

Final Report by Roger Best

Complaint No FCA 206987075/004

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.

Your Complaint

2. You wrote to the Financial Regulators Complaints Commissioner (the Complaints Commissioner) on 23 October 2020 making a complaint under the Scheme. On 28 October 2010 the Complaints Commissioner suggested you ask the FCA to investigate your complaint first and copied the FCA Complaints Team. You complained to me after the FCA notified you that it would not be investigating your complaint under the Scheme.

What the complaint is about

3. In your letter of 23 October 2020, you explained that your complaint was about the FCA's handling of its test case on business interruption insurance (the Test Case) with particular reference to (i) the FCA's decision not to seek to appeal certain aspects of the High Court judgment in the Test Case and (ii) the FCA's treatment of affected policyholders and your perception that the FCA had refused to engage with affected policy holders when deciding not to seek to appeal those aspects. Your interest in the Test Case arose as the owner of a business that operated at a number of sites that had to close following the Government's Covid-19 measures but had claims for business interruption losses denied by its insurers.

What the Regulator Decided

4. By its letter of 29 January 2021, the FCA Complaints Team notified you that it would not be investigating your complaint under the Scheme because Paragraph 3.6 of the Scheme explains that: *“the regulators will not investigate a complaint under the scheme that they reasonably consider could have been, or would be, more appropriately dealt with in another way (for example, by referring the matter to the Upper Tribunal or by the institution of other legal proceedings)”*.

Why you are unhappy with the regulator’s decision

5. You indicated to the Complaints Commissioner’s Office in December 2020 that you would like the Complaints Commissioner’s Office to look at your complaint because you considered that the FCA has a conflict of interest and since receiving the FCA’s decision letter of 29 January 2021, you have continued to press for the complaint to be looked at under Stage 2 of the Scheme.

My analysis

6. The FCA’s basis for not investigating your complaint is that it is more appropriately dealt with in another way, rather than that your complaint is outside the scope of the scheme. I consider that the FCA are correct not to take the position that your complaint is outside the scope of the Scheme. The Scheme is designed for the investigation of complaints arising in connection with the FCA’s exercise of, or failure to exercise, any of its relevant functions under the Financial Services and Markets Act 2000 (“FSMA”). It covers complaints about mistakes and lack of care, unreasonable delay, unprofessional behaviour, bias, and lack of integrity.
7. Whilst, at first sight there may appear to be an issue as to whether the FCA’s handling of the Test Case was “connected with” the FCA’s exercise of its statutory functions, I consider that any doubt on this point is resolved by reference to the FCA’s Business Interruption Test Case Framework Agreement relating to the Test Case (see <https://www.fca.org.uk/firms/business-interruption-insurance>) which explains that:
“The FCA has an interest in the resolution of this uncertainty through the test case, acting in a way that is compatible with its strategic objective to ensure the relevant markets function well and to advance its operational objectives to ensure appropriate protection for consumers and to ensure market integrity. This is in order to facilitate the FCA’s: (1) assessment of whether insurers are complying with

their regulatory obligations in relation to the handling of claims and associated complaints; (2) determination of its policy and principles”.

Assessing whether insurers are complying with their regulatory obligations is clearly connected with the FCA’s supervision and enforcement functions and determination by the FCA of its general policies and principles is a general function of the FCA under FSMA. Further, your complaint alleges that the FCA made a mistake in failing to pursue all relevant aspects of the appeal in the Test Case, showed bias against policyholders with one particular form of wording, acted unprofessionally and demonstrated a lack of care for affected policy holders. It is therefore of a type that the Scheme is intended to cover.

8. When the FCA notified you in its decision letter of 29 January 2021 that it would not investigate your complaint under the Scheme and recited Paragraph 3.6 of the Scheme (which is headed “*Complaints that are more appropriately dealt with in another way*”) it did not identify any other way by which it considered that your complaint should be dealt with. Rather, the FCA said that it did not have a duty to litigate, and once it had commenced litigation, it did not have a duty to continue, or discontinue the litigation. This explanation seems to be the FCA’s immediate partial response to the substance of your complaint that was given without any investigation, rather than any indication of a more appropriate mechanism or procedure for dealing with the subject matter of your complaint.
9. For my part, I cannot see a way of dealing with your complaint against the FCA that is more appropriate than an investigation under the Scheme. Whether or not you or your business could have sought to resolve the issues relating to the wording of the policy with the insurers through the courts is not, in my view, relevant to the issue of whether you have grounds to complain about the FCA’s handling of the Test Case and its dealings with one category of policyholder in relation to the Test Case. The FCA did not suggest that it would have been more appropriate for you to seek to resolve your complaint by judicial review proceedings against the FCA and the time limit for seeking permission to commence a judicial review has likely expired. Accordingly, I am not convinced that the FCA’s decision not to investigate your complaint was correct.
10. Under paragraph 6.12 of the Scheme, I have to decide whether it would be desirable to allow the FCA Complaints Team to carry out an investigation of your

complaint before conducting my own investigation. I have noted that at the outset you addressed your complaint to the Complaints Commissioner and that you maintained that you would like the Complaints Commissioner to determine the complaint even when he recommended that your complaint should be made to the FCA. The reason you gave was that the FCA has a conflict of interest. You also explained that your attempt to “leapfrog” Stage 1 of the Scheme was due to the urgency of resolving the issue of the FCA’s position in the Test Case appeal.

11. It is axiomatic that the FCA has a conflict of interest in relation to every complaint it faces that it investigates itself. The Scheme seeks to mitigate this risk by providing a Stage 1 investigation procedure for investigation by a suitable senior member of the FCA’s staff who has not previously been involved in the matter complained of who will aim to resolve the matter to the complainant’s satisfaction. I am going to recommend that the FCA investigate your complaint under this Stage 1 procedure rather than conduct the initial investigation myself. In my view, an internal FCA investigation will be more efficient at pulling together the relevant material. Further, whilst you will undoubtedly feel that the progress you have made with your complaint so far is, through no fault of your own, extremely disappointing, I am pleased to note that through the efforts of other claimants, the issues on policy wording that you were expecting the FCA to take to the Court of Appeal, have now been clarified by another first instance judgment that your insurers have decided not to appeal. Accordingly, it seems to me that you are no longer seeking an urgent remedy. If you are dissatisfied with the FCA’s final report of their investigation, you may refer the matter to the Complaints Commissioner again.
12. In response to my preliminary report, you have asked that the FCA agree a 4-week time frame for the FCA Complaints Team’s Stage 1 investigation. The FCA have responded that it will not be possible to complete their investigation within 4 weeks due to the volume of information that they have to request and review, and the availability of senior members of staff involved. However, the FCA have agreed to take your complaint back to complete a Stage 1 investigation and will aim to complete the investigation within their standard time frame of 8 weeks and will keep you updated with their progress. In my view, the FCA’s response complies with the FCA’s obligations under paragraph 6.4 of the Scheme to set out a reasonable timescale within which they plan to deal with your complaint and to inform you whether the complaint will be admitted to the Scheme.

My decision

13. The FCA was wrong not to investigate your complaint under the Scheme. The complaint falls within the scope of the Scheme and it is appropriate that it be investigated.
14. It is desirable that a suitable senior member of the FCA's staff who has not previously been involved in the matter complained of conduct an investigation of your complaint under Stage 1 of the Scheme.

Roger S M Best

5 May 2022