Complaints Commissioner

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 of 10th December 2013 to my office, which I received on 13th December 2013, you set out that your complaint could be encapsulated by the following 39 points:

1. "*The FSA acted disproportionately in conducting an enforcement investigation by exercising a search and seizure warrant;*
2. *The FSA did not, by their own admission, test key evidence upon which the FSA and magistrates court relied to decide on exercising Section 176 powers;*
3. *The FSA failed to conduct the visit in a manner that would limit adverse publicity and consequential physical and reputational damage to the business;*
4. *The FSA carried out the visit in a high profile way, using an unnecessary large number of police officers and investigators (21 in total);*
5. *Obtaining a police warrant was a major error in judgement on behalf of the Authority and is at the core of the allegation of not acting in good faith;*
6. *The Authority were aware that using such a large number of police would have drawn significant media attention – which impacted the business terminally;*
7. *The Authority has sought comfort in the fact that a 'Search and Seizure Warrant' was granted by a Magistrate. This is not the issue at hand. The Magistrate can only opine on the information presented, the issue, as is now is apparent is that the information presented to the Magistrate was not tested by the Authority;*
8. *The FSA failed to respond to reasonable requests by Firm A to mitigate the physical and reputational damage to the business. When the investigation turned to the individuals this same complaint is retained;*
9. *The FSA deferred a decision to investigate the complaint pending the outcome of the enforcement investigation, despite terminal physical and reputational damage caused to Firm A and subsequently its directors;*
10. *The FSA failed to act in a fair an proportionate manner in the investigation generally;*
11. *The FSA had not acted in good faith and had acted with a lack of care and possibly with bias and/or lack of integrity;*

12. *The FSA did not review the Firm A Compliance Manual on the basis they could not locate it on the Firm A Server. This is despite being told exactly where it was located on the server by Mr O;*

13. *Firm A complained to the FSA about the management of the visit by Enforcement Officer X, who headed the FSA Investigation and was at the centre of the FSA's key decisions. We repeatedly expressed concerns about Enforcement Officer X's continued involvement in this enforcement case and these concerns were not been addressed by the FSA, other than to confirm that the FSA remained satisfied that it was appropriate for Enforcement Officer X to continue to manage the investigation even though a serious complaint was outstanding against her;*

14. *Bearing in mind the nature of the complaint, it's my firm belief that it is wholly inappropriate for the same individual to have been managing this case. It is inappropriate for the FSA to conclude that since the complaint is deferred, pending the outcome of the disciplinary process, it is fair and reasonable to have the same individual (who is the subject of the complaint) still be in charge of the case and part of the disciplinary process. Since the FSA refused to address this issue to my satisfaction, this issue remains at the centre of the complaint and it will need to be addressed as I strongly believe that the FSA led by Enforcement Officer X acted disproportionately and with bias against me;*

15. *The FSA failed to provide full disclosure about the personnel involved in this investigation – which compromised continuity in the investigation. For example Enforcement Officer X was replaced as investigation lead by Enforcement Officer Y without formal notice. In fact Enforcement Officer X was removed from the case after 18 months to work on another case, but returned without notice to personally to oversee and communicate the sanctions;*

16. *More than 5 years later and despite repeated requests I was denied access to key evidence the FSA Enforcement Team has used to prepare its case namely–*

    - *Access to the Firm A Email server. It is in all measures unfair that access to the server was denied. The FSA's case was almost exclusively built around emails, and evidence was collated using key word searches of terms provided whistleblowers. Indeed the FSA claimed to have reviewed 35,012 emails of which over 12,000 were from my email account. Ultimately about 30 emails were put forward in evidence.*

    - *All interviews i.e. the transcripts of some 20 Firm A Mortgage processing Staff were with held until the 18th of May 2012, so there was no time to incorporate this evidence into my Tribunal submissions, or indeed those to the RDC. A review of these transcripts will indeed reveals that none of the evidence collated from actual Firm A sales personnel in any way supported the FSA's case – hence it was with held despite its undermining nature (sic):*

