Complaints Commissioner

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FINAL DECISION

1. Background

1.1 Part 6 of the Financial Services Act (the 2012 Act) requires the regulators to maintain a complaints scheme for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions other than their legislative function. The complaints scheme must be designed so that, as far as reasonably practicable, complaints are investigated quickly.

1.2 The implication of that provision is that the design of the scheme is fit for purpose, which I believe it to be, and has, so far as is practicable, features such that the complaints design should not impair or slow down the entire process of complaints investigation. Finally, Section 84(1)(b) of the 2012 Act provides that an independent person is appointed as Complaints Commissioner with the task of investigating those complaints made about the way the regulators have themselves carried out their own investigation of a complaint that comes within that scheme. The appointment has to be approved by H.M. Treasury. I currently hold that role.

1.3 From 1st April 2013, as part of the changes implemented by the Government, the Financial Services Authority (FSA) was replaced by the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA) and the Bank of England as regulators of the UK's financial services industry. I would add that although the FSA has been replaced, transitional provisions have been put in place to enable the continued consideration of complaints against the FSA. As your complaint relates to the inactions of the FSA, in relations to its objectives and duties under the Financial Services and Markets Act 2000 (FSMA) your complaint has been considered by me under the new transitional complaints scheme.

1.4 It is set out in the consultation paper (CP12/30 Complaints against the regulators) and confirmed in the policy statement (PS13/7 Complaints against the regulators), any complaints which have not been concluded as of 1st April 2013 will continue to be investigated by the FCA Complaints Team with the cooperation of the PRA if needed and my office. In practice, this means that, although the governing legislation will have changed there will be no change to the manner in which, or the terms under which, your complaint is investigated.

1.5 The complaints scheme goes on to provide that there are two distinct stages which I refer to hereafter as Stage One and Stage Two.

1.6 Stage One is the investigation carried out by the FCA itself and Stage Two is the investigation that I carry out when the complainant is dissatisfied with the outcome of Stage One or where the FSA has refused to carry out the Stage One process.

1.7 The Stage Two investigations I undertake are conducted under the rules of the Complaints Scheme (as provided in the publication entitled Complaints against the regulators). I have no power to enforce any decision or action upon the regulators. My power is limited to setting out my position on a complaint based on its merits and then, if I deem it necessary, I can make recommendations to the regulators. Such recommendations are not binding on the regulators and the regulators are at liberty not to accept them. Full details of the Complaint Schemes can be found on the internet at the following website; http://www.fca.org.uk/your-fca/complaints-scheme.

2. The Complaint

2.1 In your letter and enclosures of 2nd December 2013 to my office you set out that the original complaint you made to the Regulator could be summarised in the following manner:

1. "*The FSA has acted disproportionately in conducting an enforcement investigation by exercising a search and seizure warrant and did not act in good faith.*
2. *The FSA did not test the evidence upon which they (sic) and the Magistrate's Court relied to decide upon exercising a section 176 power and as a direct result of this action has not acted in good faith.*
3. *The FSA failed to verify the credibility and/or integrity of the whistleblower (sic) and did not act in good faith.*
4. *The FSA failed to conduct the visit in a manner that would limit adverse publicity and consequential fiscal and reputational damage to the business. The FSA carried out the visit in a high profile way, using an unnecessary large number of police officers and investigators (21 in total) despite the investigation being neither criminal nor fraudulent in its nature.*
5. *The FSA failed in its duty of care and breached their (sic) code of confidentiality.*
6. *The FSA failed to respond to reasonable requests by Firm A to mitigate the fiscal and reputational damage to the business and the ultimate closure of the business within 4 months of the 'dawn raid' resulting in the loss of 154 jobs.*
7. *The FSA failed to follow their own procedures and guidelines before and during the investigation; they failed to follow any risk awareness processes including the Advanced Risk Response Operating Framework, the Operating Supervisory Framework and the Risk Management Process when investigating a concern that had been raised and they failed to issue a Preliminary Investigation Report during the investigation (sic).*
8. *Despite a complaint being raised about the conduct of the FSA and in addition about the conduct of Enforcement Officer X, the FSA left this employee in charge of the investigation to the point of the Warning Notices and fines being issued in 2010.*

9. *The FSA failed to act in a fair and proportionate manner during the investigation generally; the FSA has acted with a lack of care, with bias and lack of integrity*".

2.3 You added that you are also unhappy with the manner in which the Regulator investigated your complaint. You clarify this by stating that:

> "*In an effort to try and understand my complaint the FCA Complaints Team revised, changed and altered its content; my complaint was set out in a different format, it was rephrased, cherry-picked and in some areas clearly diluted; in my opinion this was entirely inappropriate and unacceptable; consequently over a two month period I challenged the FCA Complaints Team and continually expressed my concerns*".

You add that, whilst the Regulator explained that:

> "*It is worth restating that we used our own numbered elements to, in some cases, combine or otherwise redefine some of your allegations with the aim of structuring our investigation in a more logical way.*
>
> *Element One relates to the use of a search warrant at the premises of the Firm A Group Limited ('the Firm'). You allege:*
>
> *i) Its use was disproportionate.*
>
> *ii) The Authority did not test evidence presented to a Magistrate.*
>
> *iii) The search was carried out in a high profile way.*
>
> *Element Two is an allegation that the Authority failed to verify the integrity of its information.*
>
> *Element Three comprises two parts relating to the ultimate closure of the firm. You allege:*
>
> *i) That the Authority did not have regard for the possibility of adverse publicity and resulting reputational damage to the firm caused by the search warrant.*
>
> *ii) That the Authority did not respond to requests to prevent failure of the business after the search ('the rescue plan').*
>
> *Element Four is an allegation that the Authority "failed in its duty of care" and "breached its code of client confidentiality". Following your clarification we understand this relates to the following:*
>
> *1. Comments made by the Authority's press office, particularly in relation to the Authority's use of search warrants and inference about an element of criminality.*
>
> *2. The alleged 'leak' of information to the press relating to the warrant being executed.*
>
> *The Complaints Scheme has already investigated the first part of this element and, because the Firm was in administration, we provided a response to Administrator T on 8 April 2008. There was an opportunity to challenge the findings of that investigation with the Complaints Commissioner within three months of the response; because of that we will not now revisit that investigation. We have investigated the second part of this element, the findings of which are set out in the 'Findings' section below.*

Element Five relates to certain procedural matters of the investigation, in particular:

1. *You say the Authority could have used alternative methods to investigate its concerns.*

2. *You say the Authority should have provided you with a Preliminary Investigation Report ('PIR').*

Element Six relates to your dissatisfaction that despite you making a complaint about the conduct of the Authority and, in particular, Enforcement Officer X, the Authority left Enforcement Officer X in charge of the investigation.

Element Seven is an allegation that the Authority acted with bad faith. You said in your letter of 25 March 2013 that this element was an allegation that the Authority had failed to act in a fair and proportionate manner generally and that the Authority has acted with a lack of care, with bias and a lack of integrity. These are broad categories of the types of complaint the Scheme investigates but you have attributed some specific allegations to those categories, in particular:

1. *You are "dissatisfied and disappointed" with the conduct of the Investigation Team "throughout the entire investigation."*

2. *You are "disappointed" with the way the Regulatory Decisions Committee ('RDC') acted, and you feel their decision-making was inappropriate and biased.*

Now that you have clarified this allegation, we consider that in the majority this is an expression of general dissatisfaction with the Authority's exercise of its discretion, which paragraph 3.5 of the Complaints Scheme provides we will not investigate. Nevertheless we have considered the allegation generally during our investigation and we set out this consideration in the 'Findings' section below".

You set out that you remained unhappy with the outcome of the Regulator's investigation as:

"*It appeared to me that 'my complaint' was no longer 'my complaint'; it was being re-written, combined changed, and interpreted into a format which suited the FCA Complaints Team. I had grave concerns that the FCA Complaints Team would not provide an independent and unbiased report or conclusion in this matter; their response and subsequent correspondence thereafter confirmed my worst fears to be true.*

I believe the FCA Complaints Team response to be a long way off being impartial or independent. They have defended every single action of the FSA; it would also most appear as though they have collaborated and worked in unison to provide a guilty verdict; my reaction to their response is one of total disbelief (sic)".

