Complaints Commissioner

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16 August 2022

Final report by the Complaints Commissioner

Complaint number FCA001187

The complaint

1. On 13 May 2022 you asked me to investigate a complaint about the FCA on behalf of Firm X in which you are a shareholder and controller.

What the complaint is about

2. Your complaint is about the FSA and FCA's oversight, supervision and regulation of Keydata Investment Services Ltd (Keydata) and related matters.

What the regulator decided

3. I say more about the FCA's Decision Letter of 31 March 2022 in the My Analysis section below. Briefly, the FCA divided your complaint into eight parts, none of which were upheld, apart from a complaint relating to the handling of your complaint. In view of the delay and service failings you have experienced, the FCA offered you an ex gratia payment of £1,000.

Why you are unhappy with the regulator's decision

4. You sent me a detailed response to the FCA decision letter and have said to me that you are unhappy with the FCA's handling of your complaint and the conclusions it has reached.

Preliminary points (if any)

Historical Note

5. The FSA existed from 28 October 1997 until 1 April 2013. It took over the role of the UK Listing Authority on 1 May 2000. Its responsibilities were extended by the Financial Services and Markets Act 2000 (FSMA), which was implemented on 1 December 2001. On 1 April 2013 the Financial Services Act 2012 (the Act) came into force and the FSA was replaced by the FCA.

Relevant background to the investigation of your complaint

6. I have reviewed and published four complaints about the FCA's oversight of Keydata on my website. They are as follows:

   a. https://frccommissioner.org.uk/wp-content/uploads/FCA00814-Publication-FR-Issued-31-03-2021-Published-4-5-2021.pdf and the FCA response https://www.fca.org.uk/publication/corporate/response-complaints-commissioner-207194404.pdf

   b. https://frccommissioner.org.uk/wp-content/uploads/FCA00816-Publication-FR-Issued-31-03-2021-Published-4-5-2021.pdf and the FCA response https://www.fca.org.uk/publication/corporate/response-complaints-commissioner-207194348.pdf

   c. https://frccommissioner.org.uk/wp-content/uploads/FCA00818-Publication-FR-Issued-31-03-2021-Publication-4-5-2021.pdf and the FCA response https://www.fca.org.uk/publication/corporate/response-complaints-commissioner-207194286.pdf

   d. https://frccommissioner.org.uk/wp-content/uploads/FCA00844-Publication-FR-Issued-31-03-2021-Published-4-5-2021.pdf and the FCA response https://www.fca.org.uk/publication/corporate/response-complaints-commissioner-207194174.pdf

7. The reports above provide useful background information, brief chronology and broad conclusions of the FCA's supervision of Keydata. It is not my intention to repeat this information here, but to point it out to you as a contextual backdrop against which I will review the substance of your complaint.

8. The FCA issued a decision letter on your complaint on 31 March 22 (Appendix 1).

9. You have sent me a detailed response and numerous emails with supporting evidence. Your substantive complaint is attached (Appendix 2).

10. Under the Complaints Scheme to which both the regulators and I operate to, paragraph 6 provides that:

    6.15 In the investigation of a complaint by either the relevant regulator(s) or the Complaints Commissioner, any finding of fact of:

a) a court of competent jurisdiction (whether in the UK or elsewhere);

b) the Upper Tribunal; or

c) any other tribunal established by legislative authority (whether in the United Kingdom or elsewhere);

d) any independent tribunal charged with responsibility for hearing a final appeal from the regulatory decisions of the regulators;

which has not been set aside on appeal or otherwise, shall be conclusive evidence of the facts so found, and any decision of that court or tribunal shall be conclusive.

6.16 Any findings of fact or decisions of courts or tribunals not covered by paragraph 6.15 will carry such weight as the regulators or the Complaints Commissioner considers appropriate in the circumstances.

11. Therefore, any findings from the Upper Tribunal Judgement[1] (the Judgment) are binding on me.

S348 and confidentiality

12. The FCA's complaint response explained that there are limits on some information provided 'due to confidentiality and policy restrictions'. The Decision Letter provided you with a link to further information about this on the FCA's website. Briefly, section 348 (s.348) of 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.