- *Copies of Previous communications between Firm A and the FSA Supervisory Team,*
- *Copies of all Firm A Board Meeting Minutes and Performance Review meetings,*
- *Copy of Whistleblower (sic) information supplied to the FSA Enforcement Team which is of highly dubious origin and authenticity,*
- *A copy of the warrant was not supplied on the day of the raid. After repeated requests a redacted copy of the warrant was supplied in March 2008, after I was interviewed. I do not understand why a non redacted (sic) copy of the warrant was withheld,*
- *This is not an exhaustive list – but now that the enforcement and Tribunal process is complete, I trust that the complaints commissioner has the power to thoroughly investigate the disclosure issues above as per FSMA 394,*

17. *The FSA should account for why any reference to the file review was missing in the first Warning Notice,*
18. *Why the FSA seized 100 Mortgage Lender M and then reviewed only 42 from 55 completed during the period under review – and held this review to be representative at RDC and Tribunal level?;*
19. *Why the FSA seized only 'self-certified' Mortgage Lender M files during the raid – one of only 29 lenders on panel;*
20. *Why the FSA did not select the 42 files for review randomly;*
21. *Why the file review was completed by non-qualified employees. (FSA Enforcement Team Personnel, an accountant, a solicitor and trainee solicitor – none of whom had mortgage experience);*
22. *Why the FSA waited until the eve of the Tribunal in June 2012 to complete a re-review of the files, substantiating errors I had pointed out 4th of February 2010;*
23. *In only assessing the lending files relating to one lender, the FSA provided a wholly distorted compilation of evidence;*
24. *In completing a word search on the server of just one lender resulted in a distorted compilation of evidence;*
25. *Comparative details of vertically integrated mortgage broking were not assessed by the FSA, i.e. National Guarantee placed more that 60% of its business with one lender (its owner). On this basis alone the action against Firm A was unwarranted;*

26. *The FSA deferred a decision to investigate the complaint pending the outcome of the enforcement investigation, despite the fiscal and reputational damage caused to Firm A and its directors, and the ultimate closure of the business within 4 months of the 'dawn raid' resulting in the loss of 154 jobs;*

27. *The FSA failed to act in a fair and proportionate manner in the investigation generally;*

28. *No Preliminary Investigation Report was issued in this case – significantly biasing the opinion of the RDC and circumventing judicial process;*

29. *A draft Warning Notice was issued 2 days before the expiry of the 2 year cut off for the Authority to raise a case. This placed me at a significant disadvantage as the business had closed more than eighteen months earlier and I had moved to Australia in March 2008;*

30. *Interviews were conducted with former Firm A employees more than a year after the raid. As the business had been closed these employees had no recourse to 'live' evidence or supporting documents;*

31. *I voluntarily made myself available for interview before leaving the UK. Unfortunately I was not given the opportunity to evaluate or comment on witness evidence, and as no PIR was issued so was further disadvantaged. Its grossly unfair that I was interviewed about one set of accusations and the Warning Notice contained something completely different;*

32. *Why the FSA Complaints Team took 8 months to review the complaint raised?*

33. *Why the FSA fought for almost 12 months to have the 'Dawn Raid' excluded from the Tribunal proceedings;*

34. *The FSA claim to have settled a fine with the administrators of Firm A (Administrator B) for the sum of £2.2m. Yet the Authority then pursued myself and Mr O personally? How is this possible?*

35. *In my Written Representations I make reference to the server access on 89 separate occasions yet the authority steadfastly denied access. Initially my requests were denied on the basis that providing access could prejudice the authority's case against others. When it came to light that the only other active investigation involved Mr O and that the cases against us were identical, the authority then changed tact and claimed I could not be given access to the server on the basis of privacy issues;*

36. *The Authority under Enforcement Officer X's direction set the original fine in the belief I still owned a residential property in the UK, despite having supplied a copy of settlement statements. This is another example of the draconian approach adopted by the authority. Even when this issue was satisfied, the Authority never reassessed the level of the original fine;*

37. *Why the FSA believes it is fair that the Warning Notice should continue to be published even though I have been unemployed for 9 months since its publication and being treated for deep depression and anxiety. It remains in number 1 position on a Google search of my name – hence my employment prospects remain at zero;*

38. The Authority has not acted in good faith; and

39. *The Authority has acted with a lack of care, with bias and lack of integrity*"

2.2 In addition to setting out the 'heads of complaint' (which I have set out in full in 2.1) you have provided further information to support your claims.

