excluded from the Scheme by paragraph 3.4 (e).

Part Six- The FCA's Handling of the FCA complaint

51. You suggest that the FCA Complaints Team dismissed your complaint prior to it being passed to the "relevant area of the FCA so that they may be considered properly". You also criticise the FCA Complaints Team's expertise, investigatory practices and its data sharing and responses to FOIA requests and Data Subject Access Requests (DSARs). You say that the FCA Complaints Team's notification that they would not continue to engage in correspondence with you some months after the FCA Decision Letter, warrants a full review to prevent intelligence being disregarded and misconduct concealed.

52. Through my own investigations, I have reviewed the handling of your complaint by the FCA's Complaints Team. It is plain to me from the documents that I have reviewed that the FCA Complaints Team did involve the relevant areas of the FCA in its investigation by making enquiries of them and calling upon their expertise when necessary and that they followed their usual practices for investigating your complaint. I do not consider that the FCA Complaints Team can be criticised for "red-carding" you after considerable correspondence, in circumstances where they had no further role to play in relation to your complaint other than to notify you of my appointment. The two criticisms I have made above in relation to the FCA Complaints Team are in relation to the sentence in the FCA Decision Letter to which I have referred in paragraph 46 above and its failure to address the new concern raised in your memorandum of 31 December 2020 to which I have referred in paragraph 47 above.
53. I cannot investigate your complaints about the FCA's data sharing and its response to FOIA requests and DSARS because, in my view, compliance with the Freedom of Information Act 2000 and the Data Protection Act 2018 are not functions of the FCA under FSMA. You will be aware from the FCA's responses to those requests that those Acts provide you with specific rights to complain to the Office of the Information Commissioner.
54. You also complain about the FCA Complaints Team's delay in handling your complaint. The FCA acknowledged that there had been delay in its investigation of your complaint, for which it apologised and offered you an ex-gratia payment of £100. You made the complaint that became the FCA Complaint by a telephone message that was logged by the FCA on 23 January 2020. It took one year and a few days for the FCA to determine that complaint. I can see from the correspondence, that some of that delay was because you supplemented your submissions on a number of occasions before the complaint was determined. However, it appears that it took 8 months for the FCA Complaints Team to allocate the complaint to an investigator and I can appreciate your frustration at this period of inactivity. You also complain about the delay between the FCA Decision Letter and being notified that I had been appointed to determine your complaint under Stage 2 of the Scheme. So far as I am aware, the FCA Complaints Team bear no responsibility for that delay, although I do of course realise that this tested your patience.
55. Under FSMA, the FCA is immune from legal liability unless a court finds that the FCA has acted in bad faith. The FCA takes into account its immunity when it decides if it should pay you compensation and, if so, how much. The FCA has recently published its internal guidance on ex-gratia payments for complaints handling delays:
<https://www.fca.org.uk/about/complain-about-regulators/ex-gratia-payments-complaint->

handling-delays. The FCA's payment to you of £100 is below the level the FCA believes appropriate when assessing the impact in terms of distress or inconvenience of avoidable delay of a time period corresponding to the delay that you suffered. Accordingly, I am minded to recommend that the FCA increase its offer of an ex-gratia payment to £150.

Part Seven- The FCA refused to provide general guidance to the FOS under DISP 3.5.12 when requested

56. One or more of your service complaints to the FOS's Independent Assessor over the handling of the complaint you made to the FOS in respect of the pension provider, included allegations that the FOS refused to seek guidance under DISP 3.5.12 from the FCA relating to an alleged discrepancy in application of legal duties under DISP 3.3.4B G (3). Put like this, your complaint is a complaint about the FOS's handling of your cases, rather than a complaint against the FCA, and is therefore excluded from the Scheme by paragraph 3.4 (e).
57. You add that you sought guidance on DISP 3.5.12 (which provides that the Ombudsman may take into account evidence from third parties, including the FCA) and that the FCA should have acted under its known obligations, including protecting consumers from financial misconduct. You say that the FCA wrote to you on 5 December 2018 stating that: "DISP 3.5.12 is guidance rather than a rule and as such there's no obligation on the FCA to provide guidance to the Financial Ombudsman Service in relation to how we expect a regulated business to act in a given scenario." The FCA have not investigated this head of complaint under Part 1 of the Scheme. Providing guidance or evidence to the FOS in relation to specific complaints being determined by Ombudsman is not a function of the FCA under FSMA, so I do not consider that a complaint about the FCA's refusal to respond to your request that it provide guidance falls within the scope of the Scheme. Further, your complaint seems to be with the FCA's refusal to exercise a discretion where no unreasonable, unprofessional or other misconduct is alleged. It therefore appears to me to be a complaint that the FCA would not be bound to investigate under the Scheme (see paragraph 3.5).

My Decision

- a. The FCA was wrong not to investigate Part One of your FCA Complaint on the basis that it was a complaint about the FCA's legislative functions. However, in so far as your complaint in relation to the Disputed Rules is that the FCA should have amended them, I am not able to uphold it. In so far as your complaint is with the consent that was given to the Disputed Rules, then, in relation to DISP 3.5.4 and

DISP 3.6.4, my understanding is that it was the FSA that consented to these two rules. You have told me that you neither complain, nor intend to complain, about the FSA. If I am wrong and the FCA did consent to these two Disputed Rules, I cannot uphold your complaint. In any event, I cannot uphold your complaint against the FCA in respect of DISP 3.3.4BG;

- b. I cannot uphold Part Two and Part Three of your FCA Complaint;
- c. In respect of Part Four of your complaint, I cannot investigate the alleged lack of due diligence by the FCA in the appointment of the Complaints Commissioner because it is outside the scope of the Scheme and I cannot investigate your complaint about the Independent Assessor because it is excluded from the Scheme by paragraph 3.4(e).
- d. I cannot investigate Part Five of your complaint because it is excluded from the Scheme by paragraph 3.4(e).
- e. I have investigated Part Six of your complaint and cannot uphold the complaint against the FCA Complaints Team's handling of your FCA Complaint, except in respect of the time taken to complete the investigation. I recommended that the FCA increase its offer of an ex-gratia payment for delay to £150 and the FCA have accepted this recommendation.
- f. In respect of Part Seven, I cannot investigate any complaint that the FCA failed to respond to your request that it provide guidance to the FOS in relation to your cases before the FOS because it is a complaint that falls within paragraph 3.5 of the Scheme.

58. I know from your comments on my preliminary report that you will be dissatisfied with my decision. Underlying all your complaints about the FCA was your dissatisfaction with the outcomes of your complaints to the FOS against the pension provider and the related service complaints to the FOS. I have not as part of my investigation looked at the substance of any of those complaints, so you should not interpret my Preliminary Report as an assessment of the merits of those complaints or your complaints about how they were handled by the FOS. For reasons which I hope I have made clear, it is not my function to investigate individual complaints against firms submitted to the FOS for determination. In your letter to the senior FCA officer dated of 16 February 2021 marked "Attachment A" which you submitted to me as your complaint under Stage 2 of the Scheme, you said that the issues you raised were not your concern but that you are prepared to champion them for the protection of consumers. I acknowledge your

considerable efforts to voice your concerns with the aim of improving the protection afforded to the financial services industry's consumers. However, I do not understand it to be the function of the Scheme to determine complaints brought by those seeking to protect consumers from misconduct where the individual complainant has not suffered as a result of being directly affected by alleged action or inaction of the FCA.

Roger S M Best

31 January 2023