

21st March 2014

Dear Complainant,

Your complaint against the Financial Services Authority
Reference Number: FSA01605

I write with reference to your letter of 21st February 2014 addressed to the Office of the Complaints Commissioner.

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 charged 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 (the 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 relation 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 (together with any complaints made about the FSA after this date) 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 recent letter, I understand that you are unhappy with the Regulator's decision to rely upon paragraph 3.6 of the rules of the Transitional Complaints Scheme not to investigate your complaint concerning the claims that:

- the Regulator failed to assess appropriately the application it received from Mr X (your mortgage broker) and his firm, Firm A when it applied for authorisation to conduct regulated activity in October 2004 and January 2005.
- the Regulator's failure led to Mr X receiving authorisation when he had a number of convictions for fraud, false accounting and theft for which he had been sentenced to time in prison.
- the Regulator's failures and Mr X's actions resulted in your being charged with mortgage fraud.

Additionally, you allege that, once the permissions of both Firm A and Mr X had been withdrawn, the Regulator failed to update its list of unauthorised firms to alert other members of the public that both Mr X and Firm A were no longer authorised by the Regulator.

As a remedy to your complaint you have stated that you are seeking the maximum possible amount of compensation available to offset the financial and emotional losses that you have suffered.

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 [the Financial Services and Markets Act 2000] 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.*

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*”.

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 (my emphasis).*
- (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 events occurred (and it was these events which led directly to the losses you say that you have incurred). 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.

If you were to take the view that Schedule One referred to above was relevant in the context of the Human Rights Act 1998 referred to in (3)(b) above 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 FSA (or indeed by the FCA) which is incompatible with the Human Rights Act 1998 which *directly* (my emphasis) caused you to lose your possessions.

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

As part of my investigation into your complaint I requested a full copy of the Regulator's complaint investigation file. As I have set out above, the papers presented to me set out that, when you contacted the Regulator, and set out that:

- the Regulator failed to undertake appropriately sufficient checks over the fitness and propriety of an individual before providing him with authorisation to undertake a controlled function (providing mortgage advice);
- it was the Regulator's failure that led to you being charged with mortgage fraud; and
- it was the Regulator's failure that led to you facing and continuing to face significant financial problems. With this in mind, and in light of the serious personal injury you say you had incurred, you also indicated that you were seeking a considerable amount of compensation, which you described as the "*maximum amount of compensation the limit will allow*".

I will return to the issue of the first bullet point later in this decision. As to the second and third bullet points above I should, in the context of Article One of the First Protocol of the Human Rights Act 1998, briefly set out my views:

- (i) there is a substantive issue of causation in the context of the second and third bullet points set out above that would demand detailed investigation by a court process involving evidence being given under oath and subject to cross examination which is something I am not empowered to do; and
- (ii) there is considerable uncertainty (even taking into account (i) above) about any level of compensation that could be awarded without a detailed examination of all losses that might, after issues of causation had been examined, come within the amount of compensation awardable within the provisions of the Human Rights Act 1998 which, again is not an issue that I can adequately canvass within my jurisdiction.

Turning to the first bullet point it is clear that the Regulator did undertake a brief review of what actions it took when it received the applications from both Firm A and Mr X, given the remedy you were seeking and continue to seek. It correctly felt in my view that paragraph 3.6 of the rules of the Transitional Complaints Scheme meant that it could not consider your complaint. Paragraph 3.6 of the rules of the Transitional Complaints Scheme sets out that:

“3.6 *Complaints that are more appropriately dealt with in another way*

The regulators will not investigate a complaint under the Scheme which they reasonably consider could have been, or would be, more appropriately dealt with in another way (for example by referring the matter to the Upper Tribunal or by the institution of other legal proceedings)”.

Whilst it is clear that you are disappointed with this view, as the Regulator set out in its decision letter, the issue of compensatory payments available from the previous Complaints Scheme (and which continue to apply to the current Complaints and Transitional Complaints Schemes) is something which I have also considered previously in considerable detail. As a result of my consideration, as I set out in my 2010/11 Annual Reports (a copy of which is enclosed with this letter), I hold the view that:

“most awards payable from the scheme should be ‘modest’...”;

and that

“...from statements made in the past Parliamentary debates on this issue, it is clear that the Complaints Scheme is not intended to take the place of damages, whether common law based or otherwise, to be awarded against the FSA...”

Given the views which I have previously expressed as to liability as well as compensation, whilst I have some sympathy with the position you have found yourself in, where a complainant is seeking considerable level of compensation or damages (which is what you are seeking as a remedy for your complaint), I do not believe that the Transitional Complaints Scheme is the appropriate way for your complaint to be considered.