2.3 In relation to the background to the Regulator's visit to your firm's business premises you state the following:

"*On 3 July 2007 the company's then compliance officer – Mr H – stepped down, explaining that he had been diagnosed with a terminal heart condition, was unable to work and wanted to spend his apparently few remaining days alive with his daughter [D2/4/55/329]. As it emerged a little later, this was an extraordinary lie and a cover for Mr H' decision to take up employment with a competitor business. He also induced 4 other members of the Firm A compliance team to leave with him – including junior support compliance worker and ultimately FSA witness […].*

On 20 November 2007 – the Authority had internally appointed investigators to investigate the claims made by 3 whistleblowers – one of whom (and the central figure) was Mr H the former Compliance Director. There can be no doubt the whistleblowers acted in unison, yet this seemingly raised no alarm with the Authority. The Authority also applied on 23 November 2007 to the City of Westminster Magistrates Court for a search and seizure warrant in respect of Black and White's trading premises. The basis for the foregoing was information (emanating predominantly from Mr H) to the effect that the company had been perpetrating mortgage fraud on a grand scale. This included allegations of falsifying documents, systematic inflation of mortgage applicant's income data, shredding of documents to cover up the fraud, cold calling to force home-owners into re-mortgage transactions and arranging – against the interests of its customers, without their knowledge and to their prejudice – 'the placement of the vast majority of mortgages with one lender – Mortgage Lender M Ltd' (sic)".

2.4 You add that:

"*The Authority chose not to validate the whistleblower information which they believed was credible and wrongly applied for a Search and Seizure Warrant. The pretext for obtaining the Search and Seizure Warrant was underpinned by an extraordinary set of mistruths provided by the whistleblowers (sic) who clearly worked in unison*".

2.5 You also believe that:

"*a. The Authority did not test the information on which they relied to obtain the Search and Seizure Warrant, and importantly the reasons stated for obtaining the warrant remain unsubstantiated. One can only deduce that the Authority intent was to harm the business and to do so very publicly.*

b. The character of the individuals providing the 'whistleblower' information was not validated or tested; their motives for whistle blowing were not challenged by Authority. The quality of information provided by the whistleblowers was not challenged or tested by the Authority to ensure that information was provided honestly, in fairness and in with the absence of intent to harm other individuals. One of the whistleblowers had openly stated that his personal goal was to 'bring down the business'. The whistleblowers were disgruntled ex-employees and the Authority should have treated their evidence with some suspicion. One of the whistleblowers (Mr H) according to the testimony of Mr F and Ms G (Firm A's HR Director) staged his own terminal illness – highlighting an individual of very questionable repute (sic)".

2.6 You are also unhappy with the Regulator's conduct as you feel that:

"There were other alternatives available to the Authority which could have and *should have* been exercised."

2.7 You also dispute the Regulator's rationale for conducting the visit under a search and seizure warrant and state that:

"*There was absolutely no evidence to suggest that Firm A would not have co-operated fully if a normal ARROW style visit had been chosen*".

2.8 Likewise you also add that, prior to conducting the visit, the Regulator:

"*failed to independently validate many of the issues resulting in the issuance of a Search and Seizure Warrant prior to the FSA/Police raid i.e.*

i. Previous FSA visits at Firm A and their outcomes. It is absolutely crucial to note that the previous visits of the FSA Supervisory Team endorsed the business and its processes –

"On the basis of our current assessment we plan to carry out the next full risk assessment in 48 months"

This is concrete evidence that following the FSA Supervisory Review (ARROW) visit and follow up letter to Firm A dated 21 July 2006 that there was a high degree of comfort about Firm A's systems and processes, governance and TCF infrastructure. I have been denied access to all other correspondence between Firm A and the FSA Supervisory Team – which places me at a significant disadvantage in terms of fair judicial process.

ii. Lending delinquency ratios with Firm A's lender panel (this remains a key indicator of lending quality and soundness of systems & controls)

iii. The record of complaints of Firm A (i.e. with FOS and other independent bodies)

iv. Or any other tests which could have been done discretely by the Authority without the need for the drastic and terminal step of a Search and Seizure warrant.

v. *It should also be noted that the details of the Search and Seizure Warrant were not disclosed by the Authority until I specifically and repeatedly requested them at my interview 18th of March 2008. This clearly hindered any early attempts to expose the flaws in the information provided to the FSA by whistleblowers (sic). Again this is not acting in good faith*".

