Complaints Commissioner

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By email

24 November 2016

Dear Mr Patellis,

Complaint against the Financial Conduct Authority
Reference Number: FCA00114

Thank you for your email of 9 May 2016. I have now considered your complaint in the light of the papers you and the Financial Conduct Authority (FCA) have sent to me, I have made some further inquiries of the FCA, and am now able to write to you. I have also taken into account the comments which you, and the FCA, made in response to my preliminary decision.

How the complaints scheme works

Under the complaints scheme, I can review the decisions of the FCA's Complaints Team. If I disagree with their decisions, I can recommend that the FCA should apologise to you, take other action to put things right, or make a payment. My decision on your complaint is explained below.

Your complaint

In November 2015 you complained to the FCA about the way you had been treated by the FSA/FCA in relation to information you had supplied to it about Tiuta plc and the Connaught Series 1 Income Fund (the Fund). On 6 May 2016, the FCA issued its response. The following seven elements of your complaint had been identified:

1. Inadequate actions by the FSA/FCA since you 'whistle-blew' as CEO of Tiuta in January 2011. This complaint was categorised as 'failure to supervise.'
2. 'Lack of care' for you as a whistle-blower.
3. Failure to monitor properly the actions of Tiuta plc. This complaint was categorised as 'failure to supervise.'
4. 'Failure to supervise' BDO accountants who you had engaged to carry out a forensic audit and assess Tiuta's accounts.
5. Providing bewildering and untruthful answers to a FAQ for investors. This complaint was categorised as 'unprofessional behaviour.'
6. Passing the blame to IFAs for investor losses rather than dealing with allegations of fraud, in order to protect the FCA's reputation and save itself from embarrassment. This complaint was categorised as 'unprofessional behaviour.'
7. Failure to provide information to, or collusion with, the Financial Ombudsman Service. This complaint was categorised as 'lack of care/integrity.'

The FCA partially upheld Element One of your complaint on the grounds of delay.

Element Two was upheld because the FSA's Supervision Team did not seek guidance from the whistle-blowing team.

Elements Three to Seven were not upheld.

The FCA offered you a sincere apology for the way you were treated when providing intelligence and also offered you the sum of £500 on an ex gratia basis as a gesture of goodwill.

You are dissatisfied with the FCA's response and their £500 ex gratia goodwill offer. You have asked me to review the FCA's decisions.

Given the complexity of the issues involved, I have summarised your views in some detail, as follows.

Summary of your views

> ***Element One*** *– The evidence you provided showed fraud and misappropriation of funds. Your claims of fraudulent activity were right: £68 million from innocent investors poured into the Fund after you met with the FSA and gave them evidence. That the FSA did not consider this sufficient evidence of fraudulent activity and therefore failed to act is the most significant element of your complaint and the most serious failing by the FSA. Had the FCA taken your evidence more seriously, or you as an Approved Person who was the CEO of the company more seriously, they may have asked you a few questions or even asked you to accompany them to Tiuta where you could have showed them everything they needed to know in under an hour. It's unfortunate that the FCA's complaint investigation would not decide or even comment on whether the evidence you supplied was evidence of fraud.*
>
> *The FSA justified its lack of action due to only 5% of the Fund being regulated. In your view, £1.5 - £2.0 million should have been significant enough to do more. If the FSA felt that 5% of regulated business in the fund was not enough for them to take more action, they could have insisted that Blue Gate, the operator of the Fund and regulated by the FSA, suspend the fund and investigate the issues. The fraud continued unabated after the FSA stopped Tiuta from making regulated loans; they just ran the fraud on unregulated loans. Both Tiuta and the Fund put positive spins on the public action the FSA did take, saying it was their decision to exit the regulated loan market. This was a deliberate act to deceive and the FSA should have corrected the record publicly. It should have been another sign that showed the FSA the type of people they were dealing with.*
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> ***Element Two*** *– Your phone call to the FSA's contact centre on January 18 2011 was not to report your resignation but to advise them of your concerns over Tiuta's financial health. You heard nothing from the FSA after your meeting at their premises in March 2011. You have always considered that meeting as a whistleblowing meeting. It was only from the FAQ document that you became aware that the FCA was saying that the FSA didn't stop you from going to another agency. Their published whistle-blowing guidelines state they will inform the person if they aren't the investigative authority. At no time did the FSA follow their whistle-blowing guidelines or tell you you weren't a*

whistle-blower. In various communications the FCA refers to you as a whistle-blower. Regardless of how they classified you, they should have told you to go to another agency. You followed all 7 Principles for Approved Persons.

