

Final Report by Roger Best

Complaint No FCA 207649433/006

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 30 July 2021, you contacted the Office of Financial Regulators Complaints Commissioner (OFRCC) to ask that it investigate a complaint against the FCA following a letter from the FCA Complaints Team dated 29 July 2021 (the Decision Letter), responding to a complaint you had made to the FCA on 23 July 2021.

What the Complaint is about

3. In the Decision Letter, the FCA summarised your complaint as follows:
You first contacted the Financial Ombudsman Service in February 2017, raising three separate complaints, which encompassed the following:
 - a. The refusal by the [an insurer of buildings] to honour my third-party rights to make a claim on a buildings insurance policy;
 - b. [The insurer] refusing to quote for a second policy; and
 - c. Fraud which was unlawfully ignored by the Financial Ombudsman Service.

You are unhappy with how the Financial Ombudsman Service dealt with your underlying complaints (as above), ignoring evidence of fraud and that they are perceiving themselves immune from legislative responsibility.

What the Regulator Decided

4. By its Decision Letter the FCA Complaints Team notified you that it could not consider your complaint under the Scheme because your complaint is against the Financial Ombudsman Service (the FOS) and is therefore excluded from the Scheme by paragraph 3.4(e).

Why you are unhappy with the regulator's decision

5. On 30 July 2021, you submitted a complaint against the FCA to the OFRCC. You explained that you had rejected the Ombudsman's Final Decision in one of your four complaints to the FOS (a complaint that the FOS had ignored evidence of fraud). You said that there was no reason why the FCA cannot investigate the activities relating to any event after you had rejected the Ombudsman's "Final Decision" in your case because, in your view, all exemptions provided for the FOS ceased. You said it was a fallacy that the "Financial Services and Markets Act 2000", (FSMA), granted the FOS exemption from independent regulation because Section 212 (2) clearly states the opposite. You did not dispute that paragraph 3.4 (e) of the Scheme states the FCA cannot investigate "actions or inactions" of the FOS but argued that this paragraph is "ultra vires" because any "process", or "scheme", must be lawful.
6. You also submitted a further complaint form to the FCA Complaints Team on 30 July 2021, making the same point regarding paragraph 3.4(e) of the Scheme being ultra vires and said that you wanted the FCA to require the FOS (i) to come up with something more substantive than they do not understand the points of law you had made and (ii) to make a reasonable offer in respect costs and the damages and distress you had suffered over the last five years. You also asked the FCA to agree a revision to paragraph 3.4(e) of the Scheme to include a caveat that the FCA will only investigate the FOS in exceptional circumstances or something similar.
7. On 5 August 2021, you responded to an email from the FCA Complaints Team, copying the OFRCC and others stating: "I confirm that I have received the response to one of my requests for information submitted to the FCA on 4 August

2021 allocated the case reference [FOI****] and that I have been able to read it.

....

I further confirm that I consider that the content of the response is potentially unlawful and could be considered to be “blocking” my valid request for information which is a criminal offence under section 77 of the Freedom of Information Act 2000.”

8. After I informed you that your complaints against the FCA had been referred to me, you submitted an initial response which you described as a draft of your proposal for formal acceptance of the terms of my investigation for discussion only. In that initial response you expanded on some of the points I have set above and introduced some new points.

In respect of the FOS, you said that parts of the “FOS scheme” are *ultra vires* because a “*limited company*” cannot define a “*business rule*” because it appears the FOS are relying on their “*scheme*” rather than complying with the law. You said that the “*FOS Investigator*” acted unlawfully in your case by saying that they would ignore the evidence of “*alleged fraud*” because they did not understand it and considered it “*better suited to court*”. You also said that the FOS were exaggerating their statutory immunity and raised allegations that in their handling of your complaints they had acted in contravention of the FCA’s competition objective and with a lack of integrity.

In respect of the FCA, you supplemented your argument in respect of the exclusion of complaints about the FOS from the Scheme by paragraph 3.4(e) by arguing that it has no statutory basis and is not compliant with the consumer protection objective in section 1C of FSMA and argue that section 1B of FSMA is a clear mandate to the FCA to act as the FOS’s regulator.

You complained that both the FOS Complaints Scheme and the Scheme confuse “*operational independence*” with “*regulation*”.

