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 [redacted] 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

APPENDIX 1

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Sent by email

Emailed to: [redacted]

31 March 2022

Our Ref: 206707305

Dear [redacted]

I write further to our previous correspondence, and to confirm the investigation into your complaint under the Complaints Scheme (the Scheme) has now been finalised. Further information about how we handle complaints, and the work of the Complaints Team, can be found on our website here. Please accept my apologies for the long delay in responding to your complaint.

This Decision Letter will address the allegations raised, including the further points that you raised in your email on 24 May 2021, along with answers, where possible, to queries you raised on 5 June 2020. It will also address the delays in resolving your complaint.

Your complaint

In our letter of 11 September 2020, you were provided with a summary of our understanding of your complaint. You kindly provided comments on the summary in your letter of 6 October 2020. The further points you raised in that letter have been considered along with those that have been raised in correspondence since.

In considering your complaint, you will find that the structure of the allegations will differ slightly to the way you presented them. All the allegations you have raised within your correspondence have been addressed. These are presented below as eight allegations. This approach has been taken to ensure that the investigation avoids repetition of points and ensures that allegations are considered in the most appropriate way.

Please note, within the letter there are instances where the term 'Solvency Review' and 'Solvency Report' are used. When both terms are used, they refer to the Solvency Review prepared by Pricewaterhouse Cooper (PwC) which was submitted to the Court.

Part One

You are unhappy that the Financial Services Authority ("FSA") placed Keydata Investment Services Limited ("Keydata") into administration. You allege the FSA applied to put Keydata into administration too soon and that the FSA's action against the firm caused its collapse. You say that the FSA should have considered alternative options as the FSA's actions caused unnecessary distress and loss to your firm ([redacted] and to other investors.

Part Two

You allege the FSA's enforcement process failed to safeguard underlying assets of Lifemark/SLS.

Part Three

Concerning the legal proceedings against Keydata, you allege that the Witness Statement and supporting evidence of [redacted] was not factually correct and your letter sets out the reasons why you take this view. Further, you allege that the witness statement of [redacted] was inaccurate because the Financial Conduct Authority ("FCA") changed its position on the reasons why it issued the *Own Initiative Variation of Permission* (OIVOP). You say that the reasoning in both witness statements concerning the Price Waterhouse Cooper Solvency Review lacked integrity.

Part Four

The Financial Services Compensation Scheme ('FSCS') compensated some of the Keydata investors, which you say has resulted in the FSCS imposing significant additional levies on the financial services industry. The FSCS compensation scheme has in turn increased costs to consumers (including you), whom the FCA are supposed to protect.

You responded to our letter on 6 October 2020, which included an attachment (Court Decision dated 1 February 2016) where you stated that your complaint was misunderstood. In your letter you say;

"Part Four of your complaint is not that the FSCS made payments to investors but is about the lack of knowledge of the FSA in the nature of the ISA rules which helped fuel the wrong and devastating actions the FSA took against Keydata. It was the FSA's actions against Keydata and the sudden closure of Lifemark which led to those payments being made. 'The circumvention of due process and the wrongful issuing of an OIVOP against Keydata which was only issued after the manufactured and predetermined PwC Solvency Review was delivered to the FSA on 5 June 2009.'

This has been considered and the information you provided has been responded to in the findings below.

Part Five

You allege that the FSA failed to follow due process in the irregular and wrongful issuing of the OIVOP against Keydata. You say that the decision to put Keydata into administration flowed from this (the issuing of the OIVOP) and that it may have been motivated by a desire on the part of the FSA to prevent Keydata from challenging the action they had taken. You also make the following statements:

a) The FSA wilfully sought advice from PwC and engaged them to prepare a Solvency Review of Keydata, which was prepared with specific assumptions in place that could only deliver a predetermined outcome of insolvency. This was achieved by using an assumption that an OIVOP was already in place when it was not and by not including readily available managed accounts. This means that the Solvency Review is devoid of any weight.

b) There was a conflict of interest between PwC and the FSA and that it was improper for PwC to be advising the FSA and also prepare the solvency review.

c) The FSA used the 'manufactured' Solvency Review to wrongfully justify putting Keydata into administration.

d) The process of the approval of the OIVOP was irregular. It was sought from [redacted] as opposed to more senior directors within the FSA who would have been readily available.

e) The Regulatory Decisions Committee ("RDC") was not put on notice of the proposed action against Keydata. You query why the RDC delegated authority for such a significant decision to the FSA management. This failure resulted in the 'usual checks and balances' being circumvented. This included affording Keydata the opportunity to have the actions of the FSA Executive independently tested by the RDC which the FSA's rules required in all but exceptional circumstances and these were not exceptional circumstances.

f) The FSA's statutory duty was transferred to PricewaterhouseCoopers (PwC) partner at a time when Keydata was trying to engage meaningfully with the FSA over 6 and 7 June 2009.

g) The FSA was not open and honest in pursuing the administration order including relying on a witness statement that was not updated with facts known to the FSA. Facts you say that weakened the FSA's position on suitability and had a negative bearing on the credibility of the Solvency Review.

Part Six

You say that it would be difficult to believe that PwC had access to the Commission de Surveillance du Secteur Financier ("CSSF") without the knowledge and support of the FSA. You say that an investigation is required into the FSA's involvement in the sudden closure of Lifemark. The FSA should have supported the decision of the Lifemark board to end the 'trail commission' contract. The failure to protect/safeguard the underlying assets is secondary to the action surrounding the sudden closure of Lifemark

Part Seven

You allege that the sworn Witness statements of [redacted] and [redacted] are perjurious by missing evidence known to the FSA at the time it was written and used in Court and each gave contradicting accounts as to why the OIVOP was 'wrongfully' issued against Keydata. You say that the Upper Tribunal refused to address the circumstances surrounding the closure of Keydata and therefore the matter is open for the FCA to investigate.

Part Eight

In the further correspondence, you raised a number of points in relation to the handling of your complaint by the FSA and the FCA Complaints Team. You believe that the Complaints Team intentionally ignored you and your complaint, failed to reinstate your complaint and then failed to provide you with updates as expected resulting in you having to chase the Complaints Team.

Remedy

To resolve your complaint, you would like to be compensated for the total (combined) loss of £921,973.50 caused by the FSA and FCA.

As mentioned in previous correspondence, I would like to reiterate that the Scheme is not a compensation scheme. Under the Financial Services and Markets Act 2000, the FCA is immune from legal liability for damages unless a court finds that the FCA has acted in bad faith or has breached your human rights. The FCA will consider its immunity when it decides if it should pay you compensation and, if so, how much. Claims for substantial compensation payments are

likely to be more appropriately dealt with in another way, for example in a court.

Under the Scheme, the FCA will not pay punitive damages or costs in the same way that a court or tribunal would do. If the FCA decides that an ex-gratia payment is an appropriate way to put things right, it will take into account where its funds come from, as well as its need to be efficient and economical in using its resources, when it decides how much to pay you.

This is because the FCA is funded by the financial services industry and so the cost of any payment it makes will fall upon the financial services industry and ultimately, through it, on consumers.

Decision

This letter explains how the decisions below, in response the allegations set out above, are addressed. The decision is to partially uphold your overall complaint. You will note that some elements of your complaint have been excluded under the Scheme and others not upheld. One allegation has been upheld.

Part One	Not Upheld
Part Two	Not Upheld
Part Three	Excluded
Part Four	Excluded/ Not Upheld
Part Five	Not Upheld
Part Six	Not Upheld
Part Seven	Excluded
Part Eight	Upheld

Background

The background to your complaint concerns the FSA's supervision and enforcement action against Keydata. You were the principal shareholder of a firm, namely [redacted] You state that this company is now in liquidation as a result of what you describe as the deliberate, wilfully engineered destruction of Keydata.

It has been highlighted by lawyers [redacted] acting on behalf of [redacted], that [redacted] were a trade debtor to Keydata in the sum of £83,000 at the time Keydata was placed into administration.

The FSA regulated Keydata from 2001. Keydata produced and distributed structured products designed for retail consumers, both directly to investors and indirectly via Independent Financial Advisors. Keydata invested customers' money into bonds issued by two companies based in Luxembourg, SLS Capital SA and Lifemark SA.

The products were marketed as corporate bonds, offering a fixed income per annum and ISA eligibility.

Between March 2002 and January 2005, the FSA dealt with a number of concerns in relation to the marketing material of Keydata.

On 16 November 2007, the FSA's Supervision Division referred Keydata to Enforcement.

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.

HMRC found that Keydata products were incorrectly classified and sold as ISAs which were not eligible as the bonds were not listed and therefore not ISA compliant.

As part of the work the FSA carried out, Keydata were referred to the Serious Fraud Office (SFO) in July 2009, following the discovery by Keydata's administrators (PwC) that approximately £100m of underlying assets which should have been held by SLS Capital SA had been misappropriated. The SFO closed the criminal investigation in 2010 to focus on asset tracing, they then closed this aspect in 2013.

