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Complaints Commissioner's Detailed Damning Report on the FCA's Oversight of LCF Confirms Alan and Gina Miller's Charge That The FCA's New Proposed Compensation Scheme Is Illegal. The Treasury Must Now Launch an Independent Review of the FCA

On the 15th February the Complaints Commissioner issued the long awaited final report to complainants in respect of the FCA's oversight of LCF and proposed changes to the FCA Compensation Scheme.

In response to the True and Fair Campaign repeatedly exposing to the Treasury Select Committee the FCA's brazen attempt to break the law. This culminated in our formal complaint to the Complaints Commissioner, along with the law firm Shearman and Sterling, as acknowledged within the final report (see annex).

In her report, The Commissioner, Amerdeep Somal, criticises "***The FCA's approach to compensation in the LCF cases is unjustified and does not stand up to scrutiny,"*** and confirms that the attempt by the FCA to introduce a new 'sole or primary cause' test *"frustrates the object and purpose of s.87(5) of the FSA 2012; does not provide the desired consistency of approach; is inadequately reasoned; and its proposed introduction ought to have been subject to public consultation"* i.e**., it was illegal and introduced in an underhand, covert manner.**

Furthermore, the FCA's Remedies Statement was found to be completely bogus in purporting to seek 'a consistent and fair approach to proposals for compensation' when she found that '*if the FCA will only make payments to consumers in exceptional circumstances which are outside the terms of the policy which is intended to provide consistency, then the policy itself can provide no consistency at all for that group. It therefore does not even meet its own stated aim*.'

Para 117 goes to the heart of what the True and Fair Campaign has said all along, that with the new test **"*ex gratia compensatory payments arising from regulatory and supervisory failings will never be available in practice*"** and the fact that the FCA could not even give the Commissioner an example of when a payment would be made is indeed **"*perverse*".**

Gina Miller said, "*This report leaves the FCA in a difficult position: their diversion tactics are now laid bare for all to see, and I cannot see how they can justify the Remedies Statement now."*

"It is a damming indictment of the entire FCA Board that it sought to reduce the rights of the public to seek compensation from the FCA for regulatory failure in such an underhand manner."

"This report should be the final straw that leads to the Treasury stepping in and ordering a proper Kingman style independent review of the FCA."

"Given the former Chair's key role in this sorry affair, including various statements made by him in correspondence and orally to the Treasury Select Committee, and the True and Fair Campaign we do not believe that he should not be considered fit for any public office in the future."

Alan Miller said *"It is imperative that the FCA does not make up the law as it goes along, or who prioritise the best interests of the FCA over that of the general public.*

The Complaints Commissioner rightly states her objection to the FCA seeking to 'to introduce the "sole or primarily responsible" test by way of amendment to the Complaints Scheme and decided to introduce it without the benefit of public consultation.'

"In my view, the NEDs have completely failed to perform their oversight function of the FCA Executive Board and should be urgently replaced."

The key paras are 117 to 125, and the recommendations at 182 onwards, with the Commissioner vocal with her dissatisfaction at the FCA's smoke and mirrors tactics to confuse consumers.

The report confirms that the FCA deliberately conflated the principles of ex gratia payments with that of immunity: both are separate principles and can exist in parallel. Instead, the FCA relied on its statutory immunity to say that's its new position with respect to ex gratia payments was not only tenable, but defensible. (See para 120)

The Commissioner has clearly stated that the FCA's test is a departure from historic practice - in particular para 121 precisely refutes this argument - and has **no basis in statute**. With Para 118 stating that the new proposed test is a **"departure from both the statute and from the published scheme itself**."

