Complaints Commissioner

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Final report by the Complaints Commissioner

Complaint number FCA001645

The complaint

1. On 3 February 2022 you asked me to investigate a complaint about the FCA.

What the complaint is about

2. In its decision letter to you dated 4 November 2021 the FCA described your complaint as follows:

> *Part One:*
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> You allege that you have been unreasonably and unfairly treated by the FCA, specifically, by members of the Regulatory Decisions Committee (RDC). You allege that, in October 2015, the Enforcement Division colluded with the RDC to change the basis of the allegations made against you, in an attempt to avoid the time barring question. Consequently, the RDC issued a decision that unreasonably stated that the Advice Limitation Issue did not need to be addressed.
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> *Part Two:*
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> You allege that you have been unreasonably and unfairly treated by the FCA, specifically, by employees in the FCA's Enforcement Division. You allege that in October 2015, the Enforcement Division colluded with the RDC to change the basis of the allegations made against you, in an attempt to avoid the time barring question. You believe that this was done, as the FCA believed that if the allegations against you were not changed, there was a strong risk that you would "get off lightly", due to the allegations being found to be time-barred as, indeed, they eventually were.

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Part Three:

You allege that there was a lack of effective investigation leading to the Enforcement Stage 1 negotiations as the FCA failed to find key documentation that it should reasonably have found at this stage of the investigation; it did not interview certain staff members effectively or at all, who could have provided them with further evidence which was not disclosed until well into the Upper Tribunal proceedings; and it did not seek external Counsel advice on the time barring issue at this stage, which would have told them, had it done so, to stop.

Part Four:

You allege that the Enforcement team refused to investigate/accept the time barring issues and had a closed-minded approach to the limitation issue. Although it was aware that there was a possible limitation argument in June 2014, it did not disclose the information to the RDC, nor to the Upper Tribunal, until 21 September 2017, more than a year into the Tribunal process.

Part Five:

You allege that there was a lack of rigour by Enforcement with regards to preparations for the RDC, as the RDC were not in possession of the full facts. There were significant documents which had not been disclosed to the RDC because the Enforcement team had not carried out effective searches and had deemed documents not relevant. Enforcement did not disclose certain documents to the RDC because it had deemed them not to be relevant, having previously deemed them to be relevant. The non-disclosure also included the undermining documents which were not seen by the RDC until after a Warning Notice was issued. It is still not crystal clear what documents were and were not given to the RDC.

Part Six:

You allege that based on the evidence the RDC had in front of it and with the aid of external counsel, it should have stepped back, viewed all the evidence objectively and dispassionately. However, it did not fully consider the limitation argument. During the meeting(s) held between the RDC and Enforcement in October/November 2015, representatives of the FCA considered the limitation argument put forward by Enforcement to be sufficiently weak to cause it to unfairly and unreasonably alter the allegations against you, in an attempt to side-step the limitation issue in the first place and try to ensure you did not 'get off lightly'. Furthermore, the RDC did not follow due process as it did not provide you with its notes from its meetings with Enforcement, which led it to come to the conclusions it eventually came to.

Part Seven:

Due to the FCA's incompetence, unfair and unreasonable behaviour, you have incurred unnecessary costs.

Part Eight:

You are unhappy with the time it has taken to resolve the complaint and on 3 February 2021 you emailed the Complaints Team to ask that this issue be investigated separately. Amongst the comments you made, was: "This is not a complex issue, nor a covid issue, it's a competence issue and I require a detailed blow by blow account of the reason for the delays and the individuals responsible".

What the regulator decided

3. The FCA upheld Part Eight of your complaint, partially upheld Parts One, Three, Four and Five of your complaint.

4. The FCA did not uphold Parts Two, Six and Seven of your complaint.

Why you are unhappy with the regulator's decision

5. In your complaint letter to me you informed me why you are unhappy with the FCA and the way you have been treated by the FCA and its predecessor the

FSA, since January 2013 when the FSA visited your firm's offices. You also enclosed various documents which you say are '…several related documents…'

6. You summarised your main complaint points as follows:

   Element One

   The unacceptable time it took for the FCA to reply to you and the basis and level of ex gratia payment offered to you.

   Element Two

   The FCA's response to your complaint, your case not being investigated fully, disregarded and the FCA's inability to understand significant key events and documents

7. In your complaint letter to me you set out the above as some of the reasons you are unhappy with the FCA's response. Further on in your letter you mention several other specific complaint points. It is important to note I have only investigated the other points in your complaint letter that I have felt are relevant and appropriate for me to investigate.

8. As a resolution to your complaint, you would like the FCA to increase its ex gratia offer to you, you would like your costs to be re-imbursed from July 2015 to today including the total costs of the RDC hearing and the total costs of the Upper Tribunal (UT) proceedings. In response to my preliminary report you informed me of the following,

   > As a resolution to my complaint, I would like the FCA to increase its ex-gratia offer on the basis of the timeframes you state, but to include a deduction for the costs already awarded to me by Judge X, as I stated at the top of page 10 of my previous letter to you of 3 February 2022.

