Complaints Commissioner

FINAL DECISION
(AS PER 2.2 HEREIN)

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 the complaint relates to the inactions of the FSA, in relations to its objectives and duties under the Financial Services and Markets Act 2000 (FSMA) the 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, the 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.

1.8 Unusually in this case of this particular complaint some of my recommendations that I set out in my Preliminary Decision were not accepted by the Regulator. I hope on careful reflection after considering all that I set out in this Final Decision that the FCA will feel able to accept in full all my recommendations based as they are on the findings of an independent Complaints Commissioner after a careful and painstaking objective investigation on his part. It is of a piece that goes with modern good governance of public bodies. Further, it is important that the complaints scheme is understood to be playing a relevant and important role in sustaining the credibility of the FCA as "an accountable organisation". I know that the FCA holds strongly to that approach and will therefore bear that in mind in arriving at its final position.

2. The Complaint

2.1 In the Complainant's letter of 10th December 2013 to my office, which I received on 13th December 2013, the Complainant sets out that the 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 This Final Decision will be limited to considering the 'heads of complaint' that are detailed under points 32 and 37 above. This is not because I do not intend to address the other issues the Complainant raised but because, as my Senior Investigator set out in his email of 10th January 2014, I intend to address the other issues in a separate complaint investigation which will be conducted under the reference of FSA01597. My Final Decision in respect of the other issues the Complainant raised will be sent to the Complainant under separate cover.

2.3 My rationale for doing this is twofold. Firstly the complaint relates to two separate events namely the Regulator's decision to undertake a search and seizure visit to the Complainant's 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 (mistakenly called a 'Warning Notice' in point 37 above) despite the Complainant's strong and continuing representations that doing so has impacted *and continues to impact* (my emphasis) adversely upon the Complainant's employment situation in a different and unrelated jurisdiction.

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

2.5 In addition to setting out the 'heads of complaint' (which I have set out in full in 2.1), when corresponding with the Regulator, I note that the Complainant made further comments which set out the Complainant's understanding of the complaints process.

2.7 Following the publication of Upper Tribunal's decision, in an email, dated 9th January 2013, addressed to a member of the Regulator's Enforcement Team the Complainant states that

"*This case is the subject of an active complaint to be investigated by the Complaints Commissioner and the FSA Complaints Team internally. The complaints initially raised in 2007 by Michelmores on behalf of the company and later refreshed by Mr O could not be heard until decision notices/Tribunal procedures were complete.* ***Therefore I respectfully request that this part of the process is completed and specifically we understand the Complaints Commissioner's position on the matters raised before the Final Notices are published***" (my emphasis).

Continuing:

"*With reference to the fine, I cannot make a payment of this magnitude within the time frame stipulated (just 9 working days?). As detailed above, the complaints process should be given the opportunity to complete before sanctions are finalised*".

2.8 The following day, 10th January 2013, the member of the Regulator's Enforcement Team responded in the following terms:

"*The Final Notices in relation to you and Mr O are based upon the findings of the Tribunal. The purpose of the Tribunal proceedings was to determine the extent to which you and Mr O breached any of the FSA's rules or principles during the relevant period. Having made its findings, the Tribunal directed that the FSA should impose financial penalties upon both you and Mr O. Accordingly we issued the Final Notices for the amounts directed by the Tribunal. As set out in paragraph 13 of your Final Notice, the FSA must publish such information about the notices as the FSA considers appropriate. Typically the FSA will publish the Final Notice on its website. The complaint relates to allegations in relation to the conduct of the FSA and not your own conduct. As they deal with different matters, the outcome of the complaint will not impact upon the proceedings against you or the content of the Final Notice. The proceedings leading to the issue of the Final Notice are concluded. As such, we do not consider it appropriate to withdraw publication of your Final Notice. As you will be aware, the Tribunal has already published its findings on its own website*".

The member of the Regulator's Enforcement Team continued:

"*As stated above, the complaint relates to allegations in relation to the FSA's conduct. The financial penalty is as a result of your own conduct during the relevant period as determined by the Tribunal. We therefore do not consider it appropriate to delay payment of the penalty until after the resolution of the complaint. Your obligation to pay the fine will not be affected whatever the outcome of the complaint as the proceedings against you have been concluded*".

2.9 Although the Complainant submitted the complaint to the Regulator on 4th February 2013, on 1st March 2013 the Complainant contacted the Upper Tribunal regarding the publication of the Final Notice. In the Complainant's letter the Complainant set out why he believed that it was unfair for the Regulator to continue to publish the Final Notice on its website. The Complainant did this in the following terms:

"*I have a serious issue I need the Tribunal's consideration and assistance with.*

Unfortunately the Authority's Final Notice publication is having a significant and disproportionate impact on my career. The Final Notice was published by the Authority mid December 2012.

The Tribunal summary concluded with regard my new career in Australia;

'It would be wrong for us to impose a penalty which would have the effect of bringing this fresh start to an end[1]*'.*

Unfortunately this is exactly what has happened, as I was dismissed from [the Australian Financial Services Group] this week. I will explain the background.

[…]

So why I lost my job this week (sic)? [The Australian Financial Services Group] media's department was contacted by a journalist for the Wall Street Times seeking a comment from me about the Authority's Director of Enforcement's (Director D) comment that it was easier to take on the little guys, than the big banks.-

http://www.moneymarketing.co.uk/politics/fsa-it-is-easier-to-take-on-the-little-guys/1065180.article

[The Australian Financial Services Group] is a big conservative business and one of our senior directors perceived I was a risk to the brand based on what published in the Final Notice, and because the Warning Notice ranked so highly on a Google search of my name, page one in fact. (google.com.au) So a five year unblemished career over in the blink of an eye, which is quite devastating on lots of fronts.

Link to Final Notice on the FSA's website

Clearly this online damage is far greater than the fine imposed.

Today I met with a recruitment specialist who advised I am effectively unemployable with the online profile I have.

I have asked the Authority if the Final Notice as it relates to me could be removed. Enforcement Officer Z from the Authority responded by stating;

> *'Given that [the Australian Financial Services Group] have already made their decision to dismiss you, I do not see the benefit that the removal of the Final Notice from the FSA's website*[2]*'*

This is incredibly insensitive. Clearly I desperately need to find alternative employment, and the Final Notice is now precluding me from an opportunity to earn a living. *(my emphasis) In the context of my circumstances where our resources have been severely drained by a five year fight with Authority – it's a critical situation*

In terms of Publicity the Authority's rules state –

[1] Tribunal findings page 58
[2] Email from Enforcement Officer *Z* 27th Feb 2013

the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to you or prejudicial to the interests of consumers.

I present no risk to UK consumers (sic)".

2.10 As the publication of a Final Notice fell outside of the Upper Tribunal's jurisdiction, and the Enforcement Team was not prepared to remove the Final Notice, on 7th March 2013 the Complainant complained about the Regulator's decision not to review its decision to publish the Final Notice. The Complainant did this by email in the following terms:

"***Unfortunately I now find myself unemployed, because of what is published on the internet in the Final Notice.*** *(my emphasis)*

I have written directly to Enforcement Officer Z and also the Tribunal that heard this case, pleading for common sense to prevail.

It is completely disproportionate that for a fine of 10K and no prohibition order, that I have now lost my job of 5 years and find my self (sic) to all intents and purposes unemployable *(my emphasis). This is a far greater penalty than issued by the Tribunal, particularly in the context of being the sole income earner with a young family (sic)*".

2.11 Following this email, the Complainant's complaint regarding the continued publication of the Final Notice was included in the complaint.

2.12 After an unduly lengthy consideration of the representations, the Regulator's Complaints Team wrote to the Complainant on 22nd August 2013 setting out its decision in respect of the complaint in relation to the Final Notice.

In this decision letter the Regulator set out that following its investigation it had:

"*found that the Authority concluded reasonably that publication of the Notice would not be unfair to you, based on the information it had at the time the Notice was published.*

We did find that when you asked for the continued publication of that Notice to be reviewed the Authority did not fully explain why your request had been refused. We recognise and apologise for that fact, however we do not believe the decision not to remove the Notice was unreasonable. For this reason we have not upheld your complaint".

The Regulator's decision letter also concluded that:

"*Your complaint followed a request to the Authority for the removal of a Final Notice from publication on the basis that it had become unfair to you. Legislation requires the Authority to consider potential unfairness prior to publication of a Notice and our role has been to assess whether this had been done.*

In reaching the view that it was not unfair, we took account of the fact that the Authority must carefully balance opposing arguments – the transparency of its decision-making, public and industry awareness of types of misconduct, the deterrent effect of enforcement action and the consistent treatment of other persons whose Final Notices have been and remain published on one hand, and consideration of a subject's personal circumstances in light of the gravity of the misconduct found on the other.

In summary, we have found that it was reasonable for the Authority to have formed the view that publication of the Notice was not unfair to you".

2.13 As the Complainant remained unhappy with this decision the Complainant referred the matter to my office. In referring the matter to my office the Complainant set out the complaint in the following manner:

"*The Authority issued their Decision Notice on 13th August 2010; I made a reference with the Upper Tribunal (Tax & Chancery Chamber) disputing this decision; this was raised on 3rd September 2010.*

The Upper Tribunal (Tax & Chancery Chamber) hearing took place over the following periods:

6th – 13th June 2012

20th – 22nd June 2012

A decision notice was issued by the Upper Tribunal on the 10th of December 2012.

Summary of findings and sanctions imposed –

The FSA originally sought to fine me £170,000 and prohibit me from operating within the Financial Services sector. The Chairman Mr O was to be fined £250,000 and prohibited from operating in UK financial services. Mr F the Chief Operations Officer did not choose to defend himself in this action and agreed a fine of £50,000 which was dismissed when he was declared bankrupt in 2010.

Ultimately the Tribunal saw fit to fine me £10,000 and not issue a banning order. Mr O was fined £50,000 and initially also had his prohibition order rescinded. The FSA subsequently disputed the Tribunal findings and a prohibition order was retrospectively applied to Mr O".