2.4 To support your complaint and expand upon the reasons why you remain unhappy with the outcome of the Regulator's investigation into your complaint you set out the following:

"*Since my complaint in 2007 I have repeatedly expressed my concerns; I firmly believe that my formal complaint to your office against the actions of the FSA Investigation Team created a hostile and biased attitude towards me as an individual resulting in an unreceptive and uncompromising investigation; it has been established and latterly confirmed by The Upper Tribunal HH Judge Mackie QC in the summary of the hearing that the Investigation Team did not find what they were looking for when they visited my offices on 28th November 2007 and I believe as a direct result, to save face and embarrassment, have tried in vain to make a much more substantial case against myself and the Firm A Group Ltd.*

The Upper Tribunal HH Judge Mackie QC confirmed in his decision issued 10th December 2012: […]

'The raid attracted wide press coverage and given the police attendance, the Applicants reasonably contend, engendered a public perception that the business was dubious. No criminal proceedings were brought and the case now advanced by the Authority is of very much lower gravity than the claims made at the time of the raid. '

'The Authority's case before us has fallen short in the ways we have described. There are also it seems to us further matters of mitigation. We are not concerned with the raid on Firm A directly, this being a matter to be investigated by Sir Anthony Holland. Nonetheless the raid was a major event which caused immediate and permanent damage. ' 'The raid was carried out to deal with alleged conduct of a very much more serious kind than has been established and resulted, regardless of where if at all any responsibility for this should lie, in a degree of injustice to both Applicants'".

2.5 You continue:

"The FSA Investigation Team raided the Firm A Group Ltd following the receipt of information (by a disgruntled ex employee (sic) who faked his own terminal illness) suggesting that the firm and the approved persons had contravened FSA rules; the FSA did not verify the credibility of the source and they did not test the evidence on which they relied instead they formed an opinion that the Firm A Group Ltd were perpetrating mortgage fraud on a grand scale including allegations of mis-selling mortgages, falsifying documents, re-writing business, systematic inflation of mortgage applicant's income, shredding of documents to cover up the fraud, cleaning customer files, cold calling to force home-owners into re-mortgage transactions and arranging, against the interests of the customer, without their knowledge and to their prejudice the placement of the vast majority of mortgages with one lender; Mortgage Lender M. […]

In an effort to make a case against the Firm A Group Ltd the FSA Investigation Team attempted to complete a file review using 53 incomplete files; their record keeping and use of information was poor; they made many assumptions and speculations; their allegations were based on incomplete findings and were unreliable as evidence, this is further evidenced during the file review at the Upper Tribunal Substantive Hearing.

The Upper Tribunal rejected the Authority's file review out of hand - in summary the Upper Tribunal HH Judge Mackie QC stated: […]

'The Authority was unable to present clear evidence about how the files came to be selected and a particular number reviewed. '

'Unfortunately the review has flaws and we believe that it would be unjust for the Tribunal to rely upon it in any way. First the burden of proof in this area lies on the Authority. Secondly any review of this kind must be demonstrably reliable. It is not for the Tribunal to conduct an examination of each file one by one and it is dependent upon the assessment of the reviews. The first review was by employees of the Authority. Those conducting the second review were an accountant, a solicitor and a trainee solicitor'.

'No-one suggests that the reviews were not conscientiously carried out but the conclusions show, even within the Authority, a degree of a disagreement indicative that the exercise is subject to error and subjective'.

The FCA Complaints Team state:

'Paragraph 6.15 of the Complaints Scheme provides (among other things) that any finding of fact of the Upper Tribunal which has not been set aside on appeal or otherwise, shall be conclusive evidence of the facts found. We therefore rely on the facts as found by the Upper Tribunal in their published decision, references FS/Tribunal Reference/1 and FS/Tribunal Reference/2.'

Therefore I would respectfully ask you to consider the facts as stated by Upper Tribunal Judge HH Judge Mackie QC in reference to the file review being flawed and the case being of a very much lower gravity than at the time of the raid. […]. The Authority sought to establish evidence to substantiate wide-scale fraud, no documentary evidence to substantiate a case in fraud was uncovered and it is clear that the focus of the Authority's investigation subsequently shifted to less extreme allegations".

2.6 You add that in your view there:

"*were alternative options available to the Authority which could have and should have been exercised; they could have imposed an information requirement in relation to these documents however they advised in their search and seizure warrant that they had reason to believe: If such a requirement were to be imposed it would not be complied with or the documents or information to which it related would be removed, tampered with or destroyed*"".

Whilst the Regulator has sought to clarify its position by stating:

"'*The Authority had information which suggested that it had reasonable grounds for believing that information would be destroyed, removed or tampered with and we understand the Authority would have had no power to prevent that from happening on an unannounced visit. This* was *the principle reason for use of a search warrant over the alternatives and we agree that it was reasonable given the information available at the time*'".

2.7 You challenge this view and feel that:

> "*[the] 'reasonable grounds' declaration by the FSA and the FCA Complaints Team holds no substance; there was absolutely no evidence to suggest that the Firm A Group Ltd would not have fully co-operated if a normal arrow-style visit had been chosen. Our previous relationships with the FSA had always been open and transparent and at no time did the Company or its Directors give any reason to indicate that a visit by the FSA would have resulted in the disappearance of documents or files as implied by the FSA Investigation Team*".

Continuing that you are:

> "*perplexed by these statements; there was much more information, electronically recorded, available to the Authority at the time however they chose not to use it. I am worried and concerned as to why the FSA Investigation Team did not look at their own internal record keeping prior to exercising a search and seizure warrant; previous visits from the FSA Supervisory Team in October 2005, December 2005 and June 2006 fully endorsed the business and its processes.*
>
> *The FSA's own record keeping, had they accessed it in the first instance, would have confirmed this information and would have provided them with concrete objective evidence that there was a high degree of comfort around the systems, processes, governance and TCF infrastructure that was in place at the Firm A Group Ltd. Instead the FSA Investigation Team regretfully and with subsequent dire consequences chose to take the subjective route in believing the words of a disgruntled ex employee (sic) to dictate the decision to raid our premises; in my opinion this was a categorical over-reaction and an unreserved misjudgement by the FSA*".

2.8 You add that:

> "*The FCA Complaints Team has selected the words 'dissatisfied' and 'disappointed' and have considered this to be a general expression of dissatisfaction on my part and they further state that I have not provided any evidence of bad faith on the part of the Authority. I have throughout this whole process been a litigant in person (this was in part due to my being financially embarrassed through the loss of my business); would therefore ask for your forgiveness if I use the wrong vocabulary or the incorrect expressions:*
>
> *In summary I expressed concerns regarding:*

- *My outstanding complaint; how it had created a hostile and biased attitude throughout the investigation*
- *The RDC's did not have or express in any form an independent view, they simply defended the actions of the FSA Investigation Team*
- *The FSA Investigation Team adopted a one-sided position and refused to present pertinent facts relevant to the case*

- *The FSA Investigation Team manipulated the investigation by omitting relevant information which they have referred to as "Undermining Material". How can an investigation be fair and unbiased when there is undermining material? Surely all the evidence available should have been presented?*
- *Despite the number of FSA personnel present at the raid, all the information the FSA gathered throughout their four year investigation and the many internal interviews which the FSA conducted the Authority did not call or rely upon any members of the original FSA Investigation Team as a witness during the Upper Tribunal Substantive Hearing; this yet again meant I was restricted and unable to conduct any cross examination.*

  My complaint is simply not an expression of dissatisfaction and disappointment; the FSA, in my opinion, have acted in bad faith throughout the entire process; these allegations are not, as the FCA Complaints Team imply, simply assertions and implications; I have attempted to provide you with evidence to support this allegation; should you require further information or clarification from me to support this element of my complaint I will happily provide you with further detail".

2.9 Finally you add that:

> "*Within the response from the FCA Complaints Team they advise:*
>
> *'Any payment of compensation for the failure of the Firm would have to result from direct causality between the Authority's decision to execute the warrant and the failure of the business and we conclude that such direct causality does not exist. We understand that in July 2007, the business breached its capital adequacy requirement and subsequently failed to keep to a repayment schedule with HM Revenue & Customs for an amount of more than £500,000. Your plan to pre-pack the company, writing off that debt, and continuing to operate was deemed by the Authority not to be viable. We believe these factors break the chain of causation which would be required to consider a liability for compensation. '*
>
> *In my opinion the failure of the firm was directly caused by the Authority's inappropriate decision to execute the search and seizure warrant.*
>
> *The FSA dawn raid attracted wide and immediate press coverage and given the police attendance created a public perception that the business was tainted and infused with criminality; the fate of the Firm A Group Ltd was sealed; there was no prospect of recovery from the reputational damage cause (sic)*".

