



11 December 2023

## Final report by the Complaints Commissioner

### Complaint number 202300075

#### *The complaint*

On 18 April 2023, you asked me to review a complaint about the FCA, on behalf of your clients. What the complaint is about

1. In its decision letter to you, the FCA summarised your complaint as follows:

*"Our clients contacted the FCA at first instance when the issue of receiving payment arose. The FCA failed to act or consider the complaint of our clients".*

2. The FCA went onto to set out in more detail in its decision letter that:

*Our understanding of this complaint is that Mr and Mrs XXX are unhappy with the lack of action taken against an authorised firm (**Firm X**). You have explained that your clients provided intelligence the FCA regarding how the firm has dealt with client money, but you feel the FCA has failed to take any action against the firm despite it not meeting FCA rules.*

*As way of background, the firm was ordered by the Financial Ombudsman Service to pay your clients a remit payment of £58,512 for providing unsuitable advice. The Firm subsequently advised the Financial Ombudsman Service that their profession indemnity insurers paid the monies to them, but the funds had been credited to the firms' current overdrawn balance. To date your clients have not received their funds and you have said you feel the firm has acted in breach of trust, and their actions were a misappropriation of funds and possibly a criminal offence.*

#### *What the regulator decided*

3. The FCA did not uphold your complaint. They set out that its review of the information confirmed that the information provided on behalf of your clients to the FCA in relation to Firm X had been acted on appropriately.

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4. In relation to your request that the FCA took enforcement action against Firm X the FCA explained that it does not intervene in individual disputes about the firms it regulates and that it is not the mechanism for resolving complaints that relate to the actions of a regulated firm.

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

5. You wrote to my office setting out your complaint about the FCA's handling of client's complaint to it (Element One), and that you felt that the FCA had failed to address the complaint you had made to it.
6. In particular, you set out that they have failed to investigate the trading status of the Firm to determine whether or not it is carrying on business or is in operation. You have set out that it has failed to investigate the financial position of the firm. Related to this you also consider that the FCA has failed to take any action against the Firm including utilising its enforcements powers which include the power to suspend, seek the winding up and to bring criminal prosecutions. As a result of this your client's claim under the Financial Services Compensation Scheme (FSCS) was refused on the basis that the firm is still trading. (Element Two)
7. You summarised that you considered that, all such failings fall short of the FCA's overriding duty to protect our clients and other consumers "from harm caused by bad conduct in financial services", "stopping [firms] from trading or securing compensation for consumers" and acting when firms aren't following the rules.

*Preliminary points (if any)*

8. It is noted that one aspect of your complaint was that the FCA has failed to keep proper records. Your client's say that they originally contacted the FCA about the Firm in June/July 2022 and that the FCA has no records of this. I note that the FCA did attempt to locate the relevant records to confirm this, but unfortunately neither the FCA nor your clients have been able to locate records to confirm this contact. As such, my investigations have considered the information available in relation to the complaint raised to the FCA in February 2023.

9. As set out by the FCA in its decision letter, the FCA does not generally say what action has been taken in response to the information that it receives. This is because section 348 (s.348) of the Financial Services & Markets Act 2000 (FSMA) classes some information the FCA holds about firms as confidential and restricts how that information is dealt with. In addition to this, any information that is not restricted by s.348 FSMA may be restricted due to the FCA's policy on sharing information about regulated firms and individuals, who also have legal protections. Under this policy, the FCA will not normally disclose the fact of continuing action without the agreement of the firm concerned. [There is a good explanation of the statutory and FCA policy restrictions on information sharing at <https://www.fca.org.uk/freedom-information/information-we-can-share>.] This means that, as you were told, there is no general right for members of the public to know what action if any the FCA took.
10. Like the FCA, I am required to respect confidentiality. This means that sometimes I cannot report fully on the confidential material to which I have access. However, as part of the Complaints Scheme, I have access to all the FCA's complaints papers, including confidential material. This is so that I, as an independent person, can see whether I am satisfied that the FCA has behaved reasonably. Sometimes this means that all I can say to complainants is that, having studied the confidential material, I am satisfied that the FCA has (or has not) behaved reasonably – but I am unable to give further details. This can be frustrating for complainants, but it is better that I am able to see the confidential material.
11. The FCA cannot enforce the payment of an Ombudsman Award. Under the Financial Services Act 2012 a complainant can enforce through the courts a money award registered by the Ombudsman or a direction made by the Ombudsman.