9. On 15 July 2022, you emailed me regarding documents that I might regard as significant and stated that ‘I was not informed that complaint reference 207669589 was raised but you should have also noticed that the FCA case officer I have identified [as X] may have committed a criminal offence under section 77(1) of the “Freedom of information Act 2000”, “FOIA”. I requested a list of the documents I had sent to the FCA which he decided to treat as an “FOIA request” for some

strange reason and then blocked my request which could be considered a criminal offence because there was no “enquiry” involved and I had supplied the documents in the first place.’ I take that this to be a reference to the matter you raised on 5 August 2021 to which I have referred in paragraph 7 above.

10. On 21 July 2022, you elaborated on the statement of 15 July by stating “Where FCA [Case officer X] was at fault was to classify my general inquiry as a FOIA request and then fail to comply with section 10(2) FOIA which puts a strict time limit of 20 days to respond”. In the same communication you said that the FOS response to one of your FOIA requests is part of the evidence that the FOS has a policy of blocking FOIA requests which the FCA should have acted upon. I note that the FOS said in response to the particular FOIA request in question that you have made around 185 FOIA requests since October 2019, all borne out of your unhappiness with the FOS’s service.

Relevant extracts from the Financial Services Act 2012 (FSA 2012)

“84. Arrangements for the investigation of complaints

(1) The regulators must—

(a) make arrangements (“the complaints scheme”) for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions (see section 85), and..

2) For the purposes of this Part “the regulators” are the FCA, the PRA and the Bank of England, and references to a regulator are to be read accordingly.”

“85. Relevant functions in relation to complaints scheme

....

(2) The relevant functions of the FCAare-

(a) its functions conferred by or under FSMA 2000, other than its legislative functions and its standards review functions, and

(b) such other functions as the Treasury may be order provide.[See SI 2014/1195]”

.....

(4) For the purposes of subsection (2)(a), the following are the FCA's legislative functions—[list of functions under specified sections of FSMA].

Relevant extracts from the Complaints Scheme

11. The Scheme states that:

3.1 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....

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...

My analysis

12. The Scheme was established pursuant the FSA 2012 for the investigation of complaints against the FCA, the PRA and the Bank of England 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 FOS is not one of the regulators required by section 84 FSA 2012 to make arrangements for the investigation of complaints against itself in connection with its exercise or failure to exercise relevant functions. Indeed, the FOS is not a regulator, rather it is the operator of an alternative dispute resolution scheme for the determination of consumers' disputes with firms in the financial services industry (the FOS ADR Scheme). Further, complaints about the actions, or

inactions, of the FOS are specifically excluded from the Scheme by paragraph 3.4(e).

13. 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 FOS ADR Scheme. The FSA'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 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.
14. Your complaint under the Scheme began as a complaint to the FCA about the FOS' handling of three complaints you made to the FOS under the FOS ADR Scheme and also included complaints about members of the FOS staff involved (including the Independent Assessor appointed by the FOS's Board to consider complaints about the standard of service provided by the FOS).
15. In its Decision Letter, the FCA explained that it is not able to involve itself in individual disputes with a Firm or how the FOS arrives at its decisions. It acknowledged that under FSMA, the FCA is responsible for ensuring that the FOS is capable of exercising its statutory functions, which includes the FCA approving the budget and making Board and Executive appointments, and that it also publishes the rules that set out how the FOS should handle complaints in the DISP section of FCA Handbook. However, the FCA emphasised that it does not, and is not able to, intervene in the day-to-day operations or the decisions taken by the FOS because this would compromise the FOS's operational independence. The FCA noted that you had indicated in your complaint that your stated reason for escalating the issue to the FCA, is because the FOS are continuing to "Ignore evidence of fraud and has persisted with the line that as long as they are polite, the FOS are immune from the law today." The FCA saw this as indicative that the complaint is not regarding a regulated Firm, but rather is about the FOS.