On 2 July 2014 Keydata was dissolved at Companies House following a motion from PwC. As a result of this, the Enforcement action was discontinued against the firm. Enforcement proceedings continued against Keydata individuals (Mr Stewart Ford - Keydata CEO, Mr Mark Owen - Keydata Sales Director, Mr Peter Johnson - Keydata Compliance Officer, and Mr Craig McNeil - Keydata Finance Director).

The FCA's Enforcement actions against the Keydata individuals were contested, complex and lengthy. This was for various reasons outside the FCA's control, including intervening legal proceedings taken by some of the defendants against the FCA for Judicial Review.

Enforcement decision notices were issued in November 2014 and published in May 2015, finding Mr Ford, Mr Owen and Mr Johnson to be in breach of the FCA's rules 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 Mr McNeil on 21 September 2015 for which he was fined and prohibited from performing any significant influence role.

The Upper Tribunal decision sets out in detail the complex nature of Keydata's structure, products and connections, and the extent to which its senior staff acted without integrity, had conflicting interests, and misled and made false statements to the regulator.[1]

Under paragraph 6.15 of the Complaints Scheme, when we investigate complaints the FCA Complaints Team and the Complaints Commissioner must regard the Upper Tribunal's findings as fact and decisions as conclusive.

Keydata Complaints Background

Complaints in relation to Keydata arose between 2009 and 2011, and these were deferred from 2010 until 2019, due to the ongoing investigation into Keydata, which was concluded through the Upper Tribunal in November 2018.

Following the decision handed down by the Upper Tribunal, complainants were proactively contacted by the FCA Complaints Team in January 2019.

A majority of complaints were un-deferred for those complainants who wished to continue with their complaints and the complaints investigation commenced.

As you are aware, four complainants referred the FCA's decision on their complaints to the Complaints Commissioner ('OCC'). The OCC issued her Final Reports on these in March 2021.

[1] The upper Tribunal decision

In summary, a number of recommendations were made and there was criticism of the FCA / FSA regarding the inadequacies around the supervision and delayed regulatory action of Keydata.

The OCC stated that, "*It is therefore clear that by July 2009, the FSA thought that the Supervision Department should have been involved sooner after further financial promotions concerns were reported in November 2005, that the information received suggested wider issues within the firm, and that had these concerns been taken forward by Supervision at the outset, it might have led to an earlier Enforcement referral. Although the Enforcement proceedings would undoubtedly still have been protracted and contested, it seems clear that the starting point could and should have been reached earlier, with potentially better outcomes for investors*."[2]

The OCC was critical of the FSA's supervision and delayed enforcement action against Keydata, not that the FSA took regulatory action against Keydata and the regulatory action caused the firm's collapse.

For ease of reference, I have provided a table below to summarise the correspondence received between you and the FSA/FCA.

Date	**Correspondence**
22 Jul 2011	Complaint Letter from [redacted] (solicitors for [redacted]) to the FSA. [redacted] is your firm.
3 Aug 2011	FSA acknowledge complaint.
3 Aug 2011	The Complaints Team discuss the complaint with Enforcement.
22 Aug 2011	Letter from the FSA deferring the complaint due to ongoing Enforcement action, however, Enforcement is considering whether it can respond to some of the allegations raised.
30 Aug 2011	Letter from [redacted] to the FSA in which they request that the FSA reconsiders the complaint deferral as their letter of complaint relates solely to the process by which the FSA put Keydata into administration and is unconnected with any continuing action.
31 Aug 2011	Letter from the FSA to [redacted] in response to the letter of 30 Aug 2011
19 Sept 2011	Letter from FSA to [redacted], in which Enforcement refers them to information available in the public domain about the FSA's supervision of Keydata and the investigation as a result of the 'Fieldglen' litigation and information on the FSA website.[3] The information should explain the events leading up to Keydata being put into administration. They refer to the FSA's Handbook which describes the FSA's procedures for taking statutory decisions such as an OIVOP and refer to PwC's engagement letter which confirms that the FSA did not exercise any formal powers when it commissioned the Solvency Review. S.348 FSMA restricts information that is not already in the public domain therefore they cannot reconsider the deferral. The investigation in to

[2] OCC's Final Report (FCA00814, FCA00816, FCA00818, FCA00884)
[3] *Fieldglen Ltd v Financial Services Authority* [2009] EWHC 1939 (Ch)

	Keydata and Stewart Ford is at an advanced stage of the disciplinary process although was delayed due to judicial review proceedings brought against the FSA by Stewart Ford.
30 Sept 2011	Letter from [redacted] to the OCC, referring the complaint to the OCC as dissatisfied with the FSA's response.
27 Oct 2011	Letter from the OCC to [redacted] in which the OCC refuses to investigate the complaint until the Enforcement action concludes.
29 Aug 2012	Email from [redacted] to Complaints Team requesting an update.
11 Sept 2012	Email from Complaints Team to [redacted] • *'The investigation into Keydata Investment Services is at an advanced stage but still ongoing. Mr Ford, one of the subjects of the FSA's disciplinary action, applied for a judicial review of the FSA's use of certain documents as part of its investigation. On 11 October 2011, the High Court found Mr Ford could claim joint privilege with Keydata in respect of two of the eight documents being reviewed.* • *On 12 June 2012, the Court made an Order in respect of the remedies Mr Ford had requested. He is now seeking to appeal this to the Court of Appeal and in the meantime the FSA's disciplinary proceedings remain on hold. Until any appeal is resolved, we do not know how this will affect the FSA's enforcement case against Mr Ford or the timing of this matter.* • *As a result, your client's complaint remains deferred and we will write to you once the FSA's enforcement action has been concluded.'*
16 March 2016	Letter of Claim from Mr [redacted] (as assignee of [redacted]) to the FCA.
13 April 2016	FCA's Response to the Letter of claim (by their solicitors [redacted]
5 June 2020	Complaint Letter from Mr [redacted] to the Complaints Team. This letter resulted in the original complaint being identified and reinstated.
11 Sept 2020	'In Letter' to Mr [redacted] summarising the complaint and allegations.
6 Oct 2020	Mr [redacted] response to the Complaints Team's 'In Letter'.
24 May 2021	Email from Mr [redacted] with additional allegations.

Investigation Findings

The investigation findings are documented below, however, I would like to highlight that there are some limitations on the information that can be shared with you. This is due to both confidentiality requirements imposed on the FCA by legislation with which we must comply, and policy restrictions. Further detail on what information we can share can be found here. Within this decision letter I have sought to share as much information as is possible within these restrictions.

Your complaint is one of several that we subsequently investigated in relation to Keydata. Over 15 years there were a number of legal challenges, including enforcement action, that culminated in an appeal to the Upper Tribunal. This resulted in a large number of documents being reviewed. Nevertheless, I hope my letter provides you with the reassurance that we have fully considered the allegations you have made.

Throughout this letter you will note that we have referred to the FSA and the FCA. A majority of the events took place whilst the FSA was the regulator of Keydata. In April 2013, the FCA took over from the FSA to regulate conduct in the financial services market. Further information can be found here.

While conducting the complaints investigation into Keydata, we reviewed the complaints allegations and a decision was made to address the complaints using a broader approach, reviewing the actions taken by the FSA whilst supervising Keydata.

On review, I believe the supervisory approach at the time and the activity the FSA undertook (including its approach to financial promotions) could have been improved. The FSA received various pieces of intelligence on aspects of Keydata's approach and had regular contact with Keydata about its misleading financial promotions over a two-year period between 2005 and 2007. The FSA could potentially have changed its approach in response to Keydata's misleading marketing materials sooner.

This work led to the FSA undertaking a firm visit in September 2007, which, due to the extent of the concerns identified, resulted in the referral of the firm to Enforcement in November 2007. At this point, I believe Supervision could have considered using alternative tools in addition to the Enforcement referral, such as actions to require the firm to amend its financial promotions or potentially change its approach to issuing similar products to investors while the investigation was ongoing. It was not until December 2008 that other wider tools were considered in relation to Keydata, such as ceasing the sale of products. The FSA ceased Keydata's regulatory activity in June 2009.

In reaching our conclusion, I have acknowledged and considered the approach to small firm supervision that was in place at the time. I also recognised that Keydata had concealed significant amounts of relevant information from the FSA's supervisory team, with these further significant issues only being uncovered through the Enforcement investigation.

The FCA's approach to Supervision today has been revised to improve the process for identifying issues in small firms who do not have dedicated named supervisors responsible for overseeing them. In addition to this, different departments within the FCA take a more joined up approach when dealing with firms. For example, all supervisory interactions, including financial promotions, are now recorded on the same system. There is now an enhanced approach in place in relation to the interaction between the FCA's Supervision and Enforcement divisions.

Further information on the FCA's current approach to Supervision can be found here. The "FCA Mission: Approach to Supervision" was published in April 2019 and the FCA's Supervision Division now aims to be forward-looking and pre-emptive in its approach to how we supervise firms.

Response to your allegations

I have set out below the responses to your specific allegations. I understand that you have requested a remedy of £921,973.50. I am sorry to say that we will not be able to provide you with the remedy you have sought under the Scheme.