***Element Three** – Even if the FSA did not believe the evidence you turned over was sufficient evidence of fraud, the number of senior staff who resigned in such a short period of time should have led it to take another look at the evidence. There were clearly serious problems at Tiuta; the FSA should have identified a pattern and acted accordingly. How can the FCA be satisfied with the way the FSA was monitoring Tiuta's actions given all that took place after you met with the FSA in March 2011 and gave evidence and BDO were onsite?*

***Element Four** – You did not expect the FSA to keep you informed on their dealings with BDO. Your issue with BDO is about what they knew and whether they notified the FSA as was their duty under Principle 11. In May 2011 the Authority asked BDO to perform contingency planning for a Tiuta liquidation. From May 2011 until March 2012 the FCA was in regular contact with BDO and Tiuta. On March 7 2012 the Fund was suspended and on March 12 2012 the FCA was told there was a significant shortfall in the Fund. On September 28 2012 Tiuta was put into administration.*

***Element Five** – With regard to the answer to Question 16 of the FAQ document ('What has the FCA (and previously the FSA) done?') your point is that the FSA should have given consideration to the impact saying nothing would have on new investors. In the end, existing and new investors lost. It was also reckless of the FSA not to correct the press releases from Tiuta stating they voluntarily exited the regulated loan market. This also applies to the FSA's decision to use the same strategy when they amended Tiuta's permission to return all redemption money when a loan redeems. This point was a key piece of the evidence you provided to the FSA, which they said was insufficient evidence of fraud. Had the Authority made public either change in Tiuta's permissions tens of millions of pounds would not have been lost. Furthermore, Tiuta continued to misappropriate redemption money after the FSA changed their permissions. How did this happen with the FSA and BDO monitoring Tiuta?*

You also consider that the FSA should have asked Blue Gate rather than Tiuta to instruct Connaught to change their marketing material. As operator of the Fund and a regulated entity, they were responsible for approving all marketing material to ensure it was compliant.

In relation to Questions 25 and 26 (actions taken by the FSA following the meeting with you on 16 March 2011) you do not accept the argument that the FSA didn't have to advise you to go to another agency. Given the seriousness of your claims and the fact that you were an Approved Person they should have used common sense. The FSA has attempted to deflect the blame on you for not doing more. You consider that many of the FAQ's were designed to follow a certain path and in many cases the answers were incomplete.

***Elements Six and Seven** – Although you believe it is appropriate to remind consumers of their right to make a complaint if they believe they were mis-sold a product, the FCA had mountains of evidence that was clearly the reason investors lost money and it wasn't due to mis-selling. By deciding to mention publicly only the least likely cause of*

the losses, mis-selling, and selecting what was disclosed publicly an investor would zero in on that one point not knowing the serious issues the FSA decided not to disclose publicly. While there may very well have been investors who were mis-sold, the mis-selling does not contemplate fraud. UCIS funds investment strategies may be risky but a propensity for fraudulent activity is not an inherent risk to UCIS funds.

Considering what you have been through for the last 5 ½ years and the impact it has had on you financially and professionally and the impact on your family, you are not interested and will not accept the offer of £500. You do however wonder if the FCA will offer you a public apology for Elements One and Two.

