Complaints Commissioner

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24th November 2011

Dear Complainant,

Complaint against the Financial Services Authority
Reference Number: GE-L01334

I write with reference to your letter and enclosures of 3rd September 2011 in relation to your complaint against the Financial Services Authority (FSA). At the outset I should explain that the FSA is not "a government body" as you state in your letters of 3rd September and 31st October 2011. The FSA is a creation of statute and regulates the financial services industry with funding from the industry and not the taxpayer.

At this stage, I think it would be worth explaining my role and powers. I am charged, under Paragraph 7 of Schedule 1 of the Financial Services and Markets Act 2000 (the Act), with the task of investigating those complaints made about the way the FSA has itself carried out its own investigation of a complaint that falls within the complaints scheme. The investigations I undertake are conducted under the rules of the Complaints Scheme (Complaints against the FSA - known as COAF). I have no power to enforce any decision or action upon the FSA. 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 FSA. Such recommendations are not binding on the FSA and the FSA is at liberty not to accept them. It rarely declines to do so however. Full details of Complaint Scheme can be found on the internet at the following website; http://fsahandbook.info/FSA/html/handbook/COAF.

Your Complaint

From your correspondence with my office, I understand that your complaint relates to the following:

1. You are unhappy with a number of terms contained in the agreement you entered into with Firm A, which traded under the name of Firm B. As you believed these to be unfair you contacted the FSA.
2. Following a review of the terms and conditions, the FSA's Unfair Contract Terms Team (UCTT) informed you that it felt that the terms and conditions were not unfair terms as set out in the Unfair Terms in Consumer Contracts Regulations 1999 (the Regulations).
3. You dispute the UCTT's findings, and feel that it has not considered how these terms comply with the law in Scotland. Specifically, you do not believe that the FSA has considered adequately how Part IV of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (the 1990 Scottish Act) impact upon the 'fairness' of the terms which you are unhappy about.

4. As you remain unhappy with the situation you have referred the matter to my office for a review of the FSA's investigation into your complaint.

Coverage and Scope of the Scheme

COAF provides as follows:

(1) The 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. The 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.

(2) [deleted]

(3) To be eligible to make a complaint under the complaints scheme, a person (see COAF 1.2.1G) must be seeking a remedy (which for this purpose may include an apology, see COAF 1.5.5G) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the FSA's actions or inaction.

I should also make reference to the fact that my powers derived as they are, from statute contain certain limitations in the important area of financial compensation. The Act stipulates in Schedule One that the FSA is exempt from "liability in damages". It states:

"(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."

COAF nevertheless then goes on to provide in paragraph 1.5.5 that:

"Remedying a well founded complaint 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 the FSA decides not to uphold a complaint, it will give its reasons for doing so to the complainant, and will inform the complainant of his right to ask the Complaints Commissioner to review the FSA's decision."

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. Further I note that as a matter of record that in this case you have made no allegation of bad faith on the part of the FSA.

My Position

I have now had the opportunity to review the papers both you and the FSA have presented to me. From these papers, it is clear that you are unhappy with the way in which the FSA has investigated your concerns about what you believe to be unfair contract terms imposed upon you by Firm A. I have also had regard to the point you made in your letters of 6th and 9th September 2011.

I now wish however to turn to what lies at the core of the problem in investigating matters of this kind. I apologise in advance therefore both for the length of this Final Decision as well as the background that I detail but it is right that your complaint and concerns are addressed in depth in order to reassure you that all the issues you have raised have been adequately considered by me.

The core of your complaint hinges around the decisions taken by the UCTT that, in its view the terms you are unhappy about are not unfair or misleading under the Regulations. From the papers which the FSA have presented to me, it is clear that you disagree with the UCTT's view and have raised specifically the fact that you feel that the FSA has incorrectly failed to consider all of the appropriate legislation when arriving at this conclusion. I would add here that, although you feel the FSA has not considered how Part IV of the 1990 Scottish Act affects the position, other than to indicate that it has not considered the 1990 Scottish Act, you have not indicated how this alleged failure has *directly* (my emphasis) affected you.

