

On 22 December 2004, the Complaints Commissioner issued a final report on complaint GE-L0388 to the complainant and the Financial Service Authority. The introduction and summary to that report is published below.

FINAL REPORT ON COMPLAINT GE-LO388

Summary, Findings and Recommendations

- 1 This is the report of an investigation by the Complaints Commissioner of complaint reference number GE-L0388 against the Financial Services Authority (FSA). The complaint falls to be considered under the Main Complaints Scheme.
- 2 The Complainants A and B, a married couple, had used a local Independent Financial Adviser [IFA], X Ltd, to handle their finances and were very concerned to learn in April 2002 that their fund value had decreased to £34,500 from a level of £60,125 in December 1999. (The original investment placed in April 1995 was £47,000).
- 3 By email on 14 June 2002 they advised the FSA Consumer Help-line that they were concerned by the substantial loss on their investments and asked whether their adviser, X Ltd, was authorised. Not having received a reply, they telephoned the Consumer Help-line and were given information on how to make a complaint to X Ltd concerning this matter, which they then did. They received a reply by email from the FSA on 1 July 2002 stating that X Ltd was authorised to conduct investment business and that any dispute between financial firms and their customers, which could not be resolved between the two parties, should be dealt with by the Financial Ombudsman Service (FOS). The Complainants received a response from X Ltd and not being satisfied with the reply, sent their completed complaint form to the FOS on 2 August 2002. By letter dated 1 November 2001 [sic 2002], the FOS concluded that the complaint was time-barred but having received further representation from the Complainants in December 2002, confirmed to them by letter dated 28 January 2003 that the matter was being reviewed.
- 4 On 29 January 2003, X a director of X Ltd, wrote to the complainants to say that he would be resigning from the FSA and would no longer be able to act for them but that another IFA, Y Ltd, with whom a business agreement had already been established on their behalf, would be able to do so. On the same day, X Ltd sent a letter to the FSA stating that it wished to cease to be authorised due to the retirement of the director, X.
- 5 On receipt of the letter from X Ltd, Complainant A contacted the FSA Consumer Help-line on 2 February 2003 to ask whether X Ltd was still authorised and was told by Officer C on the following day that it was authorised and that there was no indication that it was resigning. On 4 February 2003 at 8.48 a.m., Complainant A emailed the same Officer again to explain that he and his wife were in dispute with X Ltd and asked for clarification as to whether it was the director X, of X Ltd, that was resigning and not the company. Again, Officer C assured him by email one hour later that there was nothing on the FSA computer system to say that either the director, X, or the company, X Ltd, had applied to resign. The following day, 5 February 2003, the resignation letter from X Ltd to the FSA (see paragraph 4 above) reached the FSA Cancellation Team division via the internal mail.

- 6 Complainant A spoke with two FSA officers by telephone on 24 February 2003 to explain his concerns and was again advised by the first officer he spoke to that there was no indication on the FSA register that X Ltd had applied to be de-authorised. He was then transferred to the second officer who advised him that *"The Ombudsman would not be able to deal with it [sic the complaint] if he [sic X Ltd] had resigned."* He was given advice about the regulatory system and the Financial Services Compensation Scheme [FSCS] in particular.
- 7 The FSA commenced the normal procedures to de-authorise X Ltd on 6 March 2003 and the Cancellation Team wrote to all divisions in the FSA and the FOS to seek whether there were any matters outstanding against the firm. The FOS replied on 7 March 2003 stating *"Nothing outstanding."* The divisions within the FSA also responded in the negative and erasure of the name of X Ltd from the FSA register was completed on 18 March 2003 and the firm notified on that date.
- 8 The Commissioner understands from information supplied by the Complainants, contained in a letter addressed to them from the Independent Assessor to the FOS, that FOS had made enquiries from X Ltd and obtained the information they required from that firm to investigate their complaint in late March 2003. By letter dated 5 June 2003, the FOS advised the Complainants that the Ombudsman who had made the original decision on jurisdiction was *"..looking through the papers again in light of the additional information."* On or around 27 June 2003, an internal memorandum at the FOS indicated that the Ombudsman may not have been correct on his original decision on jurisdiction and that the complaint would fall within the remit of the FOS. However, the complainants were not advised at that time that the decision had been reversed. Despite reminders from the complainants to the FOS in September and October 2003, they were not apprised of the situation until approximately four months later by letter dated 31 October 2003 from the FOS, which confirmed that their papers had been sent to the FSCS because Companies House had dissolved X Ltd on 23 September 2003.
- 9 On 6 November 2003, Officer D for the FSA Company Secretariat, which is the department responsible for the administration of the formal Complaints Scheme within the FSA, spoke to Complainant A who stated he wished to make a complaint against the FSA in that the FSA had de-authorised an IFA whilst the FOS was investigating a complaint against that firm. Officer D wrote to the Complainant on 10 November 2003 summarising the complaint, as he understood it, and confirmed that it had been entered into the formal Complaint Scheme as of 6 November 2003.
- 10 The FSA sent a holding letter to the Complainant A on 26 November 2003 and their substantive response on 8 January 2004 that did not uphold the complaint. On receipt of this, the Complainants telephoned the FSA leaving a voice message and also replied by email on 9 January 2004 expressing their dissatisfaction with the FSA's findings. Officer D for the FSA replied by email on 9 January 2004 stating that he would reply more fully on his return from leave. The Complainants wrote to Officer D on 16 January 2004 and enclosed a separate letter from Complainant B of the same date. The correspondence (which was also sent by email) stated that there were six other elements of their complaint that had not been considered. Officer D