The Complainant concludes his representations to me by adding that:

"*As a final footnote to these proceedings I have been unemployed for 9 months. Unfortunately my employer of 5 years took a dim view of the Google information that the Warning Notice stated. I was given the 'option' to resign. It's the way of the world that everyone especially prospective employers 'Google' every applicant.*

The result of this is that as a father of three young children and wife (sic) is that we have had no income coming in and no job prospects whatsoever in the offering. I have been undergoing treatment for deep depression and anxiety and as it can be imagined its been a very difficult time with no end in sight.

I have raised this issue with the FSA and their response is simply that the publication of Warning Notices is reviewed after 6 years, its (sic) right and proper that my head should be hung high as a warning to all others. I wonder when enough is enough given all that has happened and given I am on the other side of the world what deterrent effect the FSA is really getting now that the media interest has moved on (sic).

The Tribunal surmised;

'It would be wrong for us to impose a penalty which would have the effect of bringing this fresh start to an end[3]'.

However with the publication of the notice this is exactly what has happened and it's grossly unfair given the disproportionate impact the publication of the notice continues to have. Given that I lost my job and business to the actions of the FSA in 2007 it's with some irony that I would lose my career and more importantly my reputation a second time at the hands of the FSA".

2.14 It is this complaint, along with the time it took the Regulator to consider this *separate* (my emphasis) aspect of the complaint, which this Final Decision will consider.

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. The FSMA (as the relevant legislation in place at the time of the Enforcement investigation and when the investigation into the complaint commenced) stipulated in Schedule One that the Regulator is exempt from "liability in damages". It stated:

[3] Tribunal findings page 58

(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 the FSMA here as it was the FSMA which was the relevant legislation when the Regulator considered the complaint. This exemption has been rehearsed in sections 25(3) and 33(3) of Part 4 of Schedule 3 of the 2012 Act. The Complainant has not adduced substantive 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. I should emphasise that 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 the complaint and find the 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 the Complainant was 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 A Group 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 Whilst there does not appear to have been any breach of the Human Rights Act 1998, the Complainant alleges in his 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*"[4], where a public officer/authority is shown "*not to have had an honest belief that he was acting lawfully*"[5], or can be "*demonstrated by recklessness on his part in disregarding the risk*[6].

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 the Complainant is unhappy with the decision the Regulator made and the impact this had upon him, and therefore asserts 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. The Complainant has 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*".

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. Background

4.1 As background to my investigation, I feel that it is necessary to consider the events which gave rise to the publication of the Final Notice in January 2013, namely the Upper Tribunal hearing, and the comments made by the Upper Tribunal in the judgment it delivered.

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[4] Steyn LJ (at 12) *Three Rivers District Council and others v Governor and Company of the Bank of England* [2000] 3 CMLR 205

[5] Hobhouse LJ (at 117) *Three Rivers District Council and others v Governor and Company of the Bank of England* [2000] 3 CMLR 205

[6] Hope LJ (at 44) *Three Rivers District Council and others v Bank of England (No 3)* [2001] HL 16, [2001] All ER (D) 269

4.2 On the 10th December 2012 the Upper Tribunal Tax and Chancery Chamber published a decision (The Decision) after a six day hearing at which the Complainant was represented by Counsel, attended and gave evidence. However, no legal advice has been available to the Complainant since that hearing concluded.

4.3 The Decision contained (inter alia) the following statements:

> *"1. In this reference Mr O, the former Chairman, and [the Complainant], (the complainant in this case) the former Chief Executive Officer, of Firm A Group Ltd("Firm A"), a Company which specialised in arranging mortgages and associated insurance, challenge decisions of the Financial Services Authority ("the Authority") making prohibition orders against them and imposing financial penalties.*
>
> *2. The Authority says that the Applicants pressured advisers to sell payment protection insurance ("PPI") products without due regard to their suitability and to recommend products from a particular lender without due regard to their suitability. The Authority says that the Applicants failed to maintain adequate compliance systems and created a culture focused on maximising sales without due regard to the need to treat customers fairly. The Applicants respond that there is no reliable evidence of any risk or detriment to customers as regards PPI, that encouragement to use the particular lender was legitimate in a market where the lender's particular strength, speed to completion, was important. They say that any shortcomings in compliance should be viewed against major achievements in this area. They deny that they placed undue emphasis on maximising sales. The Authority also alleges that the Applicants were responsible for Firm A's failure promptly to inform the Authority of a shortfall in its capital adequacy requirement and of then misleading the Authority about the Company's financial position. The Applicants admit that the Company delayed for a short period in reporting an unexpected and in some ways artificial capital adequacy breach. If, which they deny, the Authority was misled the Applicants say that this was not their direct responsibility or fault.*
>
> *3. Two Decision notices, both dated 13 August 2010, record that Mr O, was Chairman of the firm and approved to perform the Director function (CF1 of the controlled functions), and that [the Complainant], was Chief Executive Officer approved to perform the Chief Executive function (CF3), the Director function (CF1) and the Apportionment and Oversight function (CF8). The Notices impose:- prohibition orders pursuant to section 56 of the Financial Services and Markets Act 2000 ("the Act"), prohibiting the Applicants from performing regulated activities on the grounds that they are not 'fit and proper' persons; and - a financial penalty of £70,000 in respect of Mr O and £50,000 in respect of [the Complainant] pursuant to section 66 of the Act on the grounds of misconduct. But for evidence of financial hardship the fines would have been £250,000 and £170,000 respectively.*

4. By Referral Notices, dated 19 September 201, the Applicants referred their cases to the Tribunal……."

and

"7. [The Complainant] was 35 when he joined. He is a well educated and experienced professional who joined from [the Australian Financial Services Group], one of Australia's largest wealth management firms. Before joining the company he had been working in related areas of business in the UK. He is currently again employed by [the Australian Financial Services Group] as Head of Financial Planning Victoria/Tasmania Region……..".

4.4 As I have indicated above, my role is to review the manner in which the Regulator has itself investigated a complaint. However, 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);

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".

4.5 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.

4.6 As such, whilst the Complainant remains unhappy with the overall outcome of the Enforcement action (including the financial penalty applied by the Upper Tribunal), I am unable to review or comment upon The Decision the Upper Tribunal made. If the Complainant was unhappy with the Upper Tribunal's Decision then the appropriate way to challenge this was by an appeal. However, as no such appeal was made by either the Complainant or the Regulator, the Upper Tribunal's decision was binding upon both the Complainant and the Regulator.

This is an important factor to consider when investigating the complaint as, The Decision made (*inter alia*) further findings of fact which are, in accordance with Paragraph 6.15 of the rules of the Transitional Complaints Scheme, binding upon me.

"112. As we see it both Applicants:

- *pressurised Firm A advisers to sell single premium Payment Protection Insurance without due regard to the suitability of the product for individual customers.*
- *pressurised advisers to sell products provided by a particular lender, Mortgage Lender M Limited, without due regard to their suitability for the customer.*
- *failed, but only to some degree, in their duty to take reasonable steps to ensure that Firm A had in place adequate compliance systems to ensure the suitability of advice given to its customers.*
- *set a "tone from the top" at Firm A that focused on profit, cash flow and the increase of sales potentially at the expense of the fair treatment of its customers.*
- *failed in their duty promptly to provide the Authority with accurate information regarding the firm's capital adequacy position and, on one occasion, misled the Authority about these matters.*

113. In these respects, which fall short of all the allegations made by the Authority, the Applicants breached Principles 1 and 7 of the Authority's Statements of Principle for Approved Persons and were knowingly concerned in Firm A's breach of Principle 6 of the Authority's Principles for Businesses. They both lacked integrity in these breaches because while not dishonest their conduct was reckless. If they had applied their minds to the first four of these matters as they should have done they would have known that their conduct was not appropriate particularly given the advice and warning they had received from the Authority following its visit.

114. We next consider the question of what penalties should be imposed which in this case. The relevant penalties are a Prohibition Order and a financial penalty.

Prohibition Order

115. We have set out at Paragraph 27 above the circumstances in which the Authority may make a Prohibition Order. The Authority contends that Orders should be made as neither Applicant is a fit and proper person as defined. We have had regard to the entire 'fit and proper' guidance in the Handbook not just that cited to us by Mr George.

116. Mr Virgo (Counsel for [the Complainant]) argues that [the Complainant] should not be the subject of an Order. He is fundamentally honest and no danger to markets. He has learned from this experience and, just as he had never been in a regulatory difficulty before this case, he has been in no trouble since. Four and a half years have gone by and [the Complainant] has built a new financial services career in Australia. If an Order is made he will probably lose his job and pointless distress will be caused to his family. The Authority points to the severity of the breaches, the absence of integrity and the risk to customers.

117. Having considered these and all the other submissions made by the parties we are persuaded, just, that an Order against [the Complainant] is not necessary in this case. We do not repeat our earlier findings. In short while we take a serious view of the Applicant's failings we do not consider that he is currently not a fit and proper person to perform regulated functions. We were concerned that [the Complainant], when giving evidence, seemed to misunderstand his responsibilities and failed to appreciate what was obvious about his duties to notify the Authority. We conclude however that this needs to be seen in the context of years of dispute with the Authority and of understandable, if not always fully justified, feelings of injustice about various matters beginning with the raid on Firm A. Further the matter has been hanging over [the Complainant] for years and in this long period he has been satisfactorily engaged in financial services working for a large and reputable employer.

121. The Authority contends that the penalty imposed by the Regulatory Decisions Committee ('RDC') was appropriate, £250,000 for Mr O reduced to £70,000 on grounds of severe financial hardship with corresponding figures of £170,000 and £50,000 for [the Complainant].

122. The Authority's published Guidance on the approach to penalty contains a non-exhaustive list of criteria which include the nature, seriousness and impact of the breach, the extent to which the breach was deliberate or reckless, whether the person on whom the penalty is imposed is an individual, the size, financial resources and other circumstances of the person on whom the penalty is to be imposed and the amount of benefit gained or loss avoided. Examples of comparables in other cases, invoked by the Applicants, (but not by the Authority except on the issue of hardship) have their uses, and we keep prevailing levels of penalty generally in mind, but each exercise is different. The Guidance rightly requires all the circumstances to be considered.

