

15 March 2018

Final report by the Complaints Commissioner**Complaint number FCA00386***The complaint*

1. On 9 December 2017 you asked me to investigate a complaint about the FCA. I have carefully reviewed the papers sent to me by you and by the regulator. My preliminary report was issued on 5 February 2018. Both you and the FCA commented on the preliminary report, and I have taken those comments into account in producing this final report.

What the complaint is about

2. Your complaint to the FCA dated 30 September 2016 is about actions taken by the FCA in relation to your financial services firm (your firm) and complaints you have made about those actions since February 2015.

What the regulator decided

3. The FCA's decision on your complaint is dated 12 September 2017. It identified five elements to your complaint as follows:
 - 1) A request for an internal review of the complaint you had made to the FCA under its reference number 4224. The FCA declined to re-open this matter because it had already been considered fully by the FCA and my Office.
 - 2) A complaint about a letter sent to you by the FCA's Supervision Team on 23 February 2012. The FCA regarded this complaint as one of 'lack of integrity' and accepted it for review under the Transitional Complaints Scheme. The FCA concluded that the content of the letter was reasonable based on evidence obtained following a site visit to your firm, and that it remained relevant for subsequent proceedings. The FCA also said that the Upper Tribunal was a more appropriate forum for your concerns.
 - 3) A complaint about the way the FCA had dealt with your application for Consumer Credit Authorisation. The FCA concluded that actions taken by its staff in processing your application were reasonable and that there was no evidence of bias against you.
 - 4) A complaint about post you had sent to the FCA being returned to you marked undelivered. The FCA suggested you take this up with Royal Mail.
 - 5) A complaint about delay by the Complaints Team. This was upheld and you were offered a payment of £150 as an apology.

Why you are unhappy with the regulator's decision

4. You consider that throughout your dealings with it, the FCA has shown 'institutional misconduct' which it has tried to cover up. You believe that the FSA's and the FCA's regulatory actions against you have ignored material facts

and amount to an abuse of power. You consider that the FCA has not complied with the Complaints Scheme and other relevant legislation. With regard to the specific complaint elements identified by the FCA, you say:

- 1) The FCA's interpretation of Element 1 of your complaint is not all-encompassing. You wanted an internal review of complaint 4224 because the FCA had wrongly rejected your complaint twice in 2015 and there were errors in its final decision letter about your complaint dated 16 March 2016.

You consider that the FCA's previous deferral of your complaint under paragraph 3.7 of the Complaints Scheme was inappropriate and that it should have applied the 'exceptional circumstances' clause of that paragraph to investigate your complaint even though other proceedings were continuing. You believe its failure to do this has breached your human rights under the European Convention and the Human Rights Act 1998.

You consider that the FCA has applied its Threshold Conditions against you in a way that was unjustified and subjective; this has caused you to lose your business after 26 years.

You also consider that you now have new evidence, not available to you before, which shows that the FSA's supervision visit to your firm on 10 and 11 February 2012 was in fact an undisclosed "mortgage fraud investigation visit". You consider that this, and the Supervision Team's letter to you dated 23 February 2012, should now be investigated by the FCA under the Transitional Complaints Scheme.

- 2) The FCA's interpretation of Element 2 of your complaint does not consider the whole picture, particularly that the FSA did not disclose the seriousness of its 2012 visit before or during the visit. You say that it was only in January 2016, after a freedom of information request, that you were aware of the source or the seriousness of the allegations made about your firm.

You consider that these allegations prejudiced the FSA officers who visited your firm wrongly believing that you were involved in mortgage fraud.

You believe this has coloured all subsequent regulatory action against your firm. You consider that this new evidence undermines the FCA's final decision about your complaint made under reference number 4224 and that it also presents new evidence for consideration by my office. Because the events took place before 1 April 2013, you consider this matter should be dealt with under the Transitional Complaints Scheme.

- 3) The FCA's response on Element 3 of your complaint is "very far from any material fact and there is no truth in it". You say that you applied for full permission to give consumer credit advice, not a variation of permission. Neither the application form nor the guidance booklet indicated that the application would be assessed according to Part 4A permissions. The FCA did not tell you for five months that it was considering your Consumer Credit Application (CCA) under Part 4A, as a variation of existing permissions, nor that the Threshold Conditions would be taken into account and must be satisfied and continue to be satisfied prior to any authorisation.