acknowledged this by email on 20 January 2004 and sent a further substantive reply on 26 February 2004 analysing that the further components of the complaint was that, in general, the complainants believed that the FSA failed to regulate X Ltd. The letter advised the complainant that the FSA did not uphold either this complaint or the earlier one and gave reasons. The Complainants replied on 22 March 2004 reiterating their complaints and rejecting the FSA's findings. The FSA replied again on 8 April 2004 explaining again in some detail why they had not upheld the complaints.

- 11 On 12 April 2004, the Complainants wrote to the Complaints Commissioner asking for an investigation of their complaint against the FSA. On 5 July 2004, following further correspondence with the Complainants, the Commissioner confirmed to them that a Stage 2 investigation would be undertaken and advised the FSA on the same day.
- 12 In the course of the investigation, the Commissioner obtained and has considered written and verbal representations from the Complainants; and documents and correspondence provided to her by the Complainants and by the FSA. The Office of the Complaints Commissioner has also carried out interviews with appropriate personnel at the FSA. The FSA has provided the information and documents asked for during this investigation, including the tape recording of the conversation which took place between Complainant A and the two FSA officers on 24 February 2003 (see paragraph 6 above). The FSA have not, however, been able to find the main file on X Ltd. The Commissioner has been advised that following the firm's de-authorisation the file was archived off-site and although a search has been made, it has not been possible to locate it. The "cancellation" part of the file has been provided to the Commissioner. No information has been withheld by the FSA for reasons of confidentiality.
- 13 The Commissioner has analysed the complaint as having three components.
 - (a) First, that the FSA failed to regulate an authorised independent financial adviser [IFA] by failing to ensure that X Ltd and its principal director, X, followed the rules laid down by the FSA for the protection of consumers; and
 - (b) Second, that the FSA de-authorised X Ltd whilst a complaint against the firm was in progress, thereby failing to protect the consumer; and
 - (c) Third, whether the FSA have complied with their own written procedures and timescales as laid down by the formal Complaints Scheme.
- 14 In relation to the first component of the complaint, in summary, the Commissioner finds as follows.
 - (a) The Complainants were of the opinion that X Ltd did not follow the FSA rules designed to protect its customers; it did not give suitable advice; it did not act with due skill, care and diligence; it did not provide suitable investment advice for their level of risk; and generally did not follow the FSA Conduct of Business rules and therefore the FSA failed to regulate X Ltd and protect the consumer. The Commissioner has no jurisdiction over a complaint about a firm's compliance, or otherwise, with the FSA's rules. If there is a

dispute as to suitability of advice then this is a matter for the FOS. However, a lack of care by the FSA in failing to enforce its rules on an IFA regulated firm does come within his jurisdiction.