13. 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

[1] https://assets.publishing.service.gov.uk/media/5be1a3aee5274a0eea4c2be5/Stewart_Owen_Ford_and_Mark_John_Owen_v_FCA.pdf

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.

14. My office has previously criticised the FCA's reliance on s.348 in some situations. My understanding is that it applies only to confidential information received by the FCA in the course of its statutory duties. S.348 cannot in my view be used to protect information generated by the FCA itself, nor information which is already in the public domain. I recognise that the FCA has a difficult task in deciding what information should properly be disclosed, particularly when balancing its various legal responsibilities or when there is a danger of prejudicing proceedings.

15. You have referred your complaint elements to me under the headings 'Chapter' in your letter dated 13 May 2022: I refer to them as 'elements' in my report.

My analysis

16. The issues involved in the matter of the FCA's supervision of Keydata are complex and go back many years. I have referred above to my previous reports, the FCA's decision on your complaint, and your complaint to me, to chart the background against which your complaint stands, as well as the comprehensive arguments both from you and the FCA on the substance of your complaint.

17. It is not my intention to repeat here all the information referred to above in its entirety.

18. By way of brief background, you were the principal shareholder and controller of Firm X (now in liquidation), which provided printing mailing and other services to Keydata until 31 December 2010. You state that the contract was worth approximately £450,000 and was effectively terminated on 8 June 2009 when Keydata was placed into administration, making your firm a creditor of Keydata. You are complaining on behalf of the firm.

19. You are unhappy with how the FCA structured your complaint into eight parts and you feel this restructuring of the complaint downplayed the importance of

how Keydata management and their advisers were working with HMRC to address the ISA issues and with the FSA to address its underlying concerns. You also feel that the issuing of the Own Initiative Variation of Permission (OIVOP) is at the heart of the complaint and should not have been pushed to Part Five in the FCA decision letter dated 31 March 2022.

20. It is your view that was the process employed by the FSA to put Keydata out of business, the consequences of which damaged your firm (although you say you are not complaining about the FSA's underlying concerns about Keydata). In doing so, you allege the FSA imposed unnecessary distress and loss to your firm.

21. You believe that OIVOP was imposed hastily and due process was not followed, which you allege should have been a hearing in front of the RDC where both sides (i.e. Keydata management and the FCA) could present their views. You say the imposition of the OIVOP eventually brought on the administration of Keydata and subsequently your own losses stemming from that, and that alternatives were not considered properly.

22. **Element One and Three**: The gravamen of your complaint here is that you allege that had such a hearing before the RDC occurred, Keydata management may have proposed a course of action which may have persuaded the RDC not to grant the OIVOP, and allow Keydata to continue operating, whilst addressing the FSA's underlying concerns. In support of this you allege that Keydata management were working with HMRC through their lawyers Allen & Overy to address the ISA issues and were working with the FSA to address their concerns prior to the OIVOP. Had RDC not agreed the OIVOP, you feel Keydata may not have gone into administration, and your firm may not have incurred the losses you allege stem from this. In short you think this is because there was a realistic chance Keydata management, if allowed by a potential RDC hearing to continue, would have worked towards a resolution of the underlying problems Keydata faced, and that Keydata would have been profitable and solvent if the FSA had not taken the actions it did. I address your points below.

23. By way of background, FSA Supervision referred Keydata to Enforcement on 16 November 2007.

24. During the period November 2007- June 2009 (when the FCA issued the OIVOP), it is a finding of the Judgment that Keydata management [Mr Ford and Mr Owen] took 'concerted and deliberate steps to conceal from the Authority the true dire state of the Products and the substantial losses faced by investors in those Products'. The judgment states at Paragraph 647 'A constant theme is the deliberate and calculated concealment by Mr Ford of material information, both as to the fees being extracted by Mr Ford, and as to the serious issues that arose with respect to both the SLS and Lifemark Products, from 15 Keydata's compliance officer, investors, IFAs and the Authority. That concealment itself demonstrates a clear lack of integrity on the part of Mr Ford'.