9. For ease of reference and completeness you stated the following at the top of page 10 of your 3 February 2022 letter,

   > bearing in mind the award the Judge has already given me. I maintain that the whole costs should be awarded, because the RDC and UT proceedings would never have taken place, had Enforcement treated me fairly and reasonably, 'joined the dots' before Stage 1 settlement negotiations began… and done its job properly.

10. You also mentioned the following in your response to my preliminary report,

> What I am asking you to do is recommend that the FCA increase the amount of ex gratia payment it should make to me on the basis that the existing offer is not commensurate with the consequences I have suffered, due to not only the failings that have already been admitted, but also that remain unrecognised and unaddressed in Mr X's investigation and subsequent reply of 4 November 2021

11. You would like the FCA to publish its apology to you on the front page of its website for a reasonable period of time and make a suitable statement to the press incorporating its apology in the same way it would a Decision Notice or a Final Notice.

12. You would like to know what the FCA intends to do differently, to ensure that no one else is treated the way you have been treated.

Preliminary points (if any)

13. I have reviewed all the material you have provided to me. I have also been provided with the FCA case file. The documents provided on this matter from both you and the FCA were voluminous, there were thousands of papers to be analysed and I have considered the material which I have found to be most relevant to your case. I have additionally received your response on my preliminary report. I have reviewed your comments carefully and taken on board your response where I feel it is appropriate to do so.

14. It is my intention in this investigation to review and look at your main complaint points, what is appropriate and closely connected under the Complaints Scheme.

15. Your matter is one that has also been to the UT prior to this specific complaint making its way to me. As such 6.15 of the Complaints Scheme applies in my investigations into your complaint as follows:

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

16. Additionally, any complaint points that have already been considered by the UT that were not upheld, will not be appropriate for me to re-examine pursuant to the Section 6.15 of the Complaints Scheme.

17. I will not be able to look at whether I think your costs should be re-imbursed from July 2015 to today including the total costs of the RDC hearing and the total costs of the UT proceedings. It is not appropriate nor my role to revaluate whether I think you should be ordered costs in UT cases. Considering your response to my preliminary report I should make it clear that it is not my role to look at and assess whether I think a deduction for the costs already awarded to you by the Judge should be included. I cannot investigate or determine that the '…whole costs…' should be awarded to you. I am sorry but this is not a matter for the Complaints Scheme. I can however investigate and make recommendations if I feel it is appropriate that the regulator remedy the matter complained of. For example, offering an apology, taking steps to rectify an error or, if appropriate, the offer of a compensatory payment on an ex gratia basis.

18. I must also mention that I am unable to consider anything such as 'pre settlement documentation' that was in place prior to when this case made its way to the Upper Tribunal for judgement. Reference has been made to pre settlement documentation in your complaint letter and you also reference the same in your response to my preliminary report. I am unable to take these into consideration for the purposes of my investigation. This is because I am bound by the findings of fact made by the Upper Tribunal judgement. I cannot make new findings based on what a Judge in the Upper Tribunal would have seen had they been given the opportunity to. This is not how the Complaints Scheme operates.

19. In your complaint you have made references to FCA individual members of staff. I should make it clear that this Complaints Scheme does not deal with complaints against individuals, but complaints against the regulators. This report does not identify individuals in the FCA.

My analysis

Element One - The unacceptable time it took for the FCA to reply to you and the basis and level of ex gratia payment offered to you.

20. You are unhappy that it has taken the FCA two years and nine months to provide its decision on your complaint. I can see the FCA upheld this part of your complaint. I am glad to see the FCA have acknowledged and accepted that it took far too long to conclude its investigation into your complaint and provide you with a response. The FCA specifically pointed out examples of where things went wrong and how its service could have been improved at various stages of your complaint including the following:

    a. I can advise the process in relation to managing deferred complaints has since been changed, so that a review of the deferral decision is undertaken, and an update provided to the complainant, at least every 6 months.

    b. We now keep a deferred case open during the period of deferral, providing regular updates to the complainant, as outlined above. We also proactively contact a complainant once a complaint no longer needs to be deferred to identify if they wish to proceed.

    c. You also had two investigators assigned to your complaint, which did lead to some duplication of the investigation being undertaken.

    d. It took 3 months for the first investigator to contact you after the complaint had been re-opened in January 2019, which we accept was unacceptable.

    e. You have not always received timely updates - we aim to send an update every four weeks whilst the investigation is progressing.

21. This demonstrates what the FCA has done since such a time to ensure the same mistakes are not made. I note you would like to know what the FCA intends to do differently, to ensure that no one else is treated the way you have

been treated. I think this sufficiently answers what the FCA now does differently in its handling of complaints about the FCA.