(b) It is particularly a matter for regret that the FSA cannot, at the time of preparing this Report, locate the file on X Ltd, however, the Commissioner knows that the FSA have adopted a risk based approach for its regulation of IFAs and X Ltd was a small IFA in the low risk category not being able to handle clients' monies. The Commissioner is aware that the Complainants were concerned as to whether X Ltd was authorised to undertake discretionary management, however, it appears that X Ltd had an arrangement with another IFA, Y Ltd, who through its authorisation with the FSA, was able to do so.

(c) There is evidence that X Ltd did not declare on its application to be de-authorised that it had received a complaint from the Complainants. The Commissioner appreciates that the FSA have to accept that the information provided to them by a firm is correct. Whether or not the firm would have been de-authorised by the FSA if X Ltd had declared that there was a complaint outstanding is debateable. From the information given to the Commissioner (see paragraph 15 (i)) it appears that it is a matter of discretion by the supervisor within the Cancellation Team. Therefore, if X on behalf of X Ltd had declared a complaint was outstanding that, subject to other regulatory requirements, it could have still been de-authorised on or around the same date.

(d) The firm was required to hold professional indemnity insurance and there is evidence from the firm itself and the FSA database that this was satisfactory up to the date from which it asked to be de-authorised, namely 31 January 2003 when the professional indemnity insurance cover expired.

(e) Whilst a review of the file held by the FSA on X Ltd is not possible, there is insufficient evidence to suggest that whilst being authorised the firm did not comply with the FSA regulations. The specific matter of whether it gave suitable advice to the complainants (or to any other consumer) is outside the jurisdiction of the Commissioner and is therefore not an issue that he can consider. The FOS has been set up to act in respect of any disputes between an IFA and a client in that context and if the IFA becomes "*departed*" in that it no longer exists, as in this case, compensation may then be obtained from the FSCS. This obviously does take time and is not satisfactory to the Complainants seeking reassurance that they will be compensated for what they see as inappropriate advice on their investments. However, on the evidence before him, the Commissioner does not uphold this component of the complaint.

15 In relation to the second component of the complaint, in summary, the Commissioner finds as follows.

(a) The Complainants' view is that the FSA acted with *undue haste* in de-authorising X Ltd; that the person responsible for doing so was not impartial but was the supervising officer for the firm; that Officer C, who Complainant A

spoke to in early February 2004, lied to them when he advised them that there was no record on the FSA data base of X or X Ltd resigning; that the FSA has failed to identify two named officers that Complainant A had spoken to on 24 February 2003; that they had brought their complaint to the attention of the FSA by their email of 14 June 2002 and therefore the FSA should have known that X Ltd had had a complaint logged against it; that the FSA six monthly complaint reporting system for all IFAs should have also highlighted that this IFA had received a complaint against it, and finally if X Ltd had not been de-authorised by the FSA the FOS could have completed its investigation into their complaint which would have saved them having to go to the FSCS thereby causing further delay in their obtaining financial compensation. Each of these parts of this component of the complaint is considered below.

(b) The FSA have a central Cancellation Team that handles the de-authorisation of IFAs and when the Investment Firms Division received the letter of 29 January 2003 from X Ltd requesting de-authorisation it was acknowledged and passed to that Team for action. At that time, the Cancellation Team had a backlog due to an increase in their volume of work and there was a delay before the request was actioned. It was not until 6 March 2003 that they formally acknowledged the request and on or around that time they also wrote to the FOS and the separate divisions within the FSA a standardised email/letter asking for information as to whether there were any matters known that were outstanding against the firm. The FOS responded on 7 March 2003 stating nothing was outstanding and the FSA divisions also responded in the negative. The de-authorisation was approved on 18 March 2003 and the firm notified of such on the same day. Therefore, in respect of standard systems of the FSA, the de-authorisation followed the normal procedure but did not take place as quickly as it should have done. It was, therefore, not undertaken with *undue haste* as alleged by the Complainants.

(c) Whilst the FSA Handbook indicates that for a firm to de-authorise the firm's usual supervisory person at the FSA would be responsible for all day-to-day contact this is not the situation with small IFAs as their regulation is not allocated to a specific team. It is only the larger IFAs with a higher risk profile, banks, building societies and insurance companies to which this applies. For some of these institutions, the de-authorisation process can take months or years to conclude due to the winding-down of the business and for continuity the first contact in these cases would be their supervision team. Therefore, the individuals in the Cancellation Team, who dealt with the de-authorisation of X Ltd, had no specific knowledge or contact with that IFA prior to receiving the request having been passed it from the Investment Firms Division.

