

30 August 2022

Final report by the Complaints Commissioner

Complaint number FCA001711

The complaint

1. On 5 May 2022 you asked me to investigate a complaint against the FCA.

What the complaint is about

2. The FCA summarised your complaint as follows:
 - a. Part One: the FCA did not adequately supervise Firm Z as a result of which the firm entered administration and you lost access to your funds.
 - b. Part Two: The FCA should have prevented the appointment of broker X during the administration.
3. The remedy you are seeking is to be compensated for your financial losses of £14,000 and loss of additional income of additional £35,000 from not being able to trade your portfolio.

What the regulator decided

4. The FCA partially upheld your complaint. With respect to Part One it said that it upholds your complaint and clarified that it believed that firm Z would have most likely gone into administration even if it had acted sooner, but that there could have theoretically been different outcomes for the clients of the firm with, for example 'trading accounts moved to other firms with a shorter period of no access'.
5. The FCA did not uphold Part Two of your complaint.

Why you are unhappy with the regulator's decision

6. You asked me to review your complaint and sent archive of relevant evidence against the FCA complaint, with numbered documents and highlighted text relevant to your complaint and showing failures and lapses in regulation.

My analysis

7. Element One: the FCA did not adequately supervise Firm Z as a result of which the firm entered administration and you lost access to your funds.
8. The fact that Firm Z entered administration does not of itself mean that the FCA did not supervise it properly.
9. You have said to me that the FCA was aware of potential problems with Firm Z in 2017 but did not disclose that publicly: if it had, you say you would not have made your investment with Firm Z in May 2018. I will address your point as follows; The FCA does not usually make public the fact that it is investigating a firm or individual. This is partly to protect the effectiveness of any investigation, as publicity might encourage people to destroy or hide evidence, and partly because announcing an FCA investigation can damage reputations of potentially innocent parties or firms that are able to rectify issues it has identified. It is important to note that just because the FCA is investigating a firm, it does not necessarily mean that the firm will be found to have breached the rules. In addition, 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. If the FCA decides to take formal action, this is recorded in the public domain. You have said to me that media reports disclosed the FCA's actions with respect to Firm Z and you have included a copy of a media article: but this is dated 25 August 2019 after the FCA took *formal* (my emphasis) action to impose requirements on Firm Z stopping it from conducting regulated activities and restricting it from disposing of its own or its clients' assets.
10. The FCA did take action in 2019, and sometime after the Board of the firm decided to apply to court to place the firm in a special administration regime.
11. I have reviewed the FCA file and I can see that notwithstanding any FCA action, it appears that the firm was potentially unable to pay their liabilities (as they fell due from the maturity date of the bond which had been issued previously) and potentially liabilities relating to other creditors. The Board of the firm reviewed its financial and operational position and considered the ongoing viability and solvency of its business, and subsequently sought legal and insolvency advice.

The decision to apply for Special Administration was made by the Board of the firm following this advice. The Directors acted in line with their fiduciary duties and determined that the firm should be placed into administration.

12. The FCA has consistently maintained that it cannot stop some of the firms that are under FCA oversight from failing, and it is not nor should it be, a zero-failure regulator.
13. Turning to the issue of whether the FCA should have acted sooner, I agree with the FCA that an intervention sooner likely would not have prevented the firm entering administration, given what I have explained to you above about its finances. I appreciate you disagree and feel that an intervention by the FCA in 2018 may have averted the firm's insolvency, but I do not think that is the case. I have pointed out to you above that the firm had maturing bonds with liabilities it would most likely not have been able to meet.
14. Given the evidence before me, I am unable to conclude that the FCA's lack of supervision of Firm Z led to it entering administration, and therefore I do not uphold this complaint.
15. Element Two: The FCA should have prevented the appointment of broker X during the administration.
16. The FCA did not uphold your complaint. It explained that 'the board of Firm Z (an FCA authorised firm) resolved to place the company into Special Administration, subject to receiving the FCA's and the Bank of England's consent to this process. The High Court granted an order placing Firm Z into Special Administration in 2019.
17. The Joint Special Administrators (JSA) were appointed by the Court and did not act on the instruction of the FCA. As part of the Administration process the JSA were also required to prepare a Distribution Plan (the purpose of the administration is to realise the company's property to make a distribution to the company's secured or preferential creditors including investors) which was approved by the Creditors' Committee and ultimately by the Court. The JSA concluded that the most appropriate strategy for the return of Client Assets was a coordinated transfer to a single regulated broker. The identified broker was Firm X. The court approved the Distribution plan in 2020.