Further at para 123, **the Commissioner again repeats the fact that the FCA introduced this new test through the backdoor and states that the FCA has not been able to refute this:**
"*In response the FCA makes the general point that the "sole or primary cause" test reflects its historic practice but, somewhat surprisingly, did not otherwise seek to refute this inference in its comments on my preliminary report*"

- END -

Annex - Pertinent screenshots from the report:

Element Two – ex gratia payment/compensation

74. Here I assemble all complaints in one and treat these as a compendious complaint about the FCA's failings in relation to LCF and in that context, the FCA's further failings in adopting a particular compensatory test regarding those complaints. Many complainants have asked me to recommend that the FCA award them an ex gratia compensation payment in view of the FCA's regulatory and supervisory failings with respect to LCF and/or to consider the points raised by Shearman and Sterling and, in some cases, Gina and Alan Miller of the True and Fair Campaign, on this issue. I have received a letter from the True and Fair Campaign dated 27 April 2021 (Appendix 3a) and a second letter dated 9 August 2021 (Appendix 3b).

100. In response, the True and Fair Campaign wrote to the FCA Chairman Charles Randell on 27 April 2021. The letter can be accessed here and additionally at Appendix 3a of my report: https://trueandfaircampaign.com/wp-content/uploads/2021/04/Open-Letter-to-Mr-Randell-FCA-From-The-True-and-Fair-Campaign-27-April-2021-1.pdf (trueandfaircampaign.com)



The publication of the Consultation Paper led to considerable and noteworthy controversy.[45] Our clients, and several public figures, asked that the FCA at least delay implementation of the amended Scheme Rules or not apply them to existing cases or complaints concerning matters arising prior to the date the Scheme Rules are to be amended.[46] Gina Miller, co-founder of the True and Fair Campaign, commented that the FCA's proposals, "*amount to the FCA blatantly attempting to close the door on all future compensation for financial loss suffered by victims where regulatory failure by the FCA has contributed to their loss*" and "[t]*he rush to undertake and conclude this consultation before publication of three major independent reviews, likely to detail the FCA's failures…is highly suspect*.[47] Mel Stride, Chair of the Treasury Select Committee, received "*several representations*" regarding the length of the consultation and asked the FCA to give "*serious and urgent consideration*" to extending the consultation period.[48] Before the consultation was launched, the Complaints Commissioner had informed the FCA that it could see no justification for curtailing the usual 12-week consultation and, in its consultation response, stated that, "*there are some significant policy issues raised by the revisions to the Scheme, issues which affect potentially vulnerable people and involve restrictions upon a statutory scheme*".[49] The matter was widely discussed and commented upon in the press, as was our clients' Consultation Response.[50] The FCA bowed to this and other public pressure and outcry, including comments from Dame Elizabeth who, "*wrote to the Chair of the FCA in September 2020 to express her concern about the potential for the proposals set out in the consultation paper adversely to impact on any complaints which might be made by Bondholders after publication of this Report.*"[51] As a result, the FCA announced in December 2020 that it would be delaying the implementation of the proposals on the basis of concerns raised by respondents to the Consultation Paper.[52]

114. Given the nature of FCA's role as a regulator of businesses, it is likely that it will always, or almost always, be the case that ex gratia compensatory payments for regulatory and supervisory failings, is caused by the default of a third party, such that the FCA is not the "sole or primary cause". As against that, Parliament has concluded that there will be some situations in which the Complaints Commissioner has the power to recommend, if appropriate, the regulator make a compensatory payment : see s.87(5) of the FSA 2012. The FCA's public statements also acknowledge that such payments should be available: see e.g. CP20/11 at paragraph 4.4. The test as currently adopted by the FCA thus appears on the face of it to frustrate the statutory object and purpose underpinning the Complaints Scheme: see *Padfield v Minister of Agriculture* [1968] AC 997.



118. Thus, even though the approach taken to LCF investors purports to take account of the factors in paragraph 7.14 of the Complaints Scheme, the de facto position appears to be that the ex gratia compensatory payments arising from regulatory and supervisory failings will never be available in practice. The FCA states that the Remedies Statement is not a bright line and that there may be exceptional circumstances when such ex gratia payments are made. This is a departure from both the statute and from the published scheme itself: there is no fifth factor within paragraph 7.14 requiring the presence of exceptional circumstances.

