



3rd February 2014

Dear Complainant,

Your complaint against the Financial Services Authority
Reference Number: FCA00001

I write with reference to your letter of 6th December 2013 addressed to the Office of the Complaints Commissioner.

I need to explain my role and powers. 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. Section 84(1)(b) of the 2012 Act provides that an independent person is appointed as Complaints Commissioner charged 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.

Your complaint

From your recent letter, I believe that your specific complaint relates to the following issues:

- You are unhappy with the outcome of the FCA's investigation into your complaint. You say that in making its decision the FCA have "*failed to take into account both the Operational Objectives and Principles of Good Regulation which are clearly stated on the FCA website*".
- Specifically you set out that
"The FCA failed to abide by the 'Principles of Good Regulation' stated on their website:
'Openness and disclosure
We should publish relevant market information about regulated persons or require them to publish it (with appropriate safeguards). This reinforces market discipline and improves consumers' knowledge about their financial matters'.

The two pieces of information below were vitally important not only for UK retail consumers, but also for the FCA to be aware of in carrying out their regulatory functions.

- *On 7 January 2011 the Cyprus Securities and Exchange Commissioner levied a fine of Euros 5,000 against Firm F Consultants Ltd for ‘purporting to perform investment activities on a professional basis in the Republic of Cyprus, without CIF authorization’.*
- *On 10 May 2012 The Cyprus Insurance Companies Control Service withdrew their authorization for Firm F Companies Control Service.*

The FCA had no system in place to alert them to either of these facts which were vital to their own regulatory decisions and also vital to UK consumers. This resulted in Firm F Consultants Ltd offering services to UK consumers for 18 months when they should have been deleted from the FCA website as they were no longer authorised by the Cyprus Authorities (sic)”.

- You continue:

“The FCA authorisation, under passporting rights, did not involve the same standard of regulation and oversight that would have been applied to a UK based company. The authorisation relied entirely on the competence of the Cyprus authorities. In order to comply with their own Principles and Objectives it was vital for the FCA to maintain regular contact with the Cyprus Regulators and have systems in place to alert UK consumers of ‘relevant market information’ such as the withdrawal of authorisation in Cyprus. Given the turmoil in Cyprus common sense indicates that at least very simple checks should have taken place from time to time that firms they listed were still authorised overseas

The FCA had no such system in place, and so was not able to publish the above ‘market information’ and therefore failed to comply with its own Principles of Good Regulation and Operational Objectives”.

- You add that as a result of these failures your late brother’s estate has incurred a loss of £100,000 as a result of advice provided by Firm F Consultants Ltd after its authorisation had been removed by the Cypriot Authorities.

Coverage and scope of the transitional complaints scheme

The Complaints Scheme provides as follows:

3 Coverage and scope of Scheme

- 3.1 The Scheme covers complaints about the way in which the regulators have acted or omitted to act, including complaints alleging:
 - a) mistakes and lack of care;
 - b) unreasonable delay;
 - c) unprofessional behaviour;
 - d) bias; and
 - e) lack of integrity.

- 3.2 Complaints can be made by anyone who is directly affected by the way in which the regulators have carried out their functions, or anyone acting directly on such a person's behalf, provided that the complaint meets the requirements of the Scheme. To be eligible to make a complaint under the 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.
- 3.3 Complaints should be made within 12 months of the date on which the complainant first became aware of the circumstances giving rise to the complaint. Complaints made later than this will be investigated under the Scheme only if the complainant can show reasonable grounds for the delay.