My position

I have reviewed the FCA's complaint file in your case and other confidential information I have seen relating to the FSA's and the FCA's involvement with Tiuta plc, Connaught Asset Management, the Fund, and its operators (Capita and Blue Gate). It is beyond the scope of the Complaints Scheme to provide a general review of the FSA's and FCA's regulatory approach in this case although, as I comment later, I consider that such a review would be appropriate. For that reason, my approach has been to ask whether the FCA's complaint response is consistent with the evidence I have seen, whether I agree with the conclusions on each element and – even if I do – whether the FCA's acceptance of shortcomings is adequate.

My overall conclusion, for the reasons set out below, is that the FCA's complaint response goes some way to acknowledging the FCA's deficiencies in this matter but does not go far enough.

Element One – Inadequate actions by the FSA/FCA since you 'whistle-blew' as CEO of Tiuta in January 2011

It is in the public domain that you approached the FSA in January 2011 in your capacity as CEO of the Tiuta Group to report your concerns about the firm's financial situation. You were interviewed by the FSA in March 2011 and a few days later were asked to provide evidence that you had been asked to bring to, and had offered to supply at, the meeting. Your view is that this evidence provided 'clear evidence of fraud' that was ignored by the FSA.

The approach the FCA took to this element of your complaint was to consider the action the FSA took in the circumstances, its remit at the time and whether or not that action was unreasonable. The complaint response said that:

"*It is not my role to decide whether the Authority was correct to decide there was not sufficient evidence of fraud or whether it should have taken different action with the Firm. Instead, I have reviewed the process it went through and its considerations in making those decisions and assessed whether they were within a range of reasonable decisions it could have made. I note you think the Fund should have been suspended immediately, but from the evidence I have seen the Authority considered the extent of its regulatory powers. The Authority can take steps, such as passing on intelligence and working with other authorities who are better placed to investigate matters relating to fraud. However, the Authority confirmed in the FAQ document that it 'did not consider that we had sufficient evidence of fraudulent activity' and so it did not consider referring the matter to the police at that time.*

The Authority was limited in what it could do because the Fund itself is not regulated by the Authority and only around 5% of Tiuta's activities at the time were regulated. You do not think this is a valid consideration, but in my view it is a relevant and important factor because it limited the scope of potential action the Authority could have taken in the circumstances. The Authority considered and discussed the types of potential action it could take – including whether to give additional publicity (other than the requirement being publicly available on the Financial Services Register) to the requirement placed on the Firms regulated mortgage lending permissions. It also considered the negative effect any action against Tiuta would have on the Fund and its investors and any other action it was considering taking at the time. I appreciate this will be frustrating for you given the nature of your complaints, but I am not able to disclose specific details of everything that was considered and discussed with the Firm due to the restrictions of s348 of the Financial Services and Markets Act 2000 (FSMA). From what I've seen, I am satisfied the Authority gave sufficient consideration to how best to proceed with the information it had and in doing so, it considered a range of potential regulatory action. Ultimately, the steps taken were not unreasonable.

While I am satisfied the Authority has considered the various options available to it, how it could protect investors and has taken some regulatory action relatively promptly, I do have concerns about the time it took to reach internal decisions about the extent of its powers in this situation. The matters involved were complex and required extensive discussion and advice from a working group of stakeholders across the Authority, tasked to consider and advise on the Authority's approach and all the surrounding issues, but these discussions were not concluded until December 2011. I have not seen any evidence to suggest a speedier internal resolution would have led to a different approach, but I think it is an issue that should have been concluded internally far quicker in the circumstances."

In reviewing this aspect of your complaint I have considered not only whether FSA/FCA activity occurred but whether a reasonable person would consider that the activity was sufficient. I have also asked myself whether it is reasonable for the FCA to refer to the restrictions of s348 as the reason for not supplying certain information.

Fraud

I must first emphasise that to date there have been no findings on whether the Fund was engaged in a fraud or indeed into whether it was managed in a negligent manner or not. No law enforcement agency has established that fraud took place at Tiuta or Connaught. It is not within my remit to determine these matters although I understand that you would like me to. My role is to comment on the way the FSA responded to the information it received.