2.9 You have also raised serious concerns regarding the aims of the visit and suggest that:

"*There was no doubt that an intended consequence of the highly public visit (which was leaked to the press by an anonymous source at 8.10am in the morning on 27th November 2007), was to shut the business down and harm the reputation of all individuals involved in its operation*".

You continue that following the visit the Regulator:

"did not move to limit any damage caused by the visit – despite immediate detriment to consumers with difficult and pressing financial circumstances (in many cases these clients were facing county court judgements, bankruptcy and even repossession of their home residence)".

2.10 Finally you add that:

"*In effectively closing the business by their actions the Authority disadvantaged more than 8,000 existing mortgage customers, who would have been contacted by Firm A's customer care team prior to the expiry of their discounted/fixed rate period. As many of these clients had previous difficulty in obtaining finance many would have been very reluctant to approach lenders direct un assisted – and it's a fair assumption that many of these clients now denied access to Firm A's customer service division would have rolled onto much more expensive standard variable rates of lenders when in fact they could qualify for cheaper products, or in the case of sub-prime clients who have met their repayment schedules could qualify for much cheaper prime products. Firm A had an active program of 'credit repair' and these clients are now left exposed*".

2.11 Whilst I am aware that your letter of complaint set out clear concerns regarding the publication of the Final Notice, the delay in assessing this issue and the impact this has had upon you (in points 32 and 37 of paragraph 2.1 above). You will note that I have not included any of the additional comments you have made to support the assertions you made in the heads of complaint in paragraphs 2.3 to 2.10 above. This is not because I do not intend to address these concerns but because, as my Senior Investigator set out in his email of 10th January 2014, I intend to address these in a separate complaint investigation which will be conducted under the reference of FSA01600.

2.12 My rationale for doing this is twofold. Firstly your complaint relates to two separate events namely the Regulator's decision to undertake a search and seizure visit to your firm's business premises on the morning of 28th November 2007 and the subsequent actions and procedures of the Regulator directly stemming from this visit. The second is the Regulator's separate decision to publish the Final Notice despite your strong representations that doing so has impacted *and continues to impact* (my emphasis) adversely your employment situation in a different and unrelated jurisdiction.

2.13 Given that there are two separate 'strands' to your complaint which are independent and relate to different time periods, I feel that it would be beneficial and assist the clarity of my investigation if I was to undertake two investigations. My view in this regard is supported by the fact that the Regulator itself has assessed your concerns within two separate investigations.

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. A mere assertion of bad faith is not enough.

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 AGroup 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].

3.8 Clearly, whilst it is easy for a complainant to make an allegation or an assertion 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 the 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 objective 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);*

[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

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 (including the case the Regulator presented), I am unable to review or comment upon the decision the Upper 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 above (with the exception of points 32 and 37 which, as I have indicated, will be addressed in a separate complaint under reference FSA01600).

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 with the exceptions I have mentioned). I believe that addressing the issues in this way allows them to be correctly and appropriately addressed:

1. Element One – The background to the visit.

   This element of your complaint will encompass the following issues that you raised in relation to the background to the visit or raid. Specifically it will consider that the "*FSA did not, by their own admission, test key evidence upon which the FSA and magistrates court relied to decide on exercising Section 176 powers*" and that "*[obtaining] a police warrant was a major error in judgement on behalf of the Authority and is at the core of the allegation of not acting in good faith*".

   It will also consider your concerns that the "*Authority has sought comfort in the fact that a 'Search and Seizure Warrant' was granted by a Magistrate. This is not the issue at hand. The Magistrate can only opine on the information presented, the issue, as is now is apparent is that the information presented to the Magistrate was not tested by the Authority*".

2. Element Two – The visit (or raid)

   This element of your complaint will encompass the following issues that you raised in relation to the manner in which the visit (or raid) was conducted. Specifically it will consider whether the *"FSA acted disproportionately in conducting an enforcement investigation by exercising a search and seizure warrant*". It will also assess whether the "*FSA carried out the visit in a high profile way, using an unnecessary large number of police officers and investigators (21 in total)*" and in doing so "*failed to conduct the visit in a manner that would limit adverse publicity and consequential physical and reputational damage to the business*".

