

5 November 2021

Final report by the Complaints Commissioner**Complaint number FCA001053***The complaint*

1. The FCA Summarised your complaint as follows:

Part One

You disagree with the outcome of your initial complaint which was considered and responded to by the Authorisations Team on 19 January 2021. You are unhappy with how the FCA dealt with an application made by Society X to amend their rules and considers that the FCA should not have registered the rule amendment, and your objections were not sufficiently considered.

Part Two

You are unhappy that an apology or remedy was not proposed by the Authorisations Team, even though your initial complaint was upheld in part. You believe that a remedy in form of compensation or otherwise is applicable, considering the considerable time and effort you have spent drawing up the complaint.

What the regulator decided

2. In its decision letter dated 14 May 2021, the FCA set out that Part One of your complaint was excluded from the Scheme under Paragraph 3.6 of the Scheme because the FCA will not investigate a complaint under the Scheme which it reasonably considers could have been, or would be, more appropriately dealt with in another way. It suggested that a possible recourse would be to take the matter to the County Court, against Society X, to argue a breach of the rules in

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making the rule amendment. It set out that this was something which it could not be party to nor intervene in.

3. In its decision letter dated 14 May 2021, the FCA set out that that it had not investigated your complaint formally under the Scheme but had liaised with the area of the FCA most closely connected to your complaint in order to provide you with a response to the matters raised. It further set out that there is no legislative process in place or statutory right to make representations or objections on a rule amendment, or for the FCA to consider such matters. A Society makes its rules in accordance with its rule book, and it is for members to agree or reject those amendments and make their points at that time.
4. It set out that it considers that it can take at face value an assertion by a Society, that it has complied with its rules in making their amendment. Administrative law generally would allow a Public Authority to accept something as bona fide in the absence of anything suggesting male fides (bad faith).
5. It continued to set out that your concerns had been considered and they set out that as its original response to your complaint alluded to, it was satisfied that Society X's rule amendment had been properly made.
6. The FCA also excluded part two of your complaint under Paragraph 3.5 of the Scheme because it relates to your dissatisfaction of the Authorisations Team in not exercising their discretion around providing an apology or remedy, since your initial complaint was upheld in part.

Why you are unhappy with the regulator's decision

7. In your complaint to me dated 1 July 2021, you have explained that you consider that your complaint is not out of jurisdiction and that the FCA should have reviewed your submissions. You feel that instead, the FCA has failed to conduct a detailed review of your submissions and has not considered your complaint in detail or with the care which it was reasonably entitled to receive. (Element One)
8. You think that the FCA was in breach of its statutory duty and its own guidance (FG 15/12: Guidance on the FCA's registration function under the Co-operative and Community Benefit Societies Act 2014 (CCBS) (FG 15/12)), by registering Society X's new rules. (Element Two)

9. You disagree with the FCA's position that your complaint is a dispute between yourself and Society X and that 'the FCA had a duty to investigate the validity of the resolution passing the rule amendment' and that your 'objection to the registration was not an attempt to get the FCA to decide a dispute' between you and Society X. (Element Three)
10. You disagree with the FCA excluding what it referred to as Part Two of your complaint under paragraph 3.5 and its decision not to disturb the Authorisation Team's decision. You consider that the FCA Complaint Team are required to act as if your complaint was the original referral and review all the evidence in full and come to its own decision about how to respond to the complaint. (Element Four).

My analysis

11. From the information provided to me, my understanding of the background to your complaint is that in or around 14 December 2020 you contacted the FCA to object to Society X's application to register an amendment to its rules and alert the FCA that they should not be registered because the resolutions passed at the special general meeting of Society X were invalid as a result of procedural failings contrary to the existing Society rules, and that it would therefore be a breach of the FCA's statutory duty as the registering body to register them.
12. In your complaint to the FCA on 5 January 2021 you set out that the FCA's Authorisation Team had written to you on 29 December 2020 and asked a question and failed to wait for your reply. It emailed its decision to reject your objection and registered the amendments to the rules on 31 December 2020.
13. You complained to the FCA on 5 January 2021 and in its decision letter of 19 January 2021, the Authorisation Team at the FCA upheld the part of your complaint that you had not been provided with adequate time to respond to its email dated 29 December 2020, but it set out that it did not uphold the rest of your complaint. It set out that its decision to register the rule amendment was correct and not contrary to the Co-operative and Community Benefit Societies Act 2014 (CCBS Act). It provided its reasoning as follows:

The rules are in effect a type of contract between the members and Society X. There is no process in legislation for members to object to

the FCA about rule amendment. If you continue to have concern you would have to direct these to the courts who could make a ruling on the matter.