Part One (Not Upheld)

You are unhappy that the FSA placed Keydata into administration. You allege the FSA applied to put Keydata into administration too soon and that the FSA's action against the firm caused its collapse. You say that the FSA should have considered alternative options as the FSA's actions caused unnecessary distress and loss to your firm ([redacted]) and to other investors.

I have considered this and have not upheld this allegation for the reasons below.

It was not the FSA's actions that caused Keydata to collapse. One of the lessons learned as a result of this case was that the FSA could have intervened earlier.

The FSA followed the correct procedure when making the decision to make an application to the Court to place Keydata into provisional liquidation by obtaining consent from the FSA's RDC on the 5 June 2009. The RDC makes certain decisions on behalf of the FCA (and previously the FSA) relating to enforcement and supervisory actions. 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.

On 8 June 2009, the FSA applied to the Court to put Keydata into administration, this was as the FSA had evidence, based on the PwC report, taking into account the potential ISA liability and the cessation of business caused by the OIVOP, that Keydata was insolvent and applied to the court for the appointment of provisional liquidators on that basis. Keydata accepted its insolvency and agreed to the appointment of administrators instead. The FSA's decision-making process was reviewed by the High Court in AAI v FCA[4], and no fault was found.

The Upper Tribunal Judgment states at paragraph 587[5].

"On 8 June 2009, Keydata was put into administration pursuant to an application by the Authority on the grounds of insolvency. Representatives of PricewaterhouseCoopers LLP ("PwC") were appointed as administrators. The Authority considered that Keydata was balance sheet insolvent as at 5 June 2009 with total liabilities (including to HMRC) of between £5.8 million and £10.1 million. We note that Mr Ford and Mr Owen dispute that Keydata was insolvent at the relevant time, but that is not something on which we can express a view. We can note only the fact that, on the basis of the Authority's application, Keydata was put into administration."

In the FCA's response to your Letter of Claim dated 13 April 2016, any claim that you or your firm suffered loss as result of the FSA's actions is dependent on the proposition that Keydata would have been profitable and solvent if the FSA had not taken the actions it did. You will note from the content of the Upper Tribunal judgment here and the investigation findings that this proposition is unfounded. The FSA and PWC have access to documents that are not available to you and these support their position. Unfortunately, we are unable to share these with you, however the evidence within these were the basis of the decisions.

Although I appreciate that you believe the company was placed into administration too soon, it is right that the application was placed by the FSA before the Court, it was the Court that placed the firm into administration after considering the information and evidence provided and on the basis of Keydata's agreement. The Court then appointed PWC as the administrator.

Finally, the FSA did consider other possibilities – as para 54 of the AAI 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.

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[4] https://www.casemine.com/judgement/uk/5a8ff72c60d03e7f57ea91bc

[5] Page 161
https://assets.publishing.service.gov.uk/media/5be1a3aee5274a0eea4c2be5/Stewart_Owen_Ford_and_Mark_John_Owen_v_FCA.pdf

I note that you believe that the above were causative factors for the loss to your firm. I empathise with the loss to the firm however, given the factors, including the outcome of the Tribunal, I believe that the correct decision was made in order to protect consumers.

Part Two (Not Upheld)

You allege the FSA's enforcement process failed to safeguard underlying assets of Lifemark/SLS.

This allegation is not upheld for the reasons set out below.

Lifemark SA (Lifemark) and SLS Capital SA (SLS) were special purpose vehicles incorporated in Luxembourg and regulated by the Commission de Surveillance du Secteur Financier (CSSF).

SLS issued the first three tranches of bonds, Secure Income Bond (SIB) 1,2 and 3. Lifemark issued the remaining bonds, SIB 4 and Secure Income Plan (SIP) 1–14. The scope of the FSA's enforcement investigation involved assessing concerns with Keydata purchasing and distributing SIB and SIP products.

The Upper Tribunal judgment confirms the problems with SLS and Lifemark's assets in detail in the following paragraphs. Paragraph 605 sets out expert evidence which covers analysis of SLS and Lifemark's balance sheet and cash flow solvency:

"*SLS and Lifemark were suffering from a more fundamental problem of insolvency in that liabilities exceeded their assets and they were unlikely to bridge that shortfall, including by rollover of all the issued bonds. The principle reasons for the shortfall appeared to have been the extraction from the structure of fees, expenses or other unattributed payments and a failure to acquire sufficient life settlement policies in the proportions advertised*."

Paragraph 610(b) sets out further analysis involving 'Monte Carlo' simulations to model Lifemark, to assess the probability of the portfolio generating sufficient returns to meet bond repayments:

"*As at December 2008, the probability of the Lifemark bonds failing by April 2012 was 100%. Even if mortality rates were double those predicted, the Lifemark bonds would still be expected to fail over 98% of the time by April 2014.*"

Paragraph 589 notes:

"A*fter Keydata went into administration on 8 June 2009, Lifemark then made a series of payments to LAS International between 7 and 20 July 2009 totalling $18.3million. Mr Ford was at that time a director of Lifemark, he resigned on 25 August 2009. That series of payments, we find, can only be described as a cynical raid by Mr Ford on the cash resources of Lifemark at a time when, as Mr Ford knew, the projections for Lifemark, even on the basis of false information as to its available cash and cost of capital, showed that there were significant liquidity concerns. That, in our judgment, puts into perspective Mr Ford's professed concern for the bondholders of Lifemark and SLS; cash that would have otherwise been available for those investors was instead channelled into a company under Mr Ford's personal contro*l."

Paragraph 654 concludes:

"*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*."

Lifemark's assets were safeguarded as part of the solvency procedures which commenced on 18 November 2009 by the Luxembourg Regulator, the Commission de Surveillance du Secteur Financier (CSSF). The FSA did not regulate SLS or Lifemark or the bonds themselves and the control of SLS assets (the actions of Mr Elias) was not the focus of the enforcement investigation.

As the Upper Tribunal judgment confirms, multiple problems with SLS and Lifemark's assets had been concealed from the FSA at the time, only becoming apparent through the enforcement investigation, and that the FSA acted appropriately in performance of its regulatory functions at the time. In addition, 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. As such, I do not uphold this allegation.

Part Three (Excluded)

Concerning the legal proceedings against Keydata, you allege that the Witness Statement and supporting evidence of [redacted] was not factually correct and your letter sets out the reasons why you take this view. Further, you allege that the witness statement of [redacted] was inaccurate because the FCA changed its position for the reasons why it issued the OIVOP. You say that the reasoning in both witness statements concerning the Price Waterhouse Cooper Solvency Review, lacked integrity.

Paragraph 3.6 of the Scheme explains that the Regulators will not investigate a complaint which they reasonably consider could have been, or would be, more appropriately dealt with in another way for example by referring the matter to the Upper Tribunal or by the institution of other legal proceedings.

Paragraph 6.3 of the Scheme explains that, 'The investigation of complaints will involve a paper-based review', and paragraph 6.6 provides examples of the types of remedy that may be available under the Scheme, which include: the offer of an apology, taking steps to rectify an error, or the making of an ex gratia compensatory payment.

This indicates that a complaints investigation under the Scheme is a desk-based review of the factual pattern that is relevant to a complaint. The FCA Complaints Team does not have the expertise to opine on matters of law, nor would it be appropriate to test the credibility of a witness or a witness statement by reviewing the witness statements in the context of a complaint investigation – this should be done in the context of a judicial process. In addition, it would be inappropriate to make findings on the criminal liability of the witnesses in the context of the Scheme. Likewise, it is not the role of the FCA's Complaints Team to replace an FCA regulatory decision or disciplinary process with its own decision nor instruct the FCA to make a new decision. This is not a remedy that is intended to be made available under the Scheme.

As such, I am of the view that this complaint, although in scope of the scheme, is more appropriately dealt with in another way, namely by a court, because it relates to the legal proceedings against Keydata and matters of law. The Scheme is not the appropriate means for which to deal with these issues therefore you may wish to obtain legal advice.

Part Four (Excluded / Not Upheld)

We set out our understanding of your allegation below. I have excluded this part of your complaint from the Scheme for the reasons below.

The Financial Services Compensation Scheme ('FSCS') compensated some of the Keydata investors, which you say has resulted in the FSCS imposing significant additional levies on the financial services industry. The FSCS compensation scheme

has in turn increased costs to consumers (including you), whom the FCA are supposed to protect.

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.

The FCA website states that the FSCS's role under FSMA is to 'protect eligible claimants that incur financial losses when firms authorised under FSMA are unable, or likely to be unable, to pay claims against them relating to certain regulated activities'. The FSCS is operationally independent of the FCA and the FCA is not involved in the decisions the FSCS makes on individual claims.

As such, complaints or concerns about the FSCS compensation scheme should be directed to the FSCS. Further information on this can be found here: https://www.fscs.org.uk/making-a-claim/claims-process/complaints/.

In your correspondence of 6 October 2020, you stated that you believed that we had misunderstood this allegation and provided the following:

You say that Part Four of your complaint is not that the FSCS made payments to investors but is about the lack of knowledge of the FSA in the nature of the ISA rules which helped fuel the wrong and devastating actions the FSA took against Keydata. It was the FSA's actions against Keydata and the sudden closure of Lifemark which led to those payments being made.

