

Final Report by Roger Best

Complaint No FCA 207207241/007

My position as Independent Investigator

1. Under the provisions of the Complaints Scheme (Complaints against the Regulators: the Scheme), the Regulators, having been informed of a conflict of interest on the part of the Complaints Commissioner (Amerdeep Somal), requested the President of the Law Society to nominate a Solicitor to carry out the functions conferred on the Commissioner by the Scheme in relation to this complaint. I was so nominated by the President and my nomination having been approved by the Treasury, it now falls to me to carry out the functions conferred on the Complaints Commissioner by the Complaints Scheme in relation to this complaint. In so doing, I have adopted the methodology of the Complaints Commissioner, although she has had no involvement in investigating this complaint.

The Complaint

2. On 29 January 2021, you emailed the Financial Regulators Complaints Commissioner (the "Complaints Commissioner") submitting a complaint in the form of two documents, (a 246 page full text document entitled "FOS Complaints ***** and ***** Lack of Oversight resulting in Complaint not being addressed" and a 52 page abstract with the same title- together the FCA Complaint). Since the Complaints Commissioner was told by the FCA that it had never received a complaint from you under Stage 1 of the Scheme, she passed the FCA Complaint to the FCA's Complaints Team to investigate on 3 February 2021.

What the Complaint is about

3. In its letter of 13 August 2021(the Decision Letter), the FCA summarised your complaint as follows:

The background to your complaint concerns the complaint (Refs: *****2 & *****6) you submitted to the Financial Ombudsman Service ('Ombudsman Service'). You were dissatisfied with a fixed cost maintenance plan you and your wife entered into when you purchased a car from [the manufacturer] in 2014. The Ombudsman Service split your complaint into two parts – Ref: *****2 dealing with the service contract/plan and Ref: *****6 dealing with the quality and fitness for purpose of the car (the car was purchased under a separate regulated consumer-credit agreement).

The Ombudsman Service said that it was unable to consider your complaint under Ref: *****2, because the service contract is not a regulated activity as defined by the Financial Services and Market Act 2000 ('FSMA'). The Ombudsman Service

explained that it could only investigate complaints within the scope of the DISP rules (as set out in the FCA's Handbook rules). The Ombudsman Service could not lawfully adjudicate on a dispute over an unregulated contract or ancillary activity.

Your second complaint under Ref: *****6 was partially upheld on the basis that [the manufacturer] made two minor errors, but the Ombudsman Service did not require [the manufacturer] to take any further action. You escalated both complaints to an Ombudsman and received Final Decisions. You also escalated both complaints to the Independent Assessor and received a decision.

You are unhappy with how the Ombudsman Service dealt with your complaint(s) because:-

- The Ombudsman Service should not have split your complaint into two parts
- You are unhappy with the outcome
- The complaint was not dealt with properly
- The Ombudsman Service ignored your evidence
- The process took too long and (in your view) time-barred your opportunity for legal action
- The Independent Assessor did not respond to your escalation

Your allegation against the FCA

You have brought your complaint with the Ombudsman Service before the FCA's Oversight Committee because of your dissatisfaction with how the complaint was dealt with and the outcome of your complaint. You say that the delay in dealing with your complaint should not have had an impact on the outcome for which you say, "the conditions of any outcome are always negotiable given the right reasons.". Your view is that the actions of the Ombudsman Service and the Independent Assessor have breached the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (the ADR Regulations). Further, your Ombudsman Service complaint outcome indicates a failure in the 'quality control' of the Ombudsman Service that brings into question its viability as an ADR entity in reference to the ADR.

You have also made the following comments:

- *"There is no further course of redress for consumers within the current FOS Quality Assurance system.*
- *Judicial Review would not address the issues that have come to light and is not affordable to the average consumer. Its value for effecting change for the better is limited.*
- *The need for a Judicial Review is seen as a failing that points to a need to review the rules of the service and system that gives cause for it.*

- *The required service level for resolving complaints is 90 days. To date this complaint has now taken around 740 days, contrary to ADR 2015, Schedule 3, 6. (d). This delay has caused our complaint(s) to be outside the time limit for court action.*
- *The ombudsman was made aware of this and issued the Final Decision on the day that this came into effect. The option of taking it to court was not then mentioned.*
- *What is the role of the Oversight Committee and should the oversight role be combined with Quality Assurance to give a higher level of protection from mistakes for both complainants and respondents?*
- *Are the service and system rules up to date and adequate as defined?*
- *The question that then arises, if permitted, is has the FCA been instrumental in the problems by failing to ensure that sufficient oversight has been exercised to prevent what has happened? The defined DISP rules point to an answer of 'Yes' because the process has demonstrably failed and the DISP service rules have not been followed. Bringing this to the attention of the Independent Assessor has failed because no response has been received to what, in system terms, is a serious failing, regardless of the intrinsic cost and value of the complaint.*
- *The question must be asked 'is it correct that the FOS Board appoints the Independent Assessor?'. If the IA is to be seen as truly independent might it not be better if selection was made by the FCA who have ultimate responsibility for the probity of the service?*
- *The system rules are not defined and appear to be based on internal rules and various promotional concepts.*
- *The combination of FOS and Independent Assessor has not yielded the required protection; a more pro active quality assurance system is needed.*
- *The IA can only consider service issues and then not until a case is closed, when the horse has bolted. Four possible exceptions to this rule have been cited on the IA website. This case matches all four but the FOS Complaints *****2 and *****6 request to intervene a year ago (13 Jan 2020) was unable to be actioned. No reasons were given. Increased workload and work pressures invariably lead to more opportunities for error.*
- *FOS have failed to address and have absolved the respondents, [the manufacturers financial services company], of any guilt, apparently without even investigating the case in any detail, even though that detail has been*