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. I would specifically draw your attention to Section 25 of Part 4 of Schedule 3 of the 2012 Act where it states:

“Exemption from liability in damages

- (1) *None of the following is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the FCA's functions—*
- (a) *the FCA;*
 - (b) *any person (“P”) who is, or is acting as, a member, officer or member of staff of the FCA;*
 - (c) *any person who could be held vicariously liable for things done or omitted by P, but only in so far as the liability relates to P's conduct.*
- (2) *Anything done or omitted by a person mentioned in subparagraph (1)(a) or (b) while acting, or purporting to act, as a result of an appointment under any of sections 166 to 169 is to be taken for the purposes of sub-paragraph (1) to have been done or omitted in the discharge, or as the case may be purported discharge, of the FCA's functions.*
- (3) *Sub-paragraph (1) does not apply—*
- (a) *if the act or omission is shown to have been in bad faith, or*
 - (b) *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 Human Rights Act 1998”.*

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 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.

If I 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 I consider 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.

It is my view, given my views in this matter, that Article 1 of the First Protocol has no application in your case. There is no act taken by the FSA (or indeed by the FCA) which is incompatible with the Human Rights Act 1998 which directly caused your late brother's estate to lose any of its possessions.

The losses you say your late brother's estate has incurred is the direct result of his decision to invest a considerable amount of money with advisers who were not authorised to conduct regulated investment activity within the UK. I would add that as your brother appears to have invested in an unregulated investment (which itself does not appear to have been based within the UK) I believe that it was the failure of the unregulated investment which caused the loss *rather* (my emphasis) than the actions of the Regulator.

My Position

As part of my investigation into your complaint I requested a full copy of the UK Regulator's investigation file.

Before I comment further on your specific concerns I feel it may be useful if I comment generally on the firm with which your brother made his unfortunate investments. Firm F Consultants Ltd (Firm F) is a Cypriot firm which was authorised by the Insurance Companies Control Service of Cyprus (ICCS) which is a Cypriot financial services regulator. As a result of the ICCS issuing Firm F with an ‘*EEA Inward Services Passport*’ (‘passport’) Firm F was able to conduct limited regulated activity within the UK.

For the sake of completeness I must also point out that under the EU Insurance Mediation Directive (IMD), once a firm's home state regulator (in this case the ICCS) has authorised a firm and, if requested by the firm, granted the firm a 'passport' the firm is then allowed to undertake regulated activity (or operate) in another EEA member state (such as the United Kingdom) without further checks being undertaken. In granting the 'passport', it is the home state regulator's responsibility to ensure that the firm meets the general fitness and propriety requirements. I would also add that as the ICCS had authorised Firm F to conduct 'regulated insurance activity within Cyprus *it was satisfied* (my emphasis) that Firm F had met all of the necessary criterion. With this in mind, when Firm F applied for a 'passport' the ICCS granted Firm F's request and notified the host state regulator (in this case FSA as the relevant UK regulator at the time) of this and, in doing so, provided the FSA with the details required under the Luxembourg Protocol. The details Firm F provided to the FSA included (but are not limited to):

- Firm F's full name;
- The name of the current home state regulator (together with confirmation that it was granting the 'passport');
- The address of the firm's head office and/or the firm's home state registration number; and
- The type of business Firm F was intending to conduct within the 'host state' (i.e. the UK).

As Firm F had been granted a 'passport' by the ICCS, the UK Regulator *was required under EU Law* (my emphasis) to authorise Firm F and to allow it to conduct insurance mediation business within the United Kingdom. I would add that, under the protocols which existed and continue to exist (and which form part of EU Law) regulators are *unable* (my emphasis) to 'gold plate' or increase their individual requirements above those set out under the protocol. As such, no matter how much the FSA may have wished to require additional information under the law it is unable to do this.

In relation to Firm F, the UK Regulator was notified that the ICCS had granted the firm with a 'passport' with effect from 6th June 2008. As such, as I have indicated above, the UK Regulator was therefore required to grant Part IV permissions (without undertaking further fitness and proprietary checks) and add the firm's details to its register of authorised firms (the Register). The UK Regulator did this with effect from 6th June 2008.

I appreciate that you feel that the UK Regulators should provide details of any disciplinary action which is undertaken by a 'passport' firm's home state regulator, but under the protocols which exist this is not a requirement. As I have set out above, once a firm has been issued with a 'passport' it is the responsibility of the Home State Regulator (in this case the ICCS) to provide the 'Host State Regulator' (the UK Regulator) with any information which it feels is pertinent.

