

24<sup>th</sup> November 2014

Dear Complainant,

**Your complaint against the UK Financial Services Regulators  
Our Reference Number: FSA01616**

Thank you for your emails in connection with this matter.

As the rules of the scheme under which I consider complaints can be found on our website at [www.fsc.gov.uk](http://www.fsc.gov.uk), I shall not set them out fully below.**Your complaint**

From your email of 15<sup>th</sup> August 2014 I understand that you are unhappy with the outcome of the FCA's investigation into your complaint. I presume that you are unhappy that, although the FCA has accepted that an operator within its Consumer Contact Centre provided you with incorrect information about the level of protection you would receive, it has refused to reimburse you for the entirety of the £22,000 you say you have lost, instead deciding to make an offer of £1,000 to you.

**My position**

Having reviewed the information provided by the FCA (which included all the correspondence you exchanged with it) and the additional information you provided to my Senior Investigator, my understanding of the events is:

- |                               |                                                                                                                                                            |
|-------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 14 <sup>th</sup> January 2005 | Group A Insurance Brokers (Firm A) becomes authorised by the FSA to provide 'non-investment based insurance contracts'.                                    |
| 4 <sup>th</sup> November 2009 | Firm P becomes an introducer (i.e. is able to refer potential clients to Firm A but is unable to arrange 'non-investment' insurance contracts for Firm A). |
| April/May 2012                | you attend a seminar run, by Firm P, in relation to overseas property investments.                                                                         |
| 4 <sup>th</sup> July 2012     | you contact the FSA regarding a property investment scheme and are advised that, based upon the information you had provided, it is potentially a scam.    |

- 30<sup>th</sup> July 2012 you receive an email from Firm P informing you about two property investments, one in North Dakota (USA) and the other in Manchester (UK).
- 14<sup>th</sup> August 2012 you ask Firm P to provide you with further details about the North Dakota (the Dakota Investment) “buy to let” investment opportunity which was projected to offer a yield of 35%.  
you exchange further correspondence with Firm P in relation to both the Dakota Investment opportunity and others which it is offering.
- 20<sup>th</sup> August 2012 you exchange further correspondence with Firm P in relation to the Dakota Investment.
- 30<sup>th</sup> August 2012 you receive an email from Firm P alerting you to further property investments which purport to provide investors with high yields (generated from the property’s rental income).
- 7<sup>th</sup> September 2012 you request and receive further information from Firm P in relation to the Dakota Investment.
- 15<sup>th</sup> October 2012 you enter into a ‘Real Estate Purchase and Sale Agreement’ with New Harmony Homes LLC (NHH) for a ‘unit’ (or a room) within a hotel development in North Dakota (the Dakota Investment).  
you also arrange for the transfer of a \$1,000 reservation fee to be made.
- 1<sup>st</sup> November 2012 you contact the FSA and advise it you have transferred £3,000 to a broker as a deposit for a development in Prague and that the broker has been unable to provide you with any update on the progress of the development. The FCA advises you that, although this is an unregulated activity, it had the hallmarks of a scam. You are also warned about investing through unregulated firms.
- 5<sup>th</sup> November 2012 you ask the FSA for clarification of the ‘protection’ given to investors.
- 8<sup>th</sup> November 2012 you contact the FSA regarding Firm P. The operator advises you that the firm is not regulated and that the firm does not have the ‘permissions’ to provide investment advice. You are also warned that property investments (such as the purchase of units in a hotel) which form part of an Unauthorised Collective Investment Scheme (UCIS) are not generally suitable for retail investors.
- 16<sup>th</sup> November 2012 you contact the FSA and are advised that Firm P is an Introducer Appointed Representative of Firm A and that Firm A would provide you with protection in the event of poor advice being provided by Firm P.  
the FSA also confirms this information to you in an email sent at 0959 on 16<sup>th</sup> November 2012.

27 <sup>th</sup> November 2012	you transfer the first instalments of \$18,316 (or £11,526.75) to the developer's lawyer.
8 <sup>th</sup> February 2013	you transfer the second instalments of \$16,470 (or £10,515.90) to the developer's lawyer.
5 <sup>th</sup> April 2013	Firm P's introducer arrangement with Firm A is terminated.
4 <sup>th</sup> October 2013	<p>you complain to Firm A that the buy to let investment property you were purchasing through Firm P has 'failed'.</p> <p>Firm A responds to your enquiry confirming that although it had an insurance 'introducer' arrangement with Firm P, Firm A was not authorised to provide investment advice (to consumers). Firm A also clarified that it understands that Firm P has been sold and provides you with contact details for Firm P's new owners.</p>
8 <sup>th</sup> October 2013	as Firm P's new owners deny responsibility you again contact Firm A.
October 2013	you are unhappy with Firm A's response that it was not responsible for the investment you made through Firm P (as Firm P only held a non-investment introducer arrangement with it), and you refer your complaint to the Financial Ombudsman Service (FOS).
6 <sup>th</sup> December 2013	the FOS informs you that, having considered Firm P's arrangement with Firm A, it holds the view that it is not able to consider your complaint as Firm A was only permitted to provide consumers with advice to arrange 'non-investment' insurance contracts.
10 <sup>th</sup> January 2014	you complain to the FCA about the information you were given by the FSA Consumer Contact Centre on 16 <sup>th</sup> November 2012.