I should add at this point that my role as Complaints Commissioner charges me with reviewing the manner in which the FSA investigates complaints (and through this process to ensure that concerns raised are adequately investigated by the Complaints Team and/or specific business areas such as the UCTT). Unfortunately, whilst my powers enable me to 'delve' more deeply into the manner in which the FSA has acted (in this case that means to ensure that it has adequately investigated your concerns about Firm A's contract terms, I am *unable to comment upon* (my emphasis) the decisions made by the UCTT.

I would however add here that I understand that the UCCT explained in its correspondence with you that its consideration of your concerns is limited to an assessment of the disputed terms under the Regulations and as a result is unable to consider the impact any other legislation (such as the 1990 Scottish Act) may have upon its assessment of the disputed terms. Specifically I would draw your attention to the second page of the FSA's letter of 22nd June 2011 where it explains that:

> "*The reason for this is that the FSA's statutory function is to consider terms under the Regulations. The Regulations extend the scope of the terms that may be considered to be unfair in relation to consumer contracts. The Unfair Contract Terms Act 1997 is primarily concerned with exemption clauses in both business and consumer contracts whereas the Regulations also apply to a wider scope of unfair terms in relation to consumer contracts*".

When considering the FSA's position, two issues are, in my opinion, relevant. The first is that, as the FSA has pointed out, the "*Unfair Contract Terms Act 1977 is primarily concerned with exemption clauses in both business and consumer contracts*". The issue you raised with the FSA in relation to the contract terms was not, as far as I can establish, in relation to exemption clauses but relates to the contractual terms applicable to Firm A's discretionary management of your account/investments and the decisions Firm A could make in this regard. The Unfair Contract Terms Act 1977 in Section 3 provides

> 3 Liability arising in contract.
>
> (1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.
>
> (2) As against that party, the other cannot by reference to any contract term—
>
> (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or
>
> (b) claim to be entitled—
>
> (i) to render a contractual performance substantially different from that which was reasonably expected of him, or
>
> (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,
>
> except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.

Whether or not your contractual arrangements in this matter amount to being unfair and therefore in breach of this Act is a matter of law rather than one of regulation on the part of the FSA as it carries out its regulatory duties in accordance with its statutory powers. In my Preliminary Decision I invited you to provide further comments on this if you felt that I had wrongly interpreted the nature of the terms about which you are unhappy or the effect the 1990 Scottish Act would have on these. In your response you commented that I did not consider fully the implication of Part II of the Unfair Contract Terms Act 1977 which related specifically to Scotland.

In arriving at my Preliminary Decision, I did consider the impact Part II of the Unfair Contract Terms Act 1977 would have on the discretionary management contract you entered into with Firm A. However, in my opinion, Part II of the Unfair Contract Terms Act 1977 is limited in its application and *does not* (my emphasis) provide the FSA with the same scope of consideration as is available to it under the Regulations.

I would also add that although you have referred me specifically to section 15(2)(c) of the Unfair Contract Terms Act 1977, given the reference to and provisions of sections 16 to 18 of the Unfair Contract Terms Act 1977, the application of this section is limited to "Liability for breach of duty", the "Control of unreasonable exemptions in consumer or standard form contracts" and "Unreasonable indemnity clauses in consumer contracts". However, given that your concerns appeared to relate to the manner in which Firm A was allowed to manage your investments under the discretionary management agreement (or contract) you entered with it, in my opinion, section 15(2)(c) would have little, if any, application in this case.

Likewise, the second relevant factor is the jurisdiction under which the FSA could consider the terms in questions. The FSA pointed out that "*is that the FSA's statutory function is to consider terms under the Regulations*". The FSA was given powers as a "*qualifying body*", under Schedule 1 of an amendment which was made to the Regulations in 2001, the Unfair Terms in Consumer Contracts (Amendment) Regulations 2001 (the Amended Regulations), to consider whether terms within a consumer contract are unfair. Given that the FSA as a "*qualifying body*" was only given these powers in relation to unfair terms in consumer contracts (as set out by the Regulations), its statutory powers simply do not extend to considering whether contracts are generally unfair under alternative or supporting regulations.

I would also add that, in my opinion, given the nature of the clauses which are predominantly covered by the Unfair Contract Terms Act 1977 (including those which are amended by the 1990 Scottish Act); I do not believe that the terms you dispute would be covered. Similarly, as the FSA's powers are limited to an assessment under the Regulations, any findings it made in relation to alternative or additional legislation would simply be *ultra vires* and the firm would be free to disregard the FSA's comments. I would add here for the sake of completeness that I too am bound by the jurisdiction given to me by the Act and as a result I am unable to go outside my jurisdictional powers.