16. I agree with the FCA's conclusion that your complaint to the FCA was about the FOS rather than the FCA. That remains my position after having considered your argument that there was no reason why the FCA cannot investigate the activities relating to any event after you had rejected the Ombudsman's "Final Decision". It is the activities of the FOS in relation to the handling of your particular FOS cases and your subsequent complaints about FOS staff members and the Independent Assessor that you want the FCA to investigate. These matters relate to the day-to-day operations of the FOS. 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 even when the relevant Ombudsman's final decision has been rejected by the complainant. Likewise, your complaints about individual FOS staff members and the Independent Assessor were matters for the FOS to consider rather than the FCA. Notwithstanding the FCA's narrowly defined oversight function in respect of the FOS, and its role in approving both the FOS as an ADR entity and certain rules of the ADR Scheme administered by the FOS, the FCA's regulatory role in relation to the FOS is very limited. The FCA does not have any power to direct the FOS how to respond to complaints or to order the FOS to make offers in respect of costs and/or damages. I should add that, in response to my preliminary report, you commented on an argument you said I had made that I "cannot consider the issues raised regarding the ADR certification process". Your complaint to the FCA under stage 1 of the Scheme did not include a complaint about the FCA's initial approval of the FOS as an ADR entity it was not therefore a matter which I have decided in relation to your complaint under Stage 2 of the Scheme (although it is a matter on which I commented in a decision on another complaint <https://frccommissioner.org.uk/wp-content/uploads/001-Final-Report-Issued-22-December-2021.-Published-20-June-2022.pdf>)
17. You will appreciate from what I have said above that I concur with the FCA Complaints Team's conclusion that because your complaint to the FCA was about the FOS it was excluded from the Scheme. As I have noted above, you responded to being notified of this conclusion by arguing that the operative provision of the Scheme (paragraph 3.4 (e)) on which the FCA relied in deciding that your complaint could not be considered under the Scheme is ultra vires, has no statutory basis, and is not compliant with FSMA.
18. Your argument as to the validity and lawfulness of paragraph 3.4(e) of the Scheme was not considered by the FCA in the Decision Letter because it was not raised

until the day after you were sent the Decision Letter. I will treat it as a separate complaint to that which the FCA determined by the Decision Letter because it is a complaint about the Scheme rather than a complaint about the FOS. However, it is not a matter that I can investigate under the Scheme because it is not a complaint about the FCA's performance of its functions under FSMA or the additional relevant functions provided for by the Treasury under statutory instrument 2014/1195. Rather, it is a complaint about arrangements made by the FCA under section 84 of the FSA 2012. In your letter commenting on my preliminary report you expanded your ultra vires claim in respect of the Scheme by arguing that several elements of the Scheme are ultra vires and not in accordance with the law. You developed this argument by reference to provisions of FSMA which you assert limit the scope of the exclusions provided for by paragraph 3.4 of the Scheme and demand that paragraph 3.5 be clarified. However, the position remains that complaints about the FSA's performance of its role in arranging the Scheme are not within the scope of the Scheme. These are matters which you will need to raise with the FCA or pursue through the courts.

19. Likewise, your complaint that an FCA case officer may have committed a criminal offence under section 77(1) of FOIA was not considered by the FCA in the Decision Letter. I assume that this was because it was not identified in your complaint to the FCA under the Scheme. I cannot make legal findings under the Scheme so I cannot rule on whether an FCA case officer may have committed an offence. This is a matter only the courts can decide. Further, my view is that the FCA's compliance with information requests under FOIA is a requirement of that Act rather than a function of the FCA under FSMA. Further, I do not consider that the allegation that FOS has a policy of blocking FOIA requests invokes the FCA's oversight function in respect of the FOS because FOIA compliance is not a function conferred on the FOS by or under FSMA. For these reasons I consider this head of complaint to be outside the scope of the Scheme. I should clarify that FCA complaint reference 207669589 does not relate to this head of complaint but is the reference number given by the FCA to the handling of the complaint that was the subject of the Decision Letter under stage 2 of the Scheme.

My Decision

- a. I cannot investigate your first complaint to the FCA because it is excluded from the Scheme by paragraph 3.4 (e); and

- b. I cannot investigate your follow up complaint about paragraph 3.4(e) of the Scheme because it is not within the scope of the Scheme.
 - c. I cannot investigate your complaint about a potential offence by an FCA officer under section 77(1) of FOIA or your allegation that the FCA should have acted on an alleged FOS policy of blocking FOIA requests because they are not within the scope of the Scheme.
20. Although I know that you will be disappointed by my decision, it may be of some consolation to know that the FCA's Oversight Committee receive data on all Stage 1 and Stage 2 complaints that have any mention of the FOS. This includes a list of all the complaints, with a description for each and the numbers are broken down by outcome of the investigation. Whilst the Oversight Committee does not involve itself with individual complaints, it does have a duty to consider FOS's ability to exercise its statutory functions under FSMA and this includes considering general concerns about FOS as an organisation, such as allegations about impropriety of its staff, or systemic complaint handling problems.

Roger S M Best

30 August 2022