

**Final report by the Complaints Commissioner, 7<sup>th</sup> December 2017****Complaint number FCA00400***The complaint*

1. On 3<sup>rd</sup> October 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. In finalising this report, I have taken into account comments which you and the FCA made on the preliminary report which I issued on 7<sup>th</sup> November 2017 – I refer to some of those comments in this report.

*What the complaint is about*

2. In its decision letter of 12<sup>th</sup> September 2017, the FCA summarised your complaint as follows:

*My understanding of your complaint is that you are unhappy with the FCA's oversight, or lack of oversight, of the Financial Ombudsman Service (FOS). You are also dissatisfied with responses you've received to date from the FCA regarding this matter.*

3. The background to this was that you had written to the FCA Chairman's office complaining that you (and others) had been forced out of financial services because of what you saw as the unreasonable behaviour of the FOS, that the FOS was unaccountable, and that there needed to be an independent review of the FOS, but the FCA had not satisfactorily answered your correspondence.

*What the regulator decided*

4. The FCA did not uphold your complaint. It said that your complaint was excluded from the Scheme "because your complaint relates to the actions, or inactions, of the Financial Ombudsman Service". The decision letter went on to say that, although the FCA had not formally investigated the complaint, it had "reviewed your contact with the FCA", that it "cannot identify any systemic failings", and that it was "satisfied that the FCA has acted appropriately".

*Why you are unhappy with the regulator's decision*

5. In your letter of 3<sup>rd</sup> October to me, you:
  - a. Say that the evidence of FOS failings which you have supplied has been "entirely ignored";
  - b. Ask me to "provide evidence of other similar complaints that have been investigated via other advisers, that have been assessed, while looking into this complaint", to support the claim that there are "no systemic failings";
  - c. Ask me to confirm that I am "able to investigate this complaint, independently, fairly, objectively and honestly with absolutely no bias";
  - d. Ask me to confirm that "the FOS is not and should not be entirely unaccountable";
  - e. Ask me to find that "the way we have been treated is not reasonable, and that the 'punishment does not fit the crime'.

### *Preliminary points*

6. I need to make three preliminary points, before I set out my analysis of your complaint.
7. First, I can confirm that I have considered this complaint in an independent and unbiased way – that is my function as Complaints Commissioner.
8. Second, I cannot interfere the constitutional arrangements which Parliament has determined for the FOS, and which I describe more fully below. For that reason, my ability to comment on your point at 5 d above is constrained.
9. Finally, I cannot consider the actions of the FOS – their actions are specifically excluded from this Complaints Scheme. For that reason, I cannot address the point summarised in 5 e above. I can, however, consider the actions or inactions of the FCA. In your letter to me, commenting on my preliminary decision, you have asked who can consider the actions of the FOS, if I cannot? The answer to that question is that, by law, the decisions of an ombudsman in an individual case can only be challenged by judicial review through the courts (a complex process, requiring legal knowledge).

### *My analysis*

10. The FCA's decision to exclude your complaint from the Complaint Scheme was clearly wrong. The FCA's summary of your complaint (quoted in paragraph 2 above) correctly identifies that you were complaining about the FCA's oversight, or lack of oversight, of the FOS, and the way in which it had dealt with your correspondence. The decision to exclude your complaint, on the grounds that it "relates to the actions, or inactions, of the Financial Ombudsman Service" is simply inconsistent with the summary of the complaint. The FCA have accepted that they made an error in excluding your complaint.
11. I considered whether to refer your complaint back to the FCA to ask them to investigate your complaint, but I concluded that, since the FCA Complaints Team had already "reviewed" the matter, it was unlikely that a second review would be productive.
12. I apologise for having to start with some technical issues, but it is necessary to examine the statutory arrangements for the FOS, since these constrain what the FCA can and cannot do.
13. Schedule 17 to the Financial Services and Markets Act 2000 states that the terms of the FOS Board members' appointments (which are made by the FCA) "must be such as to secure their independence from the FCA in the operation of the scheme." That is reinforced by the fact that, while the appointments to, and removals from, the FOS Board are made by the FCA, in the case of the chairman this must be done with the approval of the Treasury.
14. The FCA's duties, again under the statute, are to "take such steps as are necessary to ensure that the body corporate established by the Financial Services Authority under this Schedule as originally enacted is, at all times, capable of exercising the functions conferred on the scheme operator by or under this Act". The addition of the words "capable of" appears to me to be clearly designed to distance the FCA from operational responsibilities.

15. I understand that the FCA discharges its oversight duties by the making of the Board appointments, annual approval of the Financial Ombudsman Service's budget, and through a sub-committee of its Board (the Oversight Committee) which meets the FOS three to four times a year and reports to the FCA Board on its discussions, which include consideration of the overall performance of the Financial Ombudsman Service.
16. I have set out these points in some detail, since it is very clear that Parliament intended some distancing of the FCA from the FOS, not only in terms of individual decisions, but also in terms of operational responsibilities.
17. Against that background, I turn now to your complaint. To put it simply, you supplied the FCA with information which, in your view, showed that there were systemic issues with the FOS's performance, and the FCA told you that they did not agree.
18. I have carefully considered the correspondence between you and the FCA. You have received three letters from the FCA. The first letter, dated 31<sup>st</sup> July, summarised the constitutional arrangements between the FOS and FCA, and said that, having considered the information which you had provided, the FCA had concluded that there was "no reason to believe that there is any systemic problem which would bring into question the FOS's ability to carry out its statutory functions".
19. The second letter, dated 11<sup>th</sup> August, and in response to your reply to the first, gave you a fuller explanation of the FCA's distinction between "occasional errors in the system" and "systemic failure.....which might call into question the FOS's ability to fulfil its functions, and therefore justify FCA intervention".
20. The third letter – the decision letter in response to your complaint – effectively simply endorsed the conclusions of the first two.
21. Setting aside the question of the FCA's error in excluding your complaint from the Scheme (see paragraph 10 above), in my view the FCA gave you reasonable responses to your correspondence, particularly in the second letter. I recognise that you feel strongly that the Ombudsman's approach to the SIPP's issue was wrong, but the FCA's view that that does not, of itself, indicate systemic failure does not seem to me to be unreasonable. I do, however, consider that it would have been helpful if the FCA had confirmed that it would retain the information which you had supplied, and take it into account in any wider consideration of the FOS's performance.
22. In your original letter to the FCA, you complained that individual ombudsmen were unaccountable – but it is a feature of the Scheme that the ombudsman's decision is final. Some of your complaint seems to me to be about constitutional issues which are not within the FCA's control: they should be addressed to the Government or Parliament.

*My decision*

23. The FCA was wrong to exclude your complaint from the Complaints Scheme.
24. The FCA's correspondence with you, and its conclusion that the issues which you raised did not amount to systemic issues justifying FCA intervention, were not unreasonable in the context of the statutory arrangements governing the relationship between the FOS and FCA. However, in response to my preliminary

report, the FCA has confirmed that information you supplied will be retained and reviewed, if necessary, in the light of any wider consideration of the FOS's performance.

25. Finally, you asked me whom you should approach about your general concern that the FOS is "totally beyond reproach". I understand that your MP has not taken this matter up. You may wish to consider approaching the Treasury Committee – see <http://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/> - which is the Parliamentary body with oversight of the arrangements for financial services.

Antony Townsend

7<sup>th</sup> December 2017