The generic issue which is so important in the context of your complaint can best be expressed in this way. Ordinary consumers of retail financial products do not always receive identical regulatory focus because of the combination of consumer protection and market regulation existing side by side in one regulatory authority.

I must, however, in fairness to the gravamen of your complaint, now go into more detail. My starting point must be the Act itself. Section 2 of the Act (see definition of 'the Act' in the second paragraph on page 1) sets out the FSA's general duties in the following manner:

(1) In discharging its general functions the Authority must, so far as is reasonably possible, act in a way—

(a) which is compatible with the regulatory objectives; and

(b) which the Authority considers most appropriate for the purpose of meeting those objectives.

(2) The regulatory objectives are -

(a) market confidence;

(b) public awareness;

(c) the protection of consumers; and

(d) the reduction of financial crime.

(3) In discharging its general functions the Authority must have regard to—

(a) the need to use its resources in the most efficient and economic way;

(b) the responsibilities of those who manage the affairs of authorised persons;

(c) the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;

(d) The desirability of facilitating innovation in connection with regulated activities;

(e) the international character of financial services and markets and the desirability of maintaining the competitive position of the United Kingdom;

(f) the need to minimise the adverse effects on competition that may arise from anything done in the discharge of those functions;

(g) the desirability of facilitating competition between those who are subject to any form of regulation by the Authority.

(4) The Authority's general functions are—

(a) its function of making rules under this Act (considered as a whole);

(b) its function of preparing and issuing codes under this Act (considered as a whole);

(c) its functions in relation to the giving of general guidance (considered as a whole); and

(d) its function of determining the general policy and principles by reference to which it performs particular functions.

(5) "General guidance" has the meaning given in section 158(5).

From this you will see that, although the Act requires the FSA to discharge its regulatory objectives, it gives it discretion over how it does this providing that its act in a way which:

(a) is compatible with the regulatory objectives; and

(b) the Authority considers most appropriate for the purpose of meeting those objectives.

The composite effect of these provisions is to create an inevitable tension between market confidence, through the exercise of the FSA's regulatory powers, and the protection of consumers. In effect the FSA has to balance sensitivity and careful judgement with the statutory requirements of all of its regulatory objectives.

As I indicated above, the papers presented to me included full copies of the UCTT's files relating to the issues you raised with it (in relation to Firm A). From these it is clear that the FSA did consider in detail the terms you raised and provided you with a number of detailed responses setting out why it believed that the terms you had referred to it were not unfair or misleading.

I note that both the UCTT and the Complaints Team explained that although the FSA had referred the matter to other areas for further consideration (namely Firm A's Supervision Team), it could not comment further on what action, if any, these areas had taken or were intending to take in relation to the manner in which Firm A had handled this matter. This was not because the FSA (as an organisation) wished to be unhelpful but because of the limitations on disclosure imposed upon it by the Act as a result of its passage through Parliament.

In summary, Parliament by virtue of Section 348 of the Act imposes upon the FSA, as the regulator, a ruling of confidentiality in the context of disclosing its response or position when acting in the discharge of its function as the relevant regulator. This means that, other than in limited circumstances, the FSA is unable to disclose any information about what action it did or did not take against a firm or individual (and the reasons for that decision).

As part of my investigation into your complaint I have reviewed the FSA's papers and am satisfied that when it received your concerns it treated the matter appropriately, and undertook a considerable and in depth investigation to satisfy itself that the terms you referred to it were not unfair under the Regulations. I am also satisfied that the FSA set out in detail in its letters to you why it did not believe the terms were unfair under the Regulations. I would add that I cannot comment further upon the background explaining how the UCTT reached its conclusion other than to say that, in my opinion, given the considerable magnitude of its investigation, the consideration it gave the matter and the conclusions reached by the UCTT (as set out in the numerous letters and emails it sent to you) its overall decision appears reasonable within the given circumstances.