In further consideration of this point, I have not upheld this allegation. The implication of the statement is that the FSA's lack of knowledge about ISA rules led to the collapse of Keydata. It is of note that decisions in respect of Keydata were made after consultation with HMRC and that, at the Tribunal proceedings, the FCA called a lead technical adviser from HMRC who wrote the ISA Guidance Notes and confirmed the FCA's understanding of the ISA rules (see paras 45 and 541 to 560 of the Tribunal judgment) and para 54 of the AAI judgment [6]

It has been evidenced throughout the course of the Keydata court proceedings that it mis-sold its products, it marketed and sold products as ISA-eligible but these products were in fact not eligible ISA products. In order to be eligible, the underlying bonds were required to be listed on a recognised stock exchange, that they were supported by a credit facility and that they were created or managed as part of a major institution: they were not. This appears to have contributed to Keydata's tax liability, which it could not afford and subsequently led to it becoming insolvent.

It is key to highlight that it was the actions of senior individuals within Keydata that were the primary cause of investor losses, along with this it was highlighted in the Upper Tribunal that Keydata and senior individuals acted to conceal and obfuscate the regulatory process. At pages 180/181, paragraph 654 of the Judgement, it found that consumer detriment is laid squarely at Mr Ford's door, by his continued failure to disclose to the market his knowledge and awareness of the true position of SLS and Lifemark products[7]. It is also of note that Mr Ford also tried to attribute the failings on the actions of the FSA, and this was rejected in the Judgement.

[6] https://www.bailii.org/ew/cases/EWHC/Comm/2016/2812.html

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

I have set out below key parts of the chronology of events relevant to this allegation:

In December 2008, Supervision began discussing whether it should obtain a skilled persons report under section 166 FSMA, on all Keydata products to ensure there had been no mis-selling, in response to the enforcement investigation discovering the SIP products were not eligible to be classified as ISAs.

In early June 2009, the enforcement investigation manager provided a witness statement which noted that, aside from serious issues in relation to SIB and SIP products, there were also further potential issues in relation to the Defined Income Plan (DIP) products. It was noted that Keydata had not notified HMRC of the DIP breaches at this stage.

Following various interactions internally, with the firm and with HMRC and PwC, the FSA then served Keydata with the OIVOP.

The Upper Tribunal judgment notes the FSA first became aware that Keydata's products were not eligible to be classified as ISAs on 18 November 2008 in a compelled interview with Keydata's Compliance Officer. This information is confirmed in paragraph 542.

Paragraph 542 of the Upper Tribunal judgment also sets out that the FSA wrote to Keydata's CEO on 22 December 2008 after becoming aware that SLS bonds remained unlisted and therefore were not eligible for ISA status. The letter urged Keydata to refer the matter to HMRC urgently to determine the tax status of the products.

Paragraph 545 of the Upper Tribunal judgment notes that when the FSA followed up with Keydata via email on 26 January 2009, Keydata's Compliance Officer advised that Keydata would only take the matter up with HMRC once the SLS bonds were listed, on the advice of Allen & Overy. On 30 January 2009, the FSA advised Keydata that the delay in dealing with this matter was an unacceptable risk to investors and asked that Keydata consent to the FSA referring the matter to HMRC directly.

Paragraph 550 of the Upper Tribunal judgment notes that the FSA wrote to HMRC on 31 March 2009 setting out their concerns. In May 2009, the FSA wrote to HMRC again, setting out proposed FSA actions which included issuing Keydata with the FSA's preliminary investigation report and asking Keydata to agree to a Voluntary Variation of Permissions (VVOP). The FSA wanted to restrict Keydata from accepting any new investments from consumers until the FSA Enforcement process was concluded (paragraph 554 of the Upper Tribunal Judgment).

Paragraph 649 (10) of the Upper Tribunal Judgment States:

"…We agree with the Authority that Mr Ford's evident failure to comprehend the impropriety of such a course of action is a clear demonstration of Mr Ford's lack of understanding of the standards of behaviour required of an approved person. It showed beyond doubt Mr Ford's lack of integrity in that respect."

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."

It is evident that the FSA at that time made clear the concerns around the ISA products however, as highlighted in the Judgment, Keydata continued to market and sell Lifemark Products despite being aware that these were not likely to meet the ISA Regulations.

The FSA intervened and shared the appropriate information with HMRC when it became clear that Keydata was not cooperating and was not being transparent with HMRC. The FSA tried to ensure the firm shared the relevant information with HMRC. It is evident that the FSA applied to the Court on the basis that Keydata was insolvent, the Court agreed and instructed PWC to administer this process. The actions of Keydata were the cause of this insolvency, not the FSA.

It was also identified in the Upper Tribunal that the FSA sought the advice of experts from HMRC. It was apparent from this that the FSA had sought advice. Paragraph 553 of the Judgement states.

"On 13 May 2009, Mr Turner and an HMRC colleague met representatives of the Authority. During that meeting Mr Turner explained that HMRC's current view was that the SIB 1-3 Products did not qualify as ISA investments and could not be repaired so that they would qualify whilst still retaining the current maturity dates…."

The evidence indicates that it was HMRC that made the decision on the ISAs. The Judgement indicates that on 15 May 2009 HMRC wrote to Allen & Overy, and at paragraph 558 it states:

On 15 May 2009 Mr Turner 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.

It is of note that although it was contested as predetermined, the judgement found that there was no predetermined outcome. At Paragraph 560 of the judgement, it states.
"….that the decisions with respect to simplified voiding and the possible withdrawal of Keydata's ISA manager status were genuine decisions of HMRC, and not decisions suggested to them by the Authority."

As it is clear the decisions in relation to the ISA Regulations were that of HMRC, I am unable to uphold this part of your complaint.

Part Five (Not Upheld)

You allege that the FSA failed to follow due process in the irregular and wrongful issuing of the OIVOP against Keydata. You say that the decision to put Keydata into administration flowed from this (the issuing of the OIVOP) and that it may have been motivated by a desire on the part of the FSA to prevent Keydata from challenging the action they had taken. You also make the following statements:

a) *The FSA wilfully sought advice from PwC and engaged them to prepare a Solvency Review of Keydata, which was prepared with specific assumptions in place that could only deliver a predetermined outcome of insolvency. This was achieved by using an assumption that an OIVOP was already in place when it was not and by not including readily available managed accounts. This means that the Solvency Review is devoid of any weight*

I have considered this statement. I am unable to find any evidence to support your claim and you have not provided us with any supporting evidence.

I note that this was responded to by the FCA in response to your letter before claim. To avoid confusion, I refer you to the FCA's response to your Letter of Claim on 13 April 2016 (attached).

I also refer to paragraphs 556 - 557 of the Upper Tribunal Judgment which cover the points you have raised in relation to a predetermined outcome. They state:

"*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."

You will note that the judgment identifies that this was not part of a plot or conspiracy nor were any outcomes predetermined. I am therefore unable to uphold this point.

b) *There was a conflict of interest between PwC and the FSA and that it was improper for PwC to be advising the FSA and also prepare the solvency review****.***

During the course of the investigation, I identified that you raised allegations of a similar nature on 16 March 2016 in your Pre-Action Letter of Claim to the FCA. You were provided with a Letter of Response on 13 April 2016. In this it addressed your allegations, and also explained that your potential claim would be time-barred owing to the six-year limitation period.

Enforcement also informed me that during that period of time (serving your Pre-Action Letter and receiving the Letter of Response), the FCA was in litigation with AAI Consulting Limited - a company owned by Mr Stewart Ford and to which Mr Ford's rights had been assigned. The proceedings (AAI Consulting Limited & Others v The FCA) were twofold: -

1. that the FCA was guilty of misfeasance in public office; and

2. that the FCA had entered into a conspiracy with PwC and one of its employees.

These are similar to the allegations raised in your complaint. These proceedings were dismissed by the High Court on 7 November 2016. The judgment[8] states at paragraph 53 that the Judge considered material that was submitted by the claimant in order to establish if it indicated a real prospect of the claim succeeding and the judgment goes on to say in the same paragraph that,

"*all that material was consistent with a regulator which was acting in what it considered to be the best interests of consumers and in pursuance of its statutory responsibilities. Insofar as Mr Ford's evidence and submissions were to the effect that evidence might become available which would support his case, they did not persuade me that there was a likelihood of supportive material emerging which would afford the Claimants a realistic prospect of success on the causes of action which they have pleaded."*

The judgment continues at *Paragraphs 54(3),* and states in the Judge's summary that*,*

"the material I have seen has not provided a basis for considering that the FSA was acting otherwise than in good faith in commissioning the Solvency Report or in the instructions which it gave to PWC as to the basis on which it should be produced. That material indicates that PwC did as it was instructed to do and has not revealed any basis for what would be a serious, and on its face surprising, allegation that PWC intended to injure the Claimants. Furthermore, the evidence indicated that a finding of insolvency was not essential to the appointment of a provisional liquidator or the making of an OIVOP.