From the evidence I have seen, however, I am not satisfied that the FSA applied its mind sufficiently to the possibility that there might be fraudulent activity taking place at Tiuta in the first half of 2011. In reaching this conclusion, I have had regard to the following:

- There is a lack of evidence in the minutes of meetings I have seen to show that the possibility of fraud was seriously considered or discussed. As the complaint response states, the emphasis was on concerns about the firm's precarious financial position.
- The alleged fraud was that Tiuta, with Connaught's agreement, was using funds it received to redeem loans as a revolving credit facility to run its business instead of

paying off the loans and releasing the charge certificates at the Land Registry. The FSA was aware of this scenario from the evidence you supplied and it continued to occur during the FSA's supervision of Tiuta in 2011. When similar allegations were made by another party in August 2012 (after the Fund collapsed) the FCA reported the matter to the City of London Police.

- Under s165 of FSMA, the FSA had powers to require authorised persons to provide information or documents that are "reasonably required" in connection with the exercise by the FCA of its statutory powers. A s165 request was made on 19 May 2011 to BDO, the accountants appointed by you to report on the firm's finances, to enquire whether there was evidence of fraud or misappropriation of funds. However, these powers were not pursued when BDO responded that this was beyond their brief.
- A document prepared by the FSA in September 2011 (to consider enforcement options against Tiuta) states that there is "*no evidence of financial crime or profit*" from any of the firm's breaches.
- An internal assessment by the FCA in 2016 concludes that there were delays in the FSA acting on and sharing information about the allegation of fraud, including a delay of approximately 19 months in referring it to the City of London Police.

It is the FCA's position that it is not the lead prosecutor for fraud. Given that position it must follow that it should report significant allegations of fraud to those with that responsibility as soon as possible. I am pleased to note that, in responding to my preliminary decision, the FCA has accepted that the FSA did not give the possibility of fraud sufficient emphasis so as to refer the allegations to another agency in 2011. In my view there was a delay of at least 18 months in the FSA reporting allegations of fraud to the appropriate authorities.

Regulatory Action

The evidence I have seen shows that there was considerable activity within the FSA during 2011, mostly in the form of ongoing supervision as referred to in the FAQ document published by the FCA. There was also discussion about the impact on consumers and the potential for consumer detriment of actions taken or not taken. Consideration was given both to encouraging Tiuta to take voluntary action and to the FSA's enforcement powers, particularly in relation to insolvency and variations of permission. As you know, two Voluntary Variations of Permission (VVOPs) were agreed with Tiuta, in May 2011 and June 2012. The effect of these was that the firm agreed to wind down its regulated business. In December 2011 a decision was taken not to proceed with any Enforcement action against Tiuta. This was based in part on advice from the FCA's General Counsel Division (GCD). The focus of FSA activity then became supervision to oversee the winding down of Tiuta's regulated business and ongoing monitoring of its financial situation.

However, in my view the evidence does not support the conclusion reached by the FCA about this aspect of your complaint. The evidence strongly suggests that, despite considerable activity, the FSA's approach was uncoordinated, fragmented, and was focussed upon narrow issues of jurisdiction rather than overall consumer detriment. This was despite much of the evidence (some of it significant and dating back two or three years) about the larger picture being available to the FSA in 2011.

In its response to your complaint, the FCA conceded that decisions should have been made more swiftly, but concluded that the time taken to reach a decision did not affect the regulatory

options available to the FSA Given the FSA's regulatory approach during 2011, that may be strictly true; however, the delays clearly allowed risks to continue.

In reaching this conclusion, I have had regard to the following:

- There were known concerns about the directors of Connaught
- Questions were being raised about Tiuta's financial stability and how the Connaught Series 1 Fund was being promoted and operated from December 2008/January 2009 but these were not pursued.
- In March 2010, the FSA's Financial Promotions team referred the Connaught promotion to the Unauthorised Business Division with the note: "*perhaps we can stop some detriment before it happens*."
- The FSA was aware from February 2011 onwards that Tiuta was technically insolvent and not expected to meet the FSA's capital adequacy requirements until March 2012. There was evidence of breaches of Threshold Conditions 4 (adequate resources test) and 5 (fit and proper in all the circumstances) entitling the FSA to invoke its powers in relation to insolvency or Own Initiative Variation of Permission (OIVOP). The FCA now accepts that the advice from GCD seems unaware of this evidence.
- You told the FSA in January 2011 that your Chief Finance Officer had identified a potential £20m shortfall in the 2010 accounts. In August 2012, when Tiuta Group's accounts were finally signed off, a loss of £23.5m is recorded to end of 31/3/2010. At this point, the FSA noted that this is the "*First evidence of this level of losses… this would indicate that losses had already been crystallised but had not been recognised by Tiuta or the auditors.*" I do not accept that it is the first evidence, since the FSA had been given this information early in 2011.
- Action that was recommended, to issue private warnings to the Tiuta directors, was not in fact taken, although it is unclear whether this would have helped.
- FSA staff were preoccupied with whether other bodies could take action but did not in fact engage substantively with them. In December 2011 a question was raised about whether the Office of Fair Trading might take action against Tiuta. This was not followed up until March 2012 when a phone call was made on a hypothetical basis; there is no evidence that this was followed up further. The FSA did not inform the Insolvency Service that Tiuta was insolvent until March 2012, a delay of over a year.
- The conclusions reached in the FCA complaint response conflict with an FCA internal report that states: "*The promotion of unregulated CIS was within the FSA's regulatory remit throughout the Fund's life. The FSA first identified concerns with the Fund's promotion in 2009 and was aware of systemic issues within the market involving the promotion and sale of unregulated CIS from 2010. Given its work on unregulated CIS, it could have responded earlier to concerns regarding the promotion and sales of the Fund."*
- The same report concludes that:
    - "*A number of areas within the FSA/FCA dealt with different events and information relating to the Fund and the supervision of the associated entities. However, this information was not collated centrally or considered in a holistic way to ensure informed decisions and a coordinated response. Examples include the information about the financial position of Tiuta and its insolvency, concerns about the director of the Fund's Asset Manager and allegations of fraud. This information came from a variety of sources*

including the overseas regulators, regulatory alerts, whistle blowing intelligence and consumer/firm complaints.

- *The chronology highlights concerns around the consistency of some internal views and judgments, particularly around the proportionality of the approach and whether to act given the unregulated nature of the Fund and its Asset Manager.*
- *The chronology identifies gaps in the delivery of some agreed supervisory actions and also identifies a number of events whereby the pace of delivery appears slow. The chronology also highlights a number of gaps in record keeping, resulting in a lack of clarity in the rationale for decisions and outcomes of supervisory activity*."

In responding to my preliminary decision on this aspect of your complaint, the FCA has emphasised that its approach to supervising the type of small firms involved in the Fund has to be based on the size of the firm and the risks posed to FCA objectives. I accept that a graduated approach to supervision is inevitable and sensible, but it is only effective if it is operated in a way which enables supervision to be intensified and action taken when there is evidence of emerging risks. In this case, the FSA failed to pull together all the different strands affecting the operation of the Fund and to decide on a co-ordinated approach to manage the risks involved, even though some of the evidence shows that the known risks were high.

I have also considered the reliance placed by the FCA on s348 as a reason for not disclosing further information to you. My understanding is that this applies only to confidential information received by the FCA in the course of its statutory duties. S348 cannot in my view be used to protect information generated by the FCA itself, nor information which is already in the public domain. I recognise that the FCA has a difficult task in deciding what information should properly be disclosed, particularly when balancing its various legal responsibilities or when there is a danger of prejudicing proceedings. Nevertheless, in my view there is scope for greater openness in this case, which is why I have referred extensively to the further material I have reviewed.

Element Two – 'Lack of care' for you as a whistle-blower.