3. Coverage and scope of the transitional complaints scheme

3.1 The transitional complaints scheme provides as follows:

> *9.1 The transitional complaints scheme provides a procedure for enquiring into and, if necessary, addressing allegations of misconduct by the FSA arising from the way in which it has carried out or failed to carry out its functions under FSMA. The transitional complaints scheme covers complaints about the way in which the FSA has 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.

9.2 To be eligible to make a complaint under the transitional complaints scheme, a person must be seeking a remedy (which for this purpose may include an apology) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the regulators' actions or inaction.

9.3 The transitional complaints scheme does not apply to the Bank's functions under Part 5 of the Banking Act 2009 (overseeing inter-bank payment systems) as this was not previously subject to these complaints arrangements.

3.2 I should also make reference to the fact that my powers derived as they are, from statute contain certain and clear limitations in the important area of financial compensation. FSMA (as the relevant legislation in place at the time of the Enforcement investigation and when the investigation into your complaint commenced) stipulated in Schedule One that the FSA is exempt from "liability in damages". It stated:

(1) Neither the Authority nor any person who is, or is acting as, a member , officer or member of staff of the Authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority's functions.

(2) (Irrelevant to this issue under investigation)

(3) Neither subparagraph (1) nor subparagraph (2) applies

i. if the act or omission is shown to have been in bad faith; or

ii. so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the [1998 c.42] Human Rights Act 1998.

3.3 I have referred to FSMA here as it was FSMA which was the relevant legislation when the FSA considered your complaint. This exemption has been rehearsed in sections 25(3) and 33(3) of Part 4 of Schedule 3 of the 2012 Act. You have not adduced evidence of any act of bad faith on the part of the FSA which would have the effect of bringing 3(a) above into play.

The transitional complaints scheme nevertheless then goes on to provide in paragraph 6.6 that:

> *Where it is concluded that a complaint is well founded, the relevant regulator(s) will tell the complainant what they propose to do to remedy the matters complained of. This may include offering the complainant an apology, taking steps to rectify an error or, if appropriate, the offer of a compensatory payment on an ex gratia basis.*

3.4 If I were to investigate your complaint and find your complaint justified, it is to that paragraph that I must refer in order to decide any question of a "*compensatory payment on an ex-gratia basis*".

If you were to take the view that Schedule One referred to above was relevant in the context of the Human Rights Act 1998 I should explain that Section 6(1) of that Act that is referred to, provides as follows:

> *It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*

The only Convention rights that may be relevant are contained in Article 1 of the First Protocol set out in the Human Rights Act of 1998.

Article 1 of the First Protocol provides:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

3.5 There is no act taken by the FSA (or a subsequent regulator) which is incompatible with the Human Rights Act 1998 or which has caused a loss of any possessions. Whilst I accept that following the Regulator's early morning visit to the Firm A Group Ltd's premises the firm failed, the Regulator's actions, in my opinion, *do not* (my emphasis) appear to breach the requirements of the Human Rights Act 1998 for the reasons I will set out later in this Final Decision.

3.6 However, whilst there does not appear to have been any breach of the Human Rights Act 1998, you allege in your letter, on a number of occasions, that throughout the course of the Regulator's investigation it has not acted in good faith (i.e. in a manner which would be described as 'bad faith').

3.7 Before commenting further I feel it will be useful if I set out my understanding of not acting in good faith (i.e. acting in bad faith). I would add that my definition of bad faith has been taken from decisions taken by the High Court. In my view 'bad faith' can be described as "*the exercise of public power for an improper or ulterior motive*"[1], where a public officer/authority is shown "*not to have had an honest belief that he was acting lawfully*"[2], or can be "*demonstrated by recklessness on his part in disregarding the risk*[3].

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[1] Steyn LJ (at 12)*Three Rivers District Council and others v Governor and Company of the Bank of England* [2000] 3 CMLR 205

[2] Hobhouse LJ (at 117) *Three Rivers District Council and others v Governor and Company of the Bank of England* [2000] 3 CMLR 205

[3] Hope LJ (at 44) *Three Rivers District Council and others v Bank of England (No 3)* [2001] HL 16, [2001] All ER (D) 269

3.8 Clearly, whilst it is easy for a complainant to make an allegation that a Regulator has not acted in good faith, the complainant has to surpass considerable hurdles to support the allegation. I would add here that in my view it is for the complainant to show that the Regulator has not acted in good faith rather than for the Regulator to prove that it had acted in good faith.

3.9 Although you are unhappy with the decision the Regulator made and the impact this had upon your business, and therefore assert an attribution of bad faith, an assertion is simply that, i.e. it is *not evidence* (my emphasis) of a failure to act in good faith. You have not provided sufficient, if any, evidence to show that the decisions the Regulator made which led to its subsequent actions were made with an "*improper or ulterior motive*", that the Regulator did "*not have an honest belief that it was acting lawfully*" or that it acted recklessly by disregarding the risk to your business in light of the concerns that it had.

3.10 At this point, I feel that I should therefore set out that in light of the comments which I have made in paragraphs 3.5 and 3.9 above I do not believe that there is any evidence to indicate that the Regulator's actions and decision were not made in good faith.

4. My Position

4.1 As I have indicated above, my role is to review the manner in which the Regulator has itself investigated a complaint. I should also add that under paragraph 6.15 of the rules of the Transitional Complaints Scheme I am bound by any finding of fact of any competent court or authority (which would include the Upper Tribunal). For completeness I would set out here that paragraph 6.15 of the rules of the Transitional Complaints Scheme provides:

"*In the investigation of a complaint by either the relevant regulator(s) or the Complaints Commissioner, any finding of fact of:*

a) a court of competent jurisdiction (whether in the UK or elsewhere);

b) the Upper Tribunal; or

c) any other tribunal established by legislative authority (whether in the United Kingdom or elsewhere);

d) any independent tribunal charged with responsibility for hearing a final appeal from the regulatory decisions of the regulators;

which has not been set aside on appeal or otherwise, shall be conclusive evidence of the facts so found, and any decision of that court or tribunal shall be conclusive".

4.2 As such, this means that where the Upper Tribunal has made a finding, this is a finding of fact and I am bound by its decision. I am unable to revisit or review any finding which the Upper Tribunal has made in the decision it issued in respect of reference numbers FS/Tribunal Reference/1 and FS/Tribunal Reference/2.

4.3 As such, whilst you remain unhappy with the overall outcome of the Enforcement action, I am unable to review or comment upon the decision the Tribunal made.

4.4 I appreciate that you were unhappy that the Regulator, when assessing your complaint, did not investigate each and every element of your complaint individually and in the order you raised them. Whilst I can appreciate why this was disappointing, I can equally understand why the Regulator did this.

Where a complaint involves the consideration of a large number of issues (many of which are very similar in nature and/or are inexplicably linked), combining some issues into a single element can often assist with the overall investigation and the overall resolution to the complaint. It can assist with the clarity of a decision and prevent repetition and the continual rehearsal of facts which could and possibly should be addressed in a single answer. I would also add that the re-sequencing of the elements of the complaint, can also have a similar effect and result in the provision of a more coherent answer *without* (my emphasis) affecting the investigation of the issues the complainant has raised, particularly where the issues complained about result in or contribute to a single event.

4.5 In this case it is clear from the correspondence that you have exchanged with the Regulator that although you had raised a number of issues, many of these related to the decisions that the Regulator made and the manner in which it conducted the unannounced visit to your firm. Given that some of the issues you raised were similar or closely linked it does not, in my opinion, seem unreasonable for the Regulator to have re-sequenced your complaints and linked a number of the issues together.

4.6 I have made these comments for two reasons. The first is to address one of the issues you have raised in the complaint you have made to my office. The second is to explain why I have chosen to link together the investigation of a number of the elements of your complaint which I have set out in paragraph 2.1 to 2.9 above.