You consider that the FCA repeatedly asked you irrelevant questions, used inexperienced staff who knowingly made false allegations against you, changed its definition of 'consumer', and used subjective criteria to refuse

your application. The Judge in the Upper Tribunal found that there were faults on both sides and said that this was a sorry outcome for you.

- 4) It was unreasonable for the FCA to refer you to Royal Mail in relation to Element 4 of your complaint. Letters sent to a case officer at the FCA's known address in 2015 were returned to you marked 'addressee not known'. It turned out that this case officer had left the FCA. You consider that the FCA (and previously the FSA) used their departure as an excuse to reject correctly addressed post and then tell you that it had not received it. This also happened to your emails when the FCA changed its domain name from gov.uk to org.uk. You reapplied for Part 4A mortgage permission on 27 June 2013 by post and email and received no reply. You were told that your application had not been received but on 16 May 2017 you received an email saying that your application had been discovered. You consider this is evidence that it is not Royal Mail but the FCA that is responsible for mismanagement and maladministration of its mail traffic.
- 5) You disagree with the FCA's interpretation of delay in relation to Element 5 of your complaint. You consider that you have experienced delay since 2015, having made three complaints, to none of which have you had a satisfactory response. You say that the FCA has deliberately used delaying tactics that amount to 'institutional misconduct' to avoid responding to your concerns. You say that this reflects the whole of the FCA's organisational behaviour and conduct, including Directors and Committee members. You believe that two former complaints investigators have been sacked, perhaps because they did not wish to be associated with this.

You also say that the FCA complaint response was wrong to say that your complaint could not be processed until the Upper Tribunal had published its decision because, following the Upper Tribunal hearing, there was no continuing action. In addition, you say that the Upper Tribunal was looking at the Decision Notice about your firm and not your complaints.

5. You are seeking the following remedies:
 - 1) A written apology from the FCA for processing your applications 'with prejudice and bias';
 - 2) An apology from the FCA for distress and inconvenience caused by 'the long delay in responding [to your] complaints by abusing its power given by the [Financial Services and Markets Act 2000 (FSMA)] and other relevant laws and regulations, in bad faith';
 - 3) An apology from the FCA for 'not being transparent as directed by [FSMA] and for unclear regulatory guidance';
 - 4) An apology from the FCA for 'not exercising the Transitional Complaints Scheme on 18/6/2015 or after 7/7/2015 when [you] wrote to 3 Directors with executive powers';
 - 5) An apology from the FCA for 'wasting taxpayers' money and other resources unnecessarily and irresponsibly'.
6. You have also asked me to accept that there has been 'institutional misconduct' by the FCA, to use my powers to rectify the detrimental effect this has had on you and

your firm, and to compensate you for your ‘total losses’ arising, including ‘confiscating’ your Convention rights and ‘destroying’ your business.

Preliminary matters

7. You have made wide-ranging allegations about the actions of the FCA over a number of years. I have already considered some of these and others fall outside of the Complaints Scheme. I will explain below which of your complaints I am able to consider now and the reasons why I cannot consider other matters you have raised. All the points you have made have been carefully considered.

My analysis

Element 1

8. I have already issued my decision on Element 1 of your complaint. You referred this matter to me on 9 November 2016 following the FCA’s letter to you dated 31 October 2016 which informed you that it would not be conducting an internal review of this aspect of your complaint. My decision letter dated 21 November 2016 confirmed to you that all matters related to the complaints you raised in February and April 2015, in respect of your Part IV mortgage advice permission application (FCA reference 4224), have been dealt with by this office and are closed under paragraph 7.8 of the Complaints Scheme. This followed on from my Final Decision dated 23 August 2016 issued in respect of the complaint you made to me under reference number FCA00074. I concluded that it was therefore reasonable for the FCA to decline to re-open this element of your complaint. In response to my preliminary report you have made further points about matters I have considered under both reference FCA00074 and FCA00014. I explained to you that we had no further comment to make on these matters, which are concluded so far as the Complaints Scheme is concerned.
9. I have also already dealt with the question of the FCA’s deferral decision under paragraph 3.7 of the Complaints Scheme. In my Final Decision dated 23 August 2016 I said that I did not “accept the FCA’s assertion... that it was reasonable to delay its response to [your complaint about your mortgage advice permission application] to ensure there was no overlap with proceedings in respect of ... your CCA application.” I recommended a compensatory payment for the unnecessary delay that had arisen in part from this deferral decision.
10. All matters in relation to Element 1 of your complaint have therefore been concluded under the Complaints Scheme and cannot now be re-considered. However, I am able to say that I do not consider that the FCA’s use of paragraph 3.7 was intrinsically unfair to you, since there *were* continuing proceedings in relation to your CCA application. In so far as you consider you now have new evidence in relation to the Supervision Team’s visit and letter to you in February 2012, this has been considered by the FCA complaints team under Element 2 of your complaint and I turn to this below.

