



19 July 2024

Final report by the Complaints Commissioner

Complaint number 202300576

The complaint

1. On 7 November 2023, you asked my office to review a complaint about the FCA.

Your complaint to the regulator

2. Your complaint is that your firm had *“asked for clarification as to an interpretation of jurisdiction in relation to S140A Consumer Credit Act 1974 claims and it took the FCA over 16 months to respond”*. This was **Part one** of your complaint to the FCA.
3. You also alleged that *“the FCA are not being truthful and were attempting to cover up a serious error. This is because you had received a response from the FCA, advising that a response to your email of 6 March 2022 had been considered, internal stakeholders had given their view on 29 March 2022 but with regret, a response had not been sent. It is your view that these actions had not taken place and, in any case, if they had, this still highlights serious failings in the FCA’s own reporting and continuity systems.”* This was **Part two** of your complaint to the FCA.
4. To resolve your complaint, you told the FCA you want the following information:
 - *“The name and position of the officer tasked with responding;*
 - *A copy of the of the request for guidance dated 15 March 2022;*
 - *A copy of the “view” provided to said officer on 29 March and clarification of who provided this view;*

- *A copy of any communication sent to [X] by said officer in relation to this matter;*
- *Why was this “communication”/situation followed up when no response was received from [X] given the seriousness of the issue of perceived regulated activity;*
- *The name of the said officer’s supervisor; and*
- *Why was no mention of this previous advice/communication made in your email of 15 July 2023 and which stated, “With apologies for the extended delay in responding to your questions in respect of claims made under s.140A of the Consumer Credit Act 1974, please find our response set out below.”*

What the regulator decided

5. The FCA upheld both parts of your complaint.
6. The reason for upholding **Part one** of the complaint was the fact that the investigator found that there were two periods of a “break” in the FCA’s communication with your firm, one between the 30 March 2022 and 9 January 2023 and another between the 27 April 2023 and 5 July 2023. Given the realisation by the relevant team that your firm had not been provided with a response in the first instance, as promised, the investigator stated that work *“should have been expedited, considering the lack of a response to your initial request. In addition, whilst I can appreciate that gaining such information from a busy organisation like the FCA can take time, I have deemed a delay of over 2 months unreasonable in this instance.”*
7. Whilst the investigator did not find that the FCA were being untruthful or attempting to cover up a serious error, **Part two** was still upheld because *“The response not being sent was an unfortunate oversight, but I do agree that failings had occurred in this matter not being picked up by CMMIS, nor was your initial request picked up on 27 April 2023 when you re-raised the request. Therefore, it is on this basis that I am upholding this Part of your complaint.”*
8. The decision letter went on to offer *“apologies on behalf of the FCA for this oversight and for any inconvenience caused.”* The remedy offered was a distress and inconvenience payment of £100.

9. Where, according to the FCA's own assessment, its internal policies and other confidentiality considerations allowed this, the FCA provided the information you requested as part of the resolution to your complaint, but there are elements the FCA deemed confidential or legally privileged and therefore did not disclose.

Why you are unhappy with the regulator's decision

10. In your complaint to my office, you set out that you are not happy with the FCA's response because, *"Although the complaint was upheld, we are not satisfied with the response and the FCA's failure to disclose relevant documentation. They seek to hide behind legal privilege, but we are not convinced that legal privilege is applicable in these circumstances."* Furthermore, you do not understand why the details of the employees involved cannot be disclosed to you because *"had the employee communicated with us (as it is alleged was the intention) we would have received the employees name and the content of the email so are bemused as to why this cannot be disclosed, even a redacted version."*

11. I have investigated the responses you remain unsatisfied with as follows:
- a. Is the FCA's assertion that this was a simple oversight on its behalf and not a deliberate act to mislead you/ delay a response correct; is the FCA correct to claim legal privilege and confidentiality in relation to the documents you requested and to withhold the name of the employee who picked up but did not respond to your query of 22 February 2022?
Element one.
 - b. Did the FCA's failure to respond to you in a timely manner, if not a deliberate act, highlight *"serious failings in the FCA's own reporting and continuity systems"*? **Element two.**

Preliminary points

12. Whilst the topic of this complaint is a standalone one, I note that you (on behalf of your firm) also submitted two separate complaints to my office earlier this year. One encompasses four FCA decisions and a second one, related to a single FCA decision. I dealt with all these complaints in one report as they were clearly linked and that seemed to be the best option in order to be able to address your complaints thoroughly and concisely.