Unfortunately, this means that, unless the Home State Regulator either suspends or cancels the firm's authorisation, there is no requirement for the Home State Regulator to provide any further intelligence or information to the appropriate Host State Regulator. Whilst it may have been useful for the UK Regulator to have been made aware that Firm F had received a fine and the reasons for the fine, there was *no formal requirement* (my emphasis) for the ICCS actually to inform the UK Regulator.

In your submission to my office you state that you believe that Firm F had its permissions cancelled by the ICCS on 10th May 2012 and that the Regulator's failed to put sufficient process in place to ensure that the Register was correctly maintained to reflect this. Having read the correspondence you have provided it appears that you may have misinterpreted the information you have been given by the ICCS. In its correspondence with you, the ICCS simply stated, incorrectly as I will explain later in this Final Decision, that:

“Firm F's passporting rights to provide insurance mediation services in the UK ceased since 10 May 2012”.

This shows that the ICCS was confirming that it believed that Firm F's 'passport' was cancelled on 10th May 2012 *rather* (my emphasis) than its permissions to conduct regulated activity (insurance mediation services).

It is clear from the information presented to me that, whilst Firm F may possibly have informed the ICCS of its intention either to limit or to cancel its 'passport' permissions from 10th May 2012, the UK Regulator *was not informed* (my emphasis) that Firm F's 'passporting' rights had actually ceased at that time. Given this, at the time of your brother 'invested', Firm F did hold an IMD 'passport' and the position shown on the Register was wholly correct. I would however add that the Register now shows that Firm F's 'passport' has been withdrawn.

I appreciate that you feel that the UK Regulator should have a process in place where it either 'checks' or asks the Home State Regulator to confirm the 'status' of a 'passported' firm on a regular or continuing basis rather than relying upon notification being given. In my opinion, this is not an exercise which I believe it is practicable for the Regulator to undertake. Such an exercise would involve the Regulator either checking manually other Regulator's register of approved firms or would involve the UK Regulator contacting and asking all other EU regulators to provide the required information.

In my opinion, actively to do this, particularly on a regular basis, rather than relying upon the transfer of information requirement set out within the Luxembourg Protocol, would be extremely time consuming and would not be consistent with the Regulator's statutory objective of using its resources in an economic manner. As such an exercise may also impact significantly upon other EU financial services regulators, such activity could possibly also be seen to be in breach of the Luxembourg Protocol and the Insurance Mediation Directive. Additionally, it would also only show that, at the time of checking the information was correct and would only identify firms which had ceased trading and would not identify those which had ceased to hold a passport. Likewise, any changes which took place after the Regulator had undertaken the check or been provided with the information would not be identified.

I can understand why you feel that it was, what to suggest was incorrect, information contained upon the Regulator's register which led to your brother's estate's loss. However, as the Regulator (and indeed the ICCS) has confirmed, Firm F's 'passport' was granted under the Insurance Mediation Directive (IMD) and only extended to Firm F arranging insurance contracts within the UK.

As your brother appears to have made an investment, this is not an activity which could be undertaken under the 'passport' Firm F held. For the avoidance of doubt a 'passport' granted under the IMD *would not* (my emphasis) permit a firm to arrange investment contracts of any kind. If an EU based firm wishes to arrange or distribute investment based products in other EU states other than its Home State, then it needs a passport granted under the Markets in Financial Instruments Directive (MiFID). Firm F was not granted a MiFID passport by the ICCS. I would also add that Firm F's Cypriot permissions only allowed it to arrange insurance contracts and as a result it could not, I believe, arrange investment contracts. I would also add that a firm can only be granted a 'passport' to allow it offer its existing services in another EU state. A 'passport' cannot allow a firm to offer services in another state that it does not offer (or does not hold permissions to offer) in its Home State.