Element 2

11. You asked the FCA to investigate the Supervision Team’s letter to you dated 23 February 2012 under the Transitional Complaints Scheme and this was done. The FCA concluded that the content of the letter was clear and that any concerns you had about the regulatory actions that followed on from it were better addressed to the Upper Tribunal. I agree that this was a reasonable approach and conclusion.

12. The evidence I have seen does not support your claim that you were unaware of the source of the information that gave rise to the visit before January 2016. The 23 February 2012 letter itself provides this information and also states that it was communicated to you at the start of the visit on 10 February. In response to my preliminary report you have pointed out that there is a difference between knowing the source of the information (that is, who provided it) and the nature of the information (that is, whether it related to fraud). I accept this distinction and I also accept that the lenders' report form dated 4 November 2011 (a copy of which you received on 19 January 2016 following a Data Protection Act request) refers to suspicion of fraud and answers 'Yes' to the question: *Do reasons exist to suspect [your firm] was complicit in the fraud?* The report goes on to say that a case review "found poor quality submissions with 5 cases out of 8 declined (2 by fraud). Concerns income proof not being obtained before cases are submitted." I also accept that a document headed Firm Standing Data says: "Investigate whether any evidence of fraudulent activity at the firm." Although I understand that you consider this supports your argument that the FCA's team was prejudiced against you prior to the visit, it was within the FSA's discretion to follow up this information and it was entitled to take subsequent regulatory action regarding your firm. I have explained to you previously that I cannot consider such matters. If you disagreed with the action being taken it was up to you to pursue this matter to the Upper Tribunal. I have seen no evidence that the visiting team was inappropriately experienced, prejudiced against you or reached unreasonable conclusions.

13. Furthermore, the Upper Tribunal judgment in respect of your CCA application made the following finding of fact:

"There has in fact never been any suggestion by the Authority (my emphasis) that [you or your firm] has been complicit in any mortgage fraud. It is clear from the letter of 23 February 2012 that the concerns expressed by the Authority focused on systems and controls relating to the prevention of financial crime and the suitability of the firm's advice."

The Complaints Scheme is not a route to challenge or reconsider findings of fact made by the Upper Tribunal.

14. In response to my preliminary report you have also said that I have missed the point of your complaint about the Transitional Scheme. You consider that the FCA should have activated the Transitional Complaints Scheme when you first complained to the three directors of FCA who had executive powers in July 2015. You consider this supports your complaint that you have been subject to excessive delay. However, I do not consider these matters could have been addressed sooner because of the considerable overlap with the matters raised in the Upper Tribunal proceedings.

Element 3

15. You first made a complaint about the FCA's treatment of your CCA application on 18 June 2015. The FCA deferred your complaint because matters were pending in the Upper Tribunal. I have already concluded that this deferral decision was reasonable (see my final decision dated 23 August 2016). You resubmitted your complaint on 30 September 2016, following the Upper Tribunal hearing when the FCA's rejection of your application was upheld.

16. Many of the matters that you raise about your CCA application have already been considered and decided upon by the Upper Tribunal, which made a number of findings of fact. These include what type of application you made, whether and which of the Threshold Conditions applied, and the relevance of the additional questions raised by the FCA. I cannot reconsider these matters.

17. I note that the Upper Tribunal decision commented that:

"we think it would be more helpful if the form itself stated clearly at the top that it was an application for the variation of an existing Part 4A permission."

I trust that the FCA has taken note of this suggestion from the tribunal. However, the judgment goes on to say:

"... we do not give the significance to this point that [you] seek to do; we think that on balance the material that he received made the essentials of the process clear to him, namely that in order to continue to carry on consumer credit activities he needed to make an application to that effect and satisfy the Authority that he would continue to meet the Threshold Conditions both in relation to his existing activities and the new activities that he had applied for. The form then makes it clear that what the applicant is doing is making a request to add new activities to his existing permission, notwithstanding the fact that he carried on those activities for a long period of time, pursuant to his original consumer credit licence and the interim permission granted by the Authority."

