

## **Final Report by Roger Best**

### **Complaint No FCA 207071892/005**

#### *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. In July 2021, you contacted the Office of Financial Regulators Complaints Commissioner (OFRCC) to ask that it investigate a complaint you had made against the FCA because you did not feel that the FCA investigator had the knowledge or the experience to investigate such a complicated case. In a subsequent call you explained that your complaint was about the Financial Conduct Authority's (FCA) compliance with the General Data Protection Regulation (GDPR) and its oversight of the Financial Ombudsman Service (FOS). The OFRCC passed your complaint to me on 6 April 2022.
3. Your complaint to the OFRCC followed a letter from the FCA Complaints Team dated 6 July 2021 (the Decision Letter) notifying you of its decision on a complaint you had made to the FCA (the FCA Complaint) which the FCA summarised in a letter dated 12 May 2021.

#### *What the FCA Complaint was about*

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

### *Part One*

The Financial Ombudsman Service (FOS) were not listening to your complaint about the [the company that sold your late brother-in-law two annuities and provided you with a quote: (the Annuity Company)] where you allege, they mis sold an annuity. You felt that the staff at the FOS were unskilled to deal with your complaint.

### *Part Two*

You made a Subject Access Request and allege that a call recording is missing and alleged breach of the deadlines. You currently have a 'live' complaint with the Information Commissioners Office (ICO), and you are not happy with the length of time this is taking.

### *Part Three*

You are generally dissatisfied with the process of the FCA not dealing with consumers on a one-to-one basis and the lack of response when complaining about the [Annuity Company] to the FCA and the way the FOS handled the complaint.

### *Part Four:*

You raised a complaint with the FCA, and you were unhappy with the delays in dealing with your complaint. You also state that you did not get updates on the complaint as you were told would happen.

### *What the Regulator Decided*

5. By its Decision Letter the FCA Complaints Team notified you that it had decided that Part One and Part Two of the FCA Complaint were outside the scope of the Scheme and would not be investigated and that Part Three was not upheld. Part Four of the FCA Complaint was upheld and you received an apology and were offered an ex-gratia payment of £100 which you accepted on the understanding that it would not affect your right to request that the FCA Complaint be investigated under Stage 2 of the Scheme.

6. The FCA gave the following reasons for its decision:

Part One

As set out in paragraph 3.4 of the Scheme, this type of complaint is excluded from the Scheme. This is because your complaint relates to the actions, or inactions, of the Financial Ombudsman Service, the Financial Services Compensation Scheme, or the Money Advice Service.

Part Two

As set out in paragraph 3.6, The Regulators will not investigate a complaint under the Scheme which 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 institution of other legal proceedings). You have referred this matter to the Information Commissioners Office (ICO).

Part Three

We have investigated whether there was an acceptable level of customer services demonstrated by the FCA. The FCA do not deal with individual cases, however, in some circumstances in order to consider the actions of a regulated firm, permission is requested to assess the actions of the firm in some circumstances.

The investigation has found no evidence to substantiate the allegations made; therefore, this complaint is not upheld. It is apparent that the root cause of your complaint to the FCA related to the [the Annuity Company] mis selling you an annuity. You had complained to the Financial Ombudsman Service (FOS) and were not satisfied with the progress. The FOS is the most appropriate body to deal with this matter.

Part Four

I have investigated whether the correct process was followed by the FCA complaints team. I have found evidence that there were delays in handling your complaint and that due to high case volumes your investigation remained unallocated for a period of time.