123. If the Authority's case as put to the RDC had been established before us then those penalties, subject to issues of hardship, might have been appropriate. But the Authority's case before us has fallen short in the ways we have described. There are also it seems to us further matters of mitigation. We are not concerned with the raid on Firm A directly, this being a matter to be investigated by Sir Anthony Holland. Nonetheless the raid was a major event which caused immediate and permanent damage not reflected only in the financial consequences which, Mr George submits, are adequately recognised in any allowance for financial hardship. The raid was carried out to deal with alleged conduct of a very much more serious kind than has been established and resulted, regardless of where if at all any 5 responsibility for this should lie, in a degree of injustice to both Applicants. This factor should be reflected to a degree, in the penalty. So should the fact that neither Applicant has benefited much from these rule breaches. Firm A, the company which both Applicants had expected to be sold to their financial advantage, went into administration and liquidation and yielded nothing permanent for either of them.

Before that their salaries reflected the fact that this was a company in the Midlands not the City of London. Also relevant is the time it has taken to complete the investigative and disciplinary process, the absence of complaint from or direct proof of loss by customers and the realities of the personal positions of each Applicant.

124. The form of the Decision Notice may give the inaccurate impression that the Authority should first establish what the relevant figure should be and then make adjustments for potential hardship to arrive at a final figure. We recognise that it is helpful for the Authority to establish a level of fine appropriate to the breaches, leaving aside personal factors, as an example to others and a guide in future cases. But the fixing of the penalty is not a two stage process but a composite exercise evaluating all the relevant factors some of which may not be easy to reconcile. It is not a process of establishing simply the rate for the contraventions and then considering personal hardship. The Guidance makes clear that other circumstances may be relevant and these include some of those mentioned above.

125. The first step, as we see it having regard to all the circumstances other than potential hardship and the general level of penalties, is to reduce the starting point for the proposed penalty to £100,000 for Mr O and £75,000 for [the Complainant]. That then leads to the issue of whether, and if so to what extent, the figure should be reduced on grounds of hardship. As neither party was legally represented after the time the hearing finished and the issue had not been fully debated, we sought further submissions and information from the Authority about the question of hardship and gave the Applicants the opportunity to respond. That is why it has taken longer than usual for us to deliver this Decision.

126. The Authority's Guidance states that it may take into account verifiable evidence that serious financial hardship would be caused if the person were to pay the level of penalty appropriate to the breach. It is for the person affected to show hardship not for the Authority to have to prove a negative".

4.7 Following The Decision the Complainant updated with the FSA (as the then Regulator) the detail of the complaints (the Complainant's initial complaint against the FSA had previously been deferred pursuant to 1.4.4 of COAF) by a communication dated 30th January 2013 (the first complaint). Subsequently on 19th February 2013 the complainant expanded upon the first complaint by adding the following (the second complaint):

"*I also respectfully request that the Warning Notice (sic) published by the Authority is removed until the complaints process has run its full course with your team and if necessary the Complaints Commissioner. I note in relation to publicity –*

The FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to you or prejudicial to the interests of the consumers.

I feel that the publication of the Warning Notice prior to the complaints being heard, is inherently unfair. His Honour Judge Mackie stated (sic);

It would be wrong for us to impose a penalty which would have the effect of bringing this fresh start to an end.

The publishing of the Final Notice is having a detrimental and unfair effect on my financial services career here in Australia. Throughout these proceedings I have respected the enforcement process and the need for confidentiality. I have also made myself available at every stage throughout the last five years, despite some very strong feelings of injustice. I also present no threat to UK consumers.

Following the notice publication and the media frenzy that followed I was contacted for comment by a number of UK journalists - I did not provide comment as I did not want to prejudice the complaints process. This did not stop significant negative coverage about me. Today a journalist was seeking comment about [the Director of Enforcement]'s statement - 'its easier to take on the little guys'. I again refused to comment.

Therefore I restate my request that the Warning Notice (sic) is removed. The level of penalty imposed does not warrant the continued negative publicity generated online, mindful this is second round of negative publicity-the first which prematurely ended my UK financial services career following the dawn raid. The point should be made at this stage that the complainant (wrongly) believed that until his complaint that had been deferred had been dealt with by the Commissioner everything was still "at large" though in reality that was not the case since once the UT had issued the Decision the Regulatory role of the FSA was completed".

4.8 I treat the references to "Warning Notice" in 4.7 above as references to a "Final Notice". I would again reiterate that this Final Decision relates only to the second complaint. I should also add this comment at this point. On 9th January 2013 the Complainant emailed the Regulator to the following effect:

"*Therefore I respectfully request that this part of the process is completed and specifically we understand the Complaints Commissioner's position on the matters raised before the Final Notices are published*".

The Complainant thereby had put the Regulator on notice of the relevance of the importance the Complainant attached to the publication of the Final Notice.

4.9 On 22nd August 2013 the Regulator's Complaints Team notified the complainant of its decision on the second complaint. In that decision the FCA stated, *inter alia*, that:

"*we have found that the Authority concluded reasonably that publication of the Notice would not be unfair to you, based on the information it had at the time the Notice was published.*

We did find that when you asked for the continued publication of that Notice to be reviewed the Authority did not fully explain why your request had been refused. We recognise and apologise for that fact, however we do not believe the decision not to remove the Notice was unreasonable. For this reason we have not upheld your complaint".

and

"*Your complaint followed a request to the Authority for the removal of a Final Notice from publication on the basis that it had become unfair to you. Legislation requires the Authority to consider potential unfairness prior to publication of a Notice and our role has been to assess whether this had been done.*

In reaching the view that it was not unfair, we took account of the fact that the Authority must carefully balance opposing arguments – the transparency of its decision-making, public and industry awareness of types of misconduct, the deterrent effect of enforcement action and the consistent treatment of other persons whose Final Notices (sic) have been and remain published on one hand, and consideration of a subject's personal circumstances in light of the gravity of the misconduct found on the other.

In summary, we have found that it was reasonable for the Authority to have formed the view that publication of the Notice was not unfair to you.

In relation of your later request for removal of the Notice, we had some concern about a lack of documented decision-making which led us to question the extent to which the decisions taken on 26 & 27 February 2013 were considered. However, we have been reassured by documentation produced prior to the Authority's 11 March 2013 'final decision' e-mail. We have concluded on this point that the Authority has not been unreasonable in its decision-making, only that it should have better documented its earlier consideration of your request.

In summary on this point, although we have made a recommendation below in relation to the way the decision was communicated to you, we have concluded that it was reasonable for the Authority to have refused your request for the removal of the Notice from its website.

On this basis we have not upheld your complaint.

We recommend that a senior member of the Authority's Enforcement Division sets out in reasonable detail the reasons for its decision to refuse your request for the removal of the Notice. Whilst you are entitled to make a future request for removal of the Notice, we remind you of the Authority's policy that notices will not usually be removed within six years of their publication".

4.10 However, on 11th March 2013 it is important to appreciate that the Regulator was aware of the following relevant and clearly established facts:

(i) that the Complainant was clearly stating that publication was preventing the Complainant from obtaining a new job;

(ii) that the circumstances leading to Enforcement action had occurred over six years earlier (in 2007);

(iii) that The Decision did not take the view that the Complainant was "*not a fit and proper person*" to perform regulated functions;

(iv) that The Decision found that "*[Enforcement proceedings had] been hanging over [the Complainant] for years and in this long period he has been satisfactorily engaged in financial services working for a large and reputable employer*".

(v) that The Decision emphasised (iv) above by specifically stating that "*it would be wrong for us to impose a penalty which would have the* ***effect*** *(my emphasis) of bringing this fresh start to an end*" and

(vi) that the effect of section 391 of the FSMA imposed upon the Regulator a duty to consider the issue of ongoing fairness and appropriateness of continued publication of any Final Notice.

It is unclear to me from the files I have studied in depth that all these factors were ever collectively considered in such a way as to meet the obligations of section 391 of the FSMA.

4.11 On the 10th December 2013 the Complainant asked the Commissioner to investigate both the first complaint and the second complaint. In the context of the latter he argued the following issues:

"*As a final footnote to these proceedings I have been unemployed for 9 months. Unfortunately my employer of 5 years took a dim view of the Google information that the Warning Notice (sic) started. I was given the 'option' to resign. It's the way of the world that everyone especially prospective employers 'Google' every applicant.*

The result of this is that as a father of three young children and wife (sic) is that we have had no income coming in and no job prospects whatsoever in the offering. I have been undergoing treatment for deep depression and anxiety and as it can be imagined its (sic) been a very difficult time with no end in sight.

I have raised this issue with the FSA and their response is simply that the publication of Warning Notices (sic) is reviewed after 6 years, it's right and proper that my head should be hung high as a warning to all others. I wonder when enough is enough given all that has happened and given I am on the other side of the world what deterrent effect the FSA is really getting now that the media interest has moved on.

The Tribunal surmised;

> *'It would be wrong for us to impose a penalty which would have the effect of bringing this fresh start to an end'.*

However with the publication of the notice (sic) this is exactly what has happened and it's grossly unfair given the disproportionate impact the publication of the notice continues to have. Given that I lost my job and business to the actions of the FSA in 2007 it's with some irony that I would lose my career and more importantly my reputation a second time at the hands of the FSA".

5 My Findings

5.1 As to the substance of the second complaint, the legal position that is relevant is set out in Sections 390 and 391 of the FSMA. I would add here that it is the provisions of the FSMA which are initially relevant here as it was the legislation which was in force at the time that the Regulator took the decision to published the Final Notice. In the context of publication generally Section 391 of the FSMA provides *inter alia* that:

> "*(1) Neither the Authority nor a person to whom a warning notice, Publication or decision notice is given or copied may publish the notice or any details concerning it.*
>
> *(2) A notice of discontinuance must state that, if the person to whom the notice is given consents, the Authority may publish such information as it considers appropriate about the matter to which the discontinued proceedings related.*
>
> *(3) A copy of a notice of discontinuance must be accompanied by a statement that, if the person to whom the notice is copied consents, the Authority may publish such information as it considers appropriate about the matter to which the discontinued proceedings related, so far as relevant to that person.*
>
> *(4) The Authority must publish such information about the matter to which a final notice relates as it considers appropriate.*
>
> *(5) When a supervisory notice takes effect, the Authority must publish such information about the matter to which the notice relates as it considers appropriate.*
>
> *(6) But the Authority may not publish information under this section if publication of it would, in its opinion, be unfair to the person with respect to whom the action was taken or prejudicial to the interests of consumers.*
>
> *(7) Information is to be published under this section in such manner as the Authority considers appropriate…*".