provided. The (new) IA (Independent Assessor) has effectively rubber-stamped the FOS findings, it would appear without too much regard for any comments that have been put forward.”.

By way of a remedy, you have requested compensation for the failings identified in your complaint, the complaint itself and the distress and inconvenience caused by the FOS's complaints handling delays.

What the Regulator Decided

4. In the Decision Letter the FCA explained that it cannot investigate complaints about the actions or inactions of the FOS, nor is it able to intervene in complaints with the FOS. It also explained that this is because it is outside the FCA's remit to intervene in the FOS's complaints process or how it makes its decisions on complaints. However, the FCA accepted that complaints about the FCA's oversight duties in respect of the FOS do fall within the scope of the Complaints Scheme and therefore this is something that it is able to investigate. The FCA decided that it was unable to uphold your oversight complaint, because it did not find any evidence to support your view that the FOS has breached the ADR Regulations.
5. The FCA explained that the ADR Regulations require the FCA to only approve the FOS as an 'ADR entity' if the FCA is satisfied that the Ombudsman Service meets the requirements in Schedule 3 of the Regulations. The FCA found no evidence to show that the FOS is not meeting the requirements of Schedule 3 of the ADR Regulations.
6. In the reasons set out in the Decision Letter, the FCA explained how it discharges its oversight duties and provided the following responses to your questions:

There is no further course of redress for consumers within the current FOS Quality Assurance system.

- The Ombudsmen have the power to make legally binding decisions. If you reject the final decision, the complaint cannot be taken any further within the FOS's process, but you could seek to pursue the matter in Court.
- Complaints can also be escalated to the Independent Assessor, but the Independent Assessor's role is to review complaints about the level of service provided by the Ombudsman during the handling of your complaint. The Independent Assessor will not review the merits or the outcome of the complaint itself.
- To put [it] simply, if you are unhappy with the Final Decision from the Ombudsman about your complaint, the option available to you is to commence legal proceedings. It should be noted that the FOS's website does state that, "If either side is unhappy with the decision, they can't appeal an ombudsman's final decision to another ombudsman. You also can't go to court to appeal the ombudsman's decision just because you disagree with it. However, we're a public body and we can be judicially

reviewed. A judicial review usually focuses on the process an ombudsman has used to make their decision, not on the facts and evidence of the dispute itself. You'd probably need to get legal advice before starting judicial review proceedings."

- I understand that you are unhappy with the FOS's process and in your view there should be further additions to the process/quality assurance but this is something you may wish to obtain legal advice on and/or raise with Parliament and the Government as this is outside the FCA's remit. The FCA's Oversight Committee's role is to take such steps as are necessary to ensure that the Ombudsman Service can carry out its role as defined by FSMA (i.e. as defined by law). The FOS was set up by Parliament and exercises its function under FSMA. As such, if you have questions or suggestions about the manner in which Parliament set up the FOS or questions about how the FOS carries its function under FSMA, these should be directed at Parliament/the Government as it is outside the FCA's remit. According to the information on the FOS's website, you may also wish to bring Judicial Review proceedings but the website does state that such proceedings will usually focus on the process an Ombudsman has used to make their decision, not on the facts and evidence of the dispute itself.

A Judicial Review would not address the issues that have come to light and is not affordable to the average consumer. Its value for effecting change for the better is limited.

- I am unable to comment on this as I cannot predict the outcomes of a Judicial Review nor am I able to comment on the legal costs.

The need for a Judicial Review is seen as a failing that points to a need to review the rules of the service and system that gives cause for it.

- I understand that this is your view, however, complainants have the option to reject a Final Decision from an Ombudsman and pursue the matter in Court. It is therefore incorrect to state that there is no further course for redress when legal proceedings are an option.
- If you consider that the need for a Judicial Review is seen as a failing and the rules for which the Ombudsman Service operates under (i.e. FSMA) needs to be reviewed, you may wish to direct your comments/suggestions about this to Parliament/the Government as this falls outside the FCA's Oversight Role.

The required service level for resolving complaints is 90 days. To date this complaint has now taken around 740 days, contrary to ADR 2015, Schedule 3, 6.

(d). This delay has caused our complaint(s) to be outside the time limit for court action. The ombudsman was made aware of this and issued the Final Decision on the day that this came into effect. The option of taking it to court was not then mentioned.