*Why you are unhappy with the regulator's decision*

7. In your letter to the FCA Complaints Team of 12 July 2021 you said you were extremely disappointed with the Decision Letter and explained that:
- In relation to Part One, it has been suggested that the FCA be requested to instruct the FOS to re-open your late brother-in-law's case and allocate the file to an Ombudsman who is knowledgeable about the subject matter of your complaint and has the necessary qualifications to investigate a mis-sold annuity case. You also complained that during the FOS's investigation of your complaint it did not follow FCA Rules or the FOS's own guidance.
  - In relation to Part Two, you made the point that you had been told that the relevant call was being recorded at the outset and that you were informed that you would receive the call recording in due course.
  - In relation to Part Three, the FCA should instruct the FOS to reopen your brother-in-law's case and pointed out that the FCA has the power to open an investigation when circumstances suggest that a firm may have breached FCA Rules.
  - In relation to Part Four, that the amount of the *ex-gratia* payment is derisory in the context of the FCA's delays and failures to keep you updated on its handling of your FCA Complaint.
8. You wrote to me on 29 May 2022 to add to the points made in your letter of 12 July 2021 by alleging that:
- There were mistakes and a lack of care by the FCA Complaints Team that considered and investigated your FCA Complaint;
  - There was unreasonable delay by the FCA Complaints Team which failed to update you about your case;
  - Members of the FCA Complaints Team behaved in an unprofessional way in the manner in which they carried out their duties; and
  - The FCA showed a lack integrity in failing to investigate non-compliance by the Annuity Company and the FOS with FCA Rules.

*Relevant extracts from the Complaints Scheme*

9. Paragraph 3.1 of the Scheme states that:

The Scheme covers complaints about the way in which the regulators have acted or omitted to act, including complaints alleging:

- a) mistakes and lack of care;
- b) unreasonable delay;
- c) unprofessional behaviour;
- d) bias; and
- e) lack of integrity.

Paragraph 3.4 states that

3.4 Excluded from the Scheme are complaints:

....

e) complaints about the actions, or inactions, of the Financial Ombudsman Service....

Paragraph 3.6 states that

The regulators will not investigate a complaint under the Scheme which 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).

Paragraph 6.2 states that

The relevant regulator(s) will conduct an initial investigation into any complaint which falls within the scope of the Scheme and which does not come within the provisions of paragraphs 3.4 to 3.7. That investigation will be carried out by a suitably senior member of staff who has not previously been involved in the matter complained of, aiming to resolving the matter to the complainant's satisfaction.

*My analysis*

*Part One*

10. The 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. Complaints about the actions, or inactions, of the FOS are specifically excluded from the Scheme by paragraph 3.4.
11. 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 Ombudsman make in individual cases submitted for resolution under the alternative dispute resolution scheme operated by the FOS. The FCA's functions in relation to the FOS under FSMA include what the FCA describes as an oversight function. This involves the FCA 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 the Financial Services and Markets Act 2000 (FSMA). However, shortcomings in the FOS's performance in a particular case or cases, even if established, do not support a conclusion that the FCA has failed in its duties. The FCA's oversight function does not extend to giving the FOS directions on handling particular complaints or the making of operational decisions.
12. Part One of your FCA Complaint began as a complaint to the FCA that the FOS's complaints handlers conducting the initial assessments of your complaints against the Annuity Company had neither followed, nor taken into account, either the FCA's Rules, guidelines, standards and codes of practice applicable at the time the annuities were purchased or the FCA's Dispute Resolution Rules (DISP) that were to be followed by the FOS in investigating and determining complaints. You developed this complaint after it had been passed to the FCA Complaints Team by adding that the FOS were not listening to your complaint against the Annuity Company and you felt the FOS staff were unskilled. However, you also added that the FOS had now decided in your favour on your complaint about your own purchase of an annuity but that the complaint that you had made in respect of the annuities purchased by your later brother-in-law was still ongoing.
13. On the basis of the FCA Complaints Team's understanding of your FCA Complaint, which you confirmed to them, I agree with their assessment that Part One is about

how the FOS handled your complaints against the Annuity Company (rather than actions or inactions of the FCA). For this reason, Part One of the FCA Complaint is excluded from the Scheme by paragraph 3.4(e), so I cannot investigate it. Whilst your allegation that some of the FOS staff involved in your complaints were unskilled touches on the capability of the FOS to provide alternative dispute resolution services, you did not make any express criticism of the FCA's oversight of the FOS in this respect.

