Complaints Commissioner

Office of the Complaints Commissioner
3rd Floor
48–54 Moorgate
London EC2R 6EJ

Tel: 020 7562 5530
Fax: 020 7256 7559
E-mail: complaintscommissioner@fscc.gov.uk
www.fscc.gov.uk

16th January 2015

Dear Complainant,

Complaint against the Financial Conduct Authority
Reference Number: FCA00032

Thank you for your letter of 24th October 2014. I am sorry for the delay in responding to you but my office has been liaising with the Financial Conduct Authority (FCA) about this.

As the rules of the scheme under which I consider complaints can be found on our website at www.fscc.gov.uk, I shall not repeat them here.

Your complaint

I have obtained and reviewed the FCA's complaint file. From your letter I understand that you are unhappy with the FCA's conduct and believe that it has been unprofessional and shown a lack of care in the manner in which it has considered both the concerns you have raised on behalf of your client and when considering your subsequent complaint.

I know that you are unhappy with the manner in which the FCA has supervised Bank H and Provider S. I also appreciate that you do not feel that the regulators are ensuring that sufficient protection is being given to consumers. From your complaint I consider that your complaint can be summarised in the following way:

- the regulator failed in its supervision of Bank H and Provider S
- the regulator's rules are inadequate and do not go far enough to prevent what you perceive to be a conflict of interest occurring
- the regulator's rules should have prevented Bank H undertaking two types of activities (namely providing financial advice and providing funding), and you have alleged that the financial advice Bank H provided allowed it to mitigate some of its potential bad debt and passed the burden to your client's self-invested personal pension plan (SIPP)
- the FCA failed in the supervision of Provider S who was your client's SIPP provider by not ensuring that its rules required that the SIPP provider undertake considerable due diligence (by undertaking a full review) of the assets being transferred into the SIPP and specifically, where commercial property was concerned, review the financial position (and ability to continue to pay rent) of any sitting tenant
- the regulator failed to ensure that both Bank H and Provider S had sufficient procedures in place to allow for the adequate investigation of your complaint.

It may be beneficial if I set out some important dates which are relevant to your client's circumstances. From the information presented to me it appears that:

March 2005	a Bank H adviser recommended that your client enter into a Provider S SIPP.
March/April 2005	your client himself purchases the commercial property which his business was leasing with a mortgage provided by Bank H.
May 2006	your client, through an adviser from Bank H, asked Provider S to transfer the commercial property (which I understand had been purchased privately by your client) into the SIPP.
December 2006	the transfer of the commercial property was completed (i.e. the commercial property was purchased from your client by his SIPP).
6th April 2007	SIPPs became a regulated investment (and became subject to the FSA's jurisdiction).

To me, these dates are particularly important as any loss you say your client has incurred would appear to stem from the financial advice he received rather than the actual conduct of Provider S. It must be remembered that the property was owned (by way of a mortgage) by your client before it was transferred into his SIPP and your client would therefore have still incurred the loss when his company failed and he was unable to service the mortgage/rental payments. Furthermore, as a SIPP was not a regulated investment at the time of both its sale and the subsequent transfer of your client's commercial property, it fell outside of the regulator's jurisdiction and therefore the regulator could not set any specific rules surrounding how a SIPP provider was to act (and what checks it was to undertake).

From this it is clear to me that your client's complaint stems from the financial advice he was given by his financial adviser who I understand worked for Bank H (to enter into a SIPP and then transfer an existing commercial property into this arrangement).

The FCA, like its predecessor the Financial Services Authority (FSA) expects firms to treat their customers fairly (and fully investigate complaints made by consumers) and ensure that appropriate advice is given to consumers (i.e. they must act in the consumer's best interests). This means that any potential conflict of interest such as both providing advice and being the firm responsible for the recommended product must be managed appropriately, but is not prohibited.

I am aware that you do not consider the regulator's rules are sufficient, but within the financial services industry there are no legal rules or general principles which prohibit such situations. Prohibiting such arrangements would to remove the 'advice channels' for many consumers who only receive advice from a 'tied agent/provider' (i.e. one who is only able to recommend products from their own firm's product range).