18. The FCA worked with the JSA to support their actions but were not responsible for the decisions made by the JSA. The selection of Firm X was made by the JSA of Firm Z during the special administration, approved by the Creditors' Committee, and confirmed by the High Court as part of its approval of the Distribution Plan. The FCA liaised and provided information to the JSA throughout the process as required / requested. The FCA provided information to the JSA for the JSA to consider when selecting a firm to take on the Firm Z book.
19. The FCA do not have a formal veto over the choice of broker to whom client assets are transferred as part of the special administration process. This is because the FCA do not have a formal role in the process: the FCA provided information to the JSA but were not the decision maker. You have provided me with a copy of JSA's email to you in which they state that 'broker Y was selected as the preferred broker by the Administrators without objection by the FSCS or the FCA. FCA approval is an essential part of this process. The Creditors' Committee were also consulted on the choice of Y'. You have highlighted that the JSA say FCA approval is essential and you say this differs from the FCA's position. I **invite** the FCA to take note so it is aware (if it is not already), of the wording which has been used, however the FCA has been clear that it does not approve the choice of broker.
20. The FCA's explanation to you of its role in the matter is correct. However, it is not a full explanation of what happened, and what the FCA's powers are.
21. The FCA had the ability to stop the transfer of the book to Firm X, and it had the ability to not consent to the transfer due to the circumstances of the case, and it had the right to attend court when the distribution plan was considered.
22. I have considered whether the FCA could or should have objected, given the circumstances at the time. I should make it clear that it is not my role to say what I would have decided had I been the regulator. My task is to assess whether or not the decisions were within the range of decisions which the regulator could reasonably have taken, in the light of its statutory duties and policies. In making this assessment, I have the benefit of reviewing all the regulator's records, including material which is confidential.

23. Like the FCA, I am required to respect confidentiality. This means that sometimes I cannot report fully on the confidential material to which I have access. In this case however, a simple statement from me that, having studied the papers, I have come to the view that the FCA's decision was not unreasonable. I do think the FCA could have more open with you in its decision letter. I explain below some of the considerations which have informed my decision.
24. My review shows that the FCA had discussions with the JSA, attended the creditors committee meeting, and reviewed the distribution plan. In my opinion the FCA gave the matter at hand appropriate consideration. Some (but not all) of the factors considered, for illustrative purposes, were that it was deemed by all parties involved that it was in the clients' interest for a bulk transfer of assets to occur; Firm X had all the regulatory permissions necessary to accept the transfer, and it was chosen as a commercial decision made by JSA based on what they felt was the best option among firms interested in taking on Firm Z's book. I can see that the FCA gave feedback to JSA, but it was felt there was no strong reason to object at the time, given all the circumstances in the round.
25. I consider that the decision not to intervene cannot be said to have been unreasonable, the decision having been reached after careful analysis of the factors involved in a way which is consistent with the FCA's regulatory approach. I recognise that a case could have been made for regulatory intervention, but it is not within my remit to rule on the relative merits of competing arguments in cases such as these. It is certainly the case that some of the issues which later arose after the High Court approved the Distribution Plan in 2020 which included the proposal to use Firm X as the identified broker could not have been foreseen at the time.
26. Due to the reasons above, coupled with the explanation the FCA has already provided you with, I do not uphold your complaint. I do, however, think that if the FCA had been more forthcoming in its decision letter, some of your concerns may have been alleviated, although I appreciate you remain of the view that the FCA should have objected to the appointment of firm X.

Amerdeep Somal
Complaints Commissioner
30 August 2022