13. I also note that a distress and inconvenience payment was offered to an officer of the business, as in one of the other complaints considered in the joined preliminary report, and in relation to that report you made a comment about this being inappropriate. Whilst this point had not been made in this complaint, I take it to be applicable across the board. I have asked the FCA to comment on the points you made.
14. The subject of these complaints, including this one, span the same time period, from late 2021 to date and paint a picture of a breakdown in your trust and confidence in the FCA. As a result, communications are tense, and matters are proving difficult to resolve.
15. I also note your comments on my preliminary report, particularly that your firm has *“entered into communications (both written and via Teams) with senior members of the FCA tasked with supervising claims management companies. The outcome was a differing of legal opinion but of such a nature that no enforcement action has been taken against either of our regulated businesses. We accept that supervision is ongoing and that this is not to say action may not be taken in the future. However, we believe that this position underlines the unnecessary waste of our time and resources in trying to establish the FCA’s interpretation of s.140A of the CCA, particularly as it was our companies that approached the FCA for clarification.”*
16. I have to emphasize that the FCA is the regulator and conducts its activities based on its own understanding of the legislation and the rules. When there is a dispute between the FCA and a firm about the interpretation or application of certain laws, which does happen, only a court of law is able to make a decision about which interpretation is correct.
17. The FCA decides which cases to pursue through any one of its regulatory powers or the courts and which cases not to pursue. These decisions are made based on a number of relevant factors that it does not always publish.
18. In order to achieve the best possible outcome and to protect consumers, it is imperative that the FCA and the firms it regulates work together.

My analysis

Element one

19. I should start by explaining that the FCA has not reviewed/investigated the “legal privilege and confidentiality” issue as a complaint because you only raised this to me in response to the FCA’s Decision Letter.
20. Generally, new complaint points would be sent back to the FCA to investigate in the first instance, but I do have discretion to review complaints directly if appropriate. In this instance, all the information needed to assess this complaint point is already in the complaint file which I have, and it is my view that it is not necessary to ask the FCA to conduct a new investigation on this matter as that would lengthen the process unnecessarily.
21. As such, I have reviewed the contemporaneous emails and records that relate to your initial query to the FCA about s.140A of the Consumer Credit Act (CCA), as well as the correspondence that was generated in the course of investigating your complaint.
22. I must inform you that, like the FCA, I am subject s348 of the Financial Services and Markets Act 2000 as well as other confidentiality restrictions. 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 encompassing legally privileged information. This is so that I, as an independent person, can see whether I am satisfied that the FCA has behaved reasonably.
23. 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.
24. Having reviewed the correspondence around the guidance dated 15 March 2022, provided to the member of the team tasked with responding to you on 29 March, I accept the FCA’s assertion that this is legally privileged information and therefore a copy of it cannot be disclosed to you.

25. My understanding is that any information that was capable of being disclosed to you was provided in the email dated 15 July 2023, which addressed your questions about s.140A of the CCA. It is within the gift of the FCA to waive privilege where appropriate, but this is a decision for the FCA to make and not something I can recommend under the terms of the Complaint Scheme.
26. I have not seen any evidence of the response to your questions being delayed on purpose, at the time they were initially raised nor after it had become apparent that no response was provided, over a year later. Neither does it seem to be the case that there were any efforts to cover up mistakes or what happened in your case, for example I can see that it had been referred for review by a senior member of staff. I have, on the other hand, seen internal correspondence which expressed a concern about the wait you experienced, and which encouraged a swift response with as much detail as was possible. For these reasons, I accept the FCA's conclusion that the delay in responding to your questions was not deliberate or malicious but an unfortunate oversight on its behalf.
27. Your complaint relates to the actions of the FCA itself in its role as the regulator. The organisation takes responsibility for its staff, the way in which they act, or fail to act, and it has a policy not to disclose the names of individuals below managerial level. Which member of staff failed to provide you with a response is not in any event relevant here. The point is that this failure occurred and was not identified by the organisation in a timely manner. The FCA does not need to provide you with the name of the individual in question, because whilst you would have seen this, had the response been sent, it does not add any benefit to you to get this name now. The FCA acknowledged that there was a failure to respond to you, upheld your complaint and apologised. The FCA is entitled to have a policy not to identify individual staff members. I, therefore, do not uphold this element of your complaint.

Element two

28. Having reviewed the correspondence on file, I can confirm that your initial query of 6 March 2022 (which was a follow-up to earlier correspondence) had been picked up and the issues were considered internally, as stated by the FCA.