I appreciate that you feel that the Regulator's action, by failing to provide proper oversight of the Firm F, could have prevented your brother's loss. As I have explained above, the Luxembourg Protocol sets out a procedure by which a 'passport' is granted and also sets out how information is exchanged. From the information provided to me this process has worked correctly and the Regulator has been provided with the appropriate information by the Cypriot authorities. I would also add that there is nothing to suggest that the Regulator has failed in its supervision of Firm F.

The information provided to me indicates that the 'passport' granted to Firm F allowed it to undertake limited regulated activity within the UK from Cyprus. It did not extend to allowing Firm F to set up a branch office within the UK. Indeed the contact details contained on the Regulator's Register show that the firm did not have a have branch office as all contact was to be made through its offices in Limassol (Cyprus). Given that the firm *did not* (my emphasis) have a UK branch Supervision of Firm F full wholly within the jurisdiction of ICCS in Cyprus.

Conclusion

When arriving at my decision I have to consider the facts identified by the FSA during its own investigation together with the arguments and further evidence submitted by the complainant, together with the possible outcome or recommendations I could make.

From this it is clear that the Regulator's Register accurately portrayed the status of Firm F based upon the information which had been provided to it by the Cypriot regulator, the ICCS. I appreciate that the Cypriot regulator has provided you with different information, and whilst I do not dispute the information which it has provided to you, ultimately the Regulator has to base the accuracy of its register on the information it receives. In this case there is nothing to suggest that the Cypriot authorities informed the Regulator that Firm F's 'passport' had been cancelled until November 2013. I would also add that the papers the Regulator has presented to me includes an *email from the Cypriot Regulator, dated 23rd August 2013, which confirms that Firm F still held a passport to undertake regulated activity within the UK (my emphasis).*

Although your brother's estate has clearly lost a considerable amount of money, ultimately, from the information presented to me by both you and the Regulator, there is nothing to suggest that the Regulator acted inappropriately or included incorrect information on its Register.

I have also noted your comments that the Regulator did not address your concerns regarding the conduct of Mr M, who you claim was your brother's adviser, in its decision letter. Whilst it is clear that you are unhappy with the conduct of Mr M, when the Regulator set out its understanding of your complaint, and the issues which it was to investigate, it did not record this as something which it was intending to investigate.

Whilst it is unfortunate that any concerns you had in this regard were 'omitted' from the intended investigation it is also clear that you did not raise this 'omission' with the Regulator. Given that the Regulator has, in my opinion, investigated the elements of the complaint which it had agreed with you that it would consider, I do not believe that the Regulator has failed to investigate adequately your concerns.

Although I believe that the Regulator has adequately investigated your concerns, I feel I should reiterate that, as Firm F did not have a UK branch and, as a result, did not have any UK approved individuals working for it. Whilst I accept that you have been 'liaising' with Mr M, the FCA Register shows none of the three Mr Ms who have received approval to undertake a controlled function (under the current and previous regulatory regimes) have ever done so following an application being either made or supported by Firm F.

I should also add that whilst assessing your complaint, I have noted your comments regarding the request you had to correspond with Firm F within the UK together with the information provided from the Irish provider of one of your brother's investments (which I believe was allegedly arranged by Firm F). Having viewed the correspondence, I do have some reservations and concerns regarding the 'name' and 'contact details' which have been provided to you. As these details do not entirely match the details contained upon the Regulator's Register, it may be that the individual with whom you are dealing may simply allege or assert to be representing Firm F rather than actually acting on behalf of the Cypriot based Firm F. Although this does not impact upon my overall decision, I have made the Regulator aware of my concerns regarding the contact you have received from the individual referred to as Mr M and his assertions that he is representing Firm F.

Given my views which I have set out above, it is my Final Decision that I am unable to reach a conclusion that the Regulator has acted inappropriately or, as a result, that it should make any offer of redress to you.

Yours sincerely



Sir Anthony Holland
Complaints Commissioner