22. The FCA also cited other reasons regarding the delays associated with your complaint. Some examples include the extended time taken to investigate the complaint arisen from the seriousness of the allegations you had raised, the events going back over a decade and the complexity of the issues involved. The FCA have apologised for the delay caused and the unacceptable service issues you experienced. The FCA considered it was appropriate to make a payment in recognition of the distress and inconvenience you had suffered as a result of its complaint handling. However, the FCA have also taken the unusual step of offsetting where it went wrong with its complaint handling, versus how the FCA's failures in its complaint handling has inadvertently benefitted you. The FCA mentioned the following in its decision letter to you,

> I also consider it appropriate to make a payment in recognition of the distress and inconvenience you experienced in relation to the complaint's handling, detailed under Part Eight. In deciding the appropriate amount for this, I have taken into account that you have inadvertently received a benefit during the period of the delay, because the payment requested from you to settle the financial penalty was put on hold whilst your complaint was being considered, and during that period the relative value of the fine has decreased.
>
> In respect of your complaint I would like to offer you an ex gratia payment of £3,000. Given that you have previously indicated you will experience difficulty in settling the sum owed to the FCA under the financial penalty imposed, I recommend this sum is deducted from the balance owed.
>
> To summarise, my recommendation is to make an offer to you of £3,000 to cover the matters raised above, and that this should be applied by the FCA reducing the balance owed under the outstanding penalty by £3,000.

23. The first element I noticed when reading this is that the FCA had not provided you with a breakdown of this offer of £3000. It seems reasonable to me that the

FCA should have provided you with this. I am unable to see what part of this offer equates to the delays in the FCA's complaint handling – Part Eight of your complaint. Additionally, I am unable to see what part of this offer is consequential (if at all) to the other parts of your complaint that were partially upheld i.e.: Parts One, Three, Four and Five. This is unusual. Ordinarily the FCA set out in its decisions specifically in view of its delay, the actual amount of ex gratia offered in view of the time taken to investigate a complaint. In your case the FCA simply stated, '…In respect of your complaint I would like to offer you an ex gratia payment of £3000….' Unfortunately, this offer is not explained in any way and does not provide a breakdown as to how this figure has been arrived at, which is what I would normally expect to see. I emphasised in my preliminary report that the FCA should explain its reasoning behind this. Although the FCA have not outlined how much it is offering you for its complaint handling delays, I think it is helpful in the interests of transparency.

24. So you are aware, the FCA recently published, its approach to calculating ex gratia for the delay in its handling of complaints. This approach was published on the FCA website on 29 April 2022 here: Ex-gratia payments for complaint handling delays | FCA.

25. It is correct that you state you first complained to the FCA in 2015. I can see on 5 June 2015 your representative (at the time) whom I shall refer to as Solicitor A, submitted a complaint letter to the FCA on your behalf setting out the complaint. The FCA subsequently responded to this letter on 3 July 2015 deferring your complaint citing its reasoning by referring to 3.7 of the Complaints Scheme. I agree with the FCA's decision to defer the complaint due to the ongoing investigations at the time, as that is usually the best way of resolving matters. As such I have determined that you first logged your complaint with the FCA on 5 June 2015. Subsequently 20 days later, on 3 July 2015, the FCA formally confirmed the deferral of the complaint. The deferral of your complaint appeared to be lifted by the FCA on 5 April 2019 when it issued a letter to you confirming your complaint had been allocated for investigation. You then eventually received the FCA's decision letter much later, on 4 November 2021.

26. The duration between when you first complained and received confirmation that your complaint was deferred was 20 days (5 June 2015 to 3 July 2015). The

period between when the deferral into your complaint was lifted and when you eventually received the FCA decision letter was 659 days (5 April 2019 to 4 November 2021) Thus the total amount of delay caused on your complaint was 679 days. In my preliminary report I asked the FCA to provide me with a breakdown of its ex gratia offer (if it had one in place) when it decided to offer you £3000. This was so that I could subsequently assess the delay aspect in line with whether I thought it was fair and reasonable or otherwise. I noted in my preliminary report that I did not think it was appropriate at that stage of my investigation to make any findings on the matter. I wanted to give the FCA an opportunity to respond on the points set out in my recommendations in my preliminary report. I then set out in my preliminary report that I would subsequently take into consideration the FCA's response and investigate this further in preparation of my final report.

27. The FCA have responded to my preliminary report in full. It has provided me with a response in respect of the ex gratia of £3000 it offered you in its decision letter. The FCA have informed me that the breakdown of its offer to off-set against the debt you owe is £750 with regards to complaint handling service issues and delays, and £2,250 with regards to Parts One, Three, Four and Five of the complaint which it partially upheld. The FCA has informed me that it considers the award in respect of complaints handling service issues and delays to be consistent with other complaints where significant delay and poor service has been experienced. On reflection the FCA stated that it was happy for me to provide you with this breakdown.

28. The FCA believes that the award of £2,250 ex gratia payment is reflective of the errors it has made across Parts One, Three, Four and Five in your case recognising that there has already been an award of costs made by the Upper Tribunal. The FCA added that it had no further rationale or breakdown that could apportion sums to the different parts of the complaint/errors made to the FCA other than in the rationale it had provided to me. The FCA consider such awards to be made, by their nature in complex cases such as these, '…in the round…'.

