Complaints Commissioner

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20th March 2012

Dear Complainant,

Complaint against the Financial Services Authority (FSA)
Reference Number: GE-L01367

I write with reference to our previous correspondence with my office in relation to your complaint against the Financial Services Authority (FSA).

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 comes 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. Full details of Complaint Scheme can be found on the internet at the following website; http://fsahandbook.info/FSA/html/handbook/COAF.

Your Complaint

When referring your complaint to my office your complaint fell within three separate heads. These complaints can, I believe, be briefly summarised as follows

1. The dispatch of documents to an address in City M at which Mr X no longer resided.

   You say that the FSA was aware that Mr X no longer resided at that address as, following his divorce, he had moved overseas. You add that the address was, at the time the documents were sent, the residence of Mr X's ex-wife.

   You also add that it is unclear to you, given that the FSA knew that you were Mr X's legal adviser, why the FSA sent documentation to Mr X's old UK address when all documentation, which should include Preliminary Investigation Reports (PIRs) Supplementary Preliminary Investigation Reports (SPIRs) and Warning Notices (WN), should only have been sent to your offices.

   Specifically you have alleged that the FSA sent two confidential documents by post Mr X's City M address. The first was a package containing the SPIRs which you say the FSA sent in August 2010 (and which was returned unopened by Mr X's ex-wife). The second was a WN which the FSA sent in October 2010.

2. The FAQs the FSA published in relation to Firm A

3. The alleged comments Mr W (a member of FSA staff) made at a dinner party which he was attending in a personal and private capacity

My Position

I have now had the opportunity to consider the issues you have raised and to review the FSA's investigation file. You will recall that I wrote to you on 9th January 2012 setting out my position in relation to heads two and three. I would add here for the sake of completeness that my views on these heads have not changed since I wrote to you on 9th January 2012. Although I note that you referred to these issues in your responses to my Preliminary Decision dated 1st and 7th March 2012 my views have not changed on the issue of the deferment and the exclusion and as a result this Final Decision will only address the issues you have raised in relation to Complaint One. Although you have set out your arguments explaining your complaint in some detail in your letter of 21st December 2011, I believe that only the following require comment by me.

"*20.1 The FSA have sought to deny that the Secondary Preliminary Investigation Report was delivered to the City M address of the ex-wife of Mr X.*

20.2 The FSA have sought to blame Mr X and his lawyers for them delivering the Warning Notice to the City M address.

(a) Prior to the sending of the Second PIRs on 31st August 2010, the FSA Investigation team took great care to check with each of Mr Y, Mr Z and Mr X (through ourselves as his lawyers) where they wanted these reports delivered. ... No effort was made in this email or subsequently to ask us whether any documents to be served on Mr X personally could be served on us or any other address.

(b) Consistent with usual professional practice, once a law firm has confirmed that they were on record for an individual client that means that the law firm is instructed to accept service of any relevant documents until further notice otherwise. The FSA can not have been in any doubt about this.

(c) If there was any doubt about then it was incumbent on the party that was seeking to effect service (i.e. the FSA) to confirm with ourselves whether we were instructed to accept service or not. Otherwise it could be assumed we were instructed to accept service as indeed we were".

Whilst I accept that you have expanded your arguments to support your claims that the FSA has acted inappropriately or failed to consider adequately the matter raised, I believe that the additional points do not raise new or further arguments on matters of principle to support your claims but simply make the same points albeit in a different way.

When reviewing this case, it is clear that the FSA, in its decision letter of 2nd November 2011 confirms that it only sent the WN to the City M address, which was the only UK address it held on file for Mr X, but disputes that it sent any other documentation to the City M address prior to the WN which were sent on 26th October 2010.

I will first address the issue of the alleged delivery of the SPIR in August 2010 and then comment on the FSA's decision to issue WN to the City M address on 26th October 2010. You set out this issue in your letter of 21st December 2011 as follows:

"*20.1 The FSA have sought to deny that the Secondary Preliminary Investigation Report was delivered to the City M address of the ex-wife of Mr X.*

(a) As we have said to the FSA, that the FSA has found no internal records of its delivery to this address is not determinative. Mr X's ex-wife has confirmed that she received the package and sent it back to the FSA though the FSA has failed to investigate this with her directly".

I would also add that when issuing SPIR's to those who are the subject of an Enforcement investigation, the FSA's general policy is to do so by both email and courier. This appears to be consistent with the approach the FSA took when dealing with its investigation in this case. Whilst you say that a check of the FSA's internal records is not determinative, I respectfully disagree. The FSA, when issuing SPIRs does so, as I have indicated above, by courier and *not* (my emphasis) by post. Given that the packages you say that Mr X's ex-wife received were delivered to her by post it is not, in my opinion, unreasonable for the FSA to hold the view that the SPIRs were not sent to Mr X's ex-wife.

I would also add that as part of the FSA's investigation into you claim, the FSA undertook a review of the letters (and packages) it sent to Mr X at the time in question and in doing so undertook a review of the addresses to which these documents were sent. As a result of this review, the FSA has confirmed that although it has a record of a package being sent to Mr X on the evening of 31st August 2010, its records show that this package (which for the avoidance of doubt contained the SPIRs) was sent to your offices by courier. I would also add that this courier firm also delivered similar packages to two other members of Firm A's management team the same evening (the delivery of which generated the complaints I received from Mr and Mrs Y and Mr Z that you have referred to in your letter of complaint).