25. I appreciate that you believe that Keydata management were working with the FSA and HMRC to resolve the underlying issues, but you have not provided any evidence for this, and in any event, the judgment finding above is very clear that such cooperation from Keydata management with the FSA and HMRC prior to the OIVOP was in fact not evident. Quite the opposite, it would appear Keydata management were taking steps to conceal the dire state of the products and the substantial losses faced by investors. At Paragraph 649 (12) the Upper Tribunal Judgment States: "We find that from 22 December 2008, when the Authority made clear its concerns on the ISA status of the Products, Mr Ford continued to cause Keydata to market and sell the Lifemark Products as being appropriate for investment through an ISA "wrapper" despite being aware that it was likely that those Products would not fulfil the conditions set out in the ISA Regulations."

26. From the evidence before me I believe that the FCA is correct to say that it became clear that Keydata was not cooperating and was not being transparent with HMRC prior to issuing the OIVOP.

27. The Judgment indicates that on 15 May 2009 HMRC wrote to Allen & Overy, and at paragraph 558 it states: 'On 15 May 2009 Mr [T] wrote to Allen & Overy to say that, after further consideration, HMRC did not consider this to be a case suitable for simplified voiding as it was not based on an inadvertent breach of

the ISA Regulations. It was explained that the HMRC view was that "inadvertent" meant "unintentional". A copy of that letter was sent to Keydata, and Keydata was informed that the investments were not qualifying investments and that HMRC would be seeking to recover the tax due'.

28. At this point it became clear to the FCA that Keydata was potentially insolvent and unable to meet its tax liability. The FCA has explained that 'the FSA did consider other possibilities – as para 54 of the Judgment set out, it met with Keydata's management and lawyers during the week preceding the administration application and received proposals for alternatives. These were considered and rejected'.

29. On 5 June 2009 the OIVOP was issued (the FCA has explained this was done according to the process described in existing Decisions procedure and Penalties Manual (DEPP) part of the FCA Handbook). 'The RDC was 'on notice' of the proposed action. The Chair of the RDC consented to issuing proceedings against Keydata and was aware that the decision to issue the OIVOP was being made by an FSA director pursuant to the permitted procedure.'

30. On 8 June 2009, the Court placed Keydata into administration following the FSA's application on the grounds that the firm was insolvent. The FSA made an application to the court when it discovered that Keydata had mis-sold its products incorrectly as ISAs and owed a tax liability it could not afford.

31. Enforcement decision notices were issued in November 2014 and published in May 2015, finding Keydata's CEO, Sales Director and Compliance Officer to be in breach of Statements of Principles 1 and 4, and not fit to conduct any further regulated activity. All three were issued fines and prohibited from conducting regulated activity. These Decision Notices were referred to the Upper Tribunal which, in November 2018, upheld the penalties. A final notice was also issued to Keydata's Finance Director in 2015 for breaches of Statement of Principle 4 and 6, he was fined and prohibited from performing any significant influence role.

32. My summary analysis of the above is that:

a. Contrary to your belief, Keydata management were not cooperating with the FCA (or HMRC) during the enforcement proceedings in the period 2007-2009: in fact, the Judgment finds they were actively concealing information from the FCA.

b. The FCA was concerned about the solvency of Keydata and particularly after HMRC provided information in May 2009 which effectively meant Keydata would not be able to meet its tax liabilities. The FCA also considered the PWC report as well as other information which it explains to you it cannot share due to confidentiality reasons. Therefore, your allegation that the FSA based its conclusions about the solvency of Keydata solely based on the PWC report is not made out.

c. The FCA considered alternatives to the OIVOP but ultimately concluded that the OIVOP was the best course of action. This was a result of various interactions internally, with the firm and with HMRC and PwC.

d. The OIVOP was issued on 5 June 2008 in accordance with the FSA guidebook at the time. Therefore, your allegation that due process was not followed is not made out.

e. On 8 June, the FSA applied to court to place Keydata in provisional liquidation. However, while the FSA made the application in this case, Keydata consented to the administration order as an alternative to the appointment of provisional liquidators, and ultimately, it was the Court's decision to place the firm into administration based on the information and evidence provided.