29. I start with an assessment of the FCA's offer of £750 with regards to the complaint handling service issues and delays. Overall, I do not agree that £750

is a fair and reasonable offer for the issues and delays that occurred. As I pointed out in my preliminary report, I would normally expect to see an ex gratia offer deciphered and broken down in recognition of the FCA's complaint handling service issues and delays. It is most unusual for me to come across a case, such as this one, where the FCA decided for whatever reason, not to include a breakdown of its ex gratia offer in its decision letter. It is not clear why the FCA took this approach. I have emphasised the importance of transparency with the FCA across a realm of areas and I think it was unreasonable on the FCA's part to decide not to disclose the ex gratia breakdown to you. Subsequently I do not feel that you were treated fairly, in the sense that other decision letters issued to many complainants the FCA have indeed broken down its ex gratia offer, enabling complainants to better understand the ideology behind the FCA's reasoning. This understandably caused you more trouble and upset given the FCA have previously failed in the interests of disclosure outlined in Part Five of your complaint which the FCA partially upheld. It would have been prudent for the FCA to ensure a similar mistake for failure of disclosure was not made again. I set out in my recommendations what I think the FCA needs to do in respect of its ex gratia for complaint handling service issues and delays in your case.

30. Later in my report I also provide my findings on the FCA's £2,250 ex gratia offer to with regards to Parts One, Three, Four and Five of the complaint which it partially upheld.

Element Two - The FCA's response to your complaint

31. I understand from looking at your complaint you stated the following in relation to the FCA decision letter, '…I found it all over the place and difficult to follow generally…'. You also mention for example that the FCA decision letter was '…a series of cut and paste paragraphs…' The main issue I gathered was your difficulty in following the FCA decision letter, the letter's structure and the way the content was displayed. I can understand that at times it may have been complicated to follow the content of the FCA's decision letter. It is fair to say that this is a complicated lengthy case going back over ten years which has involved more than one FCA department. In addition to this, your case also went to the Upper Tribunal. I discuss further below in my report what Upper Tribunal cases

mean for my investigations, but this is a further important consideration to factor in when investigating your complaint. On review of the FCA decision letter I felt overall it was sufficient to address your matter. As mentioned previously your case goes back a long way, involved several different FCA departments and the Upper Tribunal, so I would expect to see that the FCA translate all of this key information into its decision letter, encompassing all matters which are interconnected, when investigating a complaint. In terms of the content, layout and structure of the FCA's decision letter, I am sorry I am unable to agree that there were significant issues. I appreciate you feel differently but given the circumstances of your case and its uniqueness, I think it was important for the FCA to structure the content of the decision letter in the way that it did.

32. You mention specifically in relation to the FCA's decision letter the following,

> X explains on page two that, under paragraph 6.15 of the Complaints Scheme, any finding of fact by the Upper Tribunal (UT) must be treated as conclusive evidence of those facts by both the FCA and yourself. The twenty pages that follow appear to me to simply re-state as much, quoting selected paragraphs from Judge X Decision on costs

33. I appreciate you found this repetitive but the information the FCA gave you here was correct and important and I too must apply the same principles investigating your complaint. The Complaints Scheme to which the regulators and I operate (albeit The Payments Systems Regulator operates under a different and separate Complaints Scheme), instil on the regulators and I the requirement to be bound by any finding of fact (which has not been set aside on appeal or otherwise). Any finding of fact by the Upper Tribunal shall be conclusive evidence of the facts so found and any decision of the Upper Tribunal shall be conclusive.

34. You mention on page five of your complaint letter your disagreement with one of the FCA's findings in its decision letter to you. You feel there were individuals within the FCA that should have been interviewed before stage one investigations took place. As a side reference you state that stage one proceedings started in July 2015. The FCA concluded that it could not find any

other individuals that it felt would be appropriate for Enforcement to have interviewed. The FCA stated,

> I also considered whether there were other individuals that Enforcement should have sought evidence from in the investigation of the case. From all the documents I have reviewed, I did not identify other individuals that were likely to have relevant evidence on the key points, therefore I do not conclude that there were other individuals that Enforcement should have interviewed.

35. The judgement of the Upper Tribunal of 17 December 2018 (for ease of reference this is the judgment I shall refer to throughout my report) determined the following at paragraph 127:

> First, it is unfortunate that for the reasons mentioned at [49] above, Associate A's note of 10 December 2012 and the associated emails were not discovered until September 2015, some months after discussions had taken place for the first time between Enforcement and Associate B and Associate C as to what was discussed at the meeting of 16 January 2012. It is also surprising that Enforcement had not by that time talked to either Associate D or Associate A about their discussions with Associate B. It seems to me reasonable to expect that at the outset of an investigation that Enforcement would seek to find out as definitively as possible what was known by the Authority about the firm or individual under investigation by speaking to all of those who may have had contact with the firm and its representatives, particularly those in supervision.