   This element of your complaint will also consider your concerns over the selection of files for the 'file reviews' specifically why attention was placed upon which you set out as why Regulator targeted files belonging relating to "*100 Mortgage Lender M*" customers with further attention being given to "'*self-certified' Mortgage Lender M files*".

3. Element Three – Reputational damage

   This element of your complaint will consider the issues you raised in relation to the reputational damage which the visit (or raid) caused. Specifically it will consider whether the *"FSA failed to respond to reasonable requests by Firm A to mitigate the physical and reputational damage to the business. When the investigation turned to the individuals this same complaint is retained*".

   It will also consider whether the Regulator correctly "*deferred a decision to investigate the complaint pending the outcome of the enforcement investigation, despite the fiscal and reputational damage caused to Firm A and its directors, and the ultimate closure of the business within 4 months of the 'dawn raid' resulting in the loss of 154 jobs*", together with assessing whether the "*Authority were aware that using such a large number of police would have drawn significant media attention – which impacted the business terminally*".

4. Element Four – The investigation and Tribunal

   This element of your complaint will consider the issues you raised in relation to the Regulator's investigation and the case placed before the Upper Tribunal caused. Specifically it will address your concerns regarding the Regulator's statement that it "*settled a fine with the administrators of Firm A (Administrator B) for the sum of £2.2m [before pursuing] myself and Mr O personally*". It will also consider your comments regarding the Regulators request "*to have the 'Dawn Raid' excluded from the Tribunal proceedings*".

   It will then consider your claims that the "*FSA failed to act in a fair an proportionate manner in the investigation general*" and that the "*FSA had not acted in good faith and had acted with a lack of care and possibly with bias and/or lack of integrity*"; along with your comments surrounding the Regulator's decision not to remove Enforcement Officer X from its investigation team despite the fact that you had complained about her conduct which you believe led to *"the FSA led by Enforcement Officer X acted disproportionately and with bias against me*". It will also consider your concerns surrounding the evidence the Regulator placed before the Upper Tribunal which, although abbreviated this for clarity, will include your comments surrounding the file reviews the Regulator conducted and the electronic record searches.

   Additionally, your comments regarding the conduct of the investigation surrounding the fact that a "*Preliminary Investigation Report was [not] issued in this case*" and the fact that a *"draft Warning Notice was issued 2 days before the expiry of the 2 year cut off for the Authority to raise a case*", together with the fact that at the time of interviews as "*the business had been closed these employees had no recourse to 'live' evidence or supporting documents*" will also be considered under this element of your complaint.

5. Element Five – Procedural irregularities

   This element of your complaint will consider the issues you raised in relation to the Regulator's investigation and the case placed before the Upper Tribunal caused. Specifically it will address the Regulator's failure to "*disclosure about the personnel involved in this investigation – which compromised continuity in the investigation" the fact that you were, for "denied access to key evidence the FSA Enforcement Team has used to prepare its case*", why "*reference to the file review was missing in the first Warning Notice*" and the Regulator's claims that you "*could not be given access to the [email] server on the basis of privacy issues*".

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 to assist me with my own investigation into your complaint. Whilst I hold these documents I am unable to provide you with copies of the documents. Given the confidential nature of a number of the documents which have been passed to me ultimately it a decision for the Regulator to make upon whether it wishes to release these documents to you.

5. Element One – The background to the visit (or raid)

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.

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

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.

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 With this in mind, in my opinion there is nothing to suggest that the Regulator did not consider the credibility adequately of the intelligence providers (including the whistle blowers) before deciding that further action was necessary. Therefore, it is my Final Decision that this part of your complaint is not upheld.

6 Element Two – The visit (or raid)

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 Authority received information from a number of sources and we have seen that such information was subject to considerable scrutiny by appropriate staff. The nature of certain sources of information and particular specific allegations (for example, falsification of documents) are such that verification cannot be achieved without direct intervention (such as, in this case, visiting the Firm). There was one allegation, relating to lender bias, which the Authority could have tested against its own records. The Authority collects data from mortgage lenders about their sales sources and we do not believe that data was used to verify information received. Nevertheless, even if that information had been tested against the Authority's data we do not believe that would have resulted in a material change of direction for the investigation team*".