- The FOS is set up as an informal and free alternative to the courts. A complainant has the option to pursue the matter in Court as opposed to using the FOS. This includes cases where a complainant has already referred the complaint to the FOS – the complaint can be withdrawn at any time and for any reason.
- As you correctly note, Schedule 3 Paragraph 6(d) of the ADR Regulations requires the Ombudsman Service to notify the parties of the “outcome of the alternative dispute resolution procedure” within a period of 90 days from the date on which the FOS notified the parties that it had received the “complete complaint file”. “Complete complaint file” is defined at Regulation 5 as “all the relevant information relating to a dispute”.
- For the purposes of the ADR Regulations, the “outcome of the alternative dispute resolution procedure” is the first opinion that the FOS issues on a complaint. This is explained in the Annual Activity Reports that the FOS is required to publish under the ADR Regulations. These reports can be found on the FOS’s website. Based on the bundle of documents you submitted in support of your complaint, it appears that, for both complaints, an opinion was issued within 90 days of receipt of the complete complaint file.
- Regarding complaint reference number *****2:
 - On 12 February 2019, the adjudicator informed you that they were still waiting for the respondent [the manufacturer’s financial services company] to send them, “a copy of the terms and conditions for the fixed cost maintenance plan”.
 - On 19 February 2019, the adjudicator sent you their view on the complaint, stating it was not a complaint they could consider.
- Regarding complaint reference *****6:
 - On 5 September 2019, the adjudicator confirmed that they had ‘enough information from you and [the manufacturer’s financial services company] to investigate the complaint.
 - On 4 October 2019, the adjudicator issued their view on the complaint.

- Concerning the issue on whether your complaint is time-barred from legal proceedings caused by the alleged delays in the FOS's determination of your complaint, the FCA notes that the law (s.33B Limitation Act 1980) allows complainants to have extra time in which to issue proceedings at Court where the matter was previously with an ADR entity (in this case the Ombudsman Service). Please do note however that this information provided to you should not be taken as the FCA providing you with legal advice as this is not the FCA's role. Ultimately, it would be for a Court to decide whether or not the statutory limitation in which to bring a claim has been missed, not the FCA. It is outside the FCA's remit to provide legal advice to complainants therefore you should seek legal advice on this issue as soon as possible.
- I do note that on the FOS's webpage, 'Are there any time limits for complaints?', it states that the time limits for court action do continue to run while a complaint is being considered by the FOS. As stated previously, complainants have the option of taking complaints to Court rather than to the FOS. Complaints referred to the FOS can be withdrawn by the complainant at any time in order to start legal proceedings or for any other reason.

What is the role of the Oversight Committee and should the oversight role be combined with Quality Assurance to give a higher level of protection from mistakes for both complainants and respondents?

- The role of the FCA's Oversight Committee as explained above and on the FCA's [website](#) is to take such steps as are necessary to ensure that the Ombudsman Service is at all times capable of exercising the functions conferred by or under paragraph 2 Schedule 17 of FSMA. The powers and remit of the Oversight Committee are focused on ensuring the Ombudsman Service has the tools and resources it needs to do perform its role. Ombudsmen and adjudicators are appointed by the FOS, not the FCA, and the quality assurance of their decisions is, therefore, a matter for the FOS. Further information on the FOS's quality assurance principles can be found on the FOS's [website](#).

Are the service and system rules up to date and adequate as defined?

- The FOS's website states that, "Our powers are set out in Part XVI and Schedule 17 of the Financial Services and Markets Act 2000. We take into account the law, codes and good practice that applied at the time of the event. We also follow the rules in the Financial Conduct Authority's (FCA) handbook, although we're operationally independent of the regulator." If your question is whether FSMA is, 'up to date and adequate as defined', this would be a matter for Parliament or the Government to consider, not the FCA.

The question that then arises, if permitted, is has the FCA been instrumental in the problems by failing to ensure that sufficient oversight has been exercised to prevent what has happened? The defined DISP rules point to an answer of 'Yes' because the process has demonstrably failed and the DISP service rules have not been followed. Bringing this to the attention of the Independent Assessor has failed because no response has been received to what, in system terms, is a serious failing, regardless of the intrinsic cost and value of the complaint.

- The implication of the question appears to be that the FOS has failed in its function under the DISP rules because of your dissatisfaction with the way in which it dealt with your complaint and with the Final Decision.
- The option available to you if you are unhappy with the outcome of the FOS's complaints process would be to pursue the matter in Court. The FOS's website states, "*If either side is unhappy with the decision, they can't appeal an ombudsman's final decision to another ombudsman. You also can't go to court to appeal the ombudsman's decision just because you disagree with it. However, we're a public body and we can be judicially reviewed. A judicial review usually focuses on the process an ombudsman has used to make their decision, not on the facts and evidence of the dispute itself. You'd probably need to get legal advice before starting judicial review proceedings.*"

The question must be asked 'is it correct that the FOS Board appoints the Independent Assessor?'. If the IA is to be seen as truly independent might it not be better if selection was made by the FCA who have ultimate responsibility for the probity of the service?