In response to this element of your complaint the FCA complaint response said that: "*The Authority organised a meeting with you at its offices on 16 March 2011. The meeting was led by Supervision and you were not treated as a whistle-blower. It is not unusual for the Authority to have met you, as an Approved Person who notified it of an event under Principle 11. I have not been able to locate any clear guidance in 2011 on how Supervision should have handled intelligence from Approved Persons who could potentially have been treated as a whistle-blower. Notwithstanding the fact that there was a clear lack of guidance, it is my view that due to the matters raised by you in the meeting, the Authority exercised a lack of care by not referring to the whistleblowing team for guidance following the meeting."*

The FCA upheld this aspect of your complaint and I agree with that conclusion. Although it is technically correct to say that you were not formally regarded as a whistle-blower by the FSA, that is clearly what you thought you were and, as you say, there are numerous later FCA references to you as such. My review of the evidence shows that at the meeting with the FSA on 16 March 2011, you were warned in rather vague terms about the risks of handing over material. The FSA declined to receive your documents at that stage and you were told that you

should hand over documents you thought the FSA needed to see as being relevant to their regulatory functions. Two days later you were asked by email to send your documents. The FCA complaint response concluded that this attitude to your documents was unhelpful. The complaint response also identified a lack of clear guidelines in 2011 about how to treat an Authorised Person making a disclosure who might also be considered a whistle-blower. Changes were made to the whistle-blowing approach between September 2013 and December 2015. You were not told that you could or should refer the matter to the police or the Serious Fraud Office yourself. In my view this would not have been a reasonable response in any event. The FCA's statement, in its published FAQs, that the FSA did not do anything to prevent you from doing so has been perceived as an attempt to shift responsibility from where it clearly lies, with the regulator itself. I am pleased to note that the FCA now recognises that its statement was drafted defensively and insensitively, although I also note that you say the statement was repeated as recently as September 2016.

Element Three – Failure to monitor properly the actions of Tiuta plc

I have addressed this element of your complaint under *Regulatory Action* in my comments on Element One above. In responding to your concern that the FSA did not monitor the fact that ten individuals resigned from the Firm during January and May 2011, the FCA complaint response stated: "*I have discussed this specific point with the Supervision area and they advise they did have knowledge of some of the resignations, but they cannot confirm knowledge of all the individuals. I understand why you would link this comment with a 'failure to supervise' but I am not persuaded that this alone would mean that… the Firm was not a relationship-managed firm and so reviewing press articles would be a way to monitor the goings on at the Firm. In this particular situation, even though it can't confirm knowledge of all the resignations, I am satisfied the Authority was monitoring the actions of the Firm at this stage and was considering what action, if any, it should take. For reasons explained above, I am not able to go into any further detail due to s348 of the Financial Services and Markets Act 2000.*" I have already stated my view about the applicability of s348. From the evidence I have seen, I am satisfied that the FSA was aware of press reports about senior staff resignations at Tiuta in April 2011. This should have rung additional alarm bells.

Element Four – 'Failure to supervise' BDO accountants who you had engaged to carry out a forensic audit and assess Tiuta's accounts

In response to this element of your complaint, the FCA said that: "*I understand that while you were at the Firm you were involved in engaging the Firm's financial advisors, BDO, to review the financial position of the Tiuta Group, rather than just Tiuta plc. You've raised concern because you haven't seen any evidence of the Authority taking action or making enquiries with BDO about this. I appreciate your concerns about BDO and its interaction with the Authority but in my opinion this isn't something the Authority should have, or indeed could have, kept you informed about. From the evidence I have seen I am satisfied the Authority engaged with BDO and it was aware of their report into the Firm, but I am not able to explain further due to s348 of the Financial Services and Markets Act 2000".*

From your comments on the FCA's complaint response about this aspect of your complaint, I understand that your main concern is the regulatory consequence of the FSA's reliance on BDO and whether BDO complied with its obligations under Principle 11. I have addressed what I consider to be the FSA's regulatory failures under *Regulatory Action* in my comments on Element One above. I agree with the FCA that s348 applies to its interactions with BDO as a

regulated firm. I am unable to comment further on this matter. However, from the evidence I have seen, I consider that the FSA was over-reliant on BDO in monitoring Tiuta and did not take its own decisive action based on the information BDO did provide about Tiuta's financial stability and solvency.