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 on 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 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:

> "*There was absolutely no evidence to suggest that Firm A would not have co-operated fully if a normal ARROW style visit had been chosen. There were other alternatives available to the Authority which could have and should have been exercised*".

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 reasonable 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 by a person authorised by the warrant to accompany a constable; but that person may only exercise those powers in the company of, and under the supervision of a police constable.

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 (who 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 officers failed to wear the correct attire whilst assisting the Regulator, this action 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 FSMA) was both proportionate and necessary.

6.9 It is unfortunate the Regulator's actions led to adverse publicity for the 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 usually easier to assess with the benefit of hindsight.

[5] Upper Tribunal transcript page 8 line 1

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 I note that you have also commented upon the Regulator's decision to target application files related to Mortgage Lender M with specific attention being given to 'self-certification' cases submitted through this lender. As can be seen from the comments I have made in 5.3 and 5.5 above the whistle blowers raised *specific concerns* (my emphasis) regarding the selection of Mortgage Lender M as a lender and the 'amendment' of 'self-certification' files which were submitted through this lender. Given the specific concerns which had been raised it is not unreasonable for the Regulator to 'focus' its investigation in the way that it did.

6.11 With this in mind, in my opinion there is nothing to suggest that the Regulator either acted 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 – Reputational Damage

7.1 In your submissions to my office you state that the Regulator "*failed to respond to reasonable requests by Firm A to mitigate the physical and reputational damage to the business*". 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 the 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 the business as it was no longer possible 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 the 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 the 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:

"*Mr O 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 the business' prospects going forward, the Upper Tribunal's comments strongly indicate that the business was in financial difficulty before the Regulator's visit and that the visit was *not solely and/or directly responsible* (my emphasis) for the business' subsequent failure.

7.11 Likewise, as I have indicated in 6.6 above, the Regulator needed to utilise 11 investigators to enable it to complete the search in a reasonable time frame and, to a degree, reduce the impact upon the business. Had the Regulator utilised fewer investigators the search would have taken longer to complete. I would also reiterate here that the Regulator only requested the support of the local constabulary with the execution of the warrant (as is required by the Police and Criminal Evidence Act 1984) and it was, I believe, the local constabulary itself rather than the Regulator which decided that eight police officers were required to assist and facilitate the Regulator's search of your business premises.

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

8 Element Four – The investigation and Tribunal

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 specific details to the exact nature of your complaint against Enforcement Officer X in any of the documents either you or the Firm A Group submitted. However, from the correspondence I have seen within the investigation file 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's investigation team, under the instruction of Enforcement Officer X as lead investigator, attended your premises on 28th November 2007. The second relates to Enforcement Officer X's involvement in 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 from the correspondence that the Firm A Group exchanged with the Regulator that the firm was 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. However, whilst the Firm A Group has suggested that the decisions were all made, in isolation, by Enforcement Officer X, it appears from the correspondence which has been exchanged with the Regulator that at least some of the decisions or input regarding the service you could offer to the Firm A Group's customers were made with the input of a number of senior managers of the 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 the 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 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 objective 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.

8.5 I am also aware of your concerns regarding Enforcement Officer X's involvement in the setting of the proposed financial penalty. In its decision letter the Regulator explained that any financial penalty is *not set* (my emphasis) by a single investigator. However, it may be useful if I set out how the process works.

8.6 Where the subject of an investigation looks to settle the matter without reference to the RDC or the Tribunal the Regulator holds internal discussions over what is the appropriate penalty. These discussions are based around a number of criteria which include, but are not limited to, the severity of the offence, the level of consumer detriment and the level of penalty which has been set on similar cases together with consideration of the individual's resources and how such a penalty would impact upon them.

8.7 Once an initial assessment has been made, reference is made to a number of parties which include the project sponsors and a number of individuals *who have had no involvement in the case* (my emphasis) to assess what is believed to be the appropriate level of the penalty. It is at this stage settlement discussions begin. Where it is not possible to agree a settlement, the Regulator makes a recommendation to the RDC over what it believes is the appropriate level of penalty. However, it is the RDC (my emphasis) which actually sets the level of penalty not the Regulator an individual will receive.