In assessing your complaint I have borne in mind that before your telephone and email exchange with the FCA of 16<sup>th</sup> November 2012 you:

- had been in contact with Firm P for a number of months, having attended one of its seminars around six months earlier.
- had already committed to the Dakota Investment by signing the "Real Estate Purchase and Sale Agreement" and transferring \$1,000 to NHH's lawyer.
- had previous unfortunate experiences of this type of investment.
- had been given warnings that these types of investments carried the hallmarks of a scam.
- had been informed that Firm P was not authorised by the regulator and that Firm A was only permitted to provide advice on non-investment insurance contracts.
- had been also warned that this type of investment was generally not suitable for a retail investor such as yourself.

However, notwithstanding these matters, I recognise that before you transferred approximately £22,000 to HNN's lawyer you did receive two incorrect assurances (including one in writing) from the FSA that, should anything go wrong, you would be protected by both Firm A (as Firm P's perceived parent organisation) and by the Financial Services Compensation Scheme (FSCS), in the event of either Firm P or Firm A being unable to meet its liabilities. In light of the subsequent events, it is extremely unfortunate that you were given incorrect information by the FSA and I welcome the FCA's acknowledgement of this.

The FCA has been in correspondence with you in an effort to establish whether a loss has actually been incurred and, if it has, what the loss is. Unfortunately, as you were unable to provide the FCA with evidence to show that you had lost the £22,000 you transferred to NHH's lawyers, the FCA concluded that it was unable to make an offer to you in excess of a goodwill payment of £1,000.

When reviewing your complaint my Senior Investigator also asked you to provide documentary evidence that you had indeed incurred a loss and details of what action you had taken to recover it. I appreciate that you have provided evidence which explained that completion of the second stage of the motel was delayed as there were 'planning issues' which in turn meant that you were not asked to make the third instalment, and that this resulted in the expected/projected income not being received. You also confirmed that you have only tried to recover your 'perceived' loss in the UK and have not made any attempts to do so in the USA.

From the quick search which my Senior Investigator has conducted on the internet it is clear that, although there were 'issues' with the construction of the motel, the motel does appear to exist albeit that it has not been completed and you are not receiving the income you had hoped for. This means that there is, to a degree, an underlying asset from which you may, in the future, realise a return. For that reason at this stage it is simply not possible to say that you have lost the £22,000 you transferred to NHH's lawyer.

Having considered your complaint I have concluded that the FSA's unfortunate email of 18<sup>th</sup> November 2012 was a major factor in your decision to complete the transfers totalling approximately £22,000 to NHH's lawyer, and that accordingly the FCA should offer you financial redress in respect of your financial loss. However, regrettably at this stage I am unable to make a recommendation to the FCA about the size of any payment, as there is insufficient information to confirm that you have in fact incurred the loss and, if you have, what the size of that loss is.

As it is clear that construction on the motel has started, it is possible that you, along with the other investors/creditors, could be able to make a claim against NHH which would mitigate some of the losses you believe you have incurred. In my view documentary evidence of the extent of your loss could be provided by the following (although other documentary evidence of a similar type may equally be persuasive):

- correspondence from NHH, NHH's lawyers or, in the event of NHH entering administration or bankruptcy, its administrators confirming that the Dakota Investment does not and will not have any future value;
- confirmation that you do not hold any title or have any claim on the partially constructed motel;
- confirmation from NHH's administrators of the return you are entitled to receive from the sale of the partially constructed motel (which formed the Dakota Investment).

If it proves impossible to obtain these details, you should alternatively produce clear evidence of the efforts you have made to obtain them.

I set out the above conclusions in my Preliminary Decision, and in its response the FCA has indicated that it is disappointed with my recommendations. The FCA has expressed this in the following manner:

“We are disappointed that you believe [the complainant] is entitled to the full investment amount less any potential residual value [...] from the partially completed Dakota Investment, despite a number of mitigating factors, some of which you have listed on page [3] of your Preliminary Report. It seems to us that some of these factors are particularly significant. In particular, [the complainant] had paid a reservation fee of \$1,000 before seeking any advice about his investment. When he did call the FSA Contact Centre he was correctly advised on his first call. It seems reasonable to us that, when he was advised differently on his second call, he should have been on notice that further enquiries should be made.

For these reasons, in particular, we invite you to reconsider your proposed decision. The effect of your current course would effectively be to make the FCA a guarantor of investments which such investors were themselves aware were inherently risky. We do not believe that was the purpose for which the Scheme was established”.