119. Further, the FCA's stated aim in publishing the Remedies Statement was to assist with ensuring a consistent and fair approach to proposals for compensation based on the individual features of the complaint and the FCA's culpability. But if the FCA will only make payments to consumers in exceptional circumstances which are outside the terms of the policy which is intended to provide consistency, then the policy itself can provide no consistency at all for that group. It therefore does not even meet its own stated aim.

120. In the FCA's letter dated 9 August 2021, the FCA sought (at paragraph [32]) to explain that the first three paragraphs of the Remedies Statement are the reasons for the test set out in the fourth paragraph. As to that purported explanation, however:

    a. The first paragraph of the Remedies Statement refers to FCA's statutory immunity and the fact that the compensation scheme is not intended to undermine that. However, that it is not of itself sufficient justification for a "sole or primary" test of causation. First, the FCA's statutory immunity at section 222 of FSMA 2000 is expressed to be an immunity from "liab[ility] in damages". Nothing the Commissioner is empowered to do renders the FCA liable "in damages". Second, the power of the Commissioner to recommend an award of financial compensation could be seen as designed to counterbalance the possible injustice of a total lack of recourse against an otherwise unaccountable regulator. Third,

the regulator is in principle free to comply with them or not. My power to make recommendations that the FCA make ex gratia payments, subject to the various considerations described in the published Complaints Scheme, represents a compromise between the various different interests at stake, rather than a means of cutting across the FCA's statutory immunity.

b. The second paragraph of the Remedies Statement seems to be referring to distress and inconvenience, which the FCA considers separately from ex gratia compensatory payments for regulatory and supervisory failings, and so is not of direct relevance to the "sole or primary cause" test.

c. The third paragraph of the Remedies Statement points out that it is often the case that, where a complainant is seeking compensation for financial losses, those losses have been caused by a third party. As observed above, that will presumably always be the case. But in order for section 87(5) of FSA 2012 to have some content, there must be some circumstances in which it is appropriate for the FCA to make an ex gratia payment for supervisory or regulatory failings. The third paragraph thus begs the question of when that will be, i.e. what degree of culpability is required on the part of the FCA before an ex gratia compensatory payment for regulatory and supervisory failings will be appropriate, and why?

121. The FCA contends that the "sole or primary cause" approach reflects historic practice. Such an approach is not self-evident from the face of the complaints scheme itself. Instead, the FCA has sought to refer to a number of what it says are examples of this being the case. Upon review, however, it seems that none of them do support a "sole or primary cause" approach as alleged. The short point to be made about all of them is that, in each case, the fact that the FCA was or was not the sole or primary cause of the loss is just one of several factors that are taken into account in deciding whether an award of ex gratia compensation should be made. None of them is an example of "sole or primary cause" working as a decisive test for decisions as to the payment or non-payment of compensation. Some of them are examples of the opposite. For

example, in complaint FCA000641, upon which the FCA relied at paragraph 25(2) of its August letter, my predecessor expressly rejected (at [164]) the FCA's reliance upon responsibility lying with the bank and its auditors was misplaced, because whilst the FCA was right about the bank's responsibilities, that did not preclude the possibility that the FCA, having been found to have fallen short in its responsibilities, might consider offering an ex gratia sum. And in respect of FCA00503, the FCA referred to a range of factors in declining to offer financial compensation, including the fact that the complainant received sensible guidance from the FCA before investing which was not followed and which, had it been followed, would have meant the investment was not lost in the way that it was. The complainant did not say that they relied on the Register.

122. In any event, even if this were the historic approach of the FCA, then that does not make it correct, for all the reasons already set out above. Further, this is not encapsulated in 7.14 of the Complaints Scheme.