As a failure to mitigate a conflict of interest would therefore amount to the provision of incorrect financial advice this is something which would fall within the jurisdiction of the Financial Ombudsman Service (FOS). If you feel that Bank H provided your client with inappropriate financial advice then that is an issue for the FOS, unless this is an issue which they have already considered.

I have noted your comments that a recent 'best practice' paper included a suggestion that SIPP providers should undertake checks on the quality of investments, but this is simply a best practice suggestion and does not form part of the FCA's current rules. Even if the regulator were to include such practice in its future rules, the regulator would be unable to apply these retrospectively.

I appreciate that you feel that the FCA have not taken investigated adequately whether both Bank H and Provider S have sufficient or robust complaint handling procedures in place, and that, as a result neither Bank H nor Provider S have investigated adequately your complaint. The FCA requires all regulated firms to have robust complaint procedures in place. The FCA does this by instructing firms to comply with the provisions contained within its Dispute Resolution (DISP) handbook. One of the DISP rules' requirements is that the firm must make the complainant aware that, if they are unhappy, they can refer the matter to the FOS. Given that you have referred your complaints about both Bank H and Provider S to the FOS there is nothing to suggest that either Bank H or Provider S failed to comply with the provisions contained within the DISP handbook. I would add that where the FOS concludes that a firm is failing to comply with the requirements imposed by the FCA's DIPS rules it will refer its concerns to the FCA.

My conclusion

When the FCA responded to your complaint it explained that it was unable to investigate your concerns as it fell within the provisions of paragraph 3.5 of the complaints scheme which states:

> 3.5 Circumstances where the regulators will not investigate
>
> The regulators will not investigate a complaint under the Scheme which they reasonably consider amounts to no more than dissatisfaction with the regulators' general policies or with the exercise of, or failure to exercise, a discretion where no unreasonable, unprofessional or other misconduct is alleged

I know that you are disappointed that the FCA chose not investigate your complaint, but having read the papers I believe that the FCA was correct to do so and that paragraph 3.5 of the Complaints Scheme does prevent the formal investigation of your complaint. Your complaint does, in my opinion, amount to general dissatisfaction with the fact that the FCA will not intervene in your complaint by instructing both Bank H and Provider S to review the advice your client was given.

I would also add that I believe that the FCA could equally have relied upon paragraph 3.4(c) of the Complaints Scheme, which excludes complaints about the FCA's legislative functions (which include the issuing of guidance and the making of rules).

Finally, I appreciate that you are unhappy with the FCA's decision that it would not provide you with details of any discussions or enquiries it may have had with Bank H and Provider S as a result of the concerns you have raised. As the FCA has explained to you in its letter of 22nd July, the confidentiality provisions in Section 348 of the Financial Services and Markets Act 2000 (the FSMA)[1] restrict what the FCA (and I) can disclose.

[1] as amended by provisions contained within ss16 to 24 of Part 2 of the Financial Services Act 2012

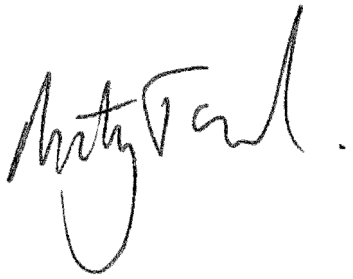
I can assure you that the FCA has not dismissed your concerns. Your concerns have been raised with the Supervision Teams responsible for Bank H and Provider S and have also been raised with the FCA's Policy Team (which is responsible for FCA policy decisions).

Details of the consideration these areas gave your concerns is contained within the FCA's complaint investigation file which it has freely passed to me. From this it is clear to me that the FCA did consider the concerns you raised and that the decisions it subsequently made were, in my opinion, reasonable and rational. It is regrettable that neither I nor the FCA can provide you (or your Member of Parliament) with further information but that is a limitation of the governing legislation.

Having considered your complaint there is nothing to indicate that the regulator has made mistakes or acted with a lack of care or that it has acted unprofessionally when corresponding with you or your MP.

I appreciate that you will be disappointed that, given that I am satisfied that the FCA has acted and considered this matter appropriately, I am unable to take any further action in relation to the conduct of the Bank H and Provider S and the FCA's decision not to intervene with these regulated firms, but I have reached this conclusion having considered the issues very carefully.

Yours sincerely



Antony Townsend
Complaints Commissioner