This Final Decision will therefore consider the following issues whilst I have combined the issues you raised (and which are fully set out in 2.1 to 2.9 above) I believe that addressing the issues in this way allows them to be correctly and appropriately addressed:

1. *Element One*

   "The FSA did not test the evidence upon which they and the Magistrate's Court relied to decide upon exercising a section 176 power and as a direct result of this action has not acted in good faith", that it *"failed to verify the credibility and/or integrity of the whistleblower (sic) and did not act in good faith*" and that the "*FSA failed to follow their own procedures and guidelines before and during the investigation; they failed to follow any risk awareness processes including the Advanced Risk Response Operating Framework, the Operating Supervisory Framework and the Risk Management Process when investigating a concern that had been raised"*

2. *Element Two*

   "The FSA has acted disproportionately in conducting an enforcement investigation by exercising a search and seizure warrant and did not act in good faith" and that it *"failed to conduct the visit in a manner that would limit adverse publicity and consequential fiscal and reputational damage to the business. The FSA carried out the visit in a high profile way, using an unnecessary large number of police officers and investigators (21 in total) despite the investigation being neither criminal nor fraudulent in its nature*".

3. *Element Three*

   "The FSA failed in its duty of care and breached their (sic) code of confidentiality" and that as it "*failed to respond to reasonable requests by Firm A to mitigate the fiscal and reputational damage to the business [which led to] the ultimate closure of the business within 4 months of the 'dawn raid' resulting in the loss of 154 jobs*".

4. *Element Four*

   Additionally, you also allege that whilst you had complained *"about the conduct of the FSA and in addition about the conduct of Enforcement Officer X, the FSA left this employee in charge of the investigation to the point of the Warning Notices and fines being issued in 2010*". As such you suggest that the Regulator by failing "*to act in a fair and proportionate manner during the investigation generally; the FSA has acted with a lack of care, with bias and lack of integrity*" and that the Regulator "*they failed to issue a Preliminary Investigation Report during the investigation (sic)*".

4.7 I feel that I should also add here that the Regulator has freely provided a full copy of its complaint investigation file, which includes the documents upon which it relied when drafting its decision. I appreciate that you are unhappy that the Regulator has refused to provide you with copies of these documents in their entirety as it believes that they contain legally privileged information. To assist me with my own investigation, the Regulator is allowed to provide me with these documents. However, in light of the Regulator's view that the documents in question contain legally privileged information, without the Regulator's consent, I am unable to provide you with copies of the documents in question.

5. Element One

5.1 In your correspondence you allege that the FSA did not test the evidence upon which it relied when deciding to obtain a warrant to allow it to undertake a search and seizure visit.

5.2 The Regulator's file shows that concerns were first raised as a result of intelligence received in April 2007 which alleged that the signatures on a number of self-certification documents had been forged although it was suggested that this was possibly for reasons of expedience rather than for reasons of dishonesty.

The intelligence the Regulator received also suggested that there were problems with the firm's sales process which was resulting in the mis-selling of mortgages to clients who could not afford the repayments and were unaware of the broker fees. Although this disclosure was considered internally by the Regulator it did not, at the time, prompt any immediate or significant action.

5.3 Subsequently, in August 2007, the Regulator received further intelligence about the firm. This made a number of allegations which raised significant concerns with the Regulator. Again, this intelligence was considered internally by the Regulator before any decision on what further action, if any, should be taken.

5.4 Before deciding how to progress its concerns, the Regulator sought further intelligence on the concerns which had been raised from a variety of sources.

5.5 Subsequently, later in August 2007, the Regulator received a further intelligence which raised a number of concerns regarding the practices of the firm. Although some of intelligence related to the Regulator's existing concerns, some of the intelligence related to potentially new issues.

5.6 Finally, in November 2007, the Regulator received further intelligence regarding the 'conduct' of the firm from a different source.

5.7 As a result of the intelligence it had received from a variety of sources (which included whistle blowers and other information providers) the Regulator had concerns over the firm's conduct in relation to a number of issues which *inter alia* included[4]:

- the falsification of documents;
- the inflation of the applicants' declared incomes on a significant proportion of self-certification mortgage applications and the subsequent destruction of documents to prevent the discovery of the fraud;
- 'lender bias' - whilst the firm had a panel of lenders a significant number of mortgages were placed with a single lender (which had granted a loan to the firm);
- The suggestion that the 'lender bias' resulted in a breach of the Treating Customers Fairly principle as customers were not necessarily obtaining the best or most appropriate 'deal';
- the firm was also mis-selling Payment Protection Insurance (PPI); and
- it was believed that the firm may have breached its capital adequacy position.

5.8 The Regulator's file shows that it did not simply accept the intelligence it had received. It shows that in some cases it challenged the intelligence. The files also show that the Regulators assessed the credibility of the intelligence (i.e. whether the Regulator felt that it could rely upon the intelligence and ultimately whether it could be believed).

5.9 As a result of the intelligence it had received the Regulator held a number of internal meetings. These meetings included staff from a number of Divisions within the Regulator and were arranged to discuss the intelligence (and resulting concerns) together with any concerns the Regulator itself may have over the conduct of the firm.

[4] Upper Tribunal transcript page 8 paragraph 20 (line 13)

5.10 From the Regulator's files it is clear that during the meetings I have described in 5.8 above a significant amount of consideration was given to all of the information available to the Regulator (i.e. that which it already held and the intelligence it had received). I would add that, in assessing this information the Regulator has shown that its consideration included assessment of the Advanced Risk Response Operating Framework visits that had previously been completed together with the information which the firm had provided in the regular Retail Mediation Activity Reports that it was required to submit.

5.11 As a result of the information it already held, the protected disclosures it had received from a variety of sources including whistle blowers and other information providers (within a period of approximately six months), it is, in my opinion, understandable that given the Regulator's statutory obligations, why it felt that further investigation of the allegations was necessary.

5.12 Whilst you say that the Regulator failed to 'test' the evidence prior to obtaining the search and seizure warrant (granted under S176 of FSMA) it is unclear how this evidence could be tested without an examination of the 'alleged' files being undertaken. Such an allegation *could not* (my emphasis) be tested without either tipping off the firm or without undertaking a visit.

5.13 For the sake of completeness I must add here that realistically, if a firm was 'altering' a customer's documents without the customer's knowledge this would not be something that the firm would openly admit to the Regulator. Likewise, if the firm was acting in this matter and was asked to provide a selection of files to the Regulator it is clear that the firm would not submit files which it had altered. Similarly, if the firm was acting in this way and either knew or suspected that was something which the Regulator wished to investigate during an impending visit, it is reasonable to believe that the firm would try either to conceal or to destroy such files prior to the Regulator's visit.

5.14 Likewise, given the nature of the allegations which had been made by the four different people and the outcome of the internal discussions, it is also equally understandable why the Regulator felt that the information it required could not be obtained except by a visit to the firm's business premises.

5.15 I have noted your comments in response to my Preliminary Decision where you set out that:

> "*You advise that the Regulator considered the disclosure internally however it did not, at the time [in April and August 2007] prompt any immediate or significant action. My immediate question would be "why not?" Why did this intelligence not prompt any immediate or significant action?*"

The Regulator has explained to me that:

- "*[The Complainant] seems to suggest that the Authority was under a duty to investigate information provided to it. This is not so.*

- *There are multiple factors the Authority will consider in deciding whether to pursue a particular case through the enforcement process. The referral criteria are published on the FCA's website: http://www.fca.org.uk/firms/being-regulated/enforcement/how-we-enforce-the-law/referral-criteria commence an investigation. The referral criteria will have been applied in this case*".

