

16 December 2021

Final report by the Complaints Commissioner**Complaint number FCA00948***The complaint*

1. On 7 June 2021 you asked me to review the outcome of your complaint to the FCA, I have carefully reviewed the information that you and the FCA have sent to me. My Preliminary report was issued on 14 September 2021 and a further preliminary report was issued on 4 November 2021. Both you and the FCA have had the opportunity to comment on these preliminary reports.
2. The FCA summarised your complaint in its decision letter as follows:

There was a lack of care and unprofessional behaviour by the FCA in regard to permitting Company X to withdraw from its role as operator of Company Y.

The FCA failed to regulate Company X and satisfy itself that Company X was operating Company Y as it ought to be.

The FCA should have avoided or mitigated the losses suffered by you by investigating the affairs of Company X before allowing them to withdraw its permissions.

What the regulator decided

3. The FCA set out that it was unable to investigate your complaint under the Scheme because paragraph 3.3 states that a complaint should be made within 12 months of the date on which the complainant first became aware of the circumstances giving rise to the complaint.

4. The FCA did set out that it can look at complaints after this 12 months' time bar if you have reasonable grounds for the delay in complaining, however it set out that it believed that you were aware of the circumstances giving rise to your complaint more than 12 months prior to your complaint in October 2020 and due to that it was unable to investigate your complaint.

Why you are unhappy with the regulator's decision

5. You have told me that you feel that the FCA's decision to reject an inquiry into your complaint on time grounds is an abuse of the FCA's own complaints procedure. You said that this is because despite what the FCA contends, your awareness of events was not sufficiently adequate for you to make a meaningful complaint before you did so.
6. You said that your correspondence with the FCA and the Financial Services Compensation Scheme (FSCS) between 2014 and 2017 represented a complaint about Company X rather than a complaint about the FCA. You only became sufficiently aware of the specific details of the regulatory failings in late 2019 - early 2020 when you instructed your lawyers to investigate the matter and to make a complaint to the FCA which was lodged in October 2020.
7. You have set out that you consider that valuable and important lessons would be learnt from an inquiry, be that internal or independent.
8. In its response to my initial preliminary report, your solicitor set out that your complaint is about the FCA decision to accede to Company X's request to withdraw its permission, and, thus, facilitate its resignation from Company Y and on that basis, you contend that the FCA's actions represented a lack of care on its part and left investors at significantly increased risk. Your solicitor set out that if the complaint was made out then the Regulator could (and it is hoped would) recommend that an ex-gratia payment be made.

Preliminary points

Confidentiality

9. Section 348 (s.348) of the Financial Services & Markets Act 2000 (FSMA) classes some information the FCA holds about firms as confidential and restricts

how that information is dealt with. In addition to this, any information that is not restricted by s.348 FSMA may be restricted due to the FCA's policy on sharing information about regulated firms and individuals, who also have legal protections. Under this policy, the FCA will not normally disclose the fact of continuing action without the agreement of the firm concerned. There is a good explanation of the statutory and FCA policy restrictions on information sharing at <https://www.fca.org.uk/freedom-information/information-we-can-share>. This means that there is no general right for members of the public to know the outcome of reports that they make.

10. 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. However, as part of the Complaints Scheme, I have access to all the FCA's complaints papers, including confidential material. This is so that I, as an independent person, can see whether I am satisfied that the FCA has behaved reasonably. Sometimes this means that all I can say to complainants is that having studied the confidential material, and whether I am satisfied (or not) that the FCA has behaved reasonably – but I am unable to give further details.

My analysis

11. From the information you have provided to both my office and the FCA, I understand and have briefly summarised the background to this complaint as follows, that in 2006 you invested £150,000 in Company Y. The investment was an unregulated collective investment scheme. Company X was appointed as the operator of the partnership and was regulated under the Financial Services and Markets Act 2000 (FSMA). In or around late 2013 and through 2014 you were notified that Company X was no longer able to meet the threshold conditions for FCA authorisation under the FSMA 2000, but that the FCA had granted permission that it could continue for the purpose of winding up Company Y or transferring its operations to another authorised operator. Neither of these purposes were achieved by the time Company X withdrew from being the operator of Company Y in January 2015. Following the withdrawal of Company X, you lost £150,000 that you invested in Company Y.