8.8 I would also add that the Regulator clarified Enforcement Officer X's involvement in the setting of the financial penalty in its decision letter where it set out that

> "*It is important to clarify Enforcement Officer X's (or any member of the Investigation Team's) role in the setting of the financial penalty. When recommending to the RDC that a Notice be given, the Investigation Team prepare a Draft Warning Notice (a copy of which you would have been provided with as part of the RDC process). That Draft Notice contained a recommendation to the RDC about the level of penalty but it did not 'set' that penalty. It is for the RDC to propose (in its Warning Notice) a penalty, on which you made representations. The 'set' figure is presented in the RDC's Decision Notice, after deliberations, which you appealed to the Upper Tribunal*".

From this it is clear that Enforcement Officer X *did not* (my emphasis) set the penalty.

8.9 I appreciate that you are unhappy that, once you clarified that your UK property had been sold, the proposed financial penalty was not adjusted accordingly. Although you suggest that this was Enforcement Officer X's decision to do this, I believe that the reason the proposed penalty was not reconsidered has already been explained to you by email dated 10th March 2010 from a member of the Enforcement Team. This email stated:

> "*Thank you for providing an updated statement of means and additional information. The Investigation Team was given a deadline of 8 March 2010 to submit its response to your representations to the RDC, and therefore in order to comply with this deadline, was unable to wait for your additional information. In the response, the Investigation Team set out its view of your financial position based on the information that was available to it and paragraph 13.1 of the response explains that we requested additional information from you and confirms that we will provide this information to the RDC*".

As it does not appear that you had provided the clarification Enforcement required until after the date the RDC required Enforcement to present it with the draft Warning Notice it was simply not possible for Enforcement to alter the draft Warning Notice. In view this was simply an unfortunate situation resulting from timing rather than inappropriate conduct on the part of the Regulator. I would however add that Enforcement confirmed that it had made the RDC aware of the new information.

8.10 You also state that you feel the Regulator was incorrect to 'defer' the investigation of your complaint about the manner in which the visit was conducted and Enforcement Officer X's continued involvement until after the Enforcement investigation had been concluded. Although I can understand why you are unhappy with this decision, this is not something I am now able to consider.

8.11 Following the commencement of the Enforcement investigation I received a complaint from the Firm A Group's lawyers (dated 14th December 2007) asking me to undertake an investigation into the Regulator's actions *at that time* (my emphasis). Following consideration of the situation, I asked the Regulator to review the decision to defer its investigation. I understand that the Regulator did this and, on 11th January 2008, informed the Firm A Group's lawyers that it continued to believe that your concerns regarding rationale behind the investigation and the decision to undertake a search and seizure visit with the assistance of the local constabulary was not something that it believed should be investigated until after the Enforcement investigation had been completed.

8.12 I would add that the Regulator also provided clear referral rights to enable your lawyer to refer the matter to my office (and that this must be dome within three months of the Regulator's letter). Given that the Firm A Group's lawyer was aware of the referral process but chose not to refer the matter back to my office following the Regulator's letter of 11th January 2008 I must conclude that it was accepted that the decision to defer the investigation of the complaint was appropriate.

8.13 It is unfortunate that you, as the ex-Chief Executive of the Firm A Group, now feel that this decision may have been incorrect. However, given that you were in receipt of legal advice at the time from a lawyer who was aware of the referral process and the clear time limit for making a referral to my office, I do not believe that I should now review that decision now.

8.14 I have also noted your concerns regarding the Enforcement process and unclear how the Regulator can pursue both the firm and individuals in relation to the same offence. As part of the Regulation process, both a firm and an individual have to be approved by the Regulator. Accordingly both the firm (as an approved entity) and those who have been approved to undertake controlled functions (particularly where the decisions those individuals make have a significant impact upon the overall conduct of a firm) have *both* (my emphasis) to comply with the Regulator's rules.

8.15 In this case, the Regulator suspected that both the firm in its dealings with consumers had breached a number its rules and regulations. It also suspected that both you and another director had failed to comply with obligations imposed upon you personally in addition to making decisions which may have had a direct impact on the firm which in turn may have led the firm to breach the Regulator's rules.