123. I also have concerns about the fact that the FCA initially sought to introduce the "sole or primarily responsible" test by way of amendment to the Complaints Scheme, and decided to introduce it without the benefit of public consultation. This suggests that the FCA originally considered that the adoption of the test would, in effect, amount to a substantive change of the rules. In my view, the FCA's original position, that this was a substantive rule-change requiring consultation, was correct: it represents a departure from historic practice; it establishes a different set of considerations to those contained within paragraph 7.14 of the Complaints Scheme; and as observed above it would in substance seem to exclude all or almost all ex gratia compensatory payments to consumers arising from regulatory and supervisory failings, which is not a position that it would otherwise be possible to infer from the statute or the current iteration of the Complaints Scheme. I observed in my preliminary report that the introduction of the test via a Remedies Statement without the benefit of public consultation, at the time and in the circumstances in which it was introduced, tends to suggest that this may have been an attempt to introduce what amounts to a substantive change to the Scheme via the backdoor, without the proper level of fair scrutiny to which it ought to have been subject. In response the FCA makes the general point that the "sole or primary cause" test



reflects its historic practice but, somewhat surprisingly, did not otherwise seek to refute this inference in its comments on my preliminary report.

124. Thus the "sole or primary cause" test contained in the Remedies Statement frustrates the object and purpose of s.87(5) of the FSA 2012; does not provide the desired consistency of approach; is inadequately reasoned; and its proposed introduction ought to have been subject to public consultation. In light of all of this, to the extent that decisions in individual cases are based on the foundation of the Remedies Statement, that foundation is fundamentally flawed and therefore vitiates the decisions that have been made. The decisions ought to have been based only upon the factors set out in the version of the Complaints Scheme applicable at the relevant time; not on the test set out in the Remedies Statement.

125. Irrespective of the Remedies Statement upon which the LCF approach is purported to be based, I am in any event of the view that the FCA's decision not to award an ex gratia payment for its regulatory failings lacks adequate justification. In my preliminary report, I gave the following reasons for this part of my decision.

149. For all the reasons given above, the FCA's approach to compensation in the LCF cases is unjustified and does not stand up to scrutiny. My decision is limited to the LCF cases that are within scope of this complaint but, given the extent to which the LCF cases rely, at least ostensibly, upon the Remedies Statement, I recognise that my decision also raises wider questions about that policy, as well as the FCA's interpretation of 'direct dealings'. I have also made a number of comments about paragraph 7.14 of the Complaints Scheme, and in particular paragraph 7.14(c) thereof, which may also require further attention in my recommendations below.

150. The FCA has asked me to have regard to the wider implications of an approach to ex gratia compensation which would generally lead to the FCA paying compensation when it is not the primary cause of the loss. My only recommendation is that the "sole or primary cause" test be abrogated, and the position under the Complaints Scheme be restored. That will not necessarily lead to the FCA "generally" paying compensation when it is not the primary cause of the loss; it simply means that decisions about compensation will need to be made in accordance with the terms of the Complaints Scheme. To the extent that this leads to more payments of compensation than has previously been the case, then that is simply the result of an application of the Complaints Scheme which has been in place since 2001.

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Notes to Editors - The True and Fair Campaign

Financial services are one of the UK economy's most important sectors. It represents 7.1% of GDP. It is a major contributor to the UK's public finances and employs more than 2.3 million people. With great success comes greater responsibility on all market participants to uphold the highest standards of probity, transparency, accountability, and fairness.

Since the Financial Crisis in 2007-2008, few lessons have been learnt and there have been even fewer examples of equitable redress in relation to those guilty of a growing tide of mis-selling scandals and regulatory infractions. Worst of all, it has demonstrated a breath-taking betrayal of the trust that is

rightly owed by so-called financial services professionals to their investors, employees, and shareholders.

The True and Fair Campaign, set up by Gina and Alan Miller in February 2012, aims to shine a light on the failures and rip-offs in the sector, and campaign for greater levels of transparency, accountability and product scrutiny, in order to improve customer outcomes.

Since its launch, the True and Fair Campaign has successfully contributed text to MiFID II legally requiring MiFID regulated firms to show 100% of their fees and charges; contributed to Packaged

Retail and Insurance-based Investment Products (PRIIPs) Regulation and The Shareholder Directive; brought to light examples of wrongdoing, poor market practice and lax regulation; and produced telling research into inflated research costs, closet indexation, illiquid funds and misleading performance reporting.

The Millers have also worked with regulators in Australia, across the European Union and the European Securities and Markets Authority (ESMA), as well as with UK politicians on a cross-party basis.

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