14. For completeness, I have also considered the points that you made on this part of your FCA Complaint in your letter to the FCA Complaints Team of 12 July 2021 commenting upon the Decision Letter and your letter to me of 29 May 2022. Again, the focus of your complaints about Part One is the FOS's handling of your complaints. You also allege that the FCA lacked integrity because it refused to investigate the FOS's compliance with FCA rules and regulations. However, in circumstances where the FCA Complaints Team's decision not to investigate was based on a *bona fide* view that the complaint was excluded from the Scheme, this allegation cannot be maintained.
15. Whilst I recognise that you will be disappointed by my conclusion on Part One of your FCA Complaint, it is not in any event open to me under the terms of the Scheme to recommend that the FCA intervene in the FOS's handling of your complaint against the Annuity Company or to order the FOS to reopen decisions in relation to that Complaint. It was open to you not to accept the FOS's determination and it may then have been open to you to bring legal proceedings against the Annuity Company. There are also legal procedures for challenging decisions of the FOS. I would suggest that you obtain independent legal advice as to whether there are still options for you to pursue the Annuity Company or challenge the FOS's determination in the courts. I accept that any options you may have had in this respect may no longer be open to you because of events or the time that has elapsed.

### *Part Two*

16. I also have to decide whether your complaint about the FCA's response to your data subject access request (DSAR) seeking a recording of a telephone call you had with an FCA staff member is within the scope of the Scheme and, if so, whether it would be appropriate to conduct an investigation.

17. Not every complaint about the FCA's response to DSARs would fall within the scope of the Scheme because responding to DSARs is not a function of the FCA under FSMA. However, your request related to a call with a member of the FCA's Enforcement and Market Oversight Team in connection with a complaint against an authorised firm. This complaint therefore seems to me to arise in connection with the FCA's exercise of its functions under FSMA and to be within the scope of the Scheme.
18. At the time you made the FCA Complaint you had already referred this part of your FCA Complaint to the ICO. For this reason, the FCA said it would not investigate it under the Scheme. Given the specific responsibilities of the ICO for investigating complaints about alleged failures to comply with DSARs and the fact that you had already lodged a complaint with the ICO before your FCA complaint, I agree with the FCA Complaints Team's decision that it was more appropriate that Part Two be investigated by the ICO. The fact that the ICO has now determined your initial complaint in respect of your DSARs, reinforces my view that it would not be appropriate to conduct another investigation of the subject matter of Part Two under the Scheme.
19. I understand that you now accept that no recording was in fact made by the FSA of the call. Whilst I have not conducted an investigation of this Part, I can see that the FCA's routine warnings to callers to its Contact Centre that their calls would be recorded can cause some confusion as to whether a recording exists. I have suggested to the FCA that it consider whether its call recording warning system can be improved so that callers are not left with a misleading impression that their calls have been recorded when that is not in fact the case. The FCA have accepted this suggestion and tell me that the FCA Supervision Hub will update the current version of the interactive voice response (IVR) pre-recorded message on IVR to say: 'Whilst you're speaking with the Supervision Hub your call will be recorded. However, if you are transferred elsewhere in the FCA your call may not be recorded'

### *Part Three*

20. I agree with the FCA that this part of your FCA Complaint is within the scope of the Scheme and have therefore conducted an investigation. I have reviewed your written communications with the FCA from the date of your email of 30 September 2020 to the Enforcement Division asking for help and guidance in relation to your



annuity mis-selling claim until the FCA Complaints Team logged your FCA Complaint under the Scheme in early December 2020. I have also been able to review internal communications in this period between those at the FCA with whom you were corresponding although I am required to respect the confidentiality of this material.