I would also add that, as part of its investigation, the FSA has also contacted the courier firm it uses to confirm what instructions it received on the evening of 31st August 2011. The courier has confirmed that, at 6.13 pm it was asked to collect three packages from the FSA's offices. These were to be delivered to the home addresses of Mr Y and Mr Z (referred to above) with the third (which related to Mr X) being delivered to your firm's offices in London. As I have set out above, the FSA has confirmed that *it only* (my emphasis) uses a courier to deliver PIRs and SPIRs to those who are the subject of an Enforcement investigation and, given the sensitivity of the information which is contained within PIRs and SPIRs would *not* (my emphasis) send these to individuals through the post.

I have noted your comments regarding the FSA choosing not to contact Mr X's ex-wife until sometime after the complaint had been made. Whilst I can appreciate your views on this, I understand from the FSA that it will normally only contact the person who has made the complaint or their representative if additional information is needed. In this case, it is clear that the FSA considered contacting Mr X's ex-wife at an earlier stage but felt that, at the time this was unnecessary given that it maintained that *it did not* (my emphasis) send any documentation to Mr X's City M address (where Mr X's ex-wife resided) in August 2010.

I appreciate that, as part of your referral to me you have kindly provided a statement from Mr X's ex-wife which confirms that

"[She] has been asked to confirm what [she] can remember of the FSA delivering packages of documents to my then home in City M addressed to my ex-husband, [Mr X] on two separate occasions.

The first time was in about September 2010. An A4 package was delivered to my home in City M addressed to [Mr X]. I could see from the markings on the package that it had been sent by the Financial Services Authority.

I was very surprised to receive this package, especially as my ex-husband had not lived with me for a number of years. I was also aware that he was having difficulties with the FSA. There had been a court case the previous year where the FSA had gained access to a computer that stored his personal information. It worried me that nevertheless the FSA seemed to think that I was still living with him.

I wrote on the A4 packages 'Not Known at this address: Return to Financial Services Authority, 25 North Colonnade, London E14 5HS" and put it in the post box the next time I posted other mail.

I hoped that the FSA would then leave me alone.

Much to my surprise, the FSA did not. About six weeks later, the FSA sent another package addresses to [Mr X] to my City M home This time the large package was left in between the double doors of my property. It had a special delivery sticker on it".

Firstly I would say that it is clear from Mr X's ex-wife's statement that she clearly recalls receiving *two packages* (my emphasis) from the FSA. However, despite Mr X's ex-wife's recollections of the events, the FSA has no record of this package either being sent or returned to it in or around early September 2010. I would also add that, as Mr X's ex-wife says she returned the package, which indicates that she did not open the packages, it is unclear why you are so sure that it was a further copy of the SPIR's (in addition to those which were sent to your firm's offices) which were sent to the City M address by post.

Whilst the FSA maintain that it did not send documents to the City M address on 31st August 2010, the FSA does accept that it sent two packages to the City M address on 26th October 2010. Both packages contained copies of the WN but, as I understand it, were sent by different postal methods to ensure that the recipient received the appropriate WN. The first package was sent by Royal Mail Special Delivery (which guaranteed delivery by 1pm the following day) with the other letter being sent by recorded delivery (requiring a signature from the person receiving it).

Both of these letters were returned to the FSA. The first, the Special Delivery, letter was returned to the FSA on 29th October 2010 annotated by Royal Mail as "*refused*". This was received by the FSA on 1st November 2010. The second letter, the one the FSA had sent by recorded delivery (or signed for post) was simply returned to the FSA and annotated as "*Not at this address. Return to: Financial Services Authority, 25 North Colonnade, London E14 5HS*". The FSA received this letter on 9th November 2010.

Given this, whilst I do not dispute that Mr X's ex-wife recalls receiving two packages from the FSA, I believe that she is mistaken in her recollections of her dates these packages were received. Mr X's ex-wife clearly recalls that she received two packages from the FSA which she returned to it. On a similar basis, the FSA maintains that the only documents the FSA sent to the City M address were the WN which were sent on 26th October 2010.

Only two packages were returned to the FSA (both of which were shown originally to have been addressed to the City M address). Given that both of these packages also appear to have been returned to the FSA in the manner described by Mr X's ex-wife in her statement, on the balance of probabilities, I believe that the documents which were sent to the City M address (and which were returned to the FSA) were the WN. As such, there is insufficient evidence to satisfy me that the FSA sent further copies of the SPIRs to the City M address (in addition to those which were sent, in accordance with the FSA's normal practice, by courier to your firm's offices).

I would also add that, whilst the FSA may not have attempted to contact Mr X's ex-wife, in my view it was not necessary for the FSA to do so at the beginning of the investigation, or indeed to contact her at all. The complaint the FSA was investigating was related to the alleged delivery of documentation and as such did not relate to Mr X's ex-wife other than to establish when the alleged documentation was received. Whilst you say that the FSA's records do not, in what amounts to your opinion, provide determination that the documentation was not sent, equally the same could be said for Mr X's ex-wife's recollection of events. On the balance of probabilities I am inclined to the view that Mr X's ex-wife's statement supports the