- The Independent Assessor is appointed by the FOS's board. The Ombudsman Service is operationally independent of the FCA and, whilst the FCA has powers under FSMA to appoint and remove members of the FOS board, this does not extend to the Independent Assessor. The independence of the Independent Assessor is secured by the independence of the FOS board, the members of which are all 'non-executive' and have no involvement in individual complaints.

The system rules are not defined and appear to be based on internal rules and various promotional concepts.

- I understand that this is your opinion, but, I am unable to provide comments on this assertion. You may wish to communicate your assertions to Parliament and the Government as this falls outside the FCA's Oversight role.

The combination of FOS and Independent Assessor has not yielded the required protection; a more proactive quality assurance system is needed.

- I understand that this is your opinion, but, I am unable to provide comments on this assertion. You may wish to communicate your assertions to Parliament and the Government as this falls outside the FCA's Oversight role.

*The IA can only consider service issues and then not until a case is closed, when the horse has bolted. Four possible exceptions to this rule have been cited on the IA website. This case matches all four but the FOS Complaints *****2 and *****6 request to intervene a year ago (13 Jan 2020) was unable to be actioned. No reasons were given. Increased workload and work pressures invariably lead to more opportunities for error.*

- The role and function of the Independent Assessor and their terms of reference is a matter for the FOS board, not the FCA. The reason the Independent Assessor cannot review the merits or outcome of a complaint is due to S.228(5) FSMA, which states that an Ombudsman's decision is final and binding.
- If you have not already done so, you may wish to direct your views about the Independent Assessor's actions (or inaction) to the FOS.

FOS have failed to address and have absolved the respondents, [the Manufacturer's Financial Services Company], of any guilt, apparently without even investigating the case in any detail, even though that detail has been provided. The (new) IA (Independent Assessor) has effectively rubber-stamped the FOS findings, it would appear without too much regard for any comments that have been put forward."

- I am unable to comment on this as it is outside the FCA's remit to intervene in the Ombudsman Service's complaints process or how it arrives at its decisions. As noted above, the Independent Assessor cannot review the merits or outcome of a complaint due to S.228(5) FSMA which states that an Ombudsman's decision is final and binding.

Why you are unhappy with the regulator's decision

7. You wrote to the FCA on 14 August 2021, stating that you could not accept the FCA's decision as set out in the Decision Letter. You explained that this was because the complaint that you had submitted to the FOS had not been addressed by the FOS. You said that your "desk audit" of how your complaint to the FOS was handled revealed non-adherence by the FOS to s.228 of FSMA, the ADR Regulations and the DISP rules in the FCA Handbook. You said that the FCA is responsible for ensuring that the FOS is able to meet the requirements of an ADR entity at all times and that the MOU between the FCA and the FOS states that the FCA can interfere in the FOS's activities. In response to the FCA's comments in the Decision Letter that you could take your complaint against the manufacturer to court, you pointed out that the ADR objective is to ensure that court proceedings are not necessary.

8. With your letter of 14 August 2021, you submitted updated versions of the full text document and the abstract that accompanied your email to the FCA of 29 January 2021. After you had been notified of my appointment to determine your complaint under Stage 2 of the Scheme, you submitted further updates of the full text document and the abstract (the Abstract). These are both dated 18 March 2022 and run to 524 and 152 pages respectively.
9. In the full text document you make a number of points about the FCA's explanations in the Decision Letter in respect of its oversight duties in respect of the FOS by way of annotations in the margin of your quotation of the Decision Letter. These points include the following:
 - You say that if the FCA cannot investigate complaints about the actions or inactions of the FOS under paragraph 2 of the Scheme, how does it exercise its functions at all?
 - You ask whether there are any "system" rules relating to how the Ombudsmen make legally binding decisions which has due regard to the law.
 - In response to the FCA's point that if you are unhappy with the Ombudsman Service's process and seek further additions to the process/quality assurance this is something you may wish to obtain legal advice on and/or raise with Parliament and the Government as this is outside the FCA's remit you ask: Does the FCA not seek to improve the FOS when/if required?
 - In response to the FCA's explanation that for the purposes of the ADR Regulations, the "outcome of the alternative dispute resolution procedure" is the first opinion that the FOS issues on a complaint, you say that a provisional decision is not the "outcome" and that you are still waiting for your complaint to the FOS to be addressed.
 - You ask who vets FOS Rules and the need for new rules and adherence to them and question whether the system rules fall outside the FCA's Oversight role.
 - You say it is for the FCA to ensure that the FOS has "adequate resources at all times".
 - You complain that no-one has admitted to being able to look at the probity of individual FOS cases from which an overall picture may be drawn.
10. In the Abstract, you make a number of distinct points about the FCA's determination of the FCA Complaint in the Decision Letter and the FCA's oversight of the FOS. These include the following:

- Without considering the papers about your complaints to the FOS and the Independent Assessor, the FCA is not able to determine the complaint about failings in the FCA's oversight for lack of evidence. You say that the FCA investigator has to look into the facts of your case before the FOS as part of the FCA oversight function.
- You ask why the FOS's Independent Assessor Complaints scheme does not include provisions similar to the Scheme and why the FCA does not appoint the Independent Assessor

11. The Abstract also raises complaints about the FOS's Independent Assessor, and the Financial Ombudsman Service. In the Abstract you identified what you say are three key other documents in addition to the Abstract; however, none of those documents relate to the FCA's oversight of the FOS.

