

25th April 2014

Dear Complainant,

Complaint against the UK's Financial Services Regulators
Reference Number: FSA01603

I write with reference to your letters of 19th February 2014 and 15th April 2014 in connection with your complaint against the UK's financial services regulators. I have now completed my investigation in respect of your complaint.

Before I do this, I need to explain my role and powers. Part 6 of the Financial Services Act (the 2012 Act) requires the regulators to maintain a complaints scheme for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions. Section 84(1)(b) of the 2012 Act provides that an independent person is appointed as Complaints Commissioner 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.

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 your complaint relates to the inactions of the FSA, in relations to its objectives and duties under the Financial Services and Markets Act 2000 (FSMA) your complaint has been considered by me under the new transitional complaints scheme.

As 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, your complaint is investigated.

Your complaint

From your correspondence with my office, I take the view that your complaint relates to the following issues:

FSA01603

- 1 -

- You are unhappy with the outcome of the FSA’s investigation into your complaint about the conduct of both Bank A and Firm C (which provided card protection and identity theft protection specifically to consumers).
- You add that you feel that the Firm C (specifically in relation to customers of Bank A) have chosen not to comply with the Regulator’s rules for their own financial benefit. Additionally you allege that Firm C are also failing to comply with the Regulator’s instructions to undertake a redress exercise (as set out in paragraph 1.8(4)(c) of the Final Notice the Regulator issued to it in November 2012).

Coverage and scope of the transitional complaints scheme

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.*

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. FSMA (as the relevant legislation in place at the time) stipulated in Schedule One that the FSA is exempt from “liability in damages”. It stated:

- “(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*
 - (a) if the act or omission is shown to have been in bad faith; or*

(b) *so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the [1998 c.42] Human Rights Act 1998.*”

I have referred to FSMA here as it was FSMA which was the relevant legislation when the FSA considered your complaint. However, this exemption has been rehearsed in sections 25(3) and 33(3) of Part 4 of Schedule 3 of the 2012 Act. You have not adduced evidence of any act of bad faith on the part of the FSA which would have the effect of bringing 3(a) above into play.

The 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.”

If I find your complaint justified, it is to that paragraph that I must refer in order to decide any question of a *“compensatory payment on an ex-gratia basis”*.

If you were to take the view that Schedule One referred to above was relevant in the context of the Human Rights Act 1998 I should explain that Section 6(1) of that Act that is referred to, provides as follows:

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

The only Convention rights that I consider may be relevant are contained in Article 1 of the First Protocol set out in the Human Rights Act of 1998.

Article 1 of the First Protocol provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.

It is my view, given my views in this matter, that Article 1 of the First Protocol has no application in your case. There is no act taken by the Regulators (either the FSA or the FCA) which is incompatible with the Human Rights Act 1998. My rationale for arriving at this decision is set out below.

My Position

I have now had the opportunity to consider the issues you have raised. I have also had the opportunity to review fully the Regulator’s complaint file, a full copy of which has been provided to me. From this it is clear that the gravamen of your complaint relates to the actions of Firm C.

Additionally, having viewed the Regulator's investigation file I specifically note that, whilst you are unhappy that with the conduct of Bank A and Firm C, and feel that the Regulator has failed to regulate properly Firm C, the Regulator has stated that your complaint is not something which it feels it can consider under the rules of the Transitional Complaints Scheme. In arriving at this view the Regulator has relied upon paragraph 3.5 of the rules of the Transitional Complaints Scheme which states:

“Circumstances where the regulators will not investigate

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

From the Regulator's decision letter it is clear that it accepts that Firm C failed to comply with its rules. However, given that, in accordance with its usual policy and practice, it has taken action to ensure that consumers are not disadvantaged (by requiring Firm C to undertake a redress exercise) it believes that it has taken the appropriate level of action. Although I can understand why you are unhappy with the overall position, ultimately I share the Regulator's view that your complaint *“amounts to no more than dissatisfaction with the regulators' general policies or with the exercise of, or failure to exercise, a discretion where no unreasonable, unprofessional or other misconduct is alleged”*.

I would add that, although it is clear from the contents of the Final Notice which the Regulator issued to Firm C that Firm C had failed to comply with the entirety of the Regulator's rules, this does not mean that the Regulator failed in its statutory duty. It is simply not possible for the Regulator to review each and every interaction a regulated firm (such as Firm C) may have with a consumer. Instead, at the time Firm C's misconduct occurred, the Regulator had adopted what is regarded as a risk based approach to regulation. Under this risk based approach the Regulator issued rules and guidance to the industry and charged the firm's individual compliance officer with ensuring that their respective firms complied fully with the issued rules and guidance.