5.16 The Regulator's stated Referral Criteria sets out that:

"*Not all the criteria will be relevant to every case and additional considerations may apply in other cases, e.g. suspected market misconduct.*

The Referral Criteria

1. *Has there been actual or potential consumer loss/detriment?*
2. *Is there evidence of financial crime or risk of financial crime?*
3. *Are there actions or potential breaches that could undermine public confidence in the orderliness of financial markets?*
4. *Are there issues that indicate a widespread problem or weakness at the firm/issuer?*
5. *Is there evidence that the firm/issuer/individual has profited from the action or potential breaches?*
6. *Has the firm/issuer/individual failed to bring the actions or potential breaches to the attention of the FCA?*
7. *Is the issue to be referred relevant to an FCA strategic priority?*
8. *If the issue does not fall within an FCA strategic priority, does the conduct in question make the conduct particularly egregious and presenting a serious risk to one of the FCA's Objectives?*
9. *What was the reaction of the firm/issuer/individual to the breach?*
10. *Overall, is the use of the enforcement tool likely to further the FCA's aims and Objectives?*
11. *Does the suspected misconduct involve an overseas jurisdiction? If so, would enforcement action materially further investor protection or market confidence in that jurisdiction?*"

The Regulator's stated referral criteria does not set out that the Regulator has to act upon each and every piece of information it receives. Clearly it would be inappropriate for the Regulator to take action on the basis of an isolated and unsupported comment from an individual who could possibly be no more than a disgruntled employee or ex-employee which was baseless and or made out of malice. However, where a number of similar assertions were identified from a number of information sources (which could include comments from potential whistle blowers) the assessment criteria indicate that the Regulator may wish to make further and more detailed enquiries of the firm or individual.

It is also worthy of note that the Regulator has also added that when it was considering what action, if any was necessary following receipt of the information the Regulator made enquiries of Firm A in relation to these concerns and that

> "*Of particular note in this case were repeated incidents of Firm A providing assurances to the [Regulator] that concerns had been met, resulting in the [Regulator] deciding not to take enforcement action at an earlier stage than it did*".

Given this, there is, in my opinion, nothing to suggest that the Regulator failed to take action at the appropriate time.

5.17 With this in mind, in my opinion there is nothing to suggest that the Regulator neither consider the credibility adequately of the intelligence providers (including the whistle blowers) before deciding that further action was necessary nor that it failed to act at the appropriate time. Therefore, it is my Final Decision that this part of your complaint is not upheld.

6 Element Two

6.1 As I have indicated in paragraph 5.10 to 5.13 above following consideration of the information the Regulator already held, the protected disclosures it had received from four different people (within a period of approximately six months) and given the Regulator's statutory obligations, it arrived at an understandable view that further investigation of the allegations was necessary and that this was realistically something which could only be undertaken through an unannounced visit.

6.2 Although you feel that the 'allegations' could have been investigated by way of action by the your firm's Supervisors, as the Regulator set out within its decision letter that

> "*The Supervision Division uses a risk-based approach to information it receives in order to use the most appropriate regulatory tool to address its concerns. In some cases, after information has been assessed, it is appropriate to refer a matter directly to the Enforcement Division. In this case, a detailed business case was prepared setting out the reasons for that referral to the Enforcement Division and the decision to do so was approved by Senior Management*".

Whilst it is unusual that the Regulator felt it necessary to move straight to an Enforcement investigation, this is an option which is open to the Regulator. I would add that where the Regulator believes that there are serious breaches of its rules or there is the possibility of inappropriate practices which could lead to consumer detriment which could possibly amount to fraud, then the Regulator correctly has the option of moving straight to an Enforcement investigation.

In making this decision the Regulator has to base its decisions on the information which is available to it at the time the decision was made. Whilst, with hindsight, it may be that some of part of the information provided to it was incorrect or that it is unable to prove beyond the balance of probabilities that significant and deliberate rule breaches have occurred (or to the extent believed) this does not mean that the Regulator's decisions were incorrect. The issue to be considered was whether the action the Regulator took *based upon the information available at the time that that decision was taken* (my emphasis) was reasonable and proportionate.

6.3 In this case, as I have set out above I am satisfied that the Regulator acted appropriately in deciding that an unannounced visit was required. However, I should add that this on its own does not immediately clarify (and more importantly justify) whether the use of a search and seizure warrant (granted under S176 of FSMA) was the most appropriate method of undertaking the visit.

6.4 The Regulator's file shows that once it was decided that an unannounced visit was required, consideration was then given to how this visit should be conducted. In doing this the Regulator's file shows that consideration was given to both an unannounced visit conducted by Enforcement without the assistance of the local constabulary and a search and seizure visit (undertaken by warrant granted by S176 of the FSMA) with the assistance of the local constabulary. The Regulator's file shows that before any formal decision was made detailed consideration was given to the aims of the visit and benefits and short comings of both of conducting both methods of conducting the visit. It is clear from the Regulator's file that the decision to undertake a search and seizure visit (undertaken by warrant granted by S176 of FSMA) with the assistance of the local constabulary was not a decision which the Regulator took lightly or without careful consideration.

6.5 The Regulator's file from the time, together with the information which the Regulator's Complaints Team obtained during its subsequent investigation shows that there were clear reasons for conducting a search and seizure visit (undertaken by warrant granted by S176 of FSMA) with the assistance of the local constabulary. I should also add here that the Regulator's documented reasons and rationale for conducting the visit in this manner to me do not appear unreasonable in all the circumstances.

It is unfortunate that I cannot comment further on the actual rationale, but what I can say is that due to the size of the premises which were to be searched and where the preservation of evidence is paramount, and the Regulator has concerns that there is a real risk that evidence may be not be preserved, the use of a search and seizure visit (undertaken by warrant granted by S176 of FSMA) with the assistance of the local constabulary, which 'guarantees' the preservation of evidence, to me would not appear to be an unreasonable use of its discretion (on how the visit should be undertaken).

I appreciate that you have indicated that you dispute this view and have stated in your submission to my office that:

> "*The 'reasonable grounds' declaration by the FSA and the FCA Complaints Team holds no substance; there was absolutely no evidence to suggest that the Firm A Group Ltd would not have fully co-operated if a normal arrow-style visit had been chosen. Our previous relationships with the FSA had always been open and transparent and at no time did the Company or its Directors give any reason to indicate that a visit by the FSA would have resulted in the disappearance of documents or files as implied by the FSA Investigation Team*".

I accept that you dispute the Regulator's position that it was likely that evidence would be destroyed. However, my role in the complaints process is to provide an independent assessment of whether the Regulator's conduct and decisions, based upon the information it had available, was a reasonable position for it to adopt.

In this case, it is clear from the information that the Regulator has provided that it believed that there was a possibility that unless a search and seizure warrant was obtained there was a possibility that the evidence it expected to find may be destroyed. Given this, the Regulator's decision to apply for a search and seizure warrant appears to be reasonable in all of the circumstances.

6.6 I have also noted your comments regarding the use of a large number of Police officers and their attire. Although the Regulator was granted a search and seizure warrant which granted the Regulator the legal authority to undertake a search of your business premises and seize any items it required as evidence, such a warrant *can only* (my emphasis) be conducted under the supervision (or in the presence) of a police officer.

As such, to allow the warrant to be correctly executed and the search to be lawfully undertaken the assistance of the Police (through the local constabulary) was required. As such, prior to the visit, the Regulator's file shows that contact was made with the local constabulary and an approach made to enable the Regulator to serve the warrant and conduct the search of your business premises.

From the information provided to me it appears that the Regulator only requested the assistance of the Police with the exercise and completion of the warrant and did not specify the number of Police officers that were needed. As such, whilst the 11 Regulator's Investigation staff (required to allow the search to be completed in a reasonable time period) were accompanied by eight Police officers[5], the number of Police officers which attended your offices was a decision which was made by the Police *rather* (my emphasis) than the Regulator.

Likewise, I also note that you are unhappy with the Police officers wore 'stab vets' whilst assisting the Regulator's staff with the execution of the warrant. Although I can understand why the wearing of such attire may appear excessive given the nature of the Police officers' role in this situation, I believe that the attire worn by the Police officers forms part of their usual uniform and is therefore a matter for the Police rather than the Regulator. I would also add that it is possible that had the Police officer's failed to wear the correct attire whilst assisting the Regulator that it may have made the execution of the search warrant unlawful.

6.7 As I have set out above, given the Regulator's concerns regarding the conduct of both you and your staff, it is clear that the Regulator felt that an unannounced Enforcement visit was required. I would reiterate here that the Regulator's file indicated that, in my opinion, it considered adequately and in detail a number of options before deciding that a search and seizure visit (conducted by warrant issued under s176 of FSMA) was the most appropriate manner to achieve its objective of obtaining and preserving the evidence it was expecting to find.

6.8 Likewise, given the Regulator's concerns in relation to both the offences which it suspected may have been committed and concerns over the preservation of the evidence it expected to find, the Regulator believed that a search and seizure visit (conducted by warrant issued under s176 of the FSMA) was both proportionate and necessary.