21. I can see from my review of the communications that after your initial contact with the FCA staff, you had raised hopes that the FCA would intervene in your dispute with the Annuity Company and your complaint to the FOS. I can also see that you became frustrated by the difficulties that you encountered in making contact with the FCA staff members with whom you initially communicated and the lack of substantive information that they were passing back to you. You had numerous exchanges with a Head of Department and also with a Supervisor in the Supervision Hub who had been nominated as your single point of contact at the FCA. In this regard I note that you were told that the queries that you had raised required involvement from different people across the organisation.
22. I do regard it as significant that you were told, in my view correctly, that the FCA was not able to update you on any communications it received from your Annuity Company. That is because section 348 of FSMA restricts the FCA from passing on some information it receives from firms and the FCA also has a policy on how information about firms it regulates is dealt with. You were also told that the FCA was not able to take on your complaint against the Annuity Company because that is the specific role of the FOS and that the FCA which has no statutory remit to intervene with the FOS in a particular case or to comment on its decisions. For the reasons I have already discussed, it was not open to the FCA to order the FOS to reopen the complaint in respect of the Annuity Company.
23. There were delays by the FCA in responding to your enquiries and correspondence and occasions when the FCA had to clarify its earlier communications and FCA staff members were not able to respond to questions that you put to them over the telephone. I accept that this caused you considerable annoyance, but, to a large extent, these difficulties resulted from the fact that no one individual at the FCA possessed all the information needed to respond. Further, it appears that you expected the FCA to assist you to secure compensation from the Annuity Company

so felt badly let down by the FCA's messages to the effect that it was not a redress service for individual consumer complaints.

24. I am satisfied on balance that the FCA's behaviour between 30 September and 30 November 2020 in response to your request for guidance in relation to your complaints against your Annuity Company and the FOS was not unprofessional or lacking in care. I have seen nothing to suggest a lack of integrity. Likewise, I do not consider that the time taken by the FCA to respond to your communications was unreasonable in circumstances where different departments needed to be consulted and those with whom you were communicating had other primary responsibilities to discharge. For these reasons, I am not minded to uphold this part of your FCA Complaint.

#### *Part Four*

25. The FCA upheld your complaint about the delays in handling the FCA Complaint for which it apologised and has made an ex-gratia payment of £100. However, your view is that the FCA's ex-gratia payment of £100 for the distress and inconvenience that you have been caused is insulting.

26. 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 in line with 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 not minded to recommend that the FCA increase its offer.

#### *My Decision*

27. (a) I cannot investigate Part One of the FCA Complaint because it does not fall within the scope of the Scheme.

(b) It is not appropriate that I investigate Part Two of the FCA Complaint under the Scheme because the subject matter has already been the subject of complaints you

have made to the ICO which has already determined them. However, I have suggested to the FCA that it review its system of warning callers that their telephone calls are being recorded and they have accepted and acted on my suggestion.

- (c) Having investigated Part Three, I do not consider that I can uphold this part for the reasons I have given in paragraphs 20 to 24 above.
- (d) I will not recommend the FCA to offer you an additional ex-gratia payment for the distress and inconvenience you have suffered as a result of its delay in handling your FCA Complaint because the payment the FSA has already made is in line with the level that the FCA considers appropriate for the length of delay you suffered.
- (e) My role under the Scheme is to consider the FCA Complaint and, where I decide that parts fell within the scope of the Scheme, to investigate them if I decide that an investigation is appropriate. In doing so, I have had access to the FCA's complaints files, and have seen no evidence to support two of the three allegations you made against the FCA Complaints Team in your letter to me of 29 May 2022. The FCA Complaints Team did accept your third allegation which was of delay in their handling of the FCA Complaint.

28. I appreciate that you have had to spend a considerable amount of time trying to sort out the difficulties which have arisen with your late brother-in-law's annuities. This was exacerbated by the complex regulatory and dispute resolution structure and the initial encouragement you received from the FCA. I am sorry to disappoint you but, for the reasons given, I do not uphold your complaint against the FCA.

**Roger S M Best**

18 July 2022