(d) The letter from X Ltd dated 29 January 2003 was addressed to the FSA's Investment Firms Division and was received by them on 3 February 2003. On the following day, 4 February 2003, the letter was acknowledged and forwarded in the internal mail to the Cancellation Team, which received it on 5 February 2003. No action was taken on it until 6 March 2003 (see paragraph 15(b)). The Commissioner understands that the Cancellation Team have their own internal data-base for logging de-authorisation requests and

that normally such a request, once received in writing with a reason for cancellation of its authorisation, would be entered into that data-base. At the time in question, it is not clear when between 5 February 2003 and 6 March 2003 the request for resignation was entered into this system due to the backlog. However, this point is academic in that Officer C from the Register Team, who received the telephone calls from the Complainants in early February 2003 (see paragraph 5), did not have access to this internal system so that even if it had been entered onto the internal system he would not be aware that the request had been made. This has now changed. The Cancellation Team enter the request for de-authorisation on both systems, their internal system and the main FSA database, on the day they receive it (unless received late on that day when it is dealt with the following day) and this is then updated over night so that the general public are now able to view the information on the FSA register on the website the following day. Therefore, there is no evidence that Officer C lied to the Complainants. The problem lay in the systems then operating and these have now been changed.

(e) The Commissioner understands that the Consumer Contact Centre has an internal base at the FSA and also an outsource centre at Bristol. Both the in-house and outsourced teams are part of the FSA, but to the consumer telephoning the Help-Line they would not be aware of the difference. However, the outsource team does not have access to the main internal database of the FSA only to the register shown on the website. For more complex telephone enquiries the outsource team has to transfer the call to the internal team but at the time in question, February 2003, again the internal team would not have access to the bespoke database in the Cancellation Team only to the main FSA internal computer database. Therefore, they too, would not be aware that X Ltd had requested to be de-authorised. For completeness, the Office of the Commissioner has requested the tape recording of the conversation which took place on 24 February 2003 between Complainant A and the Consumer Contact Centre. The recording does demonstrate that the first FSA officer in the outsourced Consumer Contact Centre, who Complainant A spoke to, confirmed that there was no indication on the register that X Ltd was resigning and the second officer to whom he was passed, who the Commissioner understands was with the internal Consumer Contact Centre, indicated that if the IFA had resigned the FOS would not be able to deal with the matter. However, as outlined above, neither of the two officers would have had access to the Cancellation Team data-base and therefore would not have been aware that X Ltd was resigning. As mentioned in paragraph 15(d) above, this system has now been changed.

(f) The email from the Complainants dated 14 June 2002 whilst expressing their concerns over their substantial losses, which they surmised as being at least stupid if not reckless decisions by their IFA, did not raise a specific complaint against the FSA or X Ltd. It sought information as to whether X Ltd was authorised.

(g) The FSA six monthly reporting system for complaints received by IFAs is held centrally and is by number, not by named complainants. Whether or not X Ltd acknowledged that he had received a complaint and declared this is not

known. As, however, he answered in the negative when required to disclose any outstanding complaints on his submission for de-authorisation, it is unlikely that he did so. If a complainant was not content that his complaint had been dealt with satisfactorily or in a timely fashion, the FSA's requirement is that the IFA has to advise the complainant that they can take the matter to the FOS. X Ltd did advise them of this facility by letter of 4 July 2002.

(h) In this case, the FOS had received the complaint on 2 August 2002 and replied on 4 September 2002 that it was likely that the complaint had been made outside the limitation period and an Ombudsman confirmed this view on 1 November 2001(sic 2002). The complainants then made further representation in December 2002 and the FOS acknowledged in January 2003 that they would review the time-bar but needed to obtain further information from X Ltd. Why the FOS when asked in March 2003 by the Cancellation Team if they were aware of any outstanding matters known against X Ltd answered in the negative is not clear. The Independent Assessor who has reviewed the handling of this complaint by the FOS analysed that the FOS did receive all the information necessary from the firm in late March 2003 but did not advise the Complainants until 5 June 2003 that the matter was being reconsidered. Internally at the FOS, in late June 2003, a decision was made that the complaint was within the jurisdiction of the FOS but the complainants were not advised of this despite them sending reminder letters in September and October 2003. The FOS did not reply to the complainants until 31 October 2003 by which time X Ltd had been dissolved at Companies House (on 23 September 2003). At that point the FOS had no jurisdiction over X Ltd. The FOS passed the case to the FSCS for consideration. Section 226(1) and (2) of the Financial Services and Markets Act 2000 provides that:

“(1) A complaint which relates to an act or omission of a person (“the respondent”) in carrying on an activity to which compulsory jurisdiction rules apply is to be dealt with under the ombudsman scheme if the conditions mentioned in subsection (2) are satisfied.

“(2) The conditions are that-

- (a) the complainant is eligible and wishes to have the complaint dealt with under the scheme;*
- (b) the respondent was an authorised person at the time of the act or omission to which the complaint relates; and*
- (c) the act or omission to which the complaint relates occurred at a time when compulsory jurisdiction rules were in force in relation to the activity in question.*

This effectively means that the FOS is able to consider complaints that relate to unauthorised firms, provided the firm was authorised at the time the complaint arose. The FOS would, therefore, still have been able to enforce their decision on the firm, X Ltd, after it had become de-authorised (18 March 2003) up to it being dissolved (23 September 2003) a period of six months. The Commissioner understands that the FOS had all the information it

required from the firm by the end of March 2003 but did not action it. He is also aware that the Independent Assessor has recommended, and the FOS has provided, compensation to the Complainants.

- (i) The Commissioner is sympathetic to the concerns expressed by the Complainants that they will suffer a further delay in receiving any due financial compensation because the matter has had to be reviewed by the FSCS. However, the Commissioner does not believe that the FSA de-authorising X Ltd, whilst a complaint was outstanding at the FOS, has caused this delay. It was the FOS that gave the incorrect information to the FSA in March 2003, and not withstanding that even if the FOS had indicated that there was a complaint outstanding, the FSA might still have de-authorized the firm under their powers to do so knowing that the FOS still had jurisdiction over X Ltd to complete its findings. The Commissioner has been advised that whether to cancel permission to undertake investment business in these circumstances is a matter of supervisory discretion. Up to 23 September 2003, (the date on which the company was dissolved), the FOS had jurisdiction over X Ltd to conclude and enforce their findings but due to administrative problems, which they have recognised and compensated the Complainants for, they failed to do so. The Commissioner is aware that it is unlikely that the FSCS would consider the case until the firm had become "dissolved". The Commissioner, therefore, does not uphold this component of the complaint.
- (j) There is one other aspect to this component of the complaint which was a matter commented on when the Stage 1 investigation was undertaken by the FSA (December 2003). It appears that when the Stage I investigator asked the Consumer Contact Centre how staff would be briefed to deal with the question "*If my IFA is de-authorized, what happens to my complaint with the Ombudsman?*" the answer he was given was that the FSA would not let a firm resign until it had dealt with any outstanding issues, such as complaints. The investigator had been advised that this may have been the case in the past but exceptions had been made in a range of circumstances and he understood that some guidelines were to be developed (see paragraph 16 (i)). He concluded "*..That for some months (at least) the CCC [sic Consumer Contact Centre] had been out of step with actual practice.*" His recommendation was "*I have not looked in any detail into the process by which the CCC is advised of developments of this kind in regulatory policy and practice, and how its briefing on such matters is reviewed for consistency with current practice. I recommend that this question is considered by those responsible for developing, approving and implementing changes in policy and practice.*" The Commissioner has asked for confirmation that the CCC is aware of the change of practise and the date from when this was implemented but the FSA have not been able to give a positive response to this question. Similarly, the second officer, who Complainant A talked to on 24 February 2003, indicated that if the IFA had resigned from the FSA, the FOS would have no jurisdiction over them. This is clearly incorrect.