5.2 Chapter 6 of the FCA's own Enforcement Guide in this context is also particularly relevant to my Final Decision. Given its relevance I set out in some detail what it has to say on the issue of publicity.

> ***"Publicity during, or upon the conclusion of regulatory action***
>
> *6.7 For supervisory notices (as defined in section 395(13)) which have taken effect, decision notices and final notices, section 391 of the Act requires the FSA to publish, in such manner as it considers appropriate, such information about the matter to which the notice relates as it considers appropriate. However, section 391 provides that the FSA cannot publish information if publication of it would, in its opinion, be unfair to the person with respect to whom the action was taken or prejudicial to consumers.*
>
> *Decision notices and final notices*

6.8 The FSA will consider the circumstances of each case, but will ordinarily publicise enforcement action where this has led to the issue of a final notice. The FSA may also publicise enforcement action where this has led to the issue of a decision notice. The FSA will decide on a case-by-case basis whether to publish information about the matter to which a decision notice relates, but expects normally to publish a decision notice if the subject of enforcement action decides to refer the matter to the Tribunal. The FSA may also publish a decision notice before a person has decided whether to refer the matter to the Tribunal if the FSA considers there is a compelling reason to do so. For example, the FSA may consider that early publication of the detail of its reasons for taking action is necessary for market confidence reasons or to allow consumers to avoid any potential harm arising from a firm's actions. If a person decides not to refer a matter to the Tribunal, the FSA will generally only publish a final notice.

6.8A If the FSA intends to publish a decision notice, it will give advance notice of its intention to the person to whom the decision notice is given and to any third party to whom a copy of the notice is given. The FSA will consider any representations made, but will normally not decide against publication solely because it is claimed that publication could have a negative impact on a person's reputation. The FSA will also not decide against publication solely because a person asks for confidentiality when they refer a matter to the Tribunal.

6.8B Publication will generally include placing the decision notice or final notice on the FSA website and this will often be accompanied by a press release. The FSA will also consider what information about the matter should be included on the FSA Register. Additional guidance on the FSA's approach to the publication of information on the FSA Register in certain specific types of cases is set out at the end of this chapter.

6.9 However, as required by the Act (see paragraph 6.7 above), the FSA will not publish information if publication of it would, in its opinion, be unfair to the person in respect of whom the action is taken or prejudicial to the interests of consumers. It may make that decision where, for example, publication could damage market confidence or undermine market integrity in a way that could be damaging to the interests of consumers.

6.10 Publishing notices is important to ensure the transparency of FSA decision-making; it informs the public and helps to maximise the deterrent effect of enforcement action. The FSA will upon request review decision notices, final notices and related press releases that are published on the FSA's website. The FSA will determine at that time whether continued publication is appropriate, or whether notices and publicity should be removed or amended.

6.10A In carrying out its review the FSA will consider all relevant factors. In particular, the FSA will take into account:

- *the seriousness of the person's misconduct;*
- *the nature of the action taken by the FSA and the level of any sanction imposed on the person;*
- *whether the FSA has continuing concerns in respect of the person and any risk they might pose to the FSA's objectives;*
- *whether the person is a firm or an individual;*
- *whether the publication sets out the FSA's expectations regarding behaviour in a particular area, and if so, whether that message still has educational value;*
- *public interest in the case (both at the time and subsequently);*
- *whether continued publication is necessary for deterrence, consumer protection or market confidence reasons;*
- *how much time has passed since publication; and*
- *any representations made by the person on the continuing impact on them of the publication*.

6.10B The FCA expects usually to conclude that notices and related press releases that have been published for less than six years should not be removed from the website, and that notices and related press releases relating to prohibition orders which are still applicable should not be removed from the website regardless of the length of time they have been published".

5.3 The effect of these provisions is that there are certain relevant obligations placed upon the Regulator in the context of the complaint the subject of this Final Decision namely:

(i) to consider what is unfair to the Complainant; and

(ii) in order to ascertain what is fair/unfair, the Regulator should have established in some detail in this particular case the Complainant's position factually and then applied the appropriate judgement to arrive at a conclusion as to what was fair and proportionate in the light of that investigated factual position.

In other words the Regulator should have carried out its own investigation before arriving at a conclusion and in particular where, as in this case, the Complainant continued to urge the issue upon the Regulator, to re-examine thereafter "the continuing impact" of publication.

5.4 From the papers presented to me it appears that the Regulator adopted the position that, as it was its usual position that a Final Notice will be published, it therefore proceeded on that basis. There is nothing to indicate in the papers presented to me that *before* (my emphasis) deciding to publish the Final Notice in January 2013 that the Regulator undertook any investigation whatsoever to ascertain if it would "*be unfair to the person with respect to whom the action was taken*". Clearly, for the Regulator to do this the Regulator should, as set out in 5.3 above have, in this particular case, bearing in mind the contents of The Decision and the fact that the events had occurred six years previously, established "*in some detail the complainant's position factually and then [to] apply the appropriate judgement to arrive at a conclusion as to what is fair and proportionate in the light of that*".

5.5 In the context of this particular case I have seen no evidence that non publication would be prejudicial to the interests of consumers. My rationale for that approach is the findings of the Upper Tribunal and the lack of any argument on that basis initially put forward by the Regulator although it now in its response to my Preliminary Decision seeks to do so in the context of a recent Banking Standards report. The Complainant however is a citizen of a jurisdiction 12,000 miles away and is not involved in any banking activities. Further I am bound by the findings of The Decision to the effect, that the Complainant is "*not considered not [to be] a fit and proper person to perform regulated functions*".

5.6 The same argument applies to the issue of "detriment to the UK Financial System" referred to in paragraph 6.9 of the Regulator's Enforcement Guide which I have set out in 5.2 above.

5.7 On any approach to the issue of publication it is clear that the Regulator must at some point, in order to address the issue of fairness, establish what may be relevant from the perspective of the complainant. In other words it should establish the background facts pertinent to the complainant. I have seen no evidence that that process took place before the initial publication and indeed the Regulator in its decision letter of 22nd August 2013 effectively concedes that factor.

5.8 Thereafter from March 2013 until its decision letter of 22nd August 2013 (a period of almost six months) the papers that I have seen shows the Regulator constantly seeking, on a number of different occasions, to address its previous failures to establish its rationale in this area. These constant attempts *ex post facto* do cause me some concern.

5.9 For example, it is clear from the papers I have seen that the Regulator plainly understood the issue and the need to focus on its approach and rationale in this matter:

On 11th March 2013 (two months after the Final Notice was published) the Regulator considered the 'fairness' of the publication of Final Notice. In its assessment the Regulator sets out, as background, the factors which it perceives as relevant:

> "*[The Complainant] has made a number of requests for the removal of the Final Notice from the FSA's website on the basis that its publication is having an unfair impact upon him. EG [Enforcement Guide] provides for the possibility of the removal of a Final Notice if we consider it appropriate. The starting proposition following the conclusion of Enforcement action is that the records of the outcomes should be publically available.*
>
> *The criteria that must be considered when reviewing a request for the removal of a Final Notice are contained in chapter 6 of EG. EG6.10A states that FSA will consider all relevant factors, and provides a non-exhaustive list of specific factors to be taken into account. The key objectives of the publication of Final Notices are to ensure the transparency of the FSA's decision making, to inform the public and maximise the deterrent effect of the FSA's enforcement action.*
>
> *More generally […] the Final Notice is a summary of the Tribunal's decision of 10 December 2012. It is difficult to understand the exact basis that the Final Notice can be considered unfair given it is an accurate summary of the detailed discussion of all the matters which were raised during the Tribunal and the Tribunal's specific findings.*

The removal of the FSA's Final Notice from publication would not resolve the mischief [the Complainant] claims he is facing as the Tribunal's decision will remain available on the Tribunal's website. Further as the Tribunal's decision provides a complete record of his misconduct that any prospective or current, employer could identify by conducting a simple web search.

I consider that the following factors listed in 6.10A are relevant:

Factors indicating that removal is appropriate

Any representations made by the person on the continuing impact of the publication.

[The Complainant] contends that the publication of the Final Notice has had a direct bearing upon the decision made by his employer ([the Australian Financial Services Group] in Australia) to dismiss him. He states that the continued publication of it threatens his future ability to obtain employment in the Australian Financial Services sector. Whilst it is clear that the Final Notice will have been a factor in [the Australian Financial Services Group]'s decision to terminate [the Complainant]'s employment we cannot speculate upon [the Australian Financial Services Group]'s full rationale for dismissing [the Complainant].

There is no indication that [the Australian Financial Services Group] would re-employ [the Complainant] if we remove the Final Notice from publication given the Tribunal's full decision remains available to the general public. The Final Notice clearly reflects the Tribunal's decision and although it outlines a breach of integrity there is no prohibition order. Any prospective employer of [the Complainant] would need to conduct its own due diligence and in order to understand [the Complainant]'s regulatory history it is necessary for the Final Notice to be generally available.

[The Complainant] also contends that articles published by the trade press following the publication of the Tribunal's decision, originally suggested he had been prohibited. [The Complainant] states that the articles were corrected following his intervention. The articles we have seen clearly state he has not been prohibited. However, [the Complainant] contends that the original error in those articles continues to have an unfair effect upon him. He suggests that the Final Notice exacerbates this problem. On the contrary, the Final Notice, if it remains published, will serve to correct any undue impression given by past press articles as the Final Notice accurately records the true sanction imposed upon [the Complainant] by the FSA.

On the basis of the above, I do not consider that [the Complainant]'s representations present a compelling argument that would lead us to remove the Final Notice from our website.

Factors indicating that removal is not appropriate

The following relevant factors listed in EG 6.10A serve to support the continued publication of the Final Notice.

The seriousness of the person's misconduct, public interest in the case and whether continued publication is necessary for deterrence.

The nature of the breaches identified in the Final Notice are serious given we conclude that [the Complainant] breached Statements of Principle 1 and 7 of the Statements of Principle and Code of Conduct for Approved Persons and was knowingly concerned in his firm's breach of Principle 6 of the Principles for Businesses.