At Paragraph 54(4) *"…I have simply not seen any material which indicates that the FSA or its employees were motivated by a political agenda or were maliciously targeting or intending to injure Keydata or Mr Ford, as opposed to acting in what they considered to be a proper pursuit of the FSA's statutory role. I have also seen no evidence that any of the FSA's employees were conscious or reckless that they were doing anything that they had no power to do. Whether or not the FSA's conduct was the best course available in the circumstances, whether or not it was the conduct of a competent regulator, and whether or not the FSA as an institution was, as Mr Ford suggested, "useless", are matters on which I do not have to form any view, and have not done so. The causes of action relied upon by the Claimants do not depend on such matters, but on the type of conduct, with concomitant mental elements, which I have referred to when considering the requirements of the wrongs alleged, above. As I have said, I have seen no evidence showing that*."

As such, I consider that you received a response to this allegation in the Letter of Response from the FCA via their solicitors, in the Upper Tribunal Judgment, and that the High Court has ruled on similar allegations in the proceedings between AAI Consulting Limited & Others v The FCA.

[8] https://www.bailii.org/ew/cases/EWHC/Comm/2016/2812.html

c) *The FSA used the 'manufactured' Solvency Review to wrongfully justify putting Keydata into administration*

The FSA considered Keydata's proposal to be untenable when new information was obtained from HMRC regarding the solvency of the firm and served Keydata with a First Supervisory Notice (OIVOP), instructing the firm to cease marketing of its products to professional intermediaries or retail customers and to cease carrying out regulated activity. The information from HMRC was in relation to the fact that simplified voiding was not an option and therefore Keydata had a tax liability regarding the ISA breach. The risk posed was the nature of the breach and the financial implications; the FSA's intention was to protect the consumer. The FSA acted in accordance with its statutory objectives under FSMA.

As previously highlighted, although the FSA applied to put Keydata into insolvency administration in June 2009, it was the Court that appointed PWC as administrators. Also, in the Upper Tribunal Judgment as set out at point a) above the court found that there was no conspiracy.

In the FCA's response to your Letter of Claim, your allegation concerning PwC's conduct is not an allegation that the FCA can address: this is because it is out of scope of the Complaints Scheme. The FCA is not responsible for the Solvency Review conclusions reached by PwC and allegations alleged about PwC's conduct should be put directly to PwC. The Complaints Commissioner also states in her Final Reports regarding other complaints relating to Keydata that complaints about insolvency administrators are outside the scope of the Scheme. These can be found at the links below;

https://frccommissioner.org.uk/wp-content/uploads/FCA00844-Publication-FR-Issued-31-03-2021-Published-4-5-2021.pdf

https://frccommissioner.org.uk/wp-content/uploads/FCA00818-Publication-FR-Issued-31-03-2021-Publication-4-5-2021.pdf

https://frccommissioner.org.uk/wp-content/uploads/FCA00814-Publication-FR-Issued-31-03-2021-Published-4-5-2021.pdf

https://frccommissioner.org.uk/wp-content/uploads/FCA00816-Publication-FR-Issued-31-03-2021-Published-4-5-2021.pdf

d) *The process of the approval of the OIVOP was irregular. It was sought from [redacted], as opposed to more senior directors within the FSA who would have been readily available*

The legal test for an OIVOP at the relevant time in September/October 2007 was set out in FSMA, Section 45 Variation etc.:

(1) The Authority may exercise its power under this section in relation to an authorised person if it appears to it that–

(a) he is failing, or is likely to fail, to satisfy the threshold conditions;
(b) he has failed, during a period of at least 12 months, to carry on a regulated activity for which he has a Part IV permission; or

(c) it is desirable to exercise that power in order to protect the interests of consumers or potential consumers.

At the time of the OIVOP, [redacted] was the director of the business area making the decision to approve the OIVOP. There were no conflicts of interest identified. I am satisfied that the correct process was followed, and I have seen no evidence to the contrary. At the time of these events the process followed was according to the existing Decisions procedure and Penalties Manual (DEPP) part of the FCA Handbook. I am therefore unable to uphold this point of the allegation.

e) *The RDC was not put on notice of the proposed action against Keydata. You query why the RDC delegated authority for such a significant decision to the FSA management. This failure resulted in the 'usual checks and balances' being circumvented. Including affording Keydata the opportunity to have the actions of the FSA executive independently tested by the RDC which the FSA's rules required in all but exceptional circumstances and these were not exceptional circumstances.*

In accordance with paragraph 3.6 of the Scheme, we consider that challenges to the RDC process would have been more appropriately dealt with by another way i.e. by way of an appeal at the Upper Tribunal. Therefore, this unfortunately cannot be dealt with under the Complaints Scheme.

Although this point is considered to be outside of the scope of the Scheme, 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 (as set out above).

f) *The FSA's statutory duty was transferred to PwC's partner at a time when Keydata was trying to engage meaningfully with the FSA over 6 and 7 June 2009.*

The First Supervisory Notice given to Keydata on 5 June appointed PwC under s166 of FSMA to undertake a review of Keydata's third party administration business and to ensure that funds were appropriately segregated. This was not transferring the FSA's statutory duty – it was using a regulatory tool permitted by FSMA. PwC liaised with the directors of Keydata over the weekend of 6-7 June to conduct this work.

Keydata were placed into administration by the court. PwC were subsequently appointed to carry out this administration on 8 June 2009. Prior to this, on 5 June 2009, the FSA considered Keydata's proposal to be untenable when new information was obtained from HMRC regarding the solvency of the firm and served the OIVOP to stop the firm marketing its products and to cease carrying out regulated activity.

Further to the above, on 5 June 2009, Keydata provided the FSA with a misleading spreadsheet via their solicitors that future income was expected from SLS and Stewart Ford failed to correct the information provided. Paragraphs 584-586 of the Upper Tribunal judgment confirm this:

"*That spreadsheet was, as the Authority submitted, misleading. In referring only to the contractual payment dates, the information crucially failed to disclose the fact, as known to Mr Ford and Mr Owen but never disclosed to the Authority, investors or IFAs, that SLS had not paid 30 trail commissions to Keydata since February 2008, had been making payments late (and so not in accordance with the contractual terms represented by the spreadsheet as dates of receipt), and had not made any income payments at all in respect of amounts due from SLS from August 2008 (and we have found that Mr Owen was aware of this from October 2008)*".

I have found no evidence to support the allegation that statutory duty was transferred to PwC at the time. They were then appointed by the court in the insolvency proceedings. I am therefore unable to support this statement and therefore this point is not upheld.

g) *The FSA was not open and honest in pursuing the administration order including relying on a witness statement that was not updated with facts known to the FSA. Facts you say that weakened the FSA's position on suitability and had a negative bearing on the credibility of the Solvency Review*

It is noted that this is your opinion, however, you may wish to engage solicitors to pursue allegations of perjurious evidence submitted by the FCA to the Court. Although this point could be considered within the Scheme, we consider that it should be dealt with another way under paragraph 3.6 of the Scheme, as per the response to Part 3 of your complaint above, and would likely be better dealt with in court proceedings.

h) *Your view is that it was not necessary to place Keydata into administration either at the time or at all. There were other options available to the FSA to address the differences between the FSA and Keydata which would have been beneficial to creditors and investors.*

Thank you for your view on this matter. When considering this complaint, I have considered the actions of the FSA at that time. I have not applied hindsight to this. It is evident that the FSA applied to the court for Keydata to be placed into administration, this was because it was insolvent - Keydata had mis-sold its products incorrectly as ISAs and owed a tax liability it could not afford. Given the size of Keydata's liabilities and the need to safeguard investor interests, administration was the course of action chosen at that time and one that was implemented by the Courts. Other options were also considered at the time (see reference to Part 1 of your complaint above).

Based on the various points raised above, I am unable to uphold Part Five of your complaint.

Part Six (Not Upheld)

You say that it would be difficult to believe that PwC had access to the CSSF without the knowledge and support of the FSA. You say that an investigation is required into the FSA's involvement in the sudden closure of Lifemark. The FSA should have supported the decision of the Lifemark board to end the 'trail commission' contract. The failure to protect/safeguard the underlying assets is secondary to the action surrounding the sudden closure of Lifemark.

This allegation is not upheld as I am unable to comment on your speculation that PwC had access to the CSSF without knowledge and support of the FSA. These are allegations you may wish to raise directly with PwC and/or the CSSF. I would also like to refer you to the information under 'Part Two' of your complaint which sets out the FSA's actions concerning Lifemark.

Lifemark and SLS were special purpose vehicles incorporated in Luxembourg and regulated by the CSSF. The scope of the FSA's enforcement investigation involved assessing concerns with Keydata purchasing and distributing SIB and SIP products. 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*."

It also confirms that multiple problems with SLS and Lifemark's assets were concealed from the FSA at the time, only becoming apparent through the enforcement investigation, and that the FSA acted appropriately in performance of its regulatory functions at the time. In addition, 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.

I am therefore unable to uphold this allegation.

Part Seven (Excluded)

You allege that the sworn witness statements of [redacted] and [redacted] are perjurious by missing evidence known to the FSA at the time it was written and used in Court and each gave contradicting accounts as to why the OIVOP was 'wrongfully' issued against Keydata. You say that the Upper Tribunal refused to address the circumstances surrounding the closure of Keydata and therefore the matter is open for the FCA to investigate.