16 In relation to the third component of the complaint, in summary, the Commissioner finds as follows.

- (a) Complainant A spoke to the FSA on 3 November 2003 stating that he wished to make a complaint. Officer D for the Company Secretariat telephoned Complainant A on 6 November 2003 and confirmed in writing to him on 10 November 2003 what he understood to be his complaint. He stated that the complaint had been entered into the formal Complaints

Scheme on 6 November 2003. Officer D asked for confirmation that he had interpreted the complaint correctly and the complainant confirmed this by email of 12 November 2003. The Scheme procedures requires an acknowledgement to be sent within five working days of receipt of the complaint and, if entered into the formal Scheme, a substantive response within eight weeks of receipt. The FSA sent a holding letter on 26 November 2003 and their substantive response on 8 January 2004, which did not uphold the complaint. Therefore, the Complainants received the substantive response nine weeks after the complaint was logged into the formal Scheme.

(b) The Complainants did not accept the findings and made a further complaint by letter of 16 January 2004 enclosing a letter from Complainant B of the same date. They stated that the FSA had only partially covered their complaint and expanded on their concern that related to the FSA's lack of care in the regulation of X Ltd. Officer D acknowledged this on 20 January 2004 and a substantive response was sent on 26 February 2004, five weeks later.

(c) The Complainants responded on 22 March 2004 repeating their complaint. Officer D replied with a further substantive response on 8 April 2004 and closed the correspondence.

(d) The substantive response from the FSA of 8 January 2004 did not specifically give an apology for the delay. The Commissioner is aware that the FSA have internal procedures whereby they seek to complete 80% of Stage 1 investigations within eight weeks and 100% within twelve weeks and therefore this case would fall within the latter timescale. However, the leaflet explaining the Scheme, which the Complainants were sent, does not specify this variation of the timescale nor did the earlier acknowledgement or holding letter sent by the FSA. The Complainants are therefore entitled to believe that their complaint would be undertaken within the eight-week period. The Complainants also make the point (their email 16 April 2004) that the response did not give the information that they may refer their complaint to the Complaints Commissioner.

(e) The Commissioner acknowledges that the FSA undertook the investigation correctly by using a senior member of staff who had not been previously involved in the matter and, when asked by the Complainants to consider additional aspects of their complaint, the FSA did endeavour to respond in a timely manner giving further details of why they had not upheld the complaints. However, there was a delay in finalising the initial investigation and the substantive letter of 8 January 2004 did not include the fact that the Complainants could refer their complaint to the Commissioner. Therefore, the Commissioner finds that this component of the complaint is upheld.

17 In the light of these findings, the Commissioner recommends as follows.

(a) The Commissioner acknowledges that the procedures for withdrawing a firm's authorisation have been amended so that the information is now shown not only on both the internal computer systems simultaneously, which the Register Team have access to, but also on the register, itself, normally 24 hours later, which is available to the public on the FSA website. He recommends, however, that the FSA gives consideration to reducing the potential risk of enquirers being given incorrect information by putting into

place a procedure whereby if a request for de-authorisation is received within the FSA, the division receiving that information (if in the correct format being in writing and giving a reason) updates the data-bases rather than leave this until the Cancellation Team has received the request. On the present system of simultaneously updating the two internal databases, this would have then been actioned on receipt of the letter from X Ltd on 3 February 2003, being the first possible opportunity that the FSA would have become aware of the change of circumstances of X Ltd, rather than wait for this request to reach the Cancellation Team. This would then minimise any possible future criticism that the FSA could give misleading information.

(b) The Commissioner seeks assurances that there is a procedure in place to ensure that the Consumer Contact Centre is advised on changes in policy and practice so that potentially misleading information is not given to enquirers. In this instance, the Consumer Contact Centre were not aware that a firm could resign from the register despite having a complaint made against it and that the FOS could still investigate a complaint even if the IFA had resigned.

(c) The Commissioner recommends that the FSA apologises to the Complainants for the delay in dealing with their complaint and for the fact that they did not mention in their substantive response that the Complainants could refer their complain to him if they were not satisfied with the findings. He recommends that this facility is included in the FSA's leaflets that explain the operation of the Stage 1 process of the formal Complaints Scheme. The Commissioner also recommends that the amended time-scale for undertaking the Stage 1 investigations is made clear to a complainant at the commencement of the review either by incorporating suitable words within the acknowledgement letter or, again, in the leaflet that explains the Scheme.

- 18 The Commissioner has decided to publish the above Summary, Findings and Recommendations.

December 04