Element Five – Providing bewildering and untruthful answers to a FAQ for investors

You raised concerns about the answers provided by the FCA to Questions 16, 25 and 26 in an FAQ document published by the FCA.

Question 16 was: '***What has the FCA (and previously the FSA) done?***' In response to this element of your complaint, the FCA said that: "*Question 16… refers to, amongst others, a requirement on the Firm to no longer carry out any new regulated mortgage lending. You have raised concerns that the requirement only applied to 'new regulated mortgage lending' and it wasn't subject to a public announcement from the Authority. I understand that overall, the actions taken by the Authority was not in line with your expectations. But from the evidence I have seen, I am satisfied the Authority considered the negative effect that making a public announcement would have on the Fund and its investors and any other action it was considering taking at the time. Question 16 also refers to the Authority requiring the Firm to instruct Connaught Asset Management Limited (Connaught) to change its marketing materials so they no longer described the Fund in a misleading way. You have said you would have expected such a request to have been directed to Blue Gate, which was the regulated operator of the Fund at the time. I appreciate your concerns in light of your fraud allegations against the Firm, but by this point Blue Gate was no longer responsible for the Fund's marketing and so directing the Firm to exercise its contractual rights over Connaught was in my view, reasonably considered to be the most effective way of taking remedial action*."

I have partially addressed this element of your complaint under *Regulatory Action* in my comments on Element One above. The evidence I have seen shows that the FSA was aware of the 'unusual' nature of the relationship between Tiuta and Connaught and the potential for conflict of interest that this gave rise to. I agree with you that it would have been more appropriate for the FCA to have requested Blue Gate, as the operator of the Fund, to address issues related to the marketing of the Fund. I am not sure what the FCA means when it says that "*by this point Blue Gate was no longer responsible for the Fund's marketing"* since Blue Gate remained the operator of the Fund until it collapsed in 2012. (In responding to my preliminary decision the FCA accepts that this was a factual error for which it will apologise.) Tiuta, of course, was never responsible for the Fund's marketing.

Questions 25 and 26 referred to the actions taken by the Authority following the meeting with you on 16 March 2011. In response to this element of your complaint, the FCA said that: "*I note that you disagree with the Authority's comments about how it was limited in the action it could take because very little of the Firm's business was regulated. I have covered this point in Element One, but in my opinion the Authority did give sufficient consideration to what action it was suitable to take in the circumstances. The size of the Firm's regulated business was, in my view, an important consideration as the Authority had to be satisfied that any action it did take was proportionate. The Authority says in question 26 how it did not do anything to prevent you from going to the police with your evidence – which is not in dispute. As discussed in Element Two above, your first call to the Authority was to provide information in line with your obligations under Principle 11, so I don't think it's reasonable for me to say the Authority should have provided advice on whether to contact other agencies at this stage. However, it*

may have been different if Supervision had referred to the Whistle-blowing team for guidance on how to treat you following your meeting on 16 March 2011. I completely understand your frustration with the way you were treated by the Authority, particularly when you were providing intelligence. However, from the evidence I have seen I am not persuaded that the answers in the FAQ contain any 'blatant lies'.

I have addressed this element of your complaint under Elements One and Two above.

Elements Six and Seven – Passing the blame to IFAs for investor losses rather than dealing with allegations of fraud, in order to protect the FCA's reputation and save itself from embarrassment. Failure to provide information to, or collusion with, the Financial Ombudsman Service

The FCA treated these two complaints together as they had some overlap. Its complaints response said that: "*I appreciate why you have said the Authority and the Financial Ombudsman Service have been passing the blame to IFAs for investors but I don't think the Authority has acted unfairly by reminding consumers of their rights to make a complaint. I understand your concerns about the way the Fund was being run but it is also possible for the Fund to have been mis-sold to consumers by advisers and this is what the Financial Ombudsman Service assesses in each individual complaint. Also, please bear in mind that the Financial Ombudsman Service, not the Authority, will determine a complaint by reference to what is, in the Financial Ombudsman Service's opinion, fair and reasonable in all the circumstances of each individual complaint. There is a Memorandum of Understanding between the Authority and the Financial Ombudsman Service but this does not extend to the Authority having a say in the way the Financial Ombudsman Service handles individual complaints. There have been discussions on this matter between the Authority and the Financial Ombudsman Service but I haven't seen any evidence to show the Authority has influenced the Financial Ombudsman Service to uphold all complaints against IFAs in relation to any mis-selling of the Fund.*"