As per Part Three of your complaint, paragraph 3.6 of the Scheme explains that the Regulators will not investigate a complaint which they reasonably consider could have been, or would be, more appropriately dealt with in another way, that is, by a Court. 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.

As such, I am unable to investigate this allegation under the Scheme. This is because it relates to legal proceedings against Keydata and a matter of law. The Scheme is not the correct means by which to deal with these issues and you may wish to obtain legal advice if you want to pursue this allegation.

In considering the point you raise that this is a matter being open to the FCA to investigate the circumstances surrounding the closure of Keydata, this has been considered as part of this investigation as far as we can, using the materials described in this letter, and we have set out our position in relation to the witness statements in our response to Part Three.

Part Eight (Upheld)

On 24 May 2021 you emailed the Complaints Team and in this correspondence you raised a number of factors relating to the handling of your complaint. I have considered these along with the other allegations.

During my review of your further points, it became apparent that it was your belief that the FCA intentionally ignored your complaint and failed to communicate with you during the various proceedings. I have considered all the points you have raised on this and although I do not accept the assertion that you were deliberately and intentionally ignored, I have identified that there were a number of customer service failings, including not providing you with updates. I would like to apologise on behalf of the FCA Complaints Team for this.

By way of a summary of my findings, I was able to identify that you raised a complaint on 22 July 2011 under [redacted] This was recorded on our system on 25 July 2011.

On 3 August 2011 your solicitor was sent correspondence acknowledging your complaint under the reference 2633.

On 22 August 2011, your Solicitors, [redacted] were sent a further letter: this letter explained that the investigation into your complaint was to be deferred due to ongoing Enforcement action.

On 30 August 2011 it appears that the Complaints Team spoke with the Complaints Commissioner and referred your complaint to him and your solicitor was copied into this email.

On 30 September 2011, your Solicitor wrote to the Complaints Commissioner expressing the view that they wished to refer the complaint.

The Commissioner responded to your Solicitor on 27 October 2011. At that time, he agreed with the decision to defer the complaint and provided a comprehensive response. I have not provided further detail on this as you provided us with a copy, and it would be unnecessary to repeat that decision.

On 29 August 2012, the Complaints Team received an email requesting an update. From the documents I have seen this was provided.

There was subsequently no action taken until January 2019 when complainants regarding Keydata were contacted by the FCA Complaints Team. It is apparent that letters were sent to a number of complainants upon the decision being reached by the Upper Tribunal in November 2018. This resulted in a total of 28 complaints being reopened.

Although it is clear that your complaint was missed, I have been unable to find documentary evidence that indicates that your case was intentionally set aside. I therefore can only surmise that the likely cause was that of human error. This is likely to have been as a result of a number of reasons including the transition of the handling of your complaint by the FSA and then the FCA and how the complaint was recorded when it was deferred in 2011.

I sincerely apologise for this oversight; I appreciate the frustration that this is likely to have caused. You should have been contacted once the deferral was lifted and you were not. I am sorry for the extra frustration this has caused.

Unfortunately, because of the above, your complaint was not reopened. This resulted in you contacting us in May 2020 and resubmitting your complaint in June 2020. At that time, we

considered your complaint and commenced the investigation. I am sorry for this failure and I am sorry you believe it was intentional: I have seen no evidence to suggest this.

You stated that, ***you "had no way of knowing that the conclusion of the Upper Tribunal proceedings brought the disciplinary proceedings against Keydata's management to an end. This confusion as to the position in relation to the disciplinary proceedings meant that there was a long and unnecessary delay before I approached the FCA in June of last year to reinstate my complaint "***

As highlighted above we should have contacted you in 2019 when the complaints were reopened. This meant that you did not receive an update from us. Although I appreciate that we did not inform you directly there were other means beyond the FCA in which you were able to find relevant information.

You highlighted that, "***When in January 2019 the disciplinary proceedings against Keydata's management were concluded, the FCA undertook (unbeknown to me) an exercise to identify and reinstate the complaints relating to Keydata. Unlike the other complainants, my complaint was not reinstated and the FCA did nothing to reinstate it. The Commissioners Reports note that the FCA had instigated a 6-monthly review of all deferred complaints, so even if it had been overlooked in January 2019, this process should have, but did not reveal that I had a subsisting complaint."***

You raised in your email that you felt your complaint should have been identified during this review process.

Unfortunately, your complaint would not have been picked up in this review. For clarity the review process in this instance consisted of the Complaints Team liaising with other areas of the FCA to identify what updates, if any, could be provided to complainants. Where appropriate complainants were then provided with an update. Unfortunately, due to the initial errors, your complaint would not have been identified in this type of review.

Since your complaint was raised the FCA Complaints Team have undergone a number of system and process changes that have since improved how information is recorded. The result of this means that complaints are unlikely to be missed if similar circumstances were to occur.

In your further correspondence, you stated ***When you were assigned to my complaint last July you said you would give me an update in 4 weeks. Having not had anything from you by September I started chasing you for an update by email and telephone. This resulted in your letter of 11 September. In this letter you sought to restate my complaint to limit its scope and having taken some 14 weeks to reach this stage you required a response to your proposals within 7 days. Given the inequality of the resources available to each of us, it was improper for you to deliberately seek to limit the scope of my complaint and, wholly unreasonable for me to respond to your proposals within 7 days. Even though I extended the time for my responding, I was still under the pressure you had intentionally imposed on me to respond, in what was a blatant attempt to cut down and limit the scope of my complaint.***

You also highlighted that you felt that we had restated your complaint and placed pressure on you to respond within seven days to this. We accept that the wording of your allegations changed, and you were allowed time to consider and amend these. Our normal process is to review and consider the allegations made and as part of this we try to ensure that where appropriate the complaint is answered as fully as possible. This enables us to provide a clearer response.

I am sorry that you felt pressured to respond in the 7 day timeframe provided; this was not our intention. On all our complaints this is a standard response time, however this was a complex complaint, and we should have considered giving you longer to respond. I note that ultimately we were flexible with the proposed date and you subsequently provided us with your comments on 6 October 2020. We have considered all of these in this decision letter.

It is also apparent that there was a breakdown in communication, with a lack of regular updates leading to clear customer service failings, for which I would like to apologise. I identified that this continued through the life of the investigation. Our customer service standards fell below your and our expectations. I am sincerely sorry for the poor service you were provided with.

I uphold this allegation on the basis that there were unacceptable delays in dealing with your complaint, but this was not an intentional action by the FCA. Throughout the process there were a number of failings in the standards expected surrounding the handling of your complaint. Since 2019 the Complaints Team have put in place a number of changes to improve the service we provide; however, those changes did not enable us to provide a satisfactory service in your case.

Conclusions

As set out above in the findings of this decision letter, I have not upheld Parts, One, Two, Five and Six. I have upheld allegation Eight. Other elements were excluded or not considered under the Scheme.

I sincerely apologise on behalf of the FCA for not proactively contacting you in January 2019. I also would like to apologise for the delays you have experienced. I am sorry that you felt that this was intentional, I can assure you that this was not the case. We have and are taking steps to improve as a Complaints Team. This includes how we manage our complaints investigations. This is an ongoing process. It is apparent that despite these changes this was a frustrating experience for you. I am sorry.

The delay in considering your complaint and service issues

Please also accept my apologies for the length of time it has taken to reach a decision on your complaint and for any inconvenience this may have caused.

In view of the delay and service failings you have experienced, I would like to offer you an ex-gratia payment of £1,000.

I would be grateful if you could let me know by **14 April 2022** if you would like to accept this payment. If you require further time to consider this please let me know.

Finally, if you accept my offer of £1,000 please send your full bank details (name on the account, sort code, account number and the name of the bank the account is held with) and I can arrange an electronic transfer for you.

The role of the Complaints Commissioner

The Complaints Commissioner is the independent person appointed by the Regulators to be responsible for the conduct of investigations in accordance with the Scheme. You can contact the Complaints Commissioner for a review of my decision if you are unhappy with it. A referral should usually be made within three months of the date of this letter. However, the Complaints Commissioner may decide to still review your complaint outside of this time.

The contact details for the Complaints Commissioner are:

Office of the Complaints Commissioner
Tower 42
25 Old Broad Street
London
EC2N 1HN

Telephone: 020 7877 0019
Email: complaints@frccommissioner.org.uk

Yours sincerely

[redacted]
FCA Complaints Team
Risk & Compliance Oversight Division

Telephone: 020 7066 9870
Email: complaints.scheme@fca.org.uk

APPENDIX 2

ANNEX – RESPONSE TO QUERIES

Queries raised in the letter of complaint dated 5 June 2020

1. **Confirm the reasons why the management of Keydata was dismissed by both the FSA and PwC**

   The management of Keydata was removed on the appointment of the administrators. I refer Mr [redacted] to the Decision Notices for Mr Ford (Keydata CEO), Mr Owen (Keydata Sales Director), Mr Johnson (Keydata Compliance Officer) and Mr McNeil (Keydata Finance Director), for further information of their breaches.