Relevant extracts from the Financial Services Act 2012 (FSA 2012)

12. "84. Arrangements for the investigation of complaints
 (1) The regulators must—
 (a) make arrangements ("the complaints scheme") for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions (see section 85), and..
 2)For the purposes of this Part "the regulators" are the FCA, the PRA and the Bank of England, and references to a regulator are to be read accordingly."

"85. Relevant functions in relation to complaints scheme

....

(2) The relevant functions of the FCA or the PRA are-
 (a) its functions conferred by or under FSMA, other than its legislative functions and its standards review functions, and
 (b) such other functions as the Treasury may be order provide."

Relevant Extracts from the Financial Services Act 2000

13. Schedule 17 Paragraph 2

"(1) The FCA must 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.

(2) The FCA must exercise any function falling within sub-paragraph (3) in a way which is consistent with enabling the scheme operator, at all times, to qualify as an ADR entity and to meet the requirements in Schedule 3 to the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015".

(3) [list of functions of the FCA]

Relevant extracts from the Complaints Scheme

14. The Scheme states that:

3.1 The Scheme covers complaints about the way in which the regulators have acted or omitted to act, including complaints alleging:

- a) mistakes and lack of care;
- b) unreasonable delay;
- c) unprofessional behaviour;
- d) bias; and
- e) lack of integrity.

Paragraph 3.4 states that

3.4 Excluded from the Scheme are complaints:

....

e) complaints about the actions, or inactions, of the Financial Ombudsman Service....

Preliminary Points

- 15. The Scheme was established pursuant the FSA 2012 for the investigation of complaints against the FCA, the PRA and the Bank of England arising in connection with the exercise of, or failure to exercise, their relevant functions.
- 16. The relevant functions of the FCA for the purposes of the Scheme, which are listed in Section 85 of FSA 2012, are, broadly speaking, its functions under FSMA other than its legislative functions. They do not include the FCA's functions under the ADR Regulations and it does not seem to me that the functions of the FCA contained solely in the ADR Regulations are within the statutory remit of the Scheme. By way of example, the FCA's function under the ADR Regulations to assess the application of the FOS to become an ADR entity is only found in the ADR Regulations. However, a complaint alleging that the FCA is not fulfilling its duties under paragraph 2(2) of Schedule 17 of FSMA to exercise any function falling within sub-paragraph (3) in a way which is consistent with enabling the FOS, at all times, to qualify as an ADR entity and to meet the requirements in Schedule 3 of the ADR Regulations is within the scope of Scheme. My understanding is that the effect of para 2(2) is to control how the FCA exercises its FSMA Schedule 17 2(3) functions rather than to import into FSMA its functions under the ADR Regulation. That is to say, the FCA must exercise those functions in a way which is consistent with allowing the FOS to qualify as an ADR entity. However, some of the FCA's functions under the ADR Regulations overlap with the FCA's functions under the FSMA so, in that respect, could be within the Scheme.

17. Complaints about the actions, or inactions, of the FOS are specifically excluded from the Scheme by paragraph 3.4(e).
18. The FOS is the operator of the alternative dispute resolution (ADR) scheme established by FSMA for complaints against regulated firms by their customers. The ADR scheme provides for the resolution of certain types of disputes quickly and fairly with minimum formality by an independent person (an Ombudsman). The FOS has its own board of independent non-executive directors who are responsible for the oversight of the FOS's day-to-day operations.
19. The Ombudsmen, who are appointed by the Board of the FOS on terms that guarantee their independence, must determine complaints by reference to what in their opinion is fair and reasonable in all the circumstances of the complaint. In considering what is fair and reasonable, the matters they must take into account include relevant law and regulations, regulators' rules, guidance and standards and codes of practice. When the Ombudsman has made his final determination of a complaint, the complainant can accept it or reject it. When the complainant accepts the final determination, it becomes final and binding.
20. Complainants who submit complaints against financial services firms to FOS are not bound to accept the final determination of their complaint by the Ombudsman. They have the option if they do not like the final determination of rejecting it and commencing court proceedings against the firm against which they have submitted a complaint. If the complainant is unhappy with the Final Decision from the Ombudsman about their complaint, the option available to them is to commence legal proceedings. Also, because the FOS is a public body, the FOS and its Ombudsmen are subject to being judicially reviewed by the court under its supervisory jurisdiction. As the FOS website suggests, a judicial review usually focuses on the process an ombudsman has used to make their decision, not on the facts and evidence of the dispute itself.
21. The FOS is operationally independent from the FCA. In practice, this means that the FCA has no remit to intervene in decisions the FOS and its Ombudsmen make in individual cases submitted for resolution under the FOS ADR Scheme. The FSA's functions in relation to the FOS under FSMA include what the FCA describes as an oversight function. This involves the FCA taking such steps as are necessary to ensure that the FOS is, at all times, capable of exercising the functions conferred on the FOS by or under FSMA. It is significant that this is not a general oversight function; rather, it is focussed on the FOS's capability to perform the functions conferred on the FOS by FSMA. Shortcomings in the FOS's performance in a particular case or cases, even if established, do not equate with evidence of the kind of systemic failure which might require the FCA's intervention, or support a conclusion that the FCA has failed in its duties. The FCA's oversight function does not extend to giving the FOS or its Ombudsmen directions on handling particular complaints or the making of operational decisions.