I should also add that whilst I concur with the Regulator’s view that it can rely upon paragraph 3.6 of the rules of the Transitional Complaints Scheme, I equally believe that paragraph 3.5 of the rules of the Transitional Complaints Scheme prevents the consideration of your complaint. Paragraph 3.5 of the rules of the Transitional Complaints Scheme sets out that:

“3.5 *Circumstances where the regulators will not investigate*

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

In this case, your comments amount to displeasure with the Regulator’s processes which led to the authorisation of Mr X and Firm A and have not suggested that the Regulator’s actions were unreasonable or unprofessional. Likewise, you have not asserted that the Regulator acted in bad faith or in a way to bring into play the provisions of the Human Rights Act 1998 which I have already referred to (or provided any evidence of to support such assertions) which might have had the effect of bringing the issue of damages into consideration. I am sorry, but I must therefore concur with the Regulator’s view that your complaint is not one which can be considered appropriately under the rules of the Transitional Complaints Scheme.

I should add that, given that I concur with the Regulator's decision that your complaint is not one which can be considered under the rules of the Transitional Complaints Scheme I have neither considered nor requested further details of the events which led to criminal charges being brought against you for suspected mortgage fraud.

Further Information

Whilst I concur with the Regulator's view I am aware that, as part of the Regulator's initial investigation it did obtain some further information as way of background to the issues which lie at the heart of your complaint. Although I do not intend to comment on the Regulator's actions, I believe it may assist your understanding of the Regulator's responsibilities if I provide you with the following comments.

Prior to 31st October 2004 the arrangement of mortgage contracts was not a regulated activity. As such, mortgage brokers and mortgage broking firms which purely provided advice on residential mortgages were not regulated and *did not* (my emphasis) need to be authorised by the Regulator. Instead, mortgage brokers simply needed to be registered with a trade body.

From the information presented to me by the Regulator, I understand that Mr X, and Firm A, started providing mortgage advice in late 2002. As such, when Mr X applied for authorisation (under the regime which was starting with effect from 31st October 2004) he had been providing mortgage advice (through Firm A) for almost two years.

At the time Mr X and Firm A applied for authorisation the Regulator had adopted a risk based approach to regulation. I would add here that, to a degree, this risk based approach was extended to the consideration of applications it received for individuals and firms which wished to provide mortgage advice (from 31st October 2004) and arrange general insurance contracts (from 14th January 2005). Given the Regulator's statutory role and objectives, this approach does not, in my opinion, appear unreasonable, particularly in view of the detailed information which is requested on its application forms and the serious and significant implications of failing to do so.

I am aware from your letter to my office that you have studied the role imposed upon the FSA (as the relevant Regulator at the time) by the FSMA. Under the FSMA the Regulator was required to assess an application and give such an application the amount of consideration it felt was necessary. This is set out in Sections 59 to 61 of FSMA:

“Approval

- 59 (1) *An authorised person (“A”) must take reasonable care to ensure that no person performs a controlled function under an arrangement entered into by A in relation to the carrying on by A of a regulated activity, unless the Authority approves the performance by that person of the controlled function to which the arrangement relates.*
- (2) *An authorised person (“A”) must take reasonable care to ensure that no person performs a controlled function under an arrangement entered into by a contractor of A in relation to the carrying on by A of a regulated activity, unless the Authority approves the performance by that person of the controlled function to which the arrangement relates.*

- (3) *“Controlled function” means a function of a description specified in rules.*
- (4) *The Authority may specify a description of function under subsection (3) only if, in relation to the carrying on of a regulated activity by an authorised person, it is satisfied that the first, second or third condition is met.*
- (5) *The first condition is that the function is likely to enable the person responsible for its performance to exercise a significant influence on the conduct of the authorised person’s affairs, so far as relating to the regulated activity.*
- (6) *The second condition is that the function will involve the person performing it in dealing with customers of the authorised person in a manner substantially connected with the carrying on of the regulated activity.*
- (7) *The third condition is that the function will involve the person performing it in dealing with property of customers of the authorised person in a manner substantially connected with the carrying on of the regulated activity.*
- (8) *Neither subsection (1) nor subsection (2) applies to an arrangement which allows a person to perform a function if the question of whether he is a fit and proper person to perform the function is reserved under any of the single market directives to an authority in a country or territory outside the United Kingdom.*
- (9) *In determining whether the first condition is met, the Authority may take into account the likely consequences of a failure to discharge that function properly.*
- (10) *“Arrangement”—*
 - (a) *means any kind of arrangement for the performance of a function of A which is entered into by A or any contractor of his with another person; and*
 - (b) *includes, in particular, that other person’s appointment to an office, his becoming a partner or his employment (whether under a contract of service or otherwise).*
- (11) *“Customer”, in relation to an authorised person, means a person who is using, or who is or may be contemplating using, any of the services provided by the authorised person.*