14. You wrote to the FCA on 3 April 2021, to advise that you were not satisfied with the response from the Authorisation Team and your complaint was then reviewed by the Complaints Team. As set out above, you wrote to me on 1 July 2021 and set out that you were unhappy with the FCA's decision letter dated 14 May 2021. I issued my preliminary report on 22 September 2021 and both you and the FCA have provided responses to my preliminary report. I will now look at each element of your complaint.

Element One

15. You have set out that you do not agree with the FCA that your complaint is out of jurisdiction and that the FCA should have reviewed your submissions. I have reviewed the FCA file including your detailed submissions, and I have seen communications between the Complaint Team and the Authorisations Team setting out that enquiries were made to Society X about 'your concerns' and satisfied itself that Society X had made the rule amendments properly. I will discuss the enquiries the FCA made in further detail below in Element Two. As previously set out in my preliminary report, I will reiterate here that in its role as a registering authority the enquiries made by the FCA would not usually be as granular as those it would conduct in its regulatory role in which it is able to discipline firms where it finds wrongdoing.
16. In relation to the FCA setting out that your complaint was excluded because it is outside of its jurisdiction and that it would be more appropriately dealt with in a different forum, I do consider that the FCA was right to exclude this element of your complaint under paragraph 3.6 of the Scheme. This is because the amended rules have already been registered and the FCA does not hold the relevant powers to reverse the registration. As a result, now the only avenue available to you to obtain the remedy you are seeking, being to deregister the rules, can only be achieved through another forum such as the courts. You should seek your own independent legal advice, which you will have to pay for, to explore what options might be available to you. In your response to my

preliminary report dated 11 October 2021, you set out that you suggested an alternative was that my office or the FCA could make an application to the courts to deregister the rules. I acknowledge that you have raised this point and I will address it further in paragraphs 31-32 below.

17. Whilst I have upheld the FCA's decision that your complaint should be excluded under 3.6 of the Complaint Scheme, I have still considered below whether the FCA breached its statutory duty and own guidance.

Element Two

18. The purpose of the Complaints Scheme is to consider complaints about the FCA actions and inactions in relation to its relevant functions, in this case the FCA's Authorisation Team as a registering authority. This element relates to the FCA's duty as a registration authority as set out in the CCBS Act.
19. The FCA has set out its position that, under Section 16 of the CCBS Act the FCA must, if satisfied that an amendment of a Society's rules is not contrary to the provisions of this Act, register the amendment. It explained that this meant that it must assess whether rule amendments are contrary to the legislation. It also set out that it must check that the rule amendment was made as a result of following adequate procedures as set out in Society X's rules.
20. In relation to your complaint the FCA set out that it had assessed all the information including the points which you raised and could not conclude that there was conclusive information showing that the proper processes had not been followed by Society X, so it was correct to register the amendment to the rules. In its decision letter of 14 May 2021, it set out that the FCA can take at face value an assertion by a Society, that it has complied with its rules in making their amendment. Administrative law generally would allow a Public Authority to accept something as bona fide in the absence of anything suggesting male fides (bad faith).
21. I consider that your original objection made to the FCA on 14 December 2020 and 18 December 2020 (paragraph 3 of your submissions), to the registration of the amended rules should have been considered as information suggesting that there could be male fides. In its response to my preliminary report the FCA have confirmed that it was the information you provided that prompted it to make

further enquiries to consider whether the rule amendments had been properly made by Society X.

22. In its letter to you dated 19 January 2021 the FCA briefly explained that any information that it had received from Society X was covered by the FSMA and this means that it was prevented from sharing it with third parties including yourself. This is correct and I will provide a little more detail. Section 348 (s.348) of the Financial Services & Markets Act 2000 (FSMA) classes some information the FCA holds 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. 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>.
23. 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, and whether I am satisfied (or not) that the FCA has behaved reasonably – but I am unable to give further details.
24. I note that at the time of my preliminary report I had not been provided with the enquiries that the FCA made of Society X or any responses it received from Society X, so I was not able to satisfy myself at that time that the FCA had obtained adequate responses to its enquiries to check whether adequate procedures were followed, as per its own guidance in FG15/12, before it registered the amended rules. The FCA has now provided copies of the correspondence between its Authorisations Team and Society X in which the FCA raised enquiries to satisfy itself that the rule amendment was made properly. These show that upon receipt of your concerns in December 2022, it made relevant enquiries of Society X. These enquiries took place by email from 22 December 2020 and involved numerous emails between the FCA and Society X in which the FCA sought further clarification to its initial enquiries to ensure

that it had full answers to its queries and that it had access to all the relevant materials to consider the responses provided by Society X.