I think that these are all reasonable points for the FCA to make, but I understand that your concerns relate more to the FCA's decision to focus on the mis-selling issue to the exclusion of other matters. In my view, the FCA's choices about what information *not* to put in the public domain, and the emphasis on IFAs, may have had the effect of shifting the focus away from the possibility that there might also have been regulatory failure.

The FCA upheld two of your complaints and you were offered an ex gratia compensatory payment of £500. However, it appears that what you are seeking is a public apology. I consider this would be a reasonable outcome to your complaint, in particular for the lack of care over your treatment as a 'whistle-blower' and the defensive and insensitive response given to Question 26 in the FCA's FAQ document.

Conclusion

The FCA has already apologised to you for not seeking advice from the whistleblowing team and offered a payment of £500 for this. They have also acknowledged that regulatory decisions in the Connaught Fund matter were not taken swiftly enough.

As is clear from my analysis above, in my view the regulator's failings go further than this. The evidence does not suggest that the regulator was simply too slow to reach its conclusions:

it suggests that, despite a long build-up of evidence pointing to the risk of serious consumer detriment, it failed to act in a co-ordinated fashion, and failed to involve other agencies when it clearly ought to have done so. I am also concerned that in responding to you the regulator may have relied too heavily upon s348 of the Financial Services and Markets Act 2000, thus denying you explanations of regulatory actions. Although you have asked me to conclude that the Regulator has acted throughout in 'bad faith', I have not seen any evidence to support this.

This Complaints Scheme is not designed to deal with major inquiries into alleged regulatory failure, nor to provide the kinds of remedies which you are seeking for yourself or on behalf of investors. However, in my view such an inquiry is needed. I am pleased to say that the FCA has agreed to appoint an external third party to conduct a review into the FSA's regulation of the Connaught Income Series 1 Fund and publish the outcome (to the extent that it can). This is a very welcome development.

The FCA has said that its review will start once the ongoing enforcement actions would not be put at risk of being prejudiced. This is of course a reasonable approach; however, I consider that the FCA should be able to commence some preparatory work on the review now and do as much work as it can without waiting for the outcome of current proceedings. I recommend that the FCA should also make sure that the review and publication of the outcome is not unduly delayed given the long wait that investors have already experienced. I ask that the FCA should keep you and my office informed regularly of progress.

In carrying out and publishing the review, the FCA should commit to being open and transparent about what went wrong in the regulation of the Connaught Fund, and what steps have been taken to prevent a recurrence. I also remind you that you will be entitled to revert to my office if you remain dissatisfied once the review has concluded.

In the light of the undertaking to carry out a review, my recommendation to the FCA in respect of your complaint is that it should:

a. offer you an increased ex gratia payment of £1500 for distress and inconvenience, to reflect its lack of care over your treatment as a 'whistle-blower', the fact that the FCA's failings went further than described in the decision letter, and for the FCA's defensive and insensitive response given to Question 26 in its FAQ document. It is of course entirely a matter for you whether you wish to accept this offer. I emphasise that this ex gratia payment is a separate matter from a claim for financial compensation, on which you may wish to take independent legal advice

b. offer you a public apology for the shortcomings that I have identified. You have asked that the FCA should work with you to agree the wording of this apology. Although this has not been the practice under this Scheme, I am sympathetic to this request, and recommend that the FCA gives it consideration, although the final wording must ultimately be decided by the FCA. I would be happy to assist in this process if that would help.

Yours sincerely

Antony Townsend
Complaints Commissioner