2. **As the evidence for both was the same, why was Tim Heathering (chairman of the RDC) able to give his express consent to the commencement of insolvency proceedings against Keydata but not able to approve the OIVOP**

   I refer you to paragraphs 95-97 of [redacted] Witness statement which explains that Tim Herrington, the Chair of the RDC, was out of the office on 5 June 2009, and was contactable only via Blackberry. It was decided that he was unable to adequately consider the documents necessary for the OIVOP via Blackberry and that the decision would accordingly be taken by a Director of the FCA, in line with the published decision-making processes at the time. He was, however, able to give his consent via telephone to the issuing of winding up proceedings on the afternoon of 5 June 2009.

3. **Confirm if either Margaret Cole or Jon Pain were in the office on Friday 5 June 2009**

   I am unable to provide information on the whereabouts of FCA colleagues.

4. **Provide an unredacted copy of the email from the FSA's Lillian small to HMRC dated 28 May 2009**

   This was considered under your FOIA reference FOI8284 of 5 July 2021.

5. **Confirm the date and time the FSA's Lillian Small received the email from HMRC's Steve Lig which he sent on 4 June 2009 17:25**

   You may wish to submit this request to the FOIA Team.

6. **Why was the witness statement of [redacted] and the Solvency Review not correctly updated to reflect the information within the email prior to being sent to Keydata on Saturday 6 June 2009.**

   It cannot now be determined what consideration was given to updating either document in light of Mr Lig's email.

7. **Provide a list of the dates the Lifemark products were subsequently listed post the OIVOP**

   I refer you to the Upper Tribunal judgment which sets out information on Lifemark products.

8. **Following the termination letter from Lifemark to Keydata provide details of correspondence along with emails between the FSA PwC and/or the CSSF**

   You may wish to submit this request to the FOIA Team.

9. **Provide the dates and names of firms the FSA engaged to provide legal advice.**

   You may wish to submit this request to the FOIA Team.

Queries from the complaint letter dated 22 July 2011, from Speechly Bircham (solicitors for [redacted] to the FSA.

10. **Which statutory power did the FSA exercise in commissioning the Solvency Review?**

    The FSA did not use a statutory power. The FSA's primary motivation for preparing the Solvency Report was to protect consumers. This was also stated in the FSA's letter to Speechly Bircham of 19 September 2011. The letter also referred to information which explained the events leading up to Keydata being put into administration. The letter referred to the FSA's Handbook which described the FSA's procedures for taking statutory decisions such as an OIVOP, and referred to PwC's engagement letter which confirmed that the FSA did not exercise any formal powers when it commissioned the Solvency Review.

11. **A material element of the scope of the review was the assumption that an OIVOP would be put in place. At what stage did the FSA instruct PwC to draft the review on the basis of this assumption.**

    It is not clear when, or if, such an instruction was made. In that the OIVOP had been made at the time of the appointment of administrators, it was an appropriate assumption to make.

12. **Was a final form Review produced.**

    The Solvency Review presented to the Court was the final version.

13. **The FSA received a copy of the profit and loss account and solvency report of Keydata which indicated profits which exceeded the minimum amount by which PwC concluded Keydata was insolvent. Given the discrepancy, why did the FSA consider it reasonable to rely solely upon the PwC review rather than attempt to reconcile the two assessments**

    The report on Keydata's solvency appears to have been provided by the firm at a meeting with the FSA on 2 June 2009. It was considered by the FSA and exhibited to [redacted] witness statement (see para 90). PwC were also provided with a copy of the report and took it into account when preparing their own review.

    I refer you to the Upper Tribunal judgment which sets out in detail the complex nature of Keydata's structure, products and connections, and the extent to which its senior staff acted without integrity, had conflicting interests, and misled and made false statements to the regulator. Under the Complaints Scheme, the FCA and the OCC must regard findings of fact and decisions of the Upper Tribunal as conclusive.

14. How if at all were the PwC conflicts of interest dealt in commissioning the Review that at this stage it was likely to be appointed as administrator.

As stated in paragraph 34 of the OCC's Final Report - FCA00816 "*Although the FSA applied to put Keydata into insolvency administration in June 2009, it was the court that actually made this decision, and appointed PWC as administrators. I have no jurisdiction over these kinds of regulatory decision, and there are separate arrangements for complaints about PWC as insolvency administrators, which fall outside this Complaints Scheme*."

15. To what extend did the FSA critically appraise the Review to ensure it was fit for purpose in particular in relation to the writing off of the parent company debt

The FSA considered the review. It is not possible to say "the extent" to which it was critically reviewed but, in that it was placed before the Court, it was plainly considered fit for purpose and, as previously mentioned, Keydata agreed to the appointment of administrators. There was no suggestion from the FSA that the Solvency Review was not 'fit for purpose'.

16. Why did the FSA deem it appropriate to apply to the Court for Keydata to be put into administration when Keydata was in ongoing negotiations with HMRC to settle the tax liability with respect to the products, particularly when HMRC appeared to have agreed in principle to such a settlement and the only outstanding point to be discussed were the quantum of the debt and mechanics for payment. How did this benefit investors.

The FSA submitted the application to the Court because Keydata was found to be insolvent and unable to meet its tax liability. The application was made on the dual basis that Keydata was insolvent and that it was just and equitable to wind the company up. This was based on the FSA having lost confidence in the management of the company. The accuracy of the basis for these concerns was outlined in the Tribunal's judgment and the justification for the FSA's decision was confirmed in the High Court decision. Keydata accepted that it was insolvent in consenting to the appointment of administrators.

17. Given that the failure of the products to meet the requirements of the ISA Regulations was not carried across to the other ISA products issued by Keydata, or other players in the market why did the FSA consider that the publicity arising from the Products would affect public confidence in ISA products more generally

We are unable to comment on this as we are unaware on what this assertion is based i.e. why did the FSA consider that the publicity arising from the Products would affect public confidence in ISA products more generally.

18. What evidence is the FSA able to provide that a decision was required with sufficient urgency to protect the interests of consumers such that action was taken before a recommendation of the RDC chairman could be made

The statement of [redacted] outlined the need for urgency. We also refer you to the Final [9]Reports of the OCC in which she concludes that given the concerns raised about Keydata, the FSA could and should have taken action against Keydata sooner than it did.

[9] Final reports FCA00818 HERE FCA00844 HERE FCA 00816 HERE FCA00814 HERE

The complaints investigation also concluded that the supervision of Keydata could have been improved and supervisory tools/enforcement referral should have occurred sooner.

Further, as the queries within this letter (22 July 2011) were raised before the Upper Tribunal judgment was issued, we refer you to the judgment which sets out the actions taken by the FSA in respect of Keydata.

19. Why did the FSA notify Keydata and its professional adviser so late on Friday 5 June that the OIVOP had been put in place and the hearing before the Court was scheduled on Monday 8 June and to what extent was such short notice reasonable and necessary in the circumstances.

Keydata was notified of the FSA's intentions on the afternoon of 5 June 2009, the OIVOP was provided as soon as was practicable after it was made and, despite the application being made on an ex parte (without notice) basis, draft court papers were provided at or around the same time. Given the urgency, this was a reasonable course to take. The Court agreed.

20. Given that approval to the OIVOP was granted by a director of the Division, how was the potential for a conflict of interest dealt with and what grounds did Ms Titcomb make her decision

The grounds for the decision are outlined in the First Supervisory Notice. There is no suggestion that Ms Titcomb had a conflict of interest. Ms Titcomb was an FSA Director and acting in a professional capacity.

21. To what extent can the manner in which the FSA exercised its powers in putting Keydata into administration be said to comply with the FSA's statutory obligation to maintain confidence in the financial system.

The FSA acted in accordance with its statutory objectives (not obligation) under FSMA. The action was taken to advance the consumer protection objective.

[redacted]

Amerdeep Somal
Complaints Commissioner
The Office of the Complaints Commissioner
23 Austin Friars
London
EC2N 2QP

13 May 2022

FCA Ref: 206707305 - Keydata Investment Services Ltd

Dear Amerdeep,

Further to my previous letter (2 September 2021), the FCA have *finally* issued their Decision Letter, dated 31 March 2022 (appx. A). Within the letter they explain that if I am unhappy with their Decision, the matter can be sent to you for review. This correspondence outlines the reasons why a review is required.

I am unhappy with (a) the FCA's handling of my complaint, and (b) the conclusions they have reached.

Introduction

It is important not to rewrite the complaint (appx. B), as the complaint, along with the supporting evidence clearly outlined the reasons why the complaint was brought, initially in 2011 and then resubmitted again in 2020.

The FCA have taken the complaint and *wrongly* dismembered it and then restructured it into eight parts. Whilst I appreciate the time and effort of Mr [redacted] by restructuring the complaint in the way they have, it seems to me the FCA have spent a lot of time and effort attempting to mitigate and justify their actions (disregarding that they are inter-connected and resulted in a cumulative outcome).

For the complaint to be understood it can only be considered in the order it is presented. The complaint is a narrative, and if a narrative is not reviewed chronologically, the connection between important, interrelated and connected actions and events are lost, meaning anyone reviewing the narrative would lose focus, get lost and confused.