18. I also note that the Upper Tribunal decision expressed surprise that the FCA did not always make explicit the detail and relevance of some of the information it was seeking from you in support of your CCA application. The tribunal clearly thought that this might have helped you to understand the regulatory context for the FCA's requests. Again, I trust that the FCA has taken note of these points. However, I note that the tribunal also thought you should have appreciated the significance of these requests and been more open and co-operative with your regulator. The tribunal did indeed conclude that this was a 'sorry outcome for you' but said that this was of your 'own making'.

Element 4

19. In response to this element of your complaint, the FCA complaint response said:

"I am unsure why the letters you sent to the FCA's office did not deliver. From what I have seen, they were appropriately addressed. You may wish to take this up with Royal Mail."

20. Although I consider that this was a reasonable response, I consider it would have been more helpful if the complaints team had specifically confirmed to you that post is not simply returned when a case officer leaves and that there are policies and practices in place that should ensure this does not happen.

21. In my preliminary report I observed that it was not clear to me whether you had previously raised with the FCA your specific concerns about emails lost due to a change in domain name or that an application you sent in June 2013 was apparently 'discovered' by the FCA in May 2017. I suggested that, for completeness, it would be helpful if the FCA, in responding to this preliminary report, could

- 1) provide a brief explanation of the arrangements it put in place to handle emails when it changed domain name;
- 2) comment on the apparent rediscovery of a very old application from you.

In response to my preliminary report the FCA has confirmed that neither of these matters were raised directly by you with the FCA at the earlier stage of your complaint. It has provided the following response to the two issues raised:

- 1) An email sent to a continuing employee @fsa.gov.uk in June 2013 would have been automatically redirected to his or her new @fca.org.uk address. If the person concerned had left employment, a response would have been sent saying that the address was no longer in use. However, the FCA also points out that an application could not have been submitted directly to a case officer's email address, since all applications have to be submitted via 'Connect'.
- 2) The exchange of emails between you and the FCA in May 2017 shows that you had commenced an application via Connect in 2013 but did not submit this. It remained in draft form until 16 May 2017 when the FCA's Authorisations division sent you an automated email with the subject "*Warning: Unsubmitted FCA application – please progress your application*". The email went on to say: "*We note there has been no activity on the above FCA application for 900 days. This application will be deleted unless you update or submit it in the next 30 days.*" The FCA believes you have misunderstood this situation to mean that it had 'lost' your application during this period which is not the case.

I have reviewed the email exchanges and I am satisfied with the explanations that the FCA has provided on these matters.

Element 5

22. I do not agree with your analysis of the delay that you have experienced. All matters save for your deferred complaint about your CCA application were concluded by my final decision dated 23 August 2016, where I recommended that the FCA offer you a compensatory payment of £150 for complaints handling delay.
23. You submitted a new complaint on 30 September 2016. You are correct that this was after the Upper Tribunal hearing; however, it was some weeks later before the tribunal published its decision. It is clear from my comments on Element 3 of your complaint, above, that the content of the tribunal's decision was highly relevant to the subject matter of your complaint to the FCA. It was therefore reasonable for the FCA to await the publication of this decision.
24. However, it then took the FCA until 12 September 2017 to issue its complaint response. It was good practice for the Complaints Team to acknowledge that this was too long and to offer you a further compensatory payment of £150 for delay.

My decision

25. I have already concluded all matters in relation to Element 1 of your complaint and made a decision that the FCA was correct to decline to look into this matter again. I am unable to investigate further this aspect of your complaint.
26. I consider the FCA's response to Element 2 of your complaint to be reasonable and therefore I do not uphold this aspect of your complaint.

27. I consider the FCA's response to Element 3 of your complaint to be reasonable and therefore I do not uphold this aspect of your complaint.
28. I consider the FCA's response to Element 4 of your complaint to be reasonable and therefore I do not uphold this aspect of your complaint. However, I consider the FCA could have offered you a more detailed explanation of its policy and practice for handling post addressed to staff who have left. I am satisfied with the explanations the FCA has provided in response to two further specific allegations you have made.
29. I consider the FCA's response to Element 5 of your complaint to be reasonable: your complaint was badly delayed between November 2016 and September 2017, but this has been acknowledged, and you have been offered a compensatory payment, which you can decide whether or not to accept. I therefore do not uphold this aspect of your complaint.
30. As I have not upheld any of your complaints, it follows that I do not consider that the FCA should apologise to you further or offer you compensation for loss. I do not agree that the FCA has shown 'institutional misconduct' in its regulatory actions towards you or your firm.
31. I note that you reject my decision in its entirety.

Antony Townsend
Complaints Commissioner
15 March 2018