

12th February 2015

Dear Complainant,

**Complaint against the Financial Conduct Authority
Reference Number: FCA00044**Thank you for your letters of 8th and 27th January 2015.As the rules of the scheme under which I consider complaints can be found on our website at www.fsc.gov.uk, I shall not repeat them here.**Your complaint**

From your letter I understand that you are unhappy with the outcome of the FCA's investigation into your complaint. Specifically:

- you are unhappy that the regulator provided you with incorrect advice about how you could pursue your complaint against Firm S, a debt recovery firm, whose services you have enlisted to help you recover repayment of a personal loan you had provided to a friend several years ago and which was not being repaid.
- you feel the regulator's decision not to uphold your complaint, in respect of the information it provided to you in August 2014, is flawed as the FCA must have been aware of the 'perimeter issues' at that time.
- you feel that the FCA's decision to uphold the part of your complaint regarding the telephone call you had with its Consumer Contact Centre (CCC) on 24th October 2014 and apologise is incorrect. You feel that the advice you were given in this call was correct and not misleading and the FCA's decision to uphold this part of your complaint, and apologise for the information which was provided to you is incorrect.

As a remedy to the complaint you have referred to my office you require me to instruct:

- the FCA to act on the information you provided and investigate your claim that Firm S has breached its contract with you.
- the FCA to secure repayment of the returnable fee of £1,200 you paid to Firm S.
- that I accept your appeal and determine compensation for your losses which total £9,350 (made up of the £1,200 fee you paid to Firm S and the outstanding debt plus interest you contracted Firm S to recover). You feel this can be recovered either from fines which you wish the FCA to impose upon Firm S or as a compensatory payment from the FCA itself in respect of its failings.

- that either I or the FCA provide you with quasi-legal comfort for any future financial transactions you or your clients contemplate in a statement as to what can be expected of the regulator, together with the criteria the FCA employs to regulate Firm S.

Legislative background

In your complaint to the FCA you indicated that you were seeking a compensatory payment on the grounds that the regulator had acted “negligently”. Negligence is a legal concept and a matter for the courts, but before I comment on the regulator’s conduct, I would like to draw your attention to Section 25 of Part 4 of Schedule 3 of the 2012 Act which contains some important provisions in relation to the FCA’s liability for damages:

25 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 sub-paragraph (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.

From this you will see that the FCA has a statutory immunity from claims for damages arising from its alleged negligence unless there is evidence of either bad faith or a breach of Section 6(1) of the Human Rights Act 1998. If you were to take the view that Schedule 3 referred to above was relevant in the context of the Human Rights Act 1998 I should explain that Section 6(1) of that Act provides as follows:

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

I have not seen anything to suggest that the provisions of sub-Section 25(3) of Part 4 of Schedule 3 of the 2012 Act should come into play, but that is a legal matter, and if you wished to pursue that issue you should seek legal advice.

However, although the regulator has a statutory immunity from claims for damages (in relation to claims for negligence), the rules of the complaints scheme do allow me to recommend a financial award if I uphold a complaint.

My Position

In considering this case, I have carefully reviewed both your complaint and the regulator's arguments for reaching the decision that it did.

It is disappointing that the FCA has provided you with advice which turned out to be incorrect. It is also equally disappointing that your subsequent telephone conversation with the FCA resulted in the overall position becoming muddled. However, I note that the FCA has apologised for any confusion which has been caused during your correspondence with it in relation to this matter, especially as a result of your telephone call of 24th October 2014.

I know that you feel that the FCA's advice to refer you to the Financial Ombudsman Service (FOS) was wholly incorrect. I have now had the opportunity to review the advice the FCA gave to you.

In this case you are unhappy with the service provided to you by a regulated firm. As the role of the FOS is to consider complaints between consumers and regulated firms, the initial advice the FCA gave you to refer your concerns to the FOS appears to have been reasonable.

Most enquiries the FCA receives about disputes with regulated firms are clear cut, and can easily be assessed to see if they should be referred to the FOS. However, upon further investigation the issues you raised were not entirely straightforward. It is extremely unfortunate that, in this case, the FOS decided that it could not consider your complaint.

Under the governing legislation, the Financial Services Act 2012, the FCA's role is to regulate the industry and the FOS's role is to adjudicate on consumer complaints which have not been resolved by the firm. Because your complaint appeared to fall into the category of a dispute between a regulated firm and a consumer, the advice the FCA gave to you to refer your concerns to the FOS appears to have been reasonable.

However, although the FOS has regard to the FCA's rules, as it is operationally independent from the FCA, it undertakes its own assessment of whether it can undertake an investigation into a complaint. As I understand it, when the FOS assessed your complaint it made the decision that it could not consider your complaint.

I do not have any jurisdiction over the FOS, but it seems that the FOS may have concluded that because your dispute related to Firm S's conduct in relation to your contractual arrangement with them rather than a complaint from a person from whom they were attempting to obtain repayment of a debt, it was unable to assist you.

In other words, the unsatisfactory position is that the FCA concluded (in my view not unreasonably) that the FOS could consider your complaint about firm S, but the FOS disagreed; and the matter was further confused when the Consumer Contact Centre suggested that they agreed with the FOS's position.

I know that you would like the FCA to intervene in this matter and instruct Firm S to refund the 'refundable' fee you paid to it. Unfortunately, the FCA's role is to regulate the financial services industry and it is unable to intervene in individual disputes between consumers and regulated firms. If, as you suggest, Firm S is guilty of breaching the contract you entered into with it, and if the FOS (following an application to have its initial decision reviewed by an Ombudsman) feels that it is unable to review your complaint, then the only other way to challenge Firm S's conduct is through the courts.

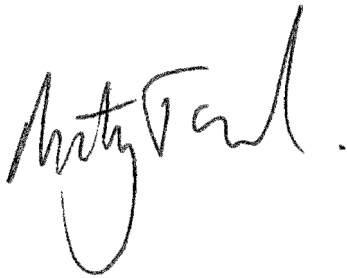
In a similar way I am unable to instruct the FCA to compensate you for your losses. The losses you have incurred are the fault of the debtor, and have not resulted from the information or guidance the FCA provided to you. Although the information the FCA provided was unsatisfactory in part, I consider that its apology was the appropriate remedy.

I would however add that your comments about Firm S's failure to adhere to the terms of the contract you entered into with it have been referred to the area responsible for the supervision of Firm S, and will be used by the FCA in relation to the general supervision and monitoring of Firm S.

In conclusion, I consider that the FCA's apology in response to your complaint was the correct remedy, and I do not therefore uphold your complaint to me. I am also asking the FCA to discuss with the FOS the issue of the different views which the two organisations have taken about this matter, in the hope of preventing a recurrence.

I appreciate that you will be disappointed with my decision but hope that you will understand why I have reached it.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Antony Townsend', with a large, stylized flourish at the end.

Antony Townsend
Complaints Commissioner