f. The judgment states at Paragraph 654:"Having regard to the evidence as a whole, including the expert evidence as to the objectively assessed state of the SLS and Lifemark portfolios, and taking account of the Authority's actions, we find that the Authority acted appropriately in performance of its regulatory functions in the face of a determined campaign of concealment and obfuscation orchestrated by Mr Ford. In our judgment, the consumer detriment is laid squarely at Mr Ford's door by reason of his continuing failures to disclose to the market his own knowledge and awareness of the true position of the SLS and Lifemark products''.

33. Given the above, I do not find the FSA actions unreasonable. Your allegations that Keydata management were cooperating with the FSA prior to the OIVOP; that the FSA did not follow due process in issuing the OIVOP and that there was a probability that Keydata would have been profitable and solvent if the FSA had not taken the actions, it did, - have no reasonable basis on the evidence before me. For the reasons above I agree with the FCA conclusion that the content of the Upper Tribunal judgment and the investigation findings show that your proposition is unfounded.

34. I am sorry to disappoint you, but I do not uphold your complaint allegations on this matter.

35. I now turn to **Element Two** of your complaint. You have said to me you are unhappy that the FCA excluded your complaint about two witness statements from FCA persons issued seven years apart which you allege provide different reasons for the issuing of the OIVOP. You allege this exposes the 'depth of the deceit of the authority or some of its employees to bring Keydata down'.

36. I agree with the FCA that the review of witness statements is best dealt with through a judicial process and is not appropriate for review under the Complaints Scheme, and that given that you allege that two witness statements submitted by the FSA were perjurious and that the Upper Tribunal refused to address the circumstances surrounding Keydata going into administration, I think it would be more appropriate for a court to make findings on this element as only a court could provide a definitive outcome in this matter.

37. I also refer you to paragraph 556 to 557 and 654 of the Upper Tribunal Judgment which state states

> '556.Mr Ford was strongly critical of this approach. He characterised it as "plotting" and argued that there was a pre-determined outcome. We do not regard the actions taken by the Authority to address the issues it perceived to have arisen with Keydata in those respects as material to the matters of conduct of Mr Ford and Mr Owen with which we are concerned in these references. Whether the Authority was right in its judgment of the consequences for Keydata, its investors and creditors, and the actions that should be taken is not the subject of our enquiry. We can say,

however, that in our view the discussions that took place between HMRC and the Authority were to address various possible outcomes and were not part of any plot or conspiracy. Nor was any outcome pre-determined; the decision of HMRC was not pre-determined and nor was the fact or outcome of any application by the Authority for Keydata to be placed in administration. Furthermore, we do not accept Mr Ford's submission that, in seeking to show that Keydata was insolvent, the Authority was attempting to avoid "due process" (in the sense of Keydata being able to dispute the Authority's actions).

557. We have examined the trail of email correspondence at this time. There is much email traffic, and extensive discussion of steps to be taken. We do not find this surprising, and it is not in our view indicative of any pre-determined outcome. It would be expected that a major event in the financial services industry would engage many participants, all of whom would need to be kept informed and consulted on the steps to be taken. We are satisfied that those steps and the outcome of those steps were not engineered by the Authority; they were the consequence of the circumstances that had arisen in Keydata itself.

654. The Authority has submitted that an aggravating factor is the level of consumer detriment caused by Mr Ford's misconduct. Mr Ford expended a great deal of time and energy seeking to show that the consumer detriment was not attributable to anything he had done, or not done, but was due entirely to the ill-conceived actions of the Authority in forcing Keydata and Lifemark into administration. We reject those submissions. Having regard to the evidence as a whole, including the expert evidence as to the objectively-assessed state of the SLS and Lifemark portfolios, and taking account of the Authority's actions, we find that the Authority acted appropriately in performance of its regulatory functions in the face of a determined campaign of concealment and obfuscation orchestrated by Mr Ford. In our judgment the consumer detriment is laid squarely at Mr Ford's door by reason of his continuing failures to disclose to the market his own knowledge and awareness of the true position of the SLS and Lifemark Products."