Whilst these are serious breaches, the Tribunal's decision did not also direct the FSA to impose a prohibition order upon [the Complainant]. Given the gravity of the misconduct and the original press confusion over the prohibition order, which occurred when only the Tribunal decision was available to the general public, the Final Notice as published serves the public interest by clarifying the position in respect of the exact sanction imposed on [the Complainant]. The case is also importance for deterrence purposes, as it is one of the few SIF cases we have pursued in the Tribunal.

Finally, EG 6.10A includes a further element that we will consider how much time has passed since publication. This is supplemented by EG 6.10B, which states that we 'expect usually to conclude that notices and related press releases that have been published for less than six years should not be removed from the website.' We published the Final Notice on 7 January 2013, which is only two months from today's date.

Conclusion

We recommend that [the Complainant]'s request for the removal of the Final Notice from the FSA website is refused. There is no justification for its removal given its publication is not unfair to [the Complainant]. There is nothing additional arising from the circumstances of [the Complainant]'s request which justifies a departure from the usual proposition that our action should be public and that the record of it should be publicly available".

Following this summary of facts, as perceived by the writer, under the heading of "Decision Made" the Decision Maker has simply stated:

"*Continued publication is appropriate for the reasons given*".

But that observation lacks to me at least clarity as to the detail of the determining rationale and contains no re-appraisal of the relevant facts underlying the rationale even in so far as the writer seeking the relevant advice has correctly set them out in all their entirety. Thus, for example, it does not take into account a number of the items set out in 4.10 above.

5.10 I will now expand upon my reasons for arriving at this conclusion. When assessing briefly, the issue of fairness, the Regulator has stated that:

"*the Final Notice is a summary of the Tribunal's decision of 10 December 2012. It is difficult to understand the exact basis that the Final Notice can be considered unfair given it is an accurate summary of the detailed discussion of all the matters which were raised during the Tribunal and the Tribunal's specific findings".*

However, given that the Regulator has referred to The Decision in support of the continued publication of the Final Notice, I believe that the Regulator should have also considered the findings of the Upper Tribunal when assessing the issue of fairness. Specifically, in paragraph 117 of The Decision, it held that:

> "*In short while we take a serious view of the Applicant's failings we do not consider that he is currently not a fit and proper person to perform regulated functions. We were concerned that [the Complainant], when giving evidence, seemed to misunderstand his responsibilities and failed to appreciate what was obvious about his duties to notify the Authority*".

Before continuing within the same paragraph:

> "*Further the matter has been hanging over [the Complainant] for years and in this long period he has been satisfactorily engaged in financial services working for a large and reputable employer*".

The Upper Tribunal also held, in paragraph 129 of The Decision that:

> "*he has provided information about the way in which he has built a promising new career in financial services in Australia working for a large institution and also doing charitable service in his community. While the delays in bringing this case on are regrettable they have given [the Complainant] an opportunity to rehabilitate himself to a degree not common in similar cases before this Tribunal. It would be wrong for us to impose a penalty which would have the effect of bringing this fresh start to an end. Having regard to his circumstances and the potential hardship which a higher penalty would impose on his young family…*".

These are, understandably, not comments which are included in the Final Notice as these were comments made by the Upper Tribunal which did not impact upon the findings in relation to the case brought against the Complainant as part of the Enforcement investigation. However, given the views of the Upper Tribunal *they are comments* (my emphasis) which are entirely relevant deserving of careful consideration in relation to any consideration of the 'fairness' of the continued publication of a Final Notice could have, when it is alleged that the impact the continued publication of the Final Notice is having is specifically that which the Upper Tribunal had expressly tried to avoid.

5.11 Although the Regulator did consider the complainant's request to have the Final Notice removed, the assessment made by the Regulator at that time, does not, in my opinion, carry out an impartial assessment of fairness as required by the FSMA and the Regulator's own Enforcement Guide. The rationale for the continued publication of the Final Notice appears to concentrate primarily on the Regulator's aims, as set out in 6.10A of the Enforcement guide rather than considering adequately the issue of fairness as set out within 6.7 of the same guide.

Where the Regulator looks to rely upon its own procedure guide (in this case the Enforcement Guide) it should not in my view select in detail sections from an area which it feels supports its decision and place lesser consideration of alternative sections which may add support to the complainant's position. This could give an overall impression of a lack of objectivity possibly caused by the Complainant having been successful, in part, in respect of his appeal but he should nevertheless remain disadvantaged by publication of a Final Notice no matter what his personal circumstances.

5.12 On 10th April 2013 a second attempt to address the rationale, in a similar form as above. On the form, under the heading of "Detailed Background" the same writer sets out the following position:

> "*[The Complainant] continues to request the removal of the Final Notice from the FSA's website on the basis that its publication has had, and continues to have, an unfair impact upon him.*
>
> *The Enforcement Guide ("EG") provides for the possibility of the removal of a Final Notice it we consider it appropriate. The starting proposition following the conclusion of Enforcement action is that the records of our outcomes should be publicly available*".

Before continuing:

> "*Our position, remains that (1) the continued publication, of the Final Notice is appropriate, is not unfair to [the Complainant] nor is it prejudicial to the interests of consumers; (2) in any event, the removal of the Final Notice from publication would not resolve the mischief [the Complainant] claims he is facing as the Tribunal's decision will remain available on the Tribunal's website.*
>
> ***(1) The unfairness caused by the publication/availability of the Final Notice rather than its contents***
>
> *[The Complainant]'s chief criticism is that the publication of the Final Notice is unfair as it appears on the first page of 'any Google search of [the Complainant]'. This is in contrast to the other publications on the internet (such as the Tribunal's decision, our December press release and related press articles) as they do not feature as prominently on the same Google search and. appear on page two or three of the search results.*
>
> *As I understand it our general position is that we recognise that the publication of a final notice (sic) may have an adverse impact upon a person's reputation. The FSA/FCA also considers that in such circumstances an adverse impact does not go so far as make the publication of the final notice inherently unfair.*
>
> *The Final Notice was drafted with regard to our stated policy in chapter 6 of EG specifically EG 6.7 (which echoes the s.391 FSMA statutory requirement to publish such information about the matter to which the final notice relates as the FSA/FCA considers appropriate) and EG 6.8 that the FSA/FCA will ordinarily publicise enforcement action where this has led to the issue of a final notice (sic).*
>
> *[The Complainant]'s Final Notice was drafted and then published with this guidance in mind and consequently we considered it was appropriate to publish the Final Notice as we would with any similar Tribunal outcome to supplement the previously published Tribunal decision.*

Whilst the Final Notice may have had an impact upon [the Australian Financial Services Group]'s decision to dismiss [the Complainant], there is no suggestion that [the Australian Financial Services Group] will re-employ [the Complainant] if we remove the Final Notice from publication. The continual publication of the Final Notice appears to be having a cross jurisdictional impact as [the Complainant] suggests it is preventing him from obtaining further employment in the Australian financial services industry. This was an outcome the Tribunal explicitly sought to avoid in its decision. This appears to be the key motivation in [the Complainant]'s request for the Final Notice's removal.

The starting principle should be that any employer has the ability to obtain all relevant information to reach an informed decision over [the Complainant]'s suitability as an employee. The FSA should not be seen to sweep a significant regulatory finding against an individual under the carpet. However significant the impact of the Final Notice on [the Complainant] it is difficult to argue that its publication outweighs the wider public and industry benefit of the Final Notice to highlight the findings concerning his conduct in the specific period outlined in the Final Notice. There is an imperative to ensure that we publicise our Final Notice that overrides the personal comments a recruitment agent has made to [the Complainant] concerning his future employment prospects.

All of the above does not overlook that the publication of the Final Notice clearly has had an adverse impact upon [the Complainant]. The key issue is that the adverse impact arising from its publication is similar to the impact presented by any Final Notice concerning any individual's past misconduct. That adverse impact is not unfair given the Final Notice is a reflection of the findings of the Tribunal.

On this basis I do not consider that the publication of the Final Notice can reasonably said to be unfair given it was so published pursuant to statutory requirements, in accordance with pre-existing guidance and following the publication of the Tribunal decision and out December publicity of the Tribunal decision.

(2) whether (sic) the FSA register entry is sufficient, publicity for individuals or whether there is any suitable alternative to the publication of the Final Notice

The Final Notice was published in accordance with: our statutory requirements (which mandate the FSA/FCA to give appropriate publicity to its Final Notices).

The FSA register entry is a very brief summary of the Final Notice which is itself a summary of the Tribunal's decision. The Register entry does not appear on a google search of [the Complainant].

The statutory requirement provides that the FSA/FCA may only depart from its obligation to publish information concerning the outcome/ the Final Notice in the circumstances set out in section 391(6) FSMA that publication is unfair to the subject of the notice or is prejudicial to the interests of consumers. In all the circumstances it is clear that neither of these conditions apply.

As our position is that the publication of the Final Notice is fair there is nothing to suggest that removing the Final Notice is necessary.

(3) does (sic) the length of time since the conduct in question occurred (over five years ago) reduce the value of the information provided by the Final Notice.

The conduct took place over 5 years ago. That period of time does not itself provide a reason to override the s.391 FSMA requirement to publish the Final Notice (or such information concerning the Notice as is necessary). A significant proportion of this lapse of time is due to the fact that [the Complainant] chose to contest the FSA's findings, which were substantially upheld by the Upper Tribunal.

Our published guidance in EG 6.10B, states that we 'expect usually to conclude that notices and related press releases that have been published for less than six years should not be removed from the website.' We published the Final Notice on 7 January 2013 which is approximately three months from today's date. The relevant date for consideration in relation to time is not the date of the misconduct but the publication of the Final Notice.

I do not consider that the FSA's publication of the Final. Notice can be considered, unfair on the basis of the length of time since tire original, misconduct. The reasons for the gap between the misconduct occurring and the publication derive from the time taken to conclude the RDC and Tribunal processes".

5.13 Following a review of the document, the Decision Maker (who commented upon the previous review document) produces the following advice again in the box headed "Decision Made":

"*I agree that publication remains appropriate. Full details of the action taken against [the Complainant] are irretrievably in the public domain. We have a statutory obligation to publish appropriate information regarding Final Notices. The exceptions to that obligation do not apply here. It is both consistent with our formal policy and with the public interest in transparency that the Final Notice remains public*".