In this instance, while I do not believe that the exceptions provided in Section 348 apply and I cannot comment further, I do myself have the power to enquire more deeply into such matters, in my role as Complaints Commissioner, to enable me to be satisfied as to the propriety of what the FSA has done. I am however limited, in most cases, as to the further disclosure of the details that I am informed about in this case specifically the investigation the UCTT conducted into the terms you raised with it. I am therefore unable, directly, to identify further on why the UCTT felt the terms were not unfair under the jurisdiction exercised by the virtue of the Regulations (other than what it has set out in the letters and emails it sent to you) or to update you on its more recent considerations of the matter.

As I indicated above, I cannot comment upon the UCTT's findings. However, in relation to the UCTT's findings you have questioned what "*legal grounds there can be to justify a government body being allowed to ignore established statutory law? In particular this is a denial of the statutory effect of the parts of these Acts which apply in Scotland*". As I have set out above the Unfair Contract Terms Act 1977 (as amended by the 1990 Scottish Act) applies mainly to exemption clauses and would therefore have limited impact on a contract term which does not relate to an exemption clause.

I would also like to clarify one further point which, although not specifically raised with my office, I do feel is worthy of further explanation. In your earlier correspondence with the FSA you have referred to information you were given by the Head of Market Supervision at the London Stock Exchange in relation to the FSA being able to provide you with information surrounding who purchased the shares which Firm A sold under the discretionary management agreement it had with you. Unfortunately, this is not something the FSA can do and it appears that the London Stock Exchange may have provided you with information which was incorrect.

Conclusion

As I have explained above, the FSA has satisfied me that, it has conducted an extensive investigation given its powers under the Regulations into whether the terms in your context are unfair. I appreciate that you disagree with the FSA's view but you are free to do this. Likewise, it is unfortunate that neither I nor the FSA cannot comment in further detail on the matter, but from the information presented to me it is clear that the FSA did consider your comments and took a course of action which it appeared appropriate and reasonable in all the circumstances at the time. I appreciate that you also feel that the FSA failed to consider all of the relevant legislation. However, whilst you hold this view, as I have set out above, ultimately the FSA's jurisdiction is limited to consideration of terms under the Regulations, which in practice covers a wider range of situations than an assessment under purely the Unfair Contract Terms Act 1977 (whether or not amended by the 1990 Scottish Act).

Similarly, the fact that Section 348 of the Act prevents the FSA (and me) from confirming in detail what action it took, is not by itself evidence that the FSA neither gave your concerns proper consideration nor that it failed to act upon concerns brought to its attention (other than in respect of the delay I have referred to above) nor that it arrived at an incorrect conclusion.

In closing there is one final point I feel I should add. It is clear from the correspondence that you sent me on 21st October 2011 that you have and still are experiencing significant problems with the manner in which Firm A are administering your remaining investments. Whilst I do sympathise with your position, ultimately this is not something in which the FSA, as the UK's Financial Services Regulator, can become involved.

Although the FSA has a high level objective of ensuring that firms (such as Firm A) treat consumers fairly, ultimately disputes such as the one you have set out in your letter and enclosures of 21st October 2011 should be dealt with by the Financial Ombudsman Service (the FOS). Whilst I understand that Firm A has given you the FOS' contact details on a number of occasions, as this is the body which can assist you with difficulties you have indicated that you are still incurring, I have set them out below:

The Financial Ombudsman Service
South Quay Plaza
183 Marsh Wall
London
E14 9SR

Telephone: 0845 080 1800
Email: complaint.info@financial-ombudsman.org.uk
Website: www.financial-ombudsman.org.uk

In the context of this issue of your overall complaint about the management of your affairs generally and the issue of the service supplied I share your irritation at what you have experienced. It is unsatisfactory in my view as any considered reading of the voluminous materials indicates. At first sight they do appear clear issues of possible maladministration and until a Senior Management Decision Letter is received (unless it has already been received) the option of taking your dispute to the FOS remains open. The financial compensation limit is £100k although there is a proposal to increase it to £150k.

I appreciate that you will be unhappy with the outcome of my investigation into your complaint but I hope that you will understand why I have reached the conclusion I have set out above. I should add this. The current legislation is now being scrutinised by Parliament in the context of the Government's intention to change the regulation of financial services. You may therefore wish to contact your Member of Parliament to discuss your concerns in the context of your complaint.

Yours sincerely

Sir Anthony Holland
Complaints Commissioner