I should also add that, the fact that the Firm A Group went into administration did not have the effect of 'stopping' the Regulator's investigation into the conduct of the firm as a whole. The Regulator continued with its investigation and held that the firm had failed to comply with the Regulator's rules and imposed a penalty upon the firm. The administrators, who were then managing the firm, did not challenge the Regulator's findings and this resulted in the Firm A Group receiving the Final Notice on 18th August 2009.

Whilst you are clearly unhappy with this situation, as the penalty imposed upon you was considered by the Upper Tribunal, the Upper Tribunal clearly accept that the Regulator is able to pursue both a firm (as an approved person) and an individual (as an individual approved to undertake a controlled function) failures which were linked to or stemmed from the same offence.

8.16 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*".

8.17 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.

8.18 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 the relevant time.

Indeed, the Tribunal found that many of the failings alleged by the whistle blower (which I included in the contents of 5.2 above) had occurred and were not acts of vindictiveness or a concerted effort to bring down the 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.

8.19 Additionally, as these findings make reference to the overall case presented by the Regulator which for the avoidance of doubt includes *inter alia* the Regulator's decision to undertake a search and seizure visit assisted by the local constabulary, the witnesses the Regulator called, the evidence it presented (which encompasses your concerns about the way it undertook electronic searches and its submissions surrounding the file reviews it undertook), I do not believe that further comment in this regard is necessary.

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

9 Element Five – Procedural irregularities

9.1 It is clear from your complaint that you feel that there were procedural problems during the investigations the Regulator's undertook into the conduct of you and another director, together with the conduct of the Firm A Group.

9.2 It is unfortunate that you believe that the Regulator did not comply with its stated procedures. Whilst I am aware of your concerns in this regard, I have noted that they do not appear to have been considered by the Regulator in the course of investigation into your complaint.

9.3 Whilst the Regulator does have procedures with which it has to comply, it is unfortunate that, in this case, you do not feel that it has done so. Whilst this is a regrettable situation, when considering this matter, I also have to have regard to the impact the alleged procedural breaches may have had upon your overall situation, particularly as the matter has been considered by the Upper Tribunal.

9.4 As such, I must conclude that whilst you feel that you were not adequately informed of 'changes' to the investigators who were conducting the Enforcement investigation this has, in my opinion, not had any adverse impact upon the overall situation.

9.5 It is also unfortunate that the Regulator felt that it could not provide you with access to the 'server' it seized from the Firm A Group. I note that the Regulator attempted to justify its position by relying upon the confidentiality clauses contained within s348 of FSMA. I must set out here that I do not believe that the Regulator is entitled to rely upon the contents of s348 of FSMA as the 'server' did not contain confidential material (pertaining to the Regulator's actions) as the server was the property of the Firm A Group and therefore contained information which was confidential to the Firm A Group and therefore *was not* (my emphasis) subject to the confidentiality restrictions contained within s348 of FSMA.

9.6 Whilst I do not believe that the Regulator was entitled to rely upon the contents of s348 of FSMA, I do however feel that the Regulator was correct in refusing you access to the contents of the 'server'. As I have indicated above, the 'server' was the property of the Firm A Group and, when the firm went into administration ownership transferred to the administrators. As such, once you had left the business and the administrators became the owners of the business, access to the 'server' could only be granted by the administrators. The Regulator should therefore have explained this to you and directed you to the administrators.

9.7 It is unfortunate that the Regulator made this error. Although I am aware that you have suggested that accessing the 'server' would have allowed you to address and rebut more appropriately the allegations which the Regulator had made against you, I have to consider the fact that the case against you has now been considered by the Upper Tribunal. As I set out in 4.1 above, I am unable to review of revisit decisions which have been made by the Upper Tribunal.

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

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 of disappointment 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 have 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 would also reiterate here that your concerns regarding the Regulator's decision to publish the Final Notice and the delay in it completing its investigations are issues which, although raised in your letter of 10th December 2013, are concerns which I will address within a separate Stage Two investigation (which will be conducted under the reference of FSA01600). I would add that my findings in respect of this complaint will therefore be provided in a separate Decision Letter.

10.6 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 concerns and complaints which I have considered within this Final Decision.

Sir Anthony Holland
Complaints Commissioner

28th February 2014