5.14 This attempt to address all the relevant factors is clearly more successful than the earlier one. While expanded there is not a statement of all the relevant facts sufficient to underpin the conclusion; merely stating that the "*exceptions to that do not apply here*" is not a reasoned decision based on all the relevant facts if only because in some part the writer seeking the advice has not encapsulated all of them. For example the Complainant's mental health problems. Equally it is not entirely fair to say either that "*Full details of the action taken against [the Complainant] are irretrievably in the public domain"*.

5.15 I should add the following. A number of comments made within the section headed "Detailed Background" could give an objective reader the opinion that the writer is simply trying to justify the Regulator's decision not to remove the Final Notice. This view is supported by the following:

(i) The writer and Decision Maker have both incorrectly stated that the Regulator has a statutory duty to publish a Final Notice. Whilst part of this statement is correct they have failed to consider the actual wording of the Act (set out within Section 391(5) and (6) of the FSMA) which clarifies this requirement:

> "*(5) When a supervisory notice takes effect, the Authority must publish such information about the matter to which the notice relates* ***as it considers appropriate*** *(my emphasis).*
>
> *(6) But the Authority may not publish information under this section if publication of it would, in its opinion, be unfair to the person with respect to whim the action was taken or prejudicial to the interests of consumers*".

From this it is clear that the Act does not require the Regulator to publice each and every Final Notice that it issues. As such, the arguments put forward by the writer and the Decision Maker are, to a degree, both incorrect.

In the document the writer also sets out that

> *"This was an outcome the Tribunal explicitly sought to avoid in its decision. This appears to be the key motivation in [the Complainant]'s request for the Final Notice's removal*".

Although accepting this argument no clear consideration appears to have been made to the comments made by the Upper Tribunal in paragraphs 117 of its decision, instead what could be considered to be a comment about the conduct of the Complainant and the ability for a potential employer to obtain this information. This does not provide a full rationale as to why the removal of the Final Notice is inappropriate given the accepted views of the Tribunal.

(ii) Likewise, the writer comments that:

> *"There is an imperative to ensure that we publicise our Final Notice that overrides the personal comments a recruitment agent has made to [the Complainant] concerning his future employment prospects".*

This is an unfortunate view from the writer as it could, to an objective reader, give the view that regardless of the 'fairness' requirement set out within the FSMA the Regulator will publish the Final Notice regardless of the impact this may have on the subject of the Final Notice.

(iii) I do not find attractive the writer's comment that

> "*A significant proportion of this lapse of time is due to the fact that [the Complainant] chose to contest the FSA's findings, which were substantially upheld by the Upper Tribunal".*

This is a comment which could suggest to an objective reader that, as the complainant chose to challenge the Regulator's decision, and in part, successfully the Regulator will not consider the request objectively. Nevertheless, the Commissioner feels that this is probably attributable to poor draftmanship.

5.16 A number of relevant provisions arising out of section 391 need at this point to be clearly understood.

(i) section 391(4) contains a requirement for the Regulator to publish such information about the matter to which a Final Notice relates as it considers appropriate. In other words the governing factor in that provision is appropriateness which empowers the Regulator to consider the suitability of its proposed course of action. It has to make a considered decision taking into account obviously all relevant factors. It cannot invariably be a "rubber stamp exercise" on its part.

(ii) section 391(6) imposes a further duty upon the Regulator to the effect (*inter alia*) that any publication should not be unfair to the person concerned.

(iii) these two subsections impose a statutory duty upon the Regulator that prevent it from 'nodding' thorough publication particularly where either the fact of publication or the content of the publication is challenged.

(iv) at that point (of initial publication) and indeed thereafter (in the case of continuing publication) if facts change the Regulator should in the relevant case consider afresh the exercise of its statutory powers in this area.

5.17 The FSA's continued search *ex post facto* then led inevitably to the delay I have referred to earlier and which in the circumstances of this particular case I find to be unacceptable. It might have made some sense if that exercise had been undertaken in the light of the final bullet point of 6.10A of the Enforcement Guide but I have searched the files in vain for that evidence.

5.18 In a communication dated 15th April 2013 further the Complainant succinctly sets out a number of relevant factors some of which may be considered particularly pertinent to the issues arising out of the second complaint. The letter concerned contained the following information:

"*The FCA are also aware that –*

(a) I did not as an individual directly derive a financial benefit from the breach;

(b) did not act fraudulently or dishonestly with a view to personal gain;

(c) Had no previous breaches with the FSA;

(d) Despite the feelings of extreme injustice of the enforcement process, and the foundation of this case being based on dishonest and untested whistleblower (sic) evidence,I have co-operated throughout with all requests of the regulator.

(d) I did not spend money or dissipate assets in anticipation of FCA/FSA or other enforcement action with a view to frustrating or limiting the impact of action taken by the FCA/FSA or other authorities (sic).

(e) I was unemployable in the UK following the high profile and highly publicised FSA Enforcement Action of November 2007 and to this end (1) had to leave the country

(f) the career I successfully rebuilt here in Australia has come to an end following the public censure, and significant media coverage that followed.

The FCA must surely appreciate that the internet knows no boundaries. Whilst I accept the regulator wants a deterrence aspect in publishing notices - this has been done twice, once in 2007 and now again in 2012/2013. This story has been well documented in the UK financial press and online. To this end the regulators deterrence objective has been met.

I have trusted the complaints process to date and I wonder if the Complaints Commissioner or other bodies of influence would have the same view of the FCA stance on this issue, when seen in the overall light of the Enforcement Action.

I need you to acknowledge in your response that my bankruptcy is imminent. I find myself unemployable despite my best efforts and I simply do not have the luxury of waiting months for the Complaints process to be finalised and the Complaints Commissioner to ultimately investigate.

It's the disproportionate and unfair continuing impact of the public censure that is the issue at hand.

I look forward to your early response".

5.19 In the context of the final bullet point of 6.10A of the Enforcement guide all that was particularly relevant information. Part of the purpose of that letter was also to hasten the Stage One process currently being carried out by the FCA but to no avail because it was still a further four months before the Stage One process was completed and the letter of 22nd August 2013 told the Complainant the outcome. The communication of 15th April 2013 from the Complainant elicited the following response from the FSA also dated 15th April 2013:

"*Thank you for your email and attached letter. This matter is now being considered via the Complaints Scheme.*

As you point out, the Enforcement division has considered your requests for removal of the Final Notice and has refused to remove it. Enforcement's view is that it remains appropriate for the Final Notice to remain available through our website. More specifically, I have explained that your concerns regarding the fairness of the publication of the Final Notice is a separate matter to your original complaint concerning the conduct of certain aspects of the investigation (see my emails of 27 February 2013 and 10 January 2013).

As you have raised a complaint concerning the publication of the Final Notice it falls to the Complaints Team to consider it, as the Complaints Scheme operates independently. You will appreciate that Enforcement will routinely provide information/ correspondence to the Complaints Scheme upon request to assist them with their review of the merits of any complaint. I note in your letter to (the person undertaking the Stage One investigation) you have raised a number of questions, some of which you have repeated in your email to me. Given those questions relate to your ongoing complaint, (I) will provide a full response to your letter in due course".

5.20 Given that this response appears to set out that the Enforcement Division has reviewed the publication issue it is unclear why the Regulator did not feel at this stage that it could issue with a response in respect of this particular issue.

5.21 On 1st May 2013 in furtherance of the issue of rationale in the file that I have read there is set out a number of worrying statements sent by Enforcement to the Stage One investigator. The relevant statements are:

> "*(i) The Final Notice was prepared in line with our policy on the preparation and publication of such Notices. Our policy is that any decision to publish a Final Notice is considered on a case by case basis, albeit with a starting presumption we will ordinarily publicise enforcement action where a final notice (sic) has been issued. This is to ensure that the FSA/FCA is seen to be transparent in its actions and to underpin our commitment to credible deterrence by informing the industry of the types of behaviour which amount to breaches of our rules and principles.*
>
> *(ii) The consideration of the fairness of the information to be published was not formally documented, although the various iterations of the draft Final Notice prepared by Enforcement staff prior to agreeing the approved Final Notice for issue and publication demonstrate that its contents amounted to a fair summary of the Tribunal's decision.*
>
> *(iii) Enforcement appreciates that there is clearly an adverse effect upon [the Complainant], but this adverse effect has to be considered against the wider public and industry interest to ensure that relevant information which may assist a potential employer to reach an informed decision over whether to employ [the Complainant]*".

5.22 I find (i) above worrying as it appears to display a lack of a wholly impartial approach. As to (ii) I have observed before to the Regulator the importance of file notes documenting reasons for decisions even where none have been taken and I find (iii) above worrying for the same reason as (i) above. The Regulator, I know, always strives to demonstrate its objectivity and in this instance the drafting could create doubts in the mind of the reader.

5.23 In my Preliminary Decision I attempted to attribute aspects relevant to the Regulator exercising its powers under section 39 of the FSMA that perhaps are more relevant to the context of notices other than a Final Notice. I also referred to the contents of a consultation paper published by the Regulator concerning publishing information. The Regulator challenges the relevance of my references in this area in the context of the Complainant's position. On balance, although one could read across from the references in question certain attributes relevant to publication generally of notices I accept the Regulator's arguments in this area and I have removed the paragraphs in question. I am grateful to the Regulator for its comments in this area which I found helpful in arriving at my decision in this area.

5.24 I find that the Complainant has provided significant evidence to show that the decision to continue to publish the Final Notice is continuing to have a significant adverse effect upon his health and his financial position (he has been out of work for almost 12 months).

5.25 I have noted the Regulator's view that, even if the Final Notice was to be removed, The Decision would still be accessible. This is a view which, to a degree, I accept but I would add that, whilst the Final Notice sets out factually the breaches of the Regulator's rules which have occurred, The Decision sets out these breaches but also provides a number of important balancing comments regarding the complainant's conduct which occurred since this date. Those balancing comments do not appear in the Final Notice.

5.26 I would also add that whilst the Regulator has a duty to protect consumers, this duty does not, I believe, extend to protecting consumers in different jurisdictions (unless the individual is authorised to conduct the regulated activity from the UK). In this case, the complainant is not resident within the UK and is not seeking to undertake any relevant activity either from or within the UK.