[5] Upper Tribunal transcript page 8 line 1

6.9 It is unfortunate the Regulator's actions led to adverse publicity for your firm but given the serious concerns the Regulator had, it had to balance carefully its statutory obligations with the possible impact the exercise of these may have had. Whilst the Regulator must try to limit the 'damage' its actions can have on a firm, equally this cannot be at the expense of the exercise of its statutory obligations. Clearly, where the Regulator has significant concerns it has to make a decision which is ultimately a judgement on what action it should take at a given time. Such judgements are often difficult decisions to make and are often easier to assess with the benefit of hindsight.

However, from the papers presented to me it is clear that the Regulator made a careful and detailed assessment of the level of action needed and the manner in which this actions should have been undertaken. It is equally clear to me that the Regulator, having considered a number of factors and different options, arrived a decision which it believed was appropriate at the time. This decision *was* (my emphasis) reviewed by a number of parties before being presented to a Magistrate who ultimately granted the Regulator with the search and seizure warrant.

6.10 With this in mind, in my opinion there is nothing to suggest that the Regulator either act disproportionately or conducted the visit in a manner which was designed to lead to adverse publicity for your firm. Therefore, it is my Final Decision that this part of your complaint is not upheld.

7 Element Three

7.1 In your submissions to my office you state that the Regulator "*failed in its duty of care and breached their (sic) code of confidentiality*". Although you have made this comment you have not expanded upon the comment and have not, as far as I can ascertain from the papers presented to me, provided any evidence to support this allegation.

7.2 I therefore believe that your comments in this area revolve around two areas. The first is informing the press of the 'raid' and the second is clarifying comments which were misinterpreted by a journalist.

7.3 Whilst it is unfortunate that the press became aware of the 'raid' to your business premises you have not provided any evidence to show that the Regulator directly or any member of its staff alerted the press to the fact that a 'raid' of your business premises was being undertaken. I note that the Regulator has suggested that any one of a number of people could have alerted the press, given that both the police and its team were gaining access to your offices and the police maintained a presence in your car park during the morning.

7.4 It is also clear that the Regulator has previously explained, in a letter sent to your lawyer on 5th December 2007, that on 29th November 2007 (the day after the 'raid') a member of its press liaison team was contacted by a reporter and specifically asked about the 'raid'. The member of the Regulator's staff simply stated that

> "*The FSA with the assistance of assistance of the police carried out a search on Wednesday 28th November 2007 at the premises of the Firm A Group. We cannot make any further comment*".

As it is clear from the supporting documentation that you have provided with your letter of complaint that the 'raid' was in the public domain, the comments by the Regulator appear to be appropriate. It is unfortunate that the reporter appears to have 'merged' the answers to questions that she posed about three unrelated issues together but this is not the fault of the Regulator. I would also add that, in my opinion, the answers provided by the Regulator do not breach any form of confidentiality.

7.5 Given that it was the journalist rather than the Regulator which incorrectly reported the facts surrounding the visit, and as it appears that the article which incorrectly reported the events was removed from the trade magazine's website following the Regulator's involvement it is unclear how you have arrived at the view that the Regulator "*failed to respond to reasonable requests by Firm A to mitigate the fiscal and reputational damage to the business [which led to] the ultimate closure of the business within 4 months of the 'dawn raid' resulting in the loss of 154 jobs*".

7.6 I have also noted your views that the Regulator's actions directly resulted in the failure of your business as it was no longer possible for you either to sell the business or to complete an AIM market floatation.

7.7 Whilst I accept that the Regulator's action created adverse publicity for your firm, as I set out in paragraph 4.1 above, when arriving at my decision I am bound by the findings of the Upper Tribunal. With this in mind I am aware that the Upper Tribunal made a finding regarding this issue regarding the 'failure' of your business.

7.8 Whilst you state that the firm's failure was directly related to the Regulator's actions on 28th November 2007, the Upper Tribunal has indicated that prior to the Regulator's visit your firm appeared to have suffered some financial difficulties. The Upper Tribunal has stated in paragraph 107 of its decision that:

> *"While [the firm] had proposed a repayment plan it had not yet been accepted [by HMRC]. Previous demands from HMRC as recently as July had not been met. There were also other debts, overdue commission payments to advisors of £50,000 as at 25 July 2007 and the overdraft was substantial and at its limit*".

7.9 Likewise, whilst you have indicated that it was the Regulator's actions on 28th November 2013 that resulted in the sale of the business collapsing and loss of 154 jobs, the Upper Tribunal has set out in paragraph 17 of its decision that

> "*The Company's revenue fell in the course of 2007 and HMRC pressed for payment of more than £500,000. In July 2007 the company learned from accountants advising on the sale of the business that commission in the pipeline had to be valued differently from before and that as a result there was a breach of capital adequacy requirements which should be reported to the Authority immediately. Firm A did not report the matter for almost three weeks and the Authority says that the information provided was misleading*".

7.10 The Upper Tribunal continued in paragraph 18 of its decision that

> "[*The Complainant] said that the prospects for the sale fell away with the financial crisis in the autumn of 2007 and the end of Lehman Brothers. There may have been other factors. The company made a payment proposal to HMRC in July which was accepted in September but which it then failed to meet*".

Given that Autumn is traditionally taken to represent the months September, October and November and that the visit did not take place until 28th November 2007, the Tribunal's comments, by which I am bound, indicate that sale of the business had fallen away *before* (my emphasis) the Regulator's visit on 28th November 2007 as a result of the financial crisis *rather* (my emphasis) than as the direct result of the Regulator's actions.

Whilst I accept that the Regulator's actions (and the adverse publicity this created) may not have aided your business' prospects going forward, the Upper Tribunal's comments strongly indicate that your business was in financial difficulty before the Regulator's visit and that the visit was *not solely and/or directly responsible* (my emphasis) for your business' subsequent failure.

7.11 Accordingly, it is my Final Decision that this part of your complaint is not upheld.

8 Element Four

8.1 The exact nature of the complaint you say you raised about Enforcement Officer X following the raid is unclear and I have been unable to find any reference to this in the bundle of supporting documents you submitted along with your letter of complaint. However, from the correspondence contained within these bundles of documents I believe that your concerns regarding Enforcement Officer X conduct can be split into two categories. The first appears to relate to the manner in which the Regulator attended your premises on 28th November 2007 and the second relates to the settlement discussions which were held prior to the matter being referred formally to the RDC.

8.2 As indicated above, whilst Enforcement Officer X was the lead investigator, the decision to undertake a search and seizure visit was not hers alone. As I have explained in sections 5 and 6 above the decision to undertake a search and seizure visit was taken, ultimately, by the Director of Enforcement. Whilst Enforcement Officer X may have been part of the decision making team, she was *not* (my emphasis) solely responsible for that decision.

8.3 Whilst it is clear that you were unhappy with Enforcement Officer X's conduct on the day, it is clear that there are differing views over who made the relevant decisions affecting your business operations on the day of the raid. Whilst you suggest that the decisions were all made, in isolation, by Enforcement Officer X, it appears from the correspondence which you exchanged with the Regulator that at least some of the decisions or input regarding the service you could offer to your customers were made with the input of a number of senior managers of your firm. As I was not present when the raid took place and given the lack of contemporaneous notes regarding the provision of services by your firm to your customers, it is not possible for me to comment further.

I would add here that I appreciate that you are unhappy that only a 'skeleton' staff was allowed to return work on the day of the visit and that they were not allowed to do so until a search of their working area had been completed. However, whilst this was unfortunate, it was not unreasonable for the Regulator to prevent staff going to their desks until the area had been searched. Whilst it was unfortunate that the search had an impact upon your staff's ability to conduct their usual tasks on the day of the search but this was, unfortunately, inevitable given the Regulator's concerns and the aims of the visit.

Even if the Regulators had chosen to undertake a unannounced visit (without relying upon the warrant obtained under S176 of FSMA) I believe that your business would have experienced similar operational problems as the Regulator would have sought to limit your staff's access to the building why the search was undertaken and also limited access to computer systems (to enable images to be taken). The fact that it was Enforcement Officer X who made the decisions about which you are unhappy on the day (and may have subsequently challenged you over your conduct and that of your firm) does not mean that she acted inappropriately, with hostility towards you or with bias.