36. As mentioned earlier I am bound by the fact findings of the Upper Tribunal judgement in this case. In my view, the findings of the Upper Tribunal above clearly stipulate that Enforcement should have spoken to all of those who may have had contact with your Firm and its representatives. In its decision letter the FCA concluded that the interviews that took place with an Associate in September and October 2015 were not effective. However, it did not additionally agree that Enforcement should have interviewed other individuals. I disagree with the FCA on this. Taking the findings of the Upper Tribunal judgement into

consideration this should be conclusive evidence of the facts so found that the FCA, should have sought to interview others such as Associate A or Associate D (as mentioned in the Upper Tribunal judgement). In my view not all individuals that could have been interviewed were interviewed and I think the FCA should have recognised the same in its investigation into your complaint. The FCA responded to me on this point stating it had noted the points I had made here. It did not provide any further comments.

37. Bearing in mind the Upper Tribunal judgement here and pursuant to the Complaints Scheme 6.5, as I have mentioned this should be conclusive evidence of the facts so found. It is important the FCA recognise this and what it should do in recognition of its failures. So far it has not. The £2,250 ex gratia offer the FCA say is reflective of the errors made across Parts One, Three, Four and Five of the complaint. However, this is not the case as the FCA have not upheld this part of Part Five of your complaint, they have only noted the points I have made.

38. This is a failing where the judgement of the Upper Tribunal found that Enforcement should have spoken to all of those who may have had contact with your Firm and its representatives. Subsequently, I think a remedy for this aspect of your complaint and the failings concerning the FCA not interviewing all individuals is appropriate. As such, I have set out in my recommendations of my report what I think the FCA needs to do in respect of its ex gratia for this part of Part Five of your complaint as I do not think £2,250 is a fair reflection of all of the failings.

39. I note in your complaint and your response to my preliminary report you refer to the fact that you would have settled during stage one negotiations. You reference certain documents which I have also described as 'pre-settlement documentation' in the preliminary point section of my report which is not appropriate for me to consider or analyse in this investigation. You mention the following,

> They provide evidence that I would have settled during Stage 1 negotiations, had Enforcement carried out an effective investigation up to that point and treated me fairly and reasonably.

40. I understand you feel this way, however I also note the judgement of the Upper Tribunal costs decision found the following:

> 165. I accept that Mr X genuinely believes that he would have settled these proceedings had the events described at [162] come to pass. However, that question is hypothetical. The reason that the Tribunal proceedings continued after the Authority made its concession on the Advice Limitation Issue was because, as the evidence clearly shows, Mr X wished to contest all the other issues which he had set out in his reference notice, and, previously, had contested before the RDC. It cannot therefore be said that the reason the proceedings continued was because of the failure of the Authority to address the Advice Limitation Issue appropriately.
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> 166. The evidence which supports this conclusion is the following:
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> (1) The fact that Mr X continued to contest the prohibition order during the second oral representations meeting (see [88] above);
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> The issues that Mr X said he wished to dispute on his reference, as set out in his reference notice (see [92] and [93] above);
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> The issues that Mr X said he wished to dispute in his Reply to the
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> Statement of Case (see [103] and [104] above). In my view Mr X was spurred on to contest the Conflict of Interest Limitation Issue in particular in response to what he regarded as the Authority's failings in relation to the Advice Limitation Issue, but nevertheless the fact was that he decided to contest all the issues mentioned in his Reply.
>
> 167. There is no evidence that Mr X attempted to settle the proceedings either before or after the Authority made its concession on the Advice Limitation Issue. He could have opened discussions with the Authority as regards the level of financial penalty in respect of the Conflict of Interest Issue after the amendment of the Statement of Case on the basis of what he regarded as a more appropriate penalty but he did not do so. His strategy before the Tribunal was to argue that the Conflict of Interest Issue was time barred, which he was perfectly entitled to do, in the hope of avoiding a financial penalty in its

entirety. He contested the other issues which he disputed, as set out in his Reply, with some vigour and considerable skill in the Tribunal proceedings which followed on the basis, as he said, he thought he had arguable points on all of those issues and, as he accepted, he achieved a significant reduction in the financial penalty.

41. I understand you may feel differently and this will be disappointing, but given the Judge's decision as above, I am also bound by the same. Subsequently I am unable to conclude that you would have settled during stage one negotiations and do not think it is appropriate for me to look at this point any further. Further, the Judge also did not reach a definitive finding on this only, that '…there must have been a reasonable prospect that there may have been…' where it is stated in the judgement as follows,

    129. It was therefore unfortunate that the settlement discussions with Mr X took place at a time when Enforcement had no clear view on the Advice Limitation Issue and did not appear to have investigated to any material extent. Whilst I cannot say, in the light of my later findings, that the parties would have been able to agree a settlement of all of the issues in dispute had the true picture on limitation emerged at that stage, there must have been a reasonable prospect that they may have been.