38. I do not think, given the judgment findings above, by which I am bound, that your allegation that the FSA sought to use methods of deceit to 'bring down Keydata' are made out.

39. I now turn to **Element Four** and **Five** of your complaint concerning the assets of Lifemark and SLS. You have said to me that Lifemark assets were linked to UK investors and that an explanation is required by the FCA as to how they were dissipated.

40. The FCA has explained to you that Lifemark and SLS were special purpose vehicles incorporated in Luxembourg and regulated by the CSSF. The FSA did not regulate SLS or Lifemark and did not have a role in safeguarding the assets of those firms, which were incorporated in Luxembourg. Multiple problems with SLS and Lifemark's assets were concealed from the FSA by Keydata management. The Upper Tribunal Judgment at paragraph 654 states:

> "Having regard to the evidence as a whole, including the expert evidence as to the objectively assessed state of the SLS and Lifemark portfolios, and taking account of the Authority's actions, we find that the Authority acted appropriately in performance of its regulatory functions in the face of a determined campaign of concealment and obfuscation orchestrated by Mr Ford. In our judgment, the consumer detriment is laid squarely at Mr Ford's door by reason of his continuing failures to disclose to the market his own knowledge and awareness of the true position of the SLS and Lifemark products."

41. I have explained that the Judgement findings are binding on me. It was not the FSA's role to safeguard and protect the Lifemark or SLS assets.

42. You have also complained about the FSCS (**Element Six**) but as set out in paragraph 3.4 (e) of the Scheme, this allegation is excluded from the Scheme because it relates to the actions, or inactions, of the FSCS.

43. The final element of your complaint to me (**Element Seven)** relates to the how the FCA handled your complaint and the £1000 ex gratia payment it offered you. You do not feel that amount reflects the time taken or how the complaint was handled.

44. You have submitted this complaint on behalf of the company in which you were a principal shareholder and controller, which is a private limited company. Those entities cannot experience distress – but an error could affect their operations or reputation. In those cases, I would consider whether an award for the inconvenience caused to them, or any damage to their reputation, would be appropriate.

45. I have not found that the FSA committed any error which affected the operations of the company, or its reputation. Therefore, I do not recommend any ex gratia payment for that.

46. As a controller of the company, you submitted a complaint to the FCA and the processing of that complaint was badly delayed. If you were complaining on your own behalf there would be a case for recommending an ex gratia compensation for distress and inconvenience, however, you are complaining on behalf of a company which cannot experience distress.

47. For this reason, I do not recommend any ex gratia payment for distress and inconvenience. The FCA has said on this occasion that it does not propose to retract the ex-gratia offer and this will be available for you to accept.

My decision

48. For the reasons given above, I agree with the FCA's decision on parts one to seven of your complaint. I do not think that the FCA's structuring of these parts in its decision letter dated 31 March 2022 has any bearing on your complaint. I also do not agree with you that the FCA's conclusions on parts one to seven of your complaint are perverse, or that the FCA or any of its employees were deceitful, nor guilty of misconduct with respect to the substantive matter of your complaint.

49. In my published reports (see paragraph 6 a-d) I stated that the FSA's supervision of Keydata was inadequate, and I explained the reasons why. My view on those issues remains the same. However, the matters you have referred to me are different from the ones that I have reviewed previously, although they also relate to the FCA's supervision of Keydata. The fact that I identified serious failings in the FSA's supervision of Keydata (and clarified what these were in my published reports) does not of itself mean that each and every

potential complaint about the FSA's supervision of Keydata is well founded. I am sorry to disappoint you, but for the reasons I give above, the elements of your complaints are not upheld and/or are excluded.

50. With respect to part eight of your complaint, I do not recommend any ex gratia payment for the reasons given above, however, the FCA has said it will not retract its offer which is available for you to accept.

51. I understand that you remain unhappy with my decision and continue to believe that due process was not followed in invoking the OIVOP, but I do not agree with you for the reasons given above.

Amerdeep Somal
Complaints Commissioner
16 August 2022