25. In my preliminary report I asked how the FCA's position that it could 'take on face value' the assertion by a Society that it has complied with its rules when passing an amendment to its rules, aligned with the FCA's own guidelines that set out that it will check that amendments are made after adequate procedures? In its response to my preliminary report the FCA provided me with a further explanation about how this position does align with its own guidelines. Through discretions provided to it under the CCBS Act 2014, it has designed the application form and statutory declaration required to be completed by societies for the registration of rule amendments, to question the society's on going compliance. On that basis when a society completes these forms, the FCA would usually be able to take on face value that the submitted rule amendments had been made after adequate procedures. However, as in this instance where the FCA was put on notice that there could be mal fides, under its guidelines it would make the further relevant enquiries.
26. The FCA have confirmed that it received a fully completed application form and statutory declaration from Society X which it accepted after it had made relevant enquiries.
27. As a result of the further information provided by the FCA, I am now satisfied that the FCA did follow its own guidelines and obtained adequate assurances in the form of answers to its enquiries and obtained a statutory declaration by Society X. Consequently, this has altered the position set out in my preliminary report and this aspect of your complaint has not been made out.

Element Three

28. When you contacted the FCA on or around 14 December 2020, you did this to raise objections to the validity of the resolution that passed the rule amendment before it was registered. You believed the FCA had a duty to investigate the validity of the resolution passing before registering the amended rules. At this time there was only a dispute between you and Society X. You had requested

that the FCA check that adequate procedures had been used to stop the rules being registered.

29. When the FCA registered the rules and failed to provide you adequate time to respond to the questions it had raised, you then had a dispute with the FCA about whether it had breached its duties and guidelines and whether it had failed to act with due care, which you raised in your submission to it on 5 January 2021.
30. Unfortunately, once the rules were registered the matter fell out of the FCA's scope because it does not hold the relevant power to deregister the rules. Consequently, this means that any desired remedy such as deregistering or a decision on the validity of the rules or the validity of the resolution passing them, can only be achieved in another forum that will consider the dispute between you and Society X. As set out in paragraph 16 above, in your response to my preliminary report you said that you felt that it was open to my office or the FCA to go to the courts to get Society X's rules deregistered. This is not something that is within the remit of my office to undertake under the Complaints Scheme. Also, on the basis that I have now established that I consider that the FCA has in fact complied with its duties and Guidelines in registering Society X's rules, there would be no cause for either the FCA or my office to approach the courts to have the rules deregistered.
31. Accordingly, if after this report you still consider that the rules should not have been registered, you would need seek your own independent legal advice, which you will have to pay for, to explore what options might be available to you.

Element Four

32. You have set out that you disagree with the Complaint Team not disturbing the Authorisation Team's decision in relation to the remedy resulting from the partial upholding of your complaint. I believe that under the Complaint Scheme the Complaint Team was entitled to exclude this aspect of your complaint under paragraph 3.5 because it did essentially relate to a dissatisfaction with the Authorisation Team not exercising its discretion to provide an apology or remedy for the aspect of the complaint that it partially upheld.

33. In my preliminary report I set out that I was disappointed that the FCA did not consider it appropriate to issue an apology in either its response to your initial complaint in January 2021 or the resultant second complaint in May 2021, in relation to the fact that it did acknowledge that it failed to provide you with adequate time to respond to its initial questions.
34. I am pleased that in its response to my preliminary report the FCA have now reconsidered this point and have now agreed that it would be appropriate to provide you with an apology and has said that it will issue an apology to you for its failure to provide you with adequate time to respond and its subsequent failure to acknowledge that it should have apologised.
35. I note that you also set out that you felt that the Complaint Team should look at your complaint from scratch and form its own decision. As set out above the purpose of the Complaints Scheme is to consider complaints about the FCA actions and inactions in relation to its relevant functions, (in this case the Complaint Team looking at the FCA's Authorisation Team actions or inactions in its function as a registering authority). In circumstances where the information available does not address all the enquiries, the Complaints Team may investigate a matter in a more granular way. However, as the Complaint Team set out in its decision to you it liaised with the relevant area of the FCA that related to your complaint and felt satisfied based on the information it received that to provide you with a response. Therefore, it did not consider a more granular investigation was required.

My decision

36. I have not upheld your complaints for the reasons stated above. I appreciate that you will find this outcome disappointing. However, I hope that you will understand my approach and why I have reached my decision.
37. I am pleased to acknowledge that the FCA has agreed to provide you with an apology for its failure to provide you with adequate time to provide a response during your original complaint about Company X and its subsequent failure to acknowledge that it should have apologised.

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Complaints Commissioner

5 November 2021