42. In the '…Summary…' section of your complaint on page eight you mention the following in relation to the Enforcement investigation,

    Enforcement did not carry out an effective initial investigation as it was required to do, in so much as:

    i. Statements made in Firm A's Directors' compelled interviews were disregarded and not followed up

    ii. Associate A and Associate B were not interviewed at the appropriate time

    iii. Associate B's note was not found when it should have been found

    iv. There was no clear view on when any applicable limitation period should start to run

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v. Enforcement did not appear to have investigated to any material extent

43. In terms of the Enforcement investigation, you mention at point i) above that the '…statements made in Firm A's Directors' compelled interviews were disregarded and not followed up…' In response to my Preliminary report you informed me that this was in relation to the interview that took place in November 2014, which has been addressed in my report.

44. In relation to point ii) above I have already investigated this and addressed this interview element earlier on in my report , so I do not feel it is appropriate for me to address this again here.

45. You allege in point iii) that '…Associate B's note was not found when it should have been found…' The Upper Tribunal ruled the following,

> 127. First, it is unfortunate that for the reasons mentioned at [49] above, Mr A's note of 10 December 2012 and the associated emails were not discovered until September 2015, some months after discussions had taken place for the first time between Enforcement and Associate A and Associate B as to what was discussed at the meeting of 16 January 2012.

46. And later on in the judgement the Judge made the following finding,

> 171. Other than item (5), these are powerful points, but I have decided that in the circumstances it is appropriate that I should make a limited costs order. To do so will send out an important message to the Authority that, even in circumstances of what is found to be serious misconduct on the part of the applicant, which I accept is the position here, it is imperative that all subjects of investigation and enforcement proceedings should be treated fairly and reasonably. There have been a number of significant instances in this case where I have found that the Authority has fallen below the standards that should reasonably be expected of it. In addition, although not specifically dealt with in this decision, because I do not think they have been material in this case, there have, as submitted by Mr A been other disclosure failings in

addition to the late disclosure of the 10 December 2012 note.

47. Given the findings of the Upper Tribunal above, it recognised that the note you have referred to was not discovered until September 2015, some months after discussions had taken place for the first time between Enforcement and Associate A and Associate B as to what was discussed at the meeting of 16 January 2012. I can also see that this contributed to the Upper Tribunal making the costs order that it did, in light of the late disclosure of the 10 December 2012 note. The FCA similarly decided the following in relation to the lateness of the disclosure of the 10 December 2012 note:

> Whilst Judge X's comment above suggests, and I would agree, that this issue is not material, I consider that the documents in question nevertheless should have been disclosed. Accordingly, I uphold the third element of Part Five of the complaint.

48. The FCA upheld this element three of Part Five of your complaint. Considering the FCA's response to my preliminary report I have set out in my recommendations what I think the FCA needs to do.

49. You state at iv) that there was no clear view on when any applicable limitation period should start to run. You also state at v) Enforcement did not appear to have investigated to any material extent. It is worth providing some context on this point and the facts brought about in the Upper Tribunal judgement. The Judge noted the following in the judgement at paragraphs 102 and 105,

> 102. In answer to a question from myself at the hearing, Mr X said that despite Mr Y's representations at the oral representations meeting that the different way in which the case had been put in the Warning Notice made no difference to the Advice Limitation Issue, Enforcement did not consider it was necessary to consider whether the RDC had been right to sidestep the issue in the way that it did in the Decision Notice. Mr X said that because the issue had been fully ventilated at the oral representations meeting and the RDC had "strongly landed on the coast that they had landed" it would have been quite unusual for Enforcement to move away from that conclusion at that point. Although he had not been privy himself to the discussions that took

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place on the topic, he was sure it was given some thought, but there had been no discussion with the RDC after the issue of the Decision Notice to seek an explanation as to why it had decided that the Advice Limitation Issue could be safely sidestepped.

> 105. In January 2017, anticipating that the Tribunal may make directions for exchange of witness evidence within a relatively short timeframe, and because Mr A's pleadings had made it clear that he intended to contest the limitation issues, Enforcement decided that it would be necessary to prepare Associate A and Associate B as potential witnesses on that issue. It would appear from this decision that Enforcement was of the view that it could not safely sidestep the Advice Limitation Issue in the way that the RDC had.

50. The Upper Tribunal recognised Enforcement took a differing view from that of the Regulatory Decisions Committee (RDC) that '…it could not safely sidestep the Advice Limitation Issue in the way that RDC had…' Later in the judgement at paragraphs 111-113 the FCA had decided to concede the Advice Limitation Issue as follows,

> 111. Accordingly, after further consideration, in which Mr X was involved, and following consultation with counsel and the Director of Enforcement, the Authority notified the Tribunal on 5 July 2017 that it had decided to concede the Advice Limitation Issue. In making the concession at this time, Enforcement was mindful of the fact that any questions that arose out of this decision from Mr A or the Tribunal could be dealt with at the forthcoming applications hearing.
>
> 112. At the applications hearing, which took place before me, I expressed my concern as to why the concession could not have been made earlier and the matter addressed at the time the Statement of Case was being prepared. Mr X, appearing for the Authority, confirmed that the concession arose because of the review of the existing evidence that had taken place and that if the Authority had proceeded on the basis that the Advice Issue was not time-barred "we would be progressing an argument that we think is strongly flawed", a

statement which he later clarified as meaning that the Authority accepted that Mr A's points on limitation as regards the Advice Issue were "strongly arguable".