Having carefully considered the FCA’s comments, and while I understand the points they are making, I am not persuaded by them. In this case a consumer contacted the FCA to establish whether the investment he was intending to make was protected. The notes made by the Contact Centre operative during the first call do not state what information the complainant was given. The notes simply state

“called to check status of Firm P. Caller says it is [FRN for Firm P] – Firm P. they find properties to invest in, he would then be able to sell the property. advised name different to that on the register and the firm on the register is not on there for that purpose. explained what they are allowed to do (*sic*)”.

These notes, although recording the discussion which took place are, in my opinion, inconclusive evidence that the complainant was correctly advised over what Firm P could do and more importantly what protection would be offered to him by Firm A.

Likewise, I have also noted the FCA suggestion that the offer should be reduced to specifically take effect of the complainant’s actions before seeking reassurance from it. Whilst I can understand the FCA’s views in this regard, I am overall not persuaded by its views. In arriving at this decision, I am mindful of the contents of the email it sent to the complainant on 16 November 2012 which sets out the following:

“Dear Complainant

Thank you for your email dated 5 November 2012.

Following our telephone conversation this morning, I am writing to confirm the information I provided to you in writing. You contacted us in relation to Firm P, and sought guidance on whether you would be eligible for compensation should anything go wrong.

As outlined, Firm P appear on our public register under a Firm Reference Number (FRN) of [FRN for Firm P]. They are registered as an Introducer Appointed Representative (AR), which is a firm that can only introduce customers to a firm or a member of the firm's group. They are registered as a trading name of the Firm A Insurance Brokers Limited; who hold an FRN of [FRN of Firm A]. As Firm A is the principal firm, they would be responsible should anything go wrong in light of a recommendation by Firm P. Although you may already be aware of the statuses firm hold, I have attached a link below which gives a detailed insight into this.

[http://www.fsa.gov.uk/fsaregister/use/firm\\_status](http://www.fsa.gov.uk/fsaregister/use/firm_status)

I indicated that you would be covered for up to £50,000 for investments (per authorised financial firm). Should the principal firm not be able to pay a sum of money back, then you would indeed be covered by the Financial Services Compensation Scheme (FSCS)".

Although the email is erroneous in its contents it clearly indicates to the complainant that the entirety of his investment would be covered in the event of something going wrong. I am not persuaded by the FCA's comments that the "effect of your current course [i.e. my recommendation] would effectively be to make the FCA a guarantor of investments which such investors were themselves aware were inherently risky. We do not believe that was the purpose for which the Scheme was established". My recommendation is simply designed to provide protection to an investor who received completely incorrect information from the FCA over the level of protection he would receive should anything go wrong with his investment. I agree with the FCA that it should not act as a guarantor of investments which investors should know are inherently risky, but the answer to that is that the FCA should not give erroneous advice about guarantees. The complainant in this case may have been naïve to rely upon the FCA's advice, but having obtained it in writing he was entitled to do so.

I have also considered your response to my Preliminary Decision in which you asked me to recommend a further payment to reflect the 'income' you have lost. Although I have sympathy for your position I am not prepared to agree to your request. I have not seen anything to suggest that you were led to believe from your correspondence with the FSA that the income you would receive (in addition to capital) would be protected by Firm A.

You have also asked that I should "instruct for the payment of amount of investment. This will enable me to earn an income. If any evidence of any sort of money is being returned to me in future (which seems impossible), that will be returned to FSA". I am not prepared to do this. There is currently not a proven loss for which the regulator could be deemed responsible: for the reasons which I have given earlier in this letter, it is important that you should take further steps to demonstrate your loss, or demonstrate that you have made substantial attempts to do so. It would not be right to expect the regulator to make a compensatory payment without such further evidence.

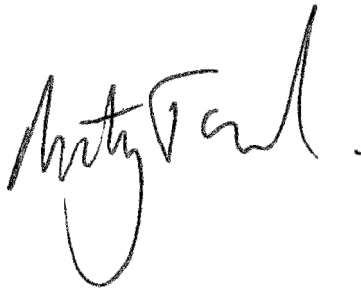
### **Recommendations**

1. The FCA should make the immediate *ex-gratia* payment of £1,000 to you in recognition of the error its member of staff made when explaining the protection offered to you, as it has already offered.

2. The FCA should review the training provided to its Consumer Contact Centre staff to ensure that they clearly understand what protection is offered to consumers.

Upon receipt of documentary evidence from a responsible third party confirming the extent of the loss you have incurred as a result of the Dakota Investment, or clear documentary evidence of further substantial but unsuccessful attempts by you to obtain that information, the FCA should make a further ex-gratia payment to you. This payment should be £22,042.65 (which represents the payments you made to NHH's lawyer namely £11,526.75 made on 27<sup>th</sup> November 2012 and a further £10,515.90 made 8<sup>th</sup> February 2013), less any residual value you may receive or are entitled to from the partially completed Dakota Investment.

Yours sincerely

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

Antony Townsend  
Complaints Commissioner