60.—(1) *An application for the Authority’s approval under section 59 may be made by the authorised person concerned.*

- (2) *The application must—*
 - (a) *be made in such manner as the Authority may direct; and*
 - (b) *contain, or be accompanied by, such information as the Authority may reasonably require.*
 - (3) *At any time after receiving the application and before determining it, the Authority may require the applicant to provide it with such further information as it reasonably considers necessary to enable it to determine the application.*
 - (4) *The Authority may require an applicant to present information which he is required to give under this section in such form, or to verify it in such a way, as the Authority may direct.*
 - (5) *Different directions may be given, and different requirements imposed, in relation to different applications or categories of application.*
 - (6) *“The authorised person concerned” includes a person who has applied for permission under Part IV and will be the authorised person concerned if permission is given.*
- 61.—**(1) *The Authority may grant an application made under section 60 only if it is satisfied that the person in respect of whom the application is made (“the candidate”) is a fit and proper person to perform the function to which the application relates.*
- (2) *In deciding that question, the Authority may have regard (among other things) to whether the candidate, or any person who may perform a function on his behalf—*
 - (a) *has obtained a qualification,*
 - (b) *has undergone, or is undergoing, training, or*
 - (c) *possesses a level of competence, required by general rules in relation to persons performing functions of the kind to which the application relates.*
 - (3) *The Authority must, before the end of the period of three months beginning with the date on which it receives an application made under section 60 (“the period for consideration”), determine whether—*
 - (a) *to grant the application; or*
 - (b) *to give a warning notice under section 62(2).*
 - (4) *If the Authority imposes a requirement under section 60(3), the period for consideration stops running on the day on which the requirement is imposed but starts running again—*
 - (a) *on the day on which the required information is received by the Authority; or*

- (b) *if the information is not provided on a single day, on the last of the days on which it is received by the Authority.*
- (5) *A person who makes an application under section 60 may withdraw his application by giving written notice to the Authority at any time before the Authority determines it, but only with the consent of—*
 - (a) *the candidate; and*
 - (b) *the person by whom the candidate is to be retained to perform the function concerned, if not the applicant”.*

The Regulator’s process, by which it considered such applications, would, in my opinion, appear to be consistent with this requirement. Likewise, whilst you state that the Regulator “*failed to carry out the most basic of checks*”, which I assume to mean that you believe that the Regulator should have undertaken a Police and Criminal Records Bureau check on Mr X before it granted him approval but this, in my opinion, was not a mandatory requirement placed upon the Regulator by the paragraphs of the FSMA I have set out above.

I would however add that, although it was clear that Mr X, through Firm A, had been providing mortgage advice for around two years, the Regulator did consider the information contained on his application and, as a result, did seek some further information from him before approving the application. Likewise, I would also add that, when the Regulator became aware that some information contained within the application form may have been incorrect it took action.

I have also noted your claims that the Regulator failed to update appropriately its records to alert consumers to the fact that both Mr X and Firm A were no longer approved to provide mortgage advice. I believe here that there may be some confusion over the records which the Regulator updates. As Mr X and Firm A had previously been approved by the Regulator they were included on the Regulator’s Register (which lists all of the individuals and firms which have been authorised to undertake regulated activity). When the Regulator removed both Mr X and Firm A’s approval their respective register entries were updated to reflect this.


The Regulator would not update the list of “*unauthorised firms and individuals*” as this is a list of firms which have *never* (my emphasis) been authorised by the Regulator (commonly referred to ‘boiler room’ or scam operations) or firms which the Regulator is aware have continued to operate *after their permissions have been removed* (my emphasis). I must also add that no evidence has been presented to me to suggest that either Mr X or Firm A fell into this category, I believe that the Regulator only needed to update its Register.

Conclusion

When arriving at my decision I have to consider the Regulator’s actions together with the rules of the Transitional Complaints Scheme. In this case, given the remedy you are seeking, I believe that the Regulator correctly relied on paragraph 3.6 of the rules of the Transitional Complaints Scheme to exclude the investigation of your complaint. Although I concur with this decision, I hope that the additional information has, to a degree, clarified the Regulator’s general duties, as imposed by the FSMA (as the relevant legislation at the time), and also set out why you were unable to locate an entry for both Mr X and Firm A on the Regulator’s list of “*unauthorised firms and individuals*”.

I am sorry but it is my Decision for the detailed reasons that I have set out above that the Regulator correctly could not investigate the concerns that you raised. I am copying this letter to the Regulator.

Yours sincerely



Sir Anthony Holland
Complaints Commissioner