> 113. The Authority was directed to amend its Statement of Case to indicate the level of financial penalty that it would now be seeking purely in relation to the Conflict of Interest Issue.

51. Subsequently the FCA amended its statement of case as outlined in paragraph 117 of the judgement,

> 117. The Authority's amended Statement of Case was filed on 9 August 2017. It now pleaded that the Authority was seeking a reduced penalty of £116,830 to reflect the concession made on the Advice Limitation Issue.

52. In setting out whether the RDC's decision was unreasonable the Judge in the Upper Tribunal made the following observations and findings at paragraph 127 to 130:

> 127. It is also surprising that Enforcement had not by that time talked to either Ms X or Mr Y about their discussions with Ms Z. It seems to me reasonable to expect that at the outset of an investigation that Enforcement would seek to find out as definitively as possible what was known by the Authority about the firm or individual under investigation by speaking to all of those who may have had contact with the firm and its representatives, particularly those in supervision. That is because it seems to me prudent that Enforcement should seek to establish at an early stage when the limitation period starts to run in respect of the issue of Warning Notice. Had that happened, then the Advice Limitation Issue might well have been bottomed out at a much earlier stage.
>
> 128. The matter might also have been investigated following Mr A's interview in 5 November 2014 when he informed his interviewers about what the Authority had been told about Firm A's advice model.
> 129. It was therefore unfortunate that the settlement discussions with Mr A's took place at a time when Enforcement had no clear view on

> the Advice Limitation Issue and did not appear to have investigated to any material extent. Whilst I cannot say, in the light of my later findings, that the parties would have been able to agree a settlement of all of the issues in dispute had the true picture on limitation emerged at that stage, there must have been a reasonable prospect that they may have been.
>
> 130. Once the evidence available to the Authority on the limitation issue began to emerge in September 2015, it appears to me that the Authority approached the issue with something of a closed mind. Unfortunately, this is not the first time this has happened. I refer to the observations of the Tribunal at [313] of the substantive decision in this case on the decision in Hussein v FCA [2018] UKUT 186 (TCC) and the comments of the Complaints Commissioner on the Authority's approach in that case.

53. The Judge recognised that FCA Enforcement did not seek to establish at an early stage when the limitation period should start to run in respect of the issue of Warning Notice and that the settlement discussions took place at a time when Enforcement had no clear view on the Advice Limitation Issue and did not appear to have investigated to any material extent. The Judge then summarised the findings as follows,

> 143. I accept what Mr X says about the differences in procedure between the RDC and the Tribunal and the differences in character between administrative decision-making and an independent judicial decision.
>
> 144. However, I do not believe in relation to the question as to whether it was open to the RDC not to deal with the Advice Limitation Issue head on, that those differences are material. The RDC had to consider whether there was a proper basis for its analysis that its characterisation of Mr A's misconduct as failing to take reasonable steps to ensure that Firm A's Personal Recommendations Process complied with regulatory requirements did not rely on a finding that

Firm A failed to advise customers on the suitability of the underlying investments. In that context, it was assisted by its own legal adviser.

145. In my view the RDC failed to consider why, if the Authority did have knowledge that Firm A did not advise on the underlying investments, that knowledge was not in itself sufficient for the Authority to be regarded as having knowledge of the "particular misconduct" that the Authority was relying on, namely the failure to take reasonable steps to ensure that the Personal Recommendations Process was compliant. However, one looks at it, failure to advise on the underlying investments meant that there was a failure in Firm A's Personal Recommendations Process. As the Tribunal said at [322] of the Decision, the test of knowledge of the "particular misconduct" is the right approach when considering the application of s 66 (5) FSMA and the RDC does not appear to have given any consideration to this issue. In my view such failure meant that there was a significant gap in the RDC's reasoning and, in my view, it was reasonable to expect that the RDC would have realised that in order for its reasoning to be complete, that was an issue that needed to be addressed. That being so, I must regard the RDC's conclusions as to why the Advice Limitation Issue did not arise as being unreasonable.

146. I therefore conclude on this issue that I do have jurisdiction to make a costs order in favour of Mr A on the basis that the RDC's decision as regards the Advice Limitation Issue was unreasonable.

54. Taking the findings of the Upper Tribunal into consideration I must agree with the Judge's conclusions and the facts found. The Judge recognised the RDC's decision as regards the Advice Limitation Issue was unreasonable. The Judge also stated at paragraph 129 as quoted above, that settlement discussions with you took place at a time when Enforcement had no clear view on the Advice Limitation Issue and did not appear to have investigated to any material extent. As such the Judge made a costs order in your favour. The FCA upheld this part of your complaint under Part One.