In addition to placing responsibilities upon the individual Compliance Officer the Regulator undertook periodic inspections to ensure that firms were complying with these rules. Whilst it is disappointing that Firm C had failed to adhere to the Regulator's rules the fact that the Regulator was not immediately aware, given the adoption of a risk based approach, does not mean that the Regulator had failed in its statutory duties. As such, I believe that the Regulator correctly relied upon the provisions contained within paragraph 3.5 of the rules of the Transitional Complaints Scheme.

I would further add that the subsequent action the Regulator has undertaken, in instructing Firm C to undertake a redress exercise will ensure that consumers are not adversely affected by the actions of Firm C. This, in my opinion, is entirely consistent with the obligations imposed upon the Regulator as it is accepted that there will be instances where it is identified that a regulated firm has failed to comply fully with the Regulator's instructions. Where this is the case, the Regulator will undertake disciplinary (Enforcement) action against the firm and, following the completion of this action, issue a Final Notice (which sets out the offence and the penalty applied by the Regulator), as was the situation in respect of Firm C.

I have also noted your comments regarding the Regulator's decision to refer you to information which can be found on the internet rather than providing you with paper copies of these documents. Whilst I can appreciate your views in this regard, we are now in the electronic age and, as the Regulator has to be economical in how it utilises its resources, adopting this approach (particularly where it is unaware that an individual may have difficulty in accessing electronic documents) appears reasonable to me. For completeness, I would however also add that, had the Regulator been aware that you have had difficulty accessing documents referred to in its decision letters by way of a 'hyperlink', it would happily provide you with paper copies.

I know that you are unhappy with the Regulator's position and that you would like me to undertake a full review of the Regulator's actions but, having reviewed the papers presented to me, I must concur that your concerns appear to amount "*to no more than dissatisfaction with the regulators' general policies or with the exercise of, or failure to exercise, a discretion where no unreasonable, unprofessional or other misconduct is alleged*". I would however add that, if you feel that Firm C is delaying unnecessarily consideration of your compensation claim, then the appropriate remedy would be to refer the matter to the Financial Ombudsman Service who can be contacted as follows:

Financial Ombudsman Service
South Quay Plaza
183 Marsh Wall
London
E14 9SR
Telephone: 0845 080 1800

E-mail: complaints-info@financial-ombudsman.org.uk

Website: www.financial-ombudsman.org.uk

I would also specifically draw your attention to paragraphs 6.14 and 6.8 of the complaints scheme which states:

- 6.14 The Complaints Commissioner will not investigate any complaint which is outside the scope of the Scheme, but the final decision on whether a particular case is so excluded rests with the Complaints Commissioner.

In my view, your complaint is essentially your displeasure with the manner in which the Regulator undertook its supervision of the UK's financial services industry by adopting a risk based approach. Whilst it is disappointing that Firm C failed to comply with the relevant guidance the Regulator issued this does not mean that the Regulator's approach was inappropriate particularly given that it had a number of other, sometimes contradicting, statutory objectives. I would also add that the subsequent action taken by the Regulator means that any consumer who was mis-sold a policy by Firm C will not be disadvantaged.

I should point out that whether a complaint is within the complaints scheme is at my sole discretion. Currently, for the reasons explained above, I do not believe that this case justifies an investigation by me.

6.8 Complainants who are dissatisfied with the outcome of an investigation, or who are dissatisfied with the relevant regulator(s)' progress in investigating a complaint, may refer the matter to the Complaints Commissioner, who will consider whether to carry out his own investigation.

This is a relevant provision as it gives me an unfettered discretion as to whether or not I carry out an investigation. I am bound to say that on what I have read the issues you have raised ultimately relate to the fact that you were 'enticed' to take out a product which was issued by Firm C which you did not need and that redress for the mis-sale has not been provided as swiftly as you had expected. Whilst this is unfortunate it does not, in my opinion, bring your complaint into the Transitional Complaints Scheme.

I am sorry that I am therefore not able to help further in this matter. I am copying this letter to the Regulator.

Yours sincerely,



Sir Anthony Holland
Complaints Commissioner