29. It appears that the person who was put in charge of responding to your query and who was making enquiries internally did not respond to you after receiving the relevant feedback, and at some point, left the FCA. There is no information on file about what happened exactly, although the consensus seems to be that when this person left, they did not hand over their outstanding work to anyone else so the lack of a response to your query was missed.
30. The FCA accepts that *“failings had occurred in this matter not being picked up by CMMIS, nor was your initial request picked up on 27 April 2023 when you re-raised the request.”* and it also upheld this element of your complaint.
31. However, the decision letter does not comment on the allegation that the failure of the member of team to either respond to your query or to hand outstanding matters over to another member of the team highlights *“serious failings in the FCA’s own reporting and continuity systems”*, nor does it make any recommendations in relation to this.
32. Whilst I agree with the FCA’s decision to uphold your complaint and the recommendation for an ex-gratia payment in recognition of the distress and inconvenience caused by these failings, the root cause of the problem does not seem to have been addressed.
33. It should be a matter of concern for the FCA that a member of its staff had left the organisation, apparently without having handed over their outstanding workload and/ or that they do not appear to have systems in place which ensures that queries from and dealings with firms are logged and monitored effectively across the board, with alerts and reminders in place when a task is not completed. I would expect there to be a proper handover before a member of staff leaves, with oversight by a manager, so they have an overview of the outstanding tasks and issues.
34. This is not the first complaint I have seen recently in which concerns over continuity, effective handovers and ensuring tasks are not dropping off and being missed have come up. Indeed, you experienced administrative failures yourselves in the way in which your firm’s previous complaints were handled, or rather, were not picked up and processed until you submitted a complaint about

the lack of progress. I have addressed these in my review of your other complaints.

35. The FCA is a large organisation which regulates over 50,000 firms and deals with large volumes of correspondence with firms, consumers and other bodies on a daily basis. Whilst there will on occasions be administrative, human or system errors in logging and following up correspondence and tasks, given the scale of all that goes on within the FCA, I know from dealing with complaints that this isn't an isolated incident. Furthermore, it is clear from your complaints alone that the impact of these administrative and/ or system failures is material.
36. Not only does it take up additional resources to chase up and deal with complaints about errors and omissions, both for firms, consumers and the FCA, but such errors can undermine the trust and confidence of firms in the FCA, hampering its ability to effectively regulate and discharge its statutory duties. This is especially unfortunate in cases such as this, where the contemporaneous evidence shows that the query was picked up and answers were sought by and provided to the area in a timely manner but the answers were then not communicated to the requestor.
37. As such, I uphold your complaint that the failure to respond to your query initially in 2022, as well as the second "break in communication" in 2023 indicate failings in the FCA's internal policies, procedures and systems. The impact caused by these failures and omissions seems material when they do occur. I therefore **recommended** in my preliminary report that the FCA takes the necessary steps to review and remediate its systems and processes, including staff training and its "joiners, movers and leavers" procedures, across the organisation to ensure that these failures are minimised as much as possible.
38. In its response to the preliminary report, the FCA confirmed that *"there is a checklist for management to follow on our HR system. Additionally, there is a leavers checklist...which ensures a successful handover to the team, which involves making sure the work which has not been dealt with has been assigned to another colleague.*

We have reviewed our process, and we have procedures in place when a staff member leaves the FCA, however, these were not followed on this occasion. We accept that this was a local incident rather than an organisation wide incident. On this occasion we should have opened a correspondence case and kept it updated for the matter referred to by the complainant, this would have been tracked and would have been picked up by another colleague, if the handover had been completed correctly.

The focus has been on our case management system and the importance of record keeping, this should help avoid this occurring in the future.”

39. In response to your question, my office keeps a log of all recommendations made and tracks the FCA’s responses to each, whether it accepts or rejects a recommendation and when it implements the ones it does accept. Should I have any concerns about their actions in relation to recommendations, I may raise these with senior FCA staff and/ or comment on them in my Annual Report.

Compensation

40. I believe it was appropriate for the FCA to offer you an apology for the experience you had, as well as an ex-gratia payment for the distress and inconvenience experienced by your firm.
41. In response to my preliminary report related to your other complaint, the FCA has confirmed that it should have made it clear that the distress and inconvenience payment would be payable to the firm, should it be accepted.

My decision

42. I **do not uphold Element one** of your complaint because I have seen evidence on the file that the information not disclosed to you is either legally privileged or comprises confidential information and it is not within the remit of the Scheme for me to overrule the FCA’s conclusions around these points. I also agree with the FCA that it is not necessary for it to disclose to you the name of the individual who did not respond to your initial query.
43. I **uphold Element two** of your complaint as I find there is evidence of there being failings in the FCA’s internal policies, procedures and systems, which resulted in a failure to respond to your queries, despite having actually taken

steps to gather the information to be able to do so. As such, I **recommend** the FCA takes the necessary steps to review and remediate its systems and processes, including staff training and its “joiners, movers and leavers” procedures, across the organisation to ensure that these failures are minimised as much as possible.

44. The FCA has confirmed that it has existing processes in place to ensure work is continued when a member of staff leaves, but stated that this process was not followed on this occasion. It also stated that it has placed focus on its “*case management system and the importance of record keeping, this should help avoid this occurring in the future.*”

Rachel Kent

Complaints Commissioner

19 July 2024