8.4 From the papers presented to me it also appears that your subsequent concerns surrounding Enforcement Officer X relate to the fact that she refused to 'negotiate' with you regarding an early settlement and simply rejected the offer you made without referring the matter to the project sponsors. The correspondence you exchange with the Head of the Regulator's Enforcement Department confirms this. However for the avoidance of doubt the letter indicates that internally, the Regulator had held discussions regarding what settlement would be acceptable (based upon the information you had provided to it). As your proposals appear to have fallen short of what the Regulator regarded as an acceptable settlement it appeared reasonable for Enforcement Officer X to reject the offer without discussing the matter with the project sponsors.

8.5 Whilst I can appreciate why you feel this approach was unhelpful, it does not suggest that Enforcement Officer X was acted inappropriately with hostility or with bias; in my opinion she was setting out the position expected by her superiors (and the project sponsors). It also appears from the papers presented to me that you made what could be described as a 'take it or leave it offer' to the Regulator. Unfortunately, discussions regarding the early settlement of Enforcement action are not conducted on this basis.

8.6 When setting penalties the Regulator has regard to a number of factors and then makes proposals to the subject of that Enforcement action. It is then a case for the subject of the investigation to show to the Regulator why this penalty is inappropriate or that they do not have the resources to enable them to meet the required settlement. In these circumstances the Regulator will 'review' what it believes then is the appropriate settlement. It is *not* (my emphasis) for the subject of the Enforcement action to make proposals to the Regulator on a "take it or leave it basis".

8.7 I appreciate that you feel that the fact that you were unhappy with Enforcement Officer X and the Regulator failed to adhere to your request to have her removed from the investigation shows that it failed "*to act in a fair and proportionate manner during the investigation generally; the FSA has acted with a lack of care, with bias and lack of integrity*". When undertaking Enforcement action the Regulator's role is very clear in that the Regulator has a statutory duty to investigate suspected breaches of the regulators roles especially where the breaches could lead to consumer detriment.

Unfortunately it is a consequence of this role that this will often lead to the Regulator often making difficult decisions or taking action which the subject of that action may dislike. The fact that Regulator has taken action and made a decision which you either dislike or disapprove of is not evidence that it has failed "*to act in a fair and proportionate manner during the investigation generally; the FSA has acted with a lack of care, with bias and lack of integrity*".

I should also add that given that Enforcement Officer X was fully conversant with the investigation and given that no evidence has been provided to suggest that she acted either unprofessionally or with bias, I believe that it was reasonable for her to remain involved in the Regulator's investigation.

8.8 In a similar manner, whilst you remain unhappy that the regulator "*failed to issue a Preliminary Investigation Report during the investigation*" the Regulator has set out on page six of its decision letter that whilst the:

> "*Enforcement Guide (EG) sets out that it is the Authority's usual practice to send a PIR but it recognises that there are exceptional circumstances in which the Authority may decide it is not appropriate to do so. For example, EG 4.31(2) states "where it is not practicable to send a preliminary findings letter, for example where there is a need for urgent action in the interests of consumer protection". Furthermore EG 4.31(3) states 'where [the Authority] believes that no useful purpose would be achieved in sending a preliminary findings letter, for example where it has otherwise already substantially disclosed its case to the subject and the subject has had an opportunity to respond to that case.*"".

Although I can understand why you remain unhappy that you were not provided with a Preliminary Investigation Report, however the Enforcement Guide only states that "*that it is the Authority's usual practice to send a PIR*". As such this *does not compel* (my emphasis) the Regulator to provide the subject of an Enforcement investigation with such a document.

The Regulator has also explained in its decision letter that

> *"In your case, referral to the RDC was urgent because the matter required a decision from the RDC before a statutory limitation period. We understand that sending a PIR would have jeopardised that limitation period and we conclude on this basis that deciding not to send a PIR is within the Authority's procedures. Incidentally, we believe the Authority had already substantially disclosed its case against you in the form of a 'without prejudice' Warning Notice during early settlement discussions, prior to making a referral to the RDC. We do not believe you were unfairly disadvantaged because you had (and took) the opportunity to make representations to the RDC on the matter*".

Given that the Regulator has provided a clear and understandable reason why a PIR was not provided, although unusual, this does not, in my opinion, amount to the Regulator acting in a manner which could be described as being acting with bias or a lack of integrity and is also consistent with the Regulator own rules.

8.9 I would also add that the fact that, as a result of the Regulator's investigation the offences found were less serious than those which were believed to have occurred does not mean that the Regulator's actions were inappropriate. I have set out above in considerable detail why I believe that the Regulator's actions appear reasonable given the information available to it at that time.

Indeed, the Tribunal found that many of the failings alleged by the whistle blower (which I included in the contents of 5.7 above) had occurred and were not acts of vindictiveness or a concerted effort to bring down your firm on the part of an ex-employee as you have suggested. Given those findings, I am bound by the Upper Tribunal's overall decision and conclusion. As these findings make reference to the overall case presented by the Regulator (including its submissions surrounding the file reviews it undertook), I do not believe that further comment in this regard is necessary.

8.10 Accordingly, it is my Final Decision that this part of your complaint is not upheld.

9 The Complainant's response to my Preliminary Decision

9.1 The Complainant made a number of comments and observations upon my Preliminary Decision. I have carefully considered all these when arriving at my Final Decision and I have, where appropriate commented earlier on a number of them in this my Final Decision. Nevertheless, I feel that some of them do require a specific and more detailed response.

9.2 In the Complainant's further submissions he sets out that:

> "*I note with interest that you been given access to documents previously inaccessible at Tribunal or throughout the Enforcement action. Specifically the significant reference to whistleblower (sic) information dating back to April 2007.*
>
> *Within your Preliminary Decision you advise: The Regulator's file shows that concerns were first raised as a result of intelligence received in April 2007.*
>
> *To set the context, the Tribunal Hearing for myself and Mr Y was consolidated, Defence Counsel for Mr Y, Mr John Virgo vigorously pursued the issue of the Authority being out of time in raising their case. We refer to Mr Y's Statement of Case prepared by Counsel Mr Virgo:*
>
> *2.4 In relation to the financial penalty proposed against Mr Y the Applicant says that the FSA is out of time to bring such a case. Specifically, the Applicant relies on section 66(4) of the Financial Services and Markets Act 2000 whereby the FSA 'may not take [such] action ... after the end of the period of two years beginning with the first day on which the Authority knew of the misconduct unless proceedings in respect of it against the person concerned were begin before the end of that period'.*

2.5 By section 66(5)(a) of the Act it is provided that 'the Authority is to be treated as knowing of the misconduct if it has information from which the misconduct can reasonably be inferred If—which is denied — the conduct now alleged against Mr Y is such as to give rise to any breach of the FSA's Principles for Approved Persons or knowing participation by him in breaches by the firm of the FSA's Principles for Businesses the conduct about which complaint is made is in substance identical to that in whistleblower information provided in April 2007.

Please note the Warning Notice was not issued until 5th August 2009 and the Authority claim they were first made aware of misconduct on 9th August 2007.

His Honour Judge Mackie CBE QC dismissed the out of time defence argument on the basis of information supplied by the Authority. The Authority claims that they first received whistleblower (sic) information on 9th August 2007.

If this is indeed the case and His Honour Judge Mackie CBE QC was denied or not shown the significant whistleblower (sic) information supplied to the Authority in April 2007, clearly stating that serious misconduct/fraud/forgery was taking place (i.e. misconduct can be reasonably inferred), it is our contention that the Authority misled the Tribunal. This would be significant evidence of bad faith on behalf of the Authority and grounds for the case to be over turned.

The whistleblower (sic) information provided to the Authority in April 2007 was clearly very significant. The Tribunal transcripts confirm that the Authority made no mention of the April 2007 Whistleblower (sic) information; the Authority claimed they were first made aware of any misconduct on 9th August 2007 as confirmed on numerous occasions within the Tribunal transcripts (sic).

[…]

23 My letter of 14 October 2009 also stated that the

24 FSA considers ...(Reading to the Words)... reasonably

25 inferred as 9 August 2007. I confirm that this is the

1 date of the FSA's first contact with the whistle blower

2 who provided information in relation to Mr Y.