*My analysis*

12. I have had access to the information provided by both you and the FCA. I have listened to the call made by your clients' mortgage broker on 23 February 2022 in which he set out the circumstances of your clients' issues in relation to Firm X and asked that the FCA take action against the firm.

13. From my review of the FCA's files I can say that I am satisfied that the FCA has not ignored the information which your clients' mortgage broker provided and that the information was passed onto the relevant supervision team for consideration in line with its relevant processes. I am also satisfied that the FCA has considered the information that you have relayed to it on behalf of your clients as part of this complaint.
14. Having said this, as I have noted previously to you and the FCA, my review of the FCA's files did lead me to feel that the FCA's decision letter failed to provide sufficient detail about the FCA's consideration, approach and response to your client's mortgage broker at the time when he presented the relevant information about Firm X. I previously acknowledged that the FCA's decision letter was lacking in details it could have shared with your clients.
15. My review of the FCA files identified that at the time your Mortgage Broker contacted the FCA, there was a miscommunication between the Supervision Hub and the Event Supervision Team who had thought that your clients had been advised by the Supervision Hub to return to the FOS again and request that they make a formal referral to the FCA. The reason they would have needed to do this is because until the FOS informs the FCA of non-co-operation the FCA does not normally act on consumer based intelligence only about firms non-compliance with FOS decisions.
16. In my correspondence with the FCA in relation to your complaint, I asked the FCA to confirm whether its processes required that the notification of a firms non-compliance with a FOS award had to be provided by the FOS itself. It confirmed that intelligence received from consumers about the non-payment of a FOS award would be passed to the relevant Event Supervision Team and that the case would be closed following the consumer being told to contact FOS. If, and when a FOS referral was received the relevant consumer intelligence would be referred to at that time in relation to any regulatory action that may be being considered by the relevant supervisory team.
17. It does not appear that this process is entirely transparent to complainants and as appears to have happened in this case, if complainants are not informed that a FOS referral is required, they lack the requisite knowledge to go back to the

FOS to pursue a referral in relation to their case. The FCA has provided me with details of the template correspondence it would usually send to complainants raising a complaint about non-payment of the FOS award directing it back to FOS. It appears that because the Supervision Hub did not relay all the relevant information to your clients at the time, this meant that they may not have been aware that the FCA would likely not consider the issues raised by the mortgage broker about Firm X until it received a FOS referral about its non-compliance with the award.

18. I appreciate that this decision at that time was in line with the relevant processes, but I have expressed to the FCA that I feel that this approach feels slightly rigid and failed to recognise that the complainants had alleged that the firm had misappropriated the insurance payout that the firm had already received in order for it to pay part of the award to the consumers. The FCA has acknowledged my position and whilst due to confidentiality restrictions I cannot provide details of the discussions I can set out that I am satisfied that the FCA has received and handled information in a reasonable and appropriate way.
19. In your response to my Preliminary Report you again set out why your client's considered that the firm had misappropriated client funds, you set out that:

On or around 21 December 2021, the Firm, a FCA regulated firm misappropriated client funds, which were held on trust for our client and were awarded by the FOS as compensation for the Firm's provision of unsuitable financial advice to our client. Mr X of the Firm informed our client that the monies in question had been paid by the Firm's professional insurers, but were credited to the Firm's current overdraft account (rather than to a separate client account). Such compensation (totally £58,512) were never sent to our client by the Firm and are still outstanding, resulting in failure by this Firm to make a FOS award.

20. Your response to my Preliminary Report also went onto say that you believe that the Firm has already been found to have given your client unsuitable advice, which resulted in the FOS' award and its recent behaviour and that you consider that this in itself shows a contravention of the FCA rules. You also

suggested that the mere fact that client monies were diverted into a firm account is a 'breach of a very basic requirement to protect client monies'.