My Analysis

22. In so far as your complaint is against the FOS and/or its Independent Assessor, then I cannot investigate it under the Scheme because complaints against the FOS are specifically excluded under paragraph 3 (e) of the Scheme. Your allegation that the FOS did not-adhere to s.228 of FSMA, the ADR Regulations or the DISP rules in the FCA Handbook is not therefore something I can investigate. Turning to your complaint against the Independent Assessor, they are an employee of the FOS appointed by and accountable to the Board of the FOS, rather than an employee of the FCA. I suggest that in so far as your complaint is with the FOS and its Independent Assessor and their processes these are matters for you to seek to raise with the Board of the FOS to the extent that you have not done so already.
23. Likewise, as I have noted above, the FCA functions in the ADR Regulations are not themselves covered by the Scheme. However, I recognise that the crux of your oversight complaint is that the FCA has not discharged its oversight functions under paragraph 2(1) of Schedule 17 of FSMA. This paragraph provides that the FCA must take such steps as are necessary to ensure that the FOS is at all times capable of exercising the functions conferred on the FOS under the Act. I stress here that it is my understanding that the focus of the FCA's oversight function is on the FOS's capability, rather than the FCA undertaking an assurance function in relation functions that have already been exercised by the FOS, an Ombudsman or the FOS's Board or Independent Assessor..
24. I do not accept that the FCA Complaints Team should have investigated how the FOS or its Ombudsman have handled your complaint to the FOS. It is not part of the FCA Complaints Team's role to perform an oversight role in relation to the FOS. The role of the FCA Complaints Team is to investigate complaints relating to the FCA's discharge of its functions under FSMA. The FCA Complaints Team must do this under the provisions of Stage 1 of the Scheme. Accordingly, while the FCA Complaints Team can investigate complaints about the FCA's oversight of the FOS, it cannot investigate the handling of individual complaints by the FOS or its Ombudsmen.
25. I also accept the FCA's position that it is outside the FCA's remit under FSMA to intervene in the FOS's complaints process or how Ombudsman and others in the FOS involved in the process make their decisions on individual complaints. Intervention in individual complaints submitted to the FOS or the day-to-day operations of the FOS is not therefore part of the FCA's oversight role in respect of the FOS. In reaching this conclusion, I have considered your argument that the Memorandum of Understanding between the FCA and the FOS (the MOU) states that the FCA can interfere in the FOS's activities. Whilst the MOU does describe how the FCA and the FOS intend to comply with their obligations to each take such steps as they consider appropriate to exercise their respective functions under FSMA, the FCA's oversight functions do not include intervening in individuals' complaints against firms. This is made clear in paragraph 6 (c) of the MOU which states that the FCA does not investigate individual complaints against firms it

regulates. Further, paragraph 6(e) of the MOU states that responsibility for the day- to-day-operations of the FOS is for the FOS. In my view, the fact that the MOU provides for the FOS to give the FCA the information the FCA reasonably requires to discharge its functions with regard to the FOS, does not override the restriction on the FCA intervening in particular complaints being handled by the FOS.