3 Now Sir, if my learned friend's position, or if the

4 position was that there would were documents pre-dating

5 5 August 2007 which the Authority were refusing to

6 provide in redacted form or otherwise but which they

accepted existed, then that might be one position. But here the Authority's position is that there are no documents in relation to a whistle blower who provided information in relation to Mr Y. That would fall outside the limitation period; effectively a nil return. In my submission, there is therefore nowhere on the evidence for this application to go. So as far as limitation is concerned — and I can say this on instructions, without making a comment one way or the other as to whether Mr M was or was not a whistle blower, I can confirm there was no information received by the FSA from Mr M outside of the limitation cut off period. That is a nil return and not a chase that can lead anywhere.

[…]

It is a fact (as you have confirmed) that the Regulator's files show that concerns were first raised as a result of intelligence received in April 2007; the source of this intelligence is irrelevant; what is relevant is that the Authority were first made aware of possible misconduct in April 2007.

The Regulators position at Tribunal was that they were first made aware of any misconduct on 9th August 2007; clearly this was not the case.

It is my belief that the Authority has misled the Tribunal by misrepresentation of the true facts, I allege that the Authority has, by concealing the April 2007 Whistleblower (sic) information which was in their possession, perpetrated perjury and has further shown absolute contempt for the due legal process. This represents a significant breach of process where the case was pursued out of time and would form a strong case for bad faith and reckless if not dishonest behaviour.

The decisions of the Regulator were made with an improper and ulterior motive and the Regulator did not have an honest belief that it was acting lawfully.

I would reiterate if this is indeed the case and His Honour Judge Mackie CBE QC was not shown the significant whistleblower (sic) information supplied to the Authority in April 2007, clearly stating that serious misconduct/fraud/forgery was taking place (i.e. misconduct can be reasonably inferred), it is our contention the Authority misled the Tribunal. This would be significant evidence of bad faith on behalf of the Authority, and grounds for the case to be over turned".

9.3 As the disclosure to the Upper Tribunal was a matter for the Regulator, I asked the Regulator to provide its comments and views upon the comments made by the Complainant. The Regulator has set out that:

"*Section 66 FSMA*[6] *provides as follows:*

"(1) The Authority may take action against a person under this section if -

(a) it appears to the Authority that he is guilty of misconduct; and

(b) the Authority is satisfied that it is appropriate in all the circumstances to take action against him.

(2) A person is guilty of misconduct if, while an approved person -

(a) he has failed to comply with a statement of principle issued under section 64; or

(b) he has been knowingly concerned in a contravention by the relevant authorised person of a requirement imposed on that authorised person by or under this Act.

(3) If the Authority is entitled to take action under this section, it may -

(a) impose a penalty on him of such amount as it considers appropriate; or

(b) publish a statement of his misconduct.

(4) The Authority may not take action under this section after the end of the period of two years beginning with the first day on which the Authority knew of the misconduct, unless proceedings in respect of it against the person concerned were begun before the end of that period.

(5) For the purposes of subsection (4)—

(a) the Authority is to be treated as knowing of misconduct if it has information from which the misconduct can reasonably be inferred; and

(b) proceedings against a person in respect of misconduct are to be treated as begun when a warning notice is given to him under section 67(1)".

The test set out in section 66 of FSMA requires that the [Regulator] "knew" of the relevant misconduct. Even though this test is partially qualified by the provisions of s66(5) to the extent that the [Regulator] "is to be treated as knowing of misconduct if it has information from which the misconduct can be reasonably inferred" it is still necessary that "knowledge" of the misconduct can be inferred from the information in the possession of the [Regulator].

[6] *(This was the version in force from April 1 2007 to June 7 2010)*

The [Regulator] received information at various times as highlighted in the Tribunal decision. It was only following receipt of information on 9 August 2007, which is within the 2-year period preceding the issue of the Warning Notice that the [Regulator] had the requisite knowledge of misconduct such that the 2 year limitation period in s66 (4) FSMA started to run. This is reflected in para 44 of the Tribunal's decision.

To return to [the Complainant's] suggestion that the April 2007 whistle-blower information should have started the limitation period running, the [Regulator's] position is as follows; the April 2007 whistle-blower contact was uncorroborated and further no specific individuals were named in that contact. Consequently, the Authority did not possess *"information from which the misconduct [of [the Complainant] or Mr Y] can reasonably be inferred" relating to either [the Complainant] or Mr Y in April 2007.*

Further, we note that Mr Y's counsel, Mr Virgo conceded the limitation argument on 21 June 2012, the final day of the Tribunal hearing".

Here the Regulator refers to the comments made by Mr Virgo, the counsel for Mr Y who appealed to the Upper Tribunal along with the Complainant with particular emphasis being placed to the comments made between lines 17 and 20 of page 89 of the transcript, where Mr Virgo states:

"*14 …the other point taken*

15 in opening, that there may have been evidence indicating

16 an awareness on the part of the Authority prior

17 to August 07. I have taken on board obviously the

18 information that the tribunal has been able to provide

19 and looked at the whistleblower (sic) situation and there is

20 no support to enable that point to be advanced".

The Regulator also add that:

"*More generally, [the Complainant's] latest correspondence overlooked Mr Justice Mackie's findings regarding the whistle-blower evidence provided on 20 June 2012*".

Here the Regulator refers to a comment made by Mr Justice Mackie, the chairman of the Upper Tribunal, which confirms that the Regulator provided the Upper Tribunal with a full disclosure of the intelligence it had received from a number of sources which clearly indicated that the Regulator had received some intelligence prior to August 2007 (and that some intelligence was received as early as April 2007). The Regulator has specifically drawn attention to the comments Mr Justice Mackie makes between lines 11 to 20 of page 184 of the transcript where he states:

"*[…] There was an earlier*

contact between an employee of Firm A, not as

we understand it a very senior one, who made some

wide-ranging complaints and did so when making

a telephone call on 13 April 2007. The individual

concerned was informed that [the] call could be treated in

confidence as with any subsequent correspondence and [the caller]

was invited to submit [their] complaints in writing. [The caller]

did not submit [the caller's] complaints in writing and, put

shortly, understandably, the FSA took no further action".

9.4 Despite what you set out in your submissions, these comments clearly indicate that the Regulator had provided a full disclosure of the information it had received from a number of information sources (including whistle blowers) to the Upper Tribunal.

9.5 Given that, as I indicated in paragraph 4.2 above, I am bound by any finding of fact by a competent court of authority (which as I set out n paragraph 4.1 above includes the Upper Tribunal), these comments give comfort to the views I expressed in paragraph 5.16 above where I indicated that the Regulator *does not* (my emphasis) have to act upon all of the information it receives. Instead it is able to consider the information it receives and act when it has evidence or significant/strong suspicions of wrong doing on the part of regulated firm or individual.

10. Conclusion

10.1 As I have set out the decision of the Upper Tribunal are binding upon me and, as a result, I am unable to review or comment upon any of its findings in respect of the case presented wither by you or the Regulator. I know that you are disappointed with the Upper Tribunal's overall findings and the penalty which it applied however, although I understand that such feelings are to a degree, reasonable, I simply do not have the legal jurisdiction to consider or comment upon decisions made by the Upper Tribunal. As such I do not intend to make any further comment.

10.2 Similarly I would also add that I know that you have a number of questions and concerns regarding the case the Regulator presented at the Upper Tribunal hearing and are disappointed that it did not call the investigation staff as witnesses. Whilst I note your concerns, ultimately it is a matter for the Regulator to call the witnesses it believes are necessary and for the Upper Tribunal to assess the cases presented.

10.3 Whilst I have noted your concerns, any comment I make would amount to a comment upon the Upper Tribunal's findings which, as I have indicated above, is something which I do not hold the legal jurisdiction to do. If you felt that the evidence or lack of witnesses undermined the Regulator's case then the appropriate manner to challenge this was to either raise this in argument at the hearing or seek leave to appeal the findings. Given that the Upper Tribunal has now issued its decision (which was also binding upon the Regulator with the issue of the Final Notices) this is not something I can now consider.

10.4 It is clear that you remain unhappy with the Regulator's conduct throughout its Enforcement investigation. That is disappointing but I hope that you will understand why I believe that, in the circumstances, the Regulator's actions were necessary, objective and ultimately proportionate.

10.5 I also hope that you will understand why I have reached the conclusions that I have and therefore it is my Final Decision that I am unable to uphold any of your complaints.

Sir Anthony Holland
Complaints Commissioner

1st April 2014