21. I appreciate that you feel that these apparent contraventions should warrant an investigation of the Firm by the FCA.
22. I should note that in my discussions with the FCA it has noted that even in cases where an allegation of misappropriation were proven, it would not lead to the FCA enforcing a FOS decision because this is not within the FCA's remit. Instead, it may potentially inform a decision to take regulatory action which would not lead to redress for your clients. I am satisfied that the FCA has received these allegations of misappropriation and the information had been passed onto the relevant team and has been handled in an appropriate way.
23. It is my position that whilst the relevant Supervision Team acted in accordance with its relevant processes and as such that the FCA has not failed to act on the information you provided to it, I do consider that the Supervision Hub, and in turn the complaints team in its decision letter, failed to communicate that the information you had provided would only be noted as a case with the supervision team but without a referral of non-compliance from FOS it was unlikely to be actioned in any way.
24. As such I **do uphold** your complaint into the handling of your complaint as I feel that the decision letter did not identify the failings in the information that the Supervision Hub provided to you, and that the decision letter failed to provide you with sufficient information about your complaint that was not covered by the confidentiality provisions. Whilst I have not agreed with the FCA decision letter fully, as noted above I am satisfied that the FCA has not ignored the information provided to it and that this was passed onto the relevant teams for consideration.
25. I do note that the FCA is not designed to be an appeals process for the FOS decisions, so the FCA's processes requiring notification from the FOS about non-compliance of awards by Firm's seems reasonable to me. However, this should be transparent to consumers and communicated to them, to inform them that the information they have provided to the FCA will be passed onto the relevant supervision team but a FOS referral would be required for any

regulatory action to be considered against a firm and in any event the FCA has no powers to require a firm to comply with a FOS award to a consumer.

26. In view of this I **suggest** that the FCA reviews its processes to ensure that its Supervision Hub staff are aware and clearly communicate that consumer led information about non-compliance with a FOS award will simply be recorded but that does not mean it will be actioned. Further, the FCA should inform complainants that they will need to pursue the FOS further about non-compliance of an award and get FOS to make a referral to the FCA where the Firm continues to refuse but to make clear this will not result in the FCA enforcing the award amount. I am pleased to note that the FCA has confirmed in its response to my preliminary report that its supervision division is currently reviewing the processes relating to consumer led intelligence for non-payment of Ombudsman awards with a view to streamlining and clarifying it, and I **recommend** the FCA updates me in six months' time on progress.
27. I also consider that the Supervision Hub's failure to identify this information to you at the time of the original complaint may have delayed your client's returning to the FOS to pursue them to send a referral to the FCA regarding Firm X's failure to pay the award to you. This is particularly so in light of the fact it had received part of the money from its insurance company to do so. As such I recommended in my Preliminary Report that the FCA should apologise for not providing the relevant information to your clients and should pay them an **ex gratia payment** for the distress and inconvenience of £200. I am pleased to confirm that the FCA has confirmed that the Supervision Hub has agreed that following this Final Report being issued it will to send an apology letter to your clients and ask for their payment details to make the recommended ex gratia payment of £200 to your client.
28. The crux of your clients' complaint is that the FCA has failed to take any action against Firm X from the information provided as part of your clients' complaint, and that consequently the FCA is failing in its overarching duty to protect consumers. I can say, however, that I am satisfied that the FCA has considered the information you have provided appropriately as a result of this complaint investigation, although for confidentiality reasons I am unable to disclose more.

29. I appreciate that this is frustrating in your client's individual situation however, as set out by the FCA in its decision letter it does not intervene in individual disputes about the firms it regulates, and neither can I. As such your clients' complaint about the non-payment of the amount awarded to your clients following the FOS investigation, should continue to be pursued with the FOS.

*My decision*

30. I appreciate your client is frustrated however I can assure you that the concerns you have brought to the FCA have been appropriately considered, although this will not lead directly to redress for your client. I have **upheld** the complaint in relation to the FCA's handling of the complaint.

31. I recommend that the FCA pay your client an ex gratia award of £200 for not disclosing relevant information to them, which is that the FCA's process is to act only if there is a FOS referral for non-payment of an award.

32. I suggest the FCA reviews its processes to ensure that this information is transparent.

33. I recommend the FCA update me in six months' time on the progress of its process update.

34. This is my final report about your client's complaint.

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Complaints Commissioner

11 December 2023