5.27 Whatever view may be taken about the second complaint it remains a concern to me that it took the FSA nearly seven months to conclude its final position on this particular issue. This despite being aware of the precarious financial position of the complainant, his family's suffering and his deteriorating medical condition any one of which, let alone all three, should have induced in the FSA some degree of urgency which I could not detect in the files it produced to me. It is my Final Decision that the FSA in its investigation of the second complaint has been guilty of unreasonable delay.

6 The Regulator's response to my Preliminary Decision and my response.

6.1 The Regulator made a number of comments and observations upon my Preliminary Decision. I have carefully considered all these when arriving at my Final Decision and I have, where appropriate commented earlier on a number of them in this my Final Decision. Nevertheless, I feel that some of them do require a specific and more detailed response.

6.2 The Regulator has set out that in respect of the findings I set out at the end of my Preliminary Decision:

> "*With regard to your decision to uphold the elements of the complaint relating to the initial and continued publication of the Final Notice, as summarised in paragraph 6 of the Preliminary Report, we regret that we are unable to accept the findings and therefore the resulting recommendations. This is because the findings (i) introduce a pre-publication investigation and consultation procedure not supported by FSMA, the FCA's published procedures or its established practice (ii) are based upon an incorrect analysis of the consequences flowing from the publication of the Final Notice on 7 January 2013 and (iii) rely inappropriately on Upper Tribunal decisions and certain consultation material published by the FCA. We have reached this conclusion reluctantly as we respect and value the role that the Scheme plays in making the FCA an accountable organisation*".

6.3 The Regulator has also continued and set out that it believes that:

> "*Paragraph 5.3 of the Preliminary Report sets out a procedure which the FCA should follow before it decides to publish a Final Notice. The Commissioner appears to consider that this procedure is of general application in Final Notice cases, as there is no language to suggest that its application is limited to [the Complainant]'s case. This procedure is summarised as a requirement that 'the Regulator should establish in some detail the complainant's position factually and then to apply the appropriate judgment …' We are unable to accept that FSMA imposes an obligation of this type on the FCA*".

The Regulator has also continued and set out that it believes that:

> "*The structure and text of Section 391, as well as the relevant statutory context, point away from the existence of the obligation. The FCA is under an obligation to publish such information as it considers appropriate in relation to Final Notices ('must'), which is subject to qualification if the FCA forms an 'opinio*n' that publication would be 'unfair'. We have not identified any basis on which a requirement to investigate before forming that opinion can be implied".

These arguments I find difficult to understand. For a regulator to "form an opinion" must presuppose some interest in investigating the facts and/or background pertinent to "the person" so that any opinion then formed is rational and fulfils the purpose of Section 391 as a whole. I also note that in 5.21(i) earlier the Regulator concedes that "*any decision to publish a Final Notice is considered on a case by case basis…"*

Whilst I can appreciate the Regulator's position, Section 391(6) of the FSMA imposed a statutory duty on the Regulator to not to publish information that would be unfair to the recipient of the Final Notice. It must follow that the Regulator has to ascertain certain information to enable it to assess fairness. I would also stress that the comments within my Preliminary Decision were based upon the facts presented to me within this particular case. I cannot create precedent and I did not specifically say it was of general application. Nevertheless it might be considered good practice and something a fair and objective regulator would always think desirable in the interests of the rules of natural justice.

6.4 Likewise, the Regulator has also set out that:

> "*Indeed, the recent changes to section 391 count against such an implication. In relation to the publication of information about Warning Notices, section 391(1)(c) now requires the FCA to consult in advance those to whom the notice is given*".

I am not sure that praying in aid legislative changes (subsequent to the date of the complaint) assists the regulator's argument in this context. A new positive legislative obligation does not lead to the conclusion that existing relevant legislation can, or should be, construed in a negative fashion.

6.5 The Regulator has also commented that:

> "*Further, as it is the FCA's practice for all Decision Notices to refer to the likelihood of publication of a Final Notice, it would be reasonable to expect the recipient of the notice to take the initiative in raising unfairness with the FCA and not the other way round*".

The Regulator suggests it may only consider the issue of fairness if the subject of that notice raises it. I am surprised by the Regulator's views in this regard. It is not consistent with the requirements imposed by Section 391 of the FSMA, in my view, nor is it consonant with the rules of natural justice. In any event, it is my view that the Complainant did raise it within the terms of his email of 9th January 2013 as well as ones thereafter.

I have set out earlier in 5.16 the legal obligations that section 391 imposes upon the Regulator. There is no precondition that the subject of such notices is obliged to notify the Regulator in order to ensure that the Regulator fulfils the duties imposed by sections 391(4) and (6) of the FSMA.

6.6 The Regulator has also commented that:

> "*The Preliminary Report finds that initial publication of the Final Notice was unfair, in effect because it triggered the consequences the Tribunal wished to avoid*".

This is not a wholly appropriate nor fair interpretation of the comments I was making in my Preliminary Decision. I set out in my Preliminary Decision that I felt the publication of the Complainant's Final Notice was unfair because there was no evidence that an assessment of 'fairness' had been conducted prior to the Final Notice being issued. Given the comments made by the Upper Tribunal that it "*would be wrong for us to impose a penalty which would have the effect of bringing this fresh start to an end*". I believed that in this instance the Regulator should have undertaken an investigation into the Complainant's background and given significant consideration to all of the likely and possible consequences the publication of the Final Notice would have on the Complainant.

I should also stress here that, whilst it would appear that the issue of the Final Notice may have started, either directly or indirectly, the events which led to the Complainant losing his job, I have deliberately not made any finding on the generic issue of causation. However, I would add that it appears that the Regulator itself has accepted that the issue of the Final Notice may have, to a degree, been linked in some way to that unfortunate outcome as it has stated that what "*caused the loss of [the Complainant]'s job were new events - the unfortunate co-incidence in timing of inquiries into his case by a journalist (ironically writing a piece critical of the FCA not [the Complainant]) and [the Australian Financial Services Group]'s annual results announcement and briefings*".

6.7 The Regulator has also commented that:

"*The FCA is also criticised for not allowing [the Complainant] more time to raise unfairness, as he did not appreciate that investigation of the complaint would not delay publication of the Final Notice. We consider this to be an unsound criticism, as [the Complainant] could reasonably have been expected to be familiar with the Complaints Scheme, given his use of it and that he was advised by lawyers when he first complained. Paragraph 1.5.13 of the Scheme in force at the time made it clear that an investigation of a complaint by the Commissioner did not prevent the FSA from taking such action as it considered appropriate which was related to a complaint. The Scheme did not therefore create any expectation in [the Complainant] that the investigation of his complaint would result in a delay in publishing the Final Notice. In any event, [the Complainant] did not make any complaint about publicity until 6 weeks after publication of the Final Notice*".

Whilst I have noted the Regulator's comments here it is clear from the emails which were exchanged between the Complainant and Enforcement Officer Z in early January 2013 that first the Complainant had a misunderstanding of what would happen as a result of him making a complaint and second that the Complainant was unhappy with the publication of the Final Notice at that point. Further, also at that point the Complainant was no longer receiving legal advice.

I am fortified in this view as Enforcement Officer Z, in his email of 10th January 2013, felt the need to set out that he would not withdraw the Final Notice from publication by saying:

"*The proceedings leading to the issue of the Final Notice are concluded. As such, **we do not consider it appropriate to withdraw publication of your Final Notice** (my emphasis). As you will be aware, the Tribunal has already published its findings on its own website*".

From this it is clear to an objective reader that the Complainant had an incorrect belief that whilst the complaint was being considered the Final Notice would not be published. Alternatively, it could equally be interpreted as the Complainant making a request that the Final Notice should not be published or that the published Final Notice should be withdrawn. I have not been provided with any evidence to show, or even suggest, that any assessment of this request was then undertaken.

6.8 The Regulator has also commented that:

"*Even if [the Complainant] had been allowed more time in January 2013, what would he have said to the FCA about unfairness? As the Preliminary Report notes, [the Complainant] was highly regarded by the [Australian Financial Services Group], to which he had already disclosed information about the enforcement proceedings. Publication of the Tribunal's decision the previous month had had no adverse effect on his career. It is hard to see, therefore, what cogent evidence of unfairness [the Complainant] would have wished, or been able to put forward at that stage*"

Although I have noted the Regulator's comments here it does not, in my opinion, provide a full and clear rationale setting out why, particularly in light of the Upper Tribunal's comments, that full consideration of the Complainant's circumstances and the likely and possible consequences that the publication of the Final Notice might have on the Complainant. The argument the Regulator has made here is not a justifiable reason for not undertaking that assessment.

6.9 I am surprised that the Regulator has chosen to suggest that

> "*Further, the analysis in the Preliminary Report supporting the conclusion omits to mention an important factor in decisions made by public bodies, which is the desirability of acting consistently and treating like cases alike. This factor is relevant to [the Complainant]'s situation, after [the Australian Financial Services Group] ended his employment in February 2013. As with many, or perhaps most individuals who the Tribunal has decided breached the standards expected of Approved Persons, [the Complainant] has been faced with looking for another job with a Final Notice against him on the FCA's website. If [the Complainant]'s request had been granted, or is granted, it is difficult to see how the FCA could, on grounds of consistency, refuse requests from other individuals who have been disciplined and who, when trying to find a new job, are told by recruitment specialists and the like, that the presence of the Final Notice will make working again in the regulated sector very difficult*".

This appears to suggest that the Regulator has, in the context of section 391 of the FSMA, adopted a "one size fits all" approach. Whilst I can understand why the Regulator looks to be consistent with its decision making it suggests that in following that approach it is not paying sufficient regard to the requirements imposed upon it by the FSMA. The provisions of section 391(4) and (6) clearly state that the Regulator is only required to publish information about a Final Notice that it considers appropriate and that it has a duty not to publish information that would be unfair to the person the notice is about. It does not specifically require the Regulator to have regard to the Final Notices it has issued to other people. The statutory provisions contained in Section 391 by their very nature mean that there must on occasions be an individuality attached to a decision to publish. Otherwise the provisions would be of little purpose. Adopting an approach which does not take account of the possible unfairness to a particular recipient of a Final Notice could, in my opinion, indicate that the Regulator has failed to undertake its statutory functions appropriately.