12. Between 2014 and 2017 you lodged complaints about Company X with both the FCA and the Financial Ombudsman Service (FOS). Then in 2018 you made a compensation application to the FSCS in relation to Company X and you were awarded £50,000 compensation. You later made a subject access request (SAR) to the FSCS and as your solicitors set out in their letter to the FCA on 19 October 2020, that it was only on receipt of this information that you became aware of the circumstances that gave rise to your complaint. This included a report prepared by Company Z about Company X and Y which I will discuss below.
13. In the FCA's decision letter dated 7 May 2021, it quoted extracts from letters from your solicitor to the FCA in which they set out the reasons for your complaint being lodged when it was. The FCA drew on parts of the letter from your solicitor dated 8 December 2020, in which it was set out that it was from the information contained in the SAR documents that it became apparent that the FSCS compensation claim was clearly paid in respect of Company X and its negligence. They also set out that it was from those documents you learnt for the first time that your application was supported by a detailed report by Company Z dated 15 March 2015. Your solicitors stated that you had not previously seen this report.
14. Later in the same letter your solicitors went on to say that it was only after disclosure of the documents from the FSCS and receiving further advice from counsel that you were made aware of the potential responsibility of the FCA and for the matters subject to the complaint. This is something that you have reiterated in your email to me dated 25 November 2021.
15. The FCA then went on in its decision letter to reference the application form submitted to the FSCS dated 17 December 2017 which you had signed to confirm that all the details submitted in the form were true and correct. It included a statement as follows:

I have seen the report by Company Z which shows negligence by Company X in operating the Company Y Property Finance Fund. The Financial Ombudsman Service were investigating complaints against Company X but now they have been de-authorised by the FCA and

submitted accounts that show they have no funds the Ombudsman told investors to submit claims to FSCS as Company X are now in default and several claims have already been paid. I have been made aware that the FSCS have the full report from Company Z as well as other documentation that shows Company X were negligent. I invested £150,000 in the Company Y Fund and due to Company X's mismanagement of the fund I seem to have had a total loss of my capital, please see the Company Z report.

16. The FCA then summarised that from its own records it could see that you had corresponded with the FCA about Company X between 2014 and 2017 and that it believed that you were aware of the circumstances giving rise to this complaint more than 12 months prior to your complaint in October 2020. It was on this basis that the FCA did not investigate your complaint. The FCA did not provide any details in its decision letter about any of the other information it relied on to make its decision.
17. Having reviewed the FCA file, in particular the application form submitted to the FSCS dated 17 December 2017, it seems that you were aware of the existence of Company Z's report, or you would not have signed the declaration in the form. It was on this basis, I concluded in my preliminary reports that your solicitor's statement in its letter dated 8 December 2020, that you had not seen the report until you received the documents from your SAR to the FSCS was incorrect and led the FCA to question the timing of your complaint and whether the information in the report was new information.
18. The statement in your FSCS compensation claim application sets out that you had seen the report which showed the negligence of Company X. I note that in your email to me dated 25 November 2021, you set out that despite evidence to the contrary, you affirmed that you had not seen the report until late 2019. Whilst I appreciate that this is now your recollection, I must also be guided by the documents available, and that were relied upon by the FSCS in making its decision to compensate you £50,000.
19. From the information available to me, it appears upon receipt of your SAR request including the report of Company Z in early 2020 that you sought legal

advice which your solicitors have stated was delayed due to issues relating to Covid 19. As set out in my preliminary report, I considered this was a reasonable action to take having obtained the documentation from your SAR request from the FSCS. The correspondence between your solicitor and the FCA, indicate that your solicitor considered that your knowledge of the potential regulatory failings of the FCA in relation to Company X were brought to your attention when you received this information.