55. As a resolution to your complaint, you would like the FCA to publish its apology to you on the front page of its website for a reasonable period of time and make a suitable statement to the press incorporating its apology in the same way it would a Decision Notice or a Final Notice. I can see the FCA apologised to you in its decision letter in recognition of the complaint handling failures and delays. I think this is appropriate and sufficient considering the delays and poor service in handling your complaint. So, I do not think the FCA need to do anymore in respect of this aspect of the complaint.

In summary:

56. The FCA agreed in Part One of your complaint with the Tribunal findings that the RDC reached unreasonable conclusions about the Advice Limitation Issue. The FCA subsequently partially upheld this part of your complaint.

57. In Part Three of your complaint the FCA partially upheld the element regarding Enforcement's interview with Associate B in September and October 2015, to the extent of agreeing these were not carried out in an effective manner as outlined by the Judge in the Upper Tribunal judgement.

58. In Part Four of your complaint the FCA found that Enforcement did act unreasonably and should have addressed the time limitation issue in the statement of case of October 2016. As such the FCA upheld Part Four of your complaint in part.

59. The FCA investigated Part Five of your complaint and upheld the third element. The FCA outlined in its decision letter that the documents in question should have been disclosed. I can see that the FCA apologised to you in February 2016 in an email informing you that the disclosure of material of 37 documents from Enforcement had not been provided to you or RDC before it issued its warning notice. The FCA subsequently acted quickly on this to get the information to you. I am glad to see that the FCA apologised in relation to the late disclosure and took immediate steps to remedy this. Part of Part Five of the complaint I uphold, which is that not all individuals that could have been interviewed were interviewed. I think the FCA should have recognised the same in its investigation into your complaint. I have outlined what I think the FCA should do in relation to this, in my recommendations below.

60. In my preliminary report I also asked the FCA to share with me what has been done or what it intends to do, to ensure the defects that were caused in the FCA's systems and its searches do not happen again (Part Five of the complaint). The FCA have wrote to me separately on this providing the number of actions it has taken since the events of your case and the additional steps it intends to take later this year in July and August. Taking into consideration the FCA's response, I can report that the FCA have taken this on board and acted appropriately. I will also separately check in with the FCA following the actions completed in July and August.

61. My overall findings in relation to Parts One, Three, Four and Five are that Seniors within the Regulatory Decisions Committee and Enforcement department should formally apologise to you personally for its failings that took place - which most certainly factored into the distress and inconvenience that you suffered. I see the FCA have apologised in its decision letter for its failings in this regard, but I do not think this goes far enough and accounts to the seriousness of the issues that took place. The FCA responded to me on this point and have informed me it accepts this recommendation and it will be apologising to you for the failings caused. I am pleased to share that this apology will come from an Executive Director within Enforcement at the FCA.

Element Four -The basis and level of ex gratia payment offered to you.

62. I noted earlier in report that the FCA have taken the unusual step of offsetting where it went wrong with its complaint handling, versus how the FCA's failures in its complaint handling has inadvertently benefitted you. I find this approach troubling and I do think there is something perverse about the FCA deciding it has the right to offset the debt owed with the FCA's offer of ex gratia payment for its failures. Notably the FCA did not decide to offset the debt owed with the costs order the Judge ordered in the Upper Tribunal matter.

63. This complaint and the failures identified are independent of the debt owed and I have conducted my investigation in a manner that I think has been appropriate. Remedying the matters upheld in my investigation needs to be resolved by an ex gratia payment, without the FCA offsetting this with the debt owed. If the FCA decide not to accept my recommendations and insist on

offsetting where it went wrong with its complaint handling, versus how the FCA's failures in its complaint handling has inadvertently benefitted you, this would undermine the independence of my role within the Complaints Scheme.

My decision

64. In my preliminary report my first recommendation was that the FCA apologise to you for its failings caused in respect of Parts One, Three, Four and Five of your complaint. The FCA has agreed with me that it will apologise to you for the failures caused and this apology will come from an Executive Director within Enforcement at the FCA. Therefore, this recommendation is no longer required. In my preliminary report my second recommendation was that the FCA should share with me what has been down or what it intends to do, to ensure the defects that were caused in the FCA's systems and its searches do not happen again (Part Five of your complaint). The FCA have responded to me on this and I am happy with the FCA's actions already completed on this and the action it intends to take in July and August 2022 in respect of this. Therefore this recommendation is no longer required.

65. I **recommend** that the FCA increase its ex gratia offered to you in recognition of its complaint handling service issues and delays caused in your case. I **recommend** the FCA increase its offer from £750 to £1000.

66. I **recommend** that the FCA increase it ex gratia offered to you in recognition of the failures identified in Parts One, Three, Four and Five of your complaint from £2250 to £3000.

67. Therefore the overall sum I recommend the FCA make to you in light of its complaint handling service issues and delays and failures is **£4000**.

68. I **recommend** the FCA provide an assurance to me that going forward it will continue to provide a breakdown of ex gratia in all its decision letters in the interests of transparency and consistency.

Amerdeep Somal
Complaints Commissioner

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13 June 2022