26. In short, you allege that the FCA cannot discharge its oversight role without looking into how the FOS determines individual cases and assessing whether they are handled by the FOS in a manner that complies with the ADR Regulations, s.228 of FSMA, the ADR Regulations and the DISP rules in the FCA Handbook. You illustrate this point by saying that the FCA should have investigated the facts of your case before the FOS as part of its oversight function. I do not accept this premise. To my mind, this would in effect, put the FCA in the position of reopening final decisions of the Ombudsman and interfering in the processes by which final decisions are reached. If the FCA were to do this, it would, be side-stepping Parliaments' intentions as to the finality of final decisions of Ombudsmen and the independence of the Ombudsmen and the FOS from interference in their handling of individual complaints. Further, by such interference the FCA would be at risk of substituting its own assessment of individual outcomes for the supervisory jurisdiction of the courts to review alleged errors in the dispute resolution process by which Ombudsmen reach final decisions and ousting the jurisdiction of the courts to determine disputes where the complainant has rejected the Ombudsman's decision.
27. My understanding is that the way the FCA performs its oversight role through the work of the Oversight Committee is forward looking. It focuses on the capability of the FOS to exercise its statutory functions, rather than how the FOS and Ombudsman have handled specific cases. Whilst the Oversight Committee does not involve itself in individual complaints, it does have a duty to consider the FOS's ability to exercise its statutory functions under FSMA and this includes considering general concerns about the FOS as an organisation, such as allegations of impropriety of its staff, or systemic complaint handling problems. This is not to say that the Oversight Committee ignores individual complaints against the FOS as part of its oversight function. In this regard, I am told by the FCA that, following the suggestion of the Complaints Commissioner in 2019, the Oversight Committee monitors and collates information it receives about the performance of the FOS independently from the FOS's own reports. This includes a system whereby both the FCA's Regulatory Affairs Team and the Oversight Committee receive and review a regular summary of any complaints received by the FCA about the FOS to inform their work. This summary lists all such complaints with a description for each and the numbers are broken down by the outcome of any investigation undertaken by the FCA Complaints Team. This seems to me to be a sensible procedure for the Oversight Committee to adopt in order to enable it to identify any systemic issues affecting the capability of the FOS to perform its functions under FSMA relating to the FOS's role as an ADR entity. It avoids encroaching on the

responsibility of the FOS board for the day-to-day operations of the FOS and the independence of Ombudsmen in their handling of individual cases that have been submitted to the FOS. I believe that this addresses your question about how the FCA exercises its oversight function in respect of the FOS. Further, I hope that it provides reassurance that complaints to the FCA about the probity of individual FOS cases do feed through to the FCA's Oversight Committee and thereby contribute to their overall picture of the FOS's capabilities.

28. In view of the fact that the FCA states in the Decision Letter that "You have brought your complaint with the Ombudsman Service before the FCA's Oversight Committee" I have investigated whether the FCA's Oversight Committee were made aware of your complaint. Whilst I cannot share the documents the FCA has shared with me because of statutory confidentiality restrictions to which I am subject, I am satisfied that the Oversight Committee were informed that you had made a complaint about the FOS to the FCA because you were unhappy with the FOS's handling of your complaint and the outcome. The Committee was also told that you had complained specifically about the FOS's quality assurance.
29. You have asked two questions about the rules by which Ombudsmen make their decisions. You question whether the rules have due regard to the law, and whether they fall outside the FCA's oversight role. These were not matters that you raised in your Stage 1 Complaint, and complaints about the FCA's rule making are outside the scope of the Scheme, such that I cannot investigate them. However, you may find it helpful to know that FSMA provides for some of the rules applicable to the FOS's handling of complaints (which are to be found in Chapter 3 of the DISP part of the FCA handbook) to be made by the FCA but, for most part, the rules are to be made by the FOS. Those made by the FOS are subject to the FCA providing its prior consent to the making of these rules by the FOS. So, the FCA has a specific function under FSMA, Schedule 17 paragraph 14(7) to provide prior consent to those rules applicable to the FOS's complaints handling procedures in DISP Chapter 3 made by the FOS. Generally, changes to these complaint handling rules are introduced after public consultation and both the FOS and the FCA take into account feedback from the consultations before the amendments to the rules are finalised. In so far as the rules in DISP do not have due regard to the law or are not adhered to, I would expect these are points that a complainant may seek to pursue in Judicial Review proceedings. It is not a function of the FCA to examine the FOS's handling of individual cases to determine whether the DISP rules have been followed. The history of changes to the rules in DISP Chapter 3 and the related consultation papers, to my mind, evidence the fact that the need for amendments is considered by both the FOS and the FCA in the light of changing circumstances.
30. You make a number of points about the systems and standards for quality assurance in respect of decisions of the FOS and its Ombudsman. I agree with the FCA that the FOS's assurance framework is a matter for the FOS and its board and is not within the FCA's remit. This has been the position since the FOS was established pursuant to FSMA (see FSA Consultation Paper CP33). However, it

may be of some comfort to know that the FCA's Annual Report and Accounts for 2021/2022 records that its work during the year included engaging with the FOS on proposals to revise the wider assurance framework.