20. I note that in my preliminary report I set out that I had read Company Z's report that was contained in the SAR request and that I considered it was plausible that it may have raised questions in your solicitors and/or your mind about the FCA's regulatory involvement in relation to the events surrounding Company X.
21. In its response to my initial preliminary report, the FCA have highlighted two further pieces of information (and provided me with copies) which it says support its decision to time bar your complaint. It says that they support its position that you were previously aware of the circumstances that relate to your complaint.
22. The first piece of correspondence was a letter you wrote on 24 May 2014 to the director of Company X and a copy was also sent to the FCA. In this letter you stated that you felt that the director of Company X should stay on in a formal position rather than a casual capacity. You expressed your dissatisfaction that *'the FCA apparently thinks otherwise, i.e. exactly the opposite of what I think'*. Having reviewed this letter, it does show that you were aware of the FCA's involvement in matters relating to Company X and that you disagreed with its actions at that time in 2014.
23. In addition to this, the FCA have also flagged your email dated 1 June 2021. You stated:

However, as I was approaching the age of 90 and time was not on my side, in 2019 I decided to take legal advice in the hope of speeding things up. Even then I still had the same belief as when I originally complained to the FCA, namely that regulatory failings were at the heart of the matter.

This again suggests that you had a belief and therefore an awareness of the alleged regulatory failings prior to 2019 back when you originally complained to the FCA 2014-17.

24. I acknowledge that in your complaint, and later correspondence to me, you said that you only became aware of the specific details of the FCA's regulatory failings in late 2019, The Complaint Scheme sets out that complaints should be made within 12 months of the date on which the complainant first became aware of the circumstances giving rise to the complaint. The letter you wrote in 2014 expressing dissatisfaction with the position of the FCA and your own admission in your email in June 2021, confirm that you had the awareness of the circumstances being the FCA's role and that you had a dissatisfaction about it, more than 12 months prior to lodging your complaint. An increase in your awareness of the specific details is unfortunately not reasonable grounds to overlook the 12 months set out in the Complaints Scheme.
25. I also acknowledge the point you have raised in your email dated 25 November 2021, in which you say that to none of the written complaints you sent to the FCA in 2014-2017 did you receive a response advising you of the formal complaints procedure which existed within the FCA, and on that basis you feel that your complaints from that time should be regarded as complaints made under the FCA's formal complaint's procedure and were 'therefore made in good time'.
26. Whilst I can accept complaints which are out of time if I feel there is good justification, I have considered the circumstances of this case including your suggestion in your email dated 25 November 2021, and I do not think it is either practical or justified to investigate this case, or to recategorise your 2014-2017 complaints as being lodged as formal complaints about the FCA. It is not practical for the Complaints Scheme to have an indefinite open time frame for lodging complaints. As the time elapses from the time of the originating events of a complaint, it becomes more difficult to investigate the matters, more difficult to locate people within the organisation who can provide first hand knowledge about the matters and obtain relevant documentation. This can result in a disproportionate amount of resources being allocated to investigate a matter for potentially inconclusive findings. The Complaints Scheme does not have

unlimited resources and whilst it is important to understand where there have potentially been historical issues and take lessons from them, this must be balanced with the available resources and ensuring that they are directed to recent and current issues. Accordingly, the time limits are put into place to avoid these issues. However, I can assure you that I always carefully consider cases where Paragraph 3.3 has been used to ensure that it has been used appropriately and not being used to avoid addressing complaints.

27. When I issued my first preliminary report, the FCA's decision letter had only specifically referenced the report of Company Z and your acknowledgment of the report in your 2017 compensation claim statement to justify its position that you already had awareness over 12 months prior to lodging your complaint. This was a reasonable position but as I set out in my first preliminary report, I felt on this information alone it was possible that your awareness only came about at the time of reading the report in detail, which you have indicated in your email dated 25 November 2021 was the case. However, I am satisfied that the FCA has now in response to my preliminary reports provided information to show you did have prior awareness of the circumstances and that provides reasonable grounds for taking the decision to time bar your complaint under 3.3 of the Complaints Scheme. Accordingly, I have concluded that the FCA was correct to time bar your complaint.

My decision

28. I am sorry as I know that this decision will disappoint you but for the reasons set out above, I have not upheld your complaint.

Amerdeep Somal
Complaints Commissioner
16 December 2021