6.10 I appreciate that the Regulator, in its response has drawn my attention to the omission of paragraph 6.10B of its Enforcement Guide which sets out the Regulator's policy of reviewing the publication of Final Notices. I have now corrected this omission on my part. In relation to this the Regulator has set out that:

> "*The FCA has made clear what its policy on continued publication is, so that individuals in [the Complainant]'s position know where they stand. The policy is in paragraph 6.10B of EG:*
>
> > *'The FCA expects usually to conclude that notices and related press releases that have been published for less than six years should not be removed from the website, and that notices and related press releases relating to prohibition orders which are still applicable should not be removed from the website regardless of the length of time they have been published.'*

> *The fact that the Preliminary Report quotes paragraphs 6.7 to 6.10A in full but omits paragraph 6.10B is disappointing, given its relevance, as is its absence in the analysis which follows, and in our view further undermines the criticisms of the FCA's decision*".

Whilst I welcome the clarity this paragraph provides it was not, and remains something which I do not believe is, relevant to the consideration of the publication of a Final Notice. The fact that the Regulator feels that this is relevant, particularly in it view that it "*has made clear what its policy on continued publication is, so that individuals in [the Complainant]'s position know where they stand*" suggests that whatever arguments are placed before the Regulator it has a predetermined position that the Regulator will not remove Final Notices until they have been published for at least six years. In addition on this aspect of continued publication for a full six years from January 2013 I find worrying because in theory, an analysis of that approach by the Regulator would mean that on 1st January 2019 the Final Notice would still be extant relative to matters by then 12 years old.

6.11 The Regulator has also looked to defend its actions by relying upon the report issued by the Parliamentary Commission on Banking Standards which was published in June 2013. In its response to my Preliminary Decision the Regulator has set out that this Commission

> "*recognised the benefits of an international approach (note, for example, paragraph 652 of the Report which provides that 'If individuals who were subject to sanctions in the UK as a result of poor … standards could simply transfer overseas and continue their careers unhindered, the incentive effects of an enforcement regime would be significantly weakened')*".

Although I accept the Regulator has to have regard to the findings of this Commission, the Complainant in question was not a 'banker' and therefore his conduct would not fall within the scope of that which the Commission was convened to consider. Equally, the report was not produced until *after* (my emphasis) the Regulator took the decisions that it did.

6.12 Summaries are always a useful approach and I note that the Regulator summarised its arguments to reject my findings (and thus my recommendations) for three reasons. First because by implication they introduce a pre-publication investigation and consultation procedure not supported by the FSMA, the Regulator's published procedures or its established practice. The crucial issue however as I hope I have shown in my approach are the statutory provisions. As a creature of statute, the Regulator's powers and procedures are governed by the FSMA. Its procedures and its practise must be complicit with the Act's provisions. It is essential that the Regulator at all times when engaged in this or similar processes demonstrate open-mindedness and flexibility. A good reason is not one encompassed by the thought process "this is what we always do". It is quite clear that anyone (clients or business contacts) who look up the Complainant will find the Regulator's notice straight away and that gives a terrible impression which employers find repellent.

It is hard to argue that this is not the case, in particular as the notice, unlike The Decision, appears very prominently on an internet search and is devoid of context. The Regulator also does not offer particular reasons why the publication is necessary – it simply refers to "wider public and industry benefit" without explaining what such benefit might be, in particular after all this time and with the individual having relocated to another country. It offers no explanation of why the notice on the Register is not sufficient (that it doesn't show up on Google as is offered as an explanation in the files I have seen seems like an absurd reason to put forward in the circumstance). There is no statutory duty on the regulator to publish the Final Notice itself. It must only publish whatever information it thinks is appropriate, and subject always to the constraint that it may not publish information that is unfair to the relevant person or prejudicial to consumers. That in my view is the overriding statutory position.

The second reason is stated to be that my findings are based on an incorrect analysis of the consequences flowing from the publication of the Final Notice on 7th January 2013. Even if the causation arguments can be challenged (and given I have no direct evidence of the precise and accurate timetable of events) that in itself is not an adequate reason for not accepting my recommendations. I am quite clear that the statutory obligations placed upon the Regulator were not followed in any rational way and therefore that certain events seemed then to have followed. Whether or not my analysis of what followed is flawed (and I do not accept that it is) that analysis is a clear indication of events that have occurred and remain the case as at the date hereof. Presenting a possible doubt about causation at this stage (when it has not been previously considered as a reason at the Stage One process) as a reason to reject my recommendations is inappropriate and, with respect, wholly misguided.

The third reason is stated to be that I rely inappropriately on upper Tribunal Decisions and certain consultation material published by the Regulator. On reflection I have been persuaded by that argument and no longer seek to rely upon it as a reason for my recommendation. Essentially those recommendations however are supported in any event as I hope I have set out in my view by the findings that I have made in this Final Decision.

7 My Final Decision

7.1 My Final Decision is that the FSA in publishing the Final Notice relating to the Complainant on 7th January 2013 failed to exercise fairness in accordance with the statutory requirements contained in Section 391 of the FSMA.

7.2 My rationale for that Final Decision is:

(i) The Upper Tribunal statements contained in Paragraphs 117, 124 and 127 of The Decision which are relevant to the position of the Complainant.

(ii) The failure of the FSA prior to publication of the Final Notice on 7th January 2013 to ascertain the background to the then current personal position of the complainant who had been working satisfactorily in Australia since 2008.

(iii) The Regulator was, or should reasonably have been, aware that the Complainant did not appreciate that the Final Notice was to be published before the investigation into the complaint had been completed. Given this, the Regulator should have therefore provided more time to allow the Complainant to object to the publication of the Final Notice before posting it on its website.

(iv) The relevance and impact of the less serious findings made by the Upper Tribunal in the context of (ii) above.

(v) The sustained *ex post facto* search to establish an adequate rationale for the Regulator's earlier failure to address the statutory requirement of fairness contained in Section 391 of the FSMA.

(vi) The failure of the Regulator to appreciate that there is no statutory duty on it to publish the Final Notice itself but rather the Regulator must only publish whatever information it thinks appropriate provided it is not unfair to the subject thereof or prejudicial to consumers.

(vii) In arriving at its decision to publish and continuing to publish the Regulator failed to document adequately its rationale to show compliance with its own Enforcement Guide.

(viii) The failure of the FSA to establish that between 2008 and 2013 while the complainant was employed by [the Australian Financial Services Group] his conduct and behaviour in general and in particular that the Complainant was "*awarded the [the Australian Financial Services Group] Excellence in Leadership Award in 2010 and was nominated to join [the Australian Financial Services Group] Executive Talent Team in 2011/2012 and 2013*" which would be one of a number of relevant factors that might be considered as relevant in the context of considering the issue of fairness under the provisions of Section 391 of the FSMA.

(ix) The Complainant, in my view, has also provided sufficient evidence to show that the publication or continued publication of the Final Notice would now be unfair and serve little useful purpose. Nevertheless this decision ultimately rests in the hands of the Regulator and not myself.

8 Recommendations

8.1 As a result of the Findings I gave detailed in 6. above I recommend that the Regulator should:

8.2 apologise to the Complainant for the unreasonable delay inflicted upon him in carrying out its Stage One investigation.

8.3 make a payment to the Complainant of £500 in recognition of the distress caused by that unacceptable delay to take into account his deteriorating health problems and the Regulator's failure to assess afresh the continued publication of the Final Notice. I am aware of the Regulator's view that this payment should not be made until the Complainant has paid, in full, the financial penalty imposed by the Upper Tribunal. Given the Complainant's financial position I feel that the Regulator should look to either make an immediate payment to the Complainant or use the award to reduce the amount owed under the penalty imposed by the Upper Tribunal.

8.4 make a payment of a further £500 for failing to consider correctly its statutory responsibilities regarding the publication of a Final Notice under the FSMA and the impact this had upon the consideration of the publication of the Final Notice. Again, given the Complainant's financial position the Regulator should look to either make an immediate payment to the Complainant or use the award to reduce the amount owed under the penalty imposed by the Upper Tribunal.

8.5 undertake a review of its procedures to ensure that where appropriate an assessment of the fairness of the publication of Final Notices is undertaken and fully documented before a decision to publish is taken in accordance with the provisions of section 391 of the FSMA.

8.6 to consider withdrawing the publication of the Complainant's Final Notice (from both the FSA and FCA websites although the Regulator's Register of Approved Persons should still contain reference to and a summary of the contents of the Final Notice) on the grounds of fairness. Thereby taking into account the results of my investigation including the Complainant's declining health, his inability to secure employment, the comments made by the Upper Tribunal in allowing, in part, his appeal, and the lapse of time since the acts the subject of the Enforcement procedure took place.

Sir Anthony Holland
Complaints Commissioner

28th February 2014

PLEASE ALSO REFER TO THE ENCLOSED ADDENDUM

Complaints Commissioner

ADDENDUM

FSA01600 TO THE FINAL DECISION

The Commissioner notes that the Regulator accepts the finding of unreasonable delay in respect of the Stage One investigation primarily caused by the Regulator failing to deal with the provision of an adequate rationale for its stance to the complainant.

The Commissioner further notes that the Regulator rejects his independent analysis in respect of the "fairness" issue. The Commissioner finds that a disappointing conclusion firstly because the Statute does provide that the Regulator has to be an accountable organisation given its regulatory powers over the Industry and this was a complaint by the Industry.

Secondly, because the rationale provided is contradictory in that the Regulator has undertaken "a review of (its) procedures to ensure that we have due regard to Section 391 FSMA *before* (my emphasis) a decision to publish a final notice is taken and that is documented" which of course is the gravamen of my decision in this area since in the complainant's case that never happened and as far as the Commissioner can see – has never happened even up to today. The Commissioner has no idea, what aspects of fairness and the rationale for reporting them is, even now.

Thirdly, indirectly the Regulator has recognised the issue of fairness by adding an addendum to the Final notice which ought to have been put there in the first place had Section 391 been wholeheartedly complied with by Enforcement.

Every consideration as to fairness has been given in the Commissioner's judgement of this complaint primarily because the Commissioner could not discover a similar consideration in the papers produced to him following the Stage One exercise by the Regulator.

Sir J Anthony Holland
Complaints Commissioner

25th March 2014