31. In respect of the questions you raise about the FOS's Independent Assessor complaints scheme, I have already made the point in paragraph 22 above, that I cannot investigate the work of the FOS's Independent Assessor or the procedures they follow because these are matters for the FOS board, rather than the FCA, and therefore fall outside the Scheme. As to your complaint that the FSA do not appoint the Independent Assessor, this is because the Independent Assessor is appointed by the FOS's Board to investigate complaints about the FOS's service levels and practical handling of cases under terms of reference set by the Board. It seems to me that were the FCA to seek to take over the appointment of the Independent Assessor from board members the FCA appoints, it would be straying into operational decisions of the FOS rather than exercising oversight.
32. You make the point that it is for the FCA to ensure that the FOS has "adequate resources at all times". The FCA accepted in the Decision Letter that the powers and remit of the Oversight Committee are focused on ensuring the FOS has the tools and resources it needs to do perform its role. Some of your criticisms of the FOS's resources arise in connection with your complaint about the time the FOS took to deal with your complaint. I can see that both the FOS and the FCA Complaints Team take a different view from you as to whether the FOS met the time limit under Schedule 3 Paragraph 6(d) of the ADR Regulations for notifying you of the outcome of your complaint to the FOS. This is not an issue of law I can resolve, but I note in this context that the Independent Assessor explained in response to your complaint of September 2019 about the FOS's service levels that the FOS is a public authority with limited resources facing unprecedented demand for its services. That does not seem to me to evidence an oversight failure by the FCA with respect to the FOS's resources. In many respects, your criticisms of the FOS's resource constraints arise in the context of your expectations as to the quality and assurance systems and controls you expect the FOS to have in place which you acknowledge would likely require significant additional resource. To me, they do not evidence an oversight failure by the FCA with respect to the FOS's resources.
33. I appreciate that you have applied your considerable energy, as well as your skills and your experience of systems and processes, to review the current framework for the system for alternative resolution of consumer complaints against financial services firms in the UK. You have included within the Abstract many suggestions as to improvements that could be made to the FOS's processes for handling complaints and quality assurance. However, the intention of Parliament when enacting FSMA was that complaints to the FOS be determined by "*what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case*" (emphasis added see s.228 FSMA). DISP 3.6.4 builds on s.228 by requiring Ombudsmen to take into account the relevant law, regulators rules, guidance and standards (and good industry practice where appropriate) when applying their own

judgment to determine what, in their view, is fair and reasonable. Against the background of this framework, which puts emphasis on the judgment of the particular Ombudsman determining a complaint by a consumer against a financial services firm, it does not seem to me that the matters you have raised evidence a failure by the FCA of its oversight of the FOS. I say this in the context of the functions of the FCA under FSMA that fall within the scope of the Scheme. It cannot be part of the FCA's oversight function to interfere with the process by which individual Ombudsmen reach their opinions when determining complaints. In reaching this conclusion, I have kept in mind that the FOS was established with the aim of resolving disputes within its jurisdiction, quickly and fairly with minimum formality by an independent person.

34. In many respects the courts provide consumers with a form of quality control in respect of determinations of complaints by Ombudsmen. Firstly, because the complainant is free to reject the Ombudsman's determination and pursue their complaint through the courts instead. Secondly, in some circumstances the courts' supervisory jurisdiction over the FOS may be invoked by Judicial Review proceedings. One such example is where there is an issue as to the process an Ombudsman has used to make their decision. You make a valid point that the cost of court proceedings is disproportionate to the amount in dispute in many consumer finance complaints to the FOS such that initiating court proceedings is not an effective remedy. But, the financial viability of taking disputes which have been submitted to the FOS through the courts does not impact on the nature of the FCA's oversight function in respect of the FOS. It is not part of the FCA's oversight role of the FCA to perform the role of a court in circumstances where the cost of legal proceedings would be disproportionate to the amount in dispute.
35. Finally, I turn to the issue of the time taken by the FCA Complaints Team to determine the FCA Complaint. It took the FCA Complaints Team nearly 7 months to determine the FCA Complaint. The FCA apologised to you for the delay and offered you an ex-gratia payment of £75. You commented that your expertise has always been valued a little higher and that the amount offered "for [your] three year's work" does not even cover the cost of the software that the FOS system requires for you to communicate with it.
36. In view of my conclusions in respect of the FCA oversight complaint, the FCA is only responsible for the delay in determining your FCA Complaint under Stage 1 of the Scheme. That is the period from 29 January 2021 until 13 August 2021. Whilst I know you have found the length of time you have been engaged in dealing with the claim you made to the FOS extremely frustrating, the FCA is not responsible for the delays you experienced in respect of your initial complaint to the FOS or the time that has elapsed between the Decision Letter and this Final Report. Further, it is not a matter in respect of which I can make recommendations under the Scheme. Under FSMA, the FCA is immune from liability unless the court finds that the FCA acted in bad faith. The FCA takes into account its immunity when it decides if it should pay you compensation and, if so, how much. The FCA has recently published its internal guidance on ex-gratia payments for complaints

handling delays: <https://www.fca.org.uk/about/complain-about-regulators/ex-gratia-payments-complaint-handling-delays>. The FCA's offer to you of £75 is in line with the level the FCA believes appropriate when assessing the impact in terms of distress or inconvenience of avoidable delay of a time period corresponding to the delay that you suffered. Accordingly, I will not recommend the FCA to increase its offer.

Conclusions

37. My conclusions are as follows:

- a. I cannot investigate your complaints against the FOS and its Independent Assessor because they are excluded from the Scheme by paragraph 3.4 (e);
- b. I have investigated your complaint against FCA in respect of its oversight of the FOS but cannot uphold it; and,
- c. The FCA's offer of an ex-gratia payment of £75 in respect of the delay in determining the FCA Complaint is appropriate, and the FCA have confirmed that it is still available to you should you wish to accept it.

Roger S M Best

23 January 2023