By restructuring the complaint, the FCA have downplayed the importance of how *(prior to the issuing of the OIVOP)*, the Keydata management and their advisors, Allen & Overy LLP **(A&O)** & Withers LLP **(Withers)**, were working with HMRC to address the ISA issues and were working with the FSA to address their concerns with the Keydata management.

The irregular issuing of the OIVOP is at the heart of the complaint, it should not have been not pushed down to *Part Five*. Not least, as the administration of Keydata *(Part One)* would not have occurred as it did, or when it did, without the issuing of the OIVOP.

In making his decision, Mr [redacted] has relied heavily on the Upper Tribunal hearing, which concluded in November 2018.

Within a letter to the FCA's [redacted] dated 6 October 2020 (appx. C), it was clearly explained that prior to the Upper Tribunal hearing, Judge Berner made a ruling in which he refused to review the actions of the Authority in the circumstances surrounding the closure of Keydata *(being the very matters of which the complaint is about)*. Whilst he refused to address those matters, Judge Berner made clear that those circumstances remain highly contentious (appx. D).

The findings of Judge Berner are, of course, respected, but, as Judge Berner did not review the evidence, or circumstances surrounding the closure of Keydata, it is hard to understand why the FCA have relied so heavily on his decision making; and not undertaken an independent investigation into their own conduct. I may be wrong, but I would have thought that the entire purpose of a public body setting up a complaints process was to provide an opportunity for the FCA to review their own work and draw lessons from any weaknesses and failures revealed.

As the FCA have relied heavily on the decision of the Upper Tribunal, this would explain why a significant amount of the evidence supplied to support the complaint has not been considered by the FCA and, is not referenced within the Decision Letter.

By way of example, one piece of evidence supplied was an email between the FCA's [redacted] and HMRC. Whilst originally redacted, through a Freedom of Information Request (FOI8284), the *unredacted* email was eventually disclosed and it clearly confirmed that PwC were only instructed to find Keydata insolvent (appx. E).

Within the Decision Letter, Mr [redacted] refers to four complainants, who referred the FCA's decision on their complaints to your office. Within your findings you make it clear the FSA should have been involved with Keydata sooner. Regardless of whether the FSA should have got involved with Keydata sooner, this does <u>not</u> excuse the FSA in circumventing due process and hastily issuing the OIVOP in the manner they did. This action ultimately brought about the administration and closure of Keydata. This is the action which brought about my losses, the losses of investors in Keydata products and the damage inflicted on the financial services sector for which we have all paid.

As reported above, the FCA have restructured the complaint for their own benefit. They were wrong to do this, the complaint should have been addressed as submitted. Therefore, those eight parts have been re-arranged into the correct order, and perhaps better referred to as Chapters, within each Chapter is a brief narrative. The narrative is not intended to replace the complaint.

Chapter ONE (FCA - *Part Five)*

The issuing of the OIVOP

The OIVOP was only issued after the PwC Solvency Review **(PwC Review)** was delivered to the FSA on Friday 5 June 2009, and issued on the dual grounds of *Suitability* and *Financial Resources*. However, the only tangible evidence available to the FSA was the PwC Review, which became *front and centre,* as demonstrated within the witness statement of the FSA's [redacted] Had the OIVOP been proposed on grounds of *Suitability* alone, this would have had to have been tested and a determination made by the Regulatory Decisions Committee **(RDC)**.

The PwC Review was manufactured to only demonstrate that Keydata was insolvent, but this claim of insolvency could only occur once the OIVOP was issued and Keydata was no longer a going concern. PwC did not provide any evidence that Keydata was insolvent prior to the issuing of the OIVOP. Whilst there clearly was an issue of suitability, had the OIVOP been issued on grounds of suitability alone, it would have required that the FSA demonstrated this to the RDC and Keydata given an opportunity to challenge the allegation.

On the FSA's instructions, PwC manufactured a Solvency Review which they both knew, was based on selective data and the manifestly incorrect assumption of the OIVOP being in place, thereby depriving it of any weight or legitimacy. It was therefore not fit to support the issuing of the OIVOP, or to be used to support the application to the court for an administration order the next working day.

One of the grounds put forward by the FSA (in 2016) justifying the OIVOP was a belief that HMRC would remove Keydata's ISA Managers status. However seven years earlier, on 2 June 2009 *(only three days before the issuing of the OIVOP)*, HMRC had written to A&O to confirm that whilst *simplified voiding* was not appropriate to repair the ISA's, HMRC were still prepared to make a settlement with the company (Keydata). Within the FSA's own 2009 evidence (Irving's witness statement) at the time of the issuing the OIVOP, there is no reference of HMRC withdrawing Keydata's ISA Manager status. In fact, as you will read, HMRC initially believed that the FSA wanted them to settle with Keydata, until they back tracked.

On the 3 June 2009, Keydata through Withers, had proposed its own VVOP to appease the FSA's concerns. Keydata's management were prepared to immediately stop issuing any products the FSA were not happy with (including the DIP product) and, were prepared to step away from the business (which was noted as a concern by [redacted].

Chapter Two (FCA - *Part Three and Part Seven*)

Witness Statements of [redacted] *Perjurious*

The witness statement of [redacted] was used to apply to the court for the administration hearing in June 2009. [redacted] reports the reason for the issuing of the OIVOP was to deal with the *"Company's Solvency Issues"*. Importantly, [redacted] also reports the company would <u>not</u> issue the DIP product.

Astonishingly, seven years later, the Witness Statement of [redacted] reports the reasons to issue the OIVOP was to prevent the Company issuing the DIP product and, HMRC were also looking to remove Keydata's ISA Manager status; as reported above *Chapter One,* seven years earlier this was not in being considered.

An explanation is both required and expected to understand why the witness statements report different reasons for the issuing of the OIVOP. It is not acceptable for the FCA to exclude this part of the complaint, possibly because it exposes the depths of deceit of the authority, or some of its employees employed to bring down Keydata.

In any event both witness statements confirm the OIVOP was issued irregularly and without respect to due process. The FSA's behaviour inflicted financial damage on my business, other creditors and on the very investors the FSA was supposed to be protecting.

Only once the FCA carry out the investigation, will it be better understood if the witness statements are, in fact perjurious.

Chapter Three (FCA - *Part One*)

The administration of Keydata

The issuing of the OIVOP was a conduit for the administration of Keydata, and the PwC Review a conduit to issue the OIVOP. Without the careful planning to issue the OIVOP it is reasonable to believe the company would not have faced administration, either at that specific time, or possibly not at all.

The FCA have attempted to place the administration at the beginning of the complaint, this is wrong, there was a sequence of events that led to the administration.

Chapter Four (FCA - *Part Six*)

Closure of Lifemark CCSF & PwC

Lifemark was only closed down once the Lifemark Directors had cancelled the lucrative monthly trail commission contract to Keydata (in administration). It was the immediate closure of Lifemark that created the devasting losses to the UK investors, it is unreasonable for the FCA not to know the reasons for Lifemark's closure. In fact they very probably did as they were closely involved with the FSCS and PwC during the process.

Chapter Five (FCA - *Part Two*)

The assets of Lifemark and SLS

There is no dispute that the assets of SLS were subject to misappropriation. However, Keydata were considered a victim, not a perpetrator of any wrongdoing in the SLS matter. Keydata only sold three SLS products which accounted for approx. 1.48% of funds under their management.

Whilst the SLS assets had disappeared, this was not the case of the Lifemark assets. Those assets were linked to the UK investors, an explanation is required by the FCA as to how they were dissipated.

Chapter Six (FCA - *Part Four*)

The FSCS

The FSCS made payments to the UK investors, those payments are extraordinarily linked to the sale of the Lifemark assets.

Chapter Seven (FCA - *Part Eight*)

Ex-gratia Payment

The FCA have made an offer of £1000, I do not believe this payment reflects the time taken, or does it reflect how the complaint has been handled. For that reason, I am not able to accept, or reject the offer. Your thoughts and guidance would be welcomed?

Epilogue

Without the PwC Solvency Review, the OIVOP could not have hastily been issued only hours after PwC Review was delivered to the FSA. The Keydata management were working to address the matters in hand with both the FSA & HMRC. If the OIVOP was to be issued on *Suitability* alone, due process would have had to have been followed, which would have required and allowed Keydata the opportunity to prepare a defence.

As I hope I have set out above, in my opinion the FCA's handling of my complaint has been fundamentally flawed and unsurprisingly the conclusions they have reached are perverse.

Whatever view may be taken of the conduct of the management of Keydata (and please understand I am in no way condoning their actions) there has clearly been misconduct either by a small group of FSA employees or, more worryingly, if it wasn't a small group of employees, it was misconduct at an institutional level. The rules and procedures are ultimately there to protect us all, and in this case the circumvention of these rules inflicted considerable personal and financial damage on me and thousands of other people.

The FSA and FCA have mounted a campaign to conceal the misconduct that occurred; however, it needs to be exposed so that the public know what transpired and regulators can reflect on the events leading up to the damage done by the destruction of Keydata and how to prevent a recurrence of this type of misconduct.

I look forward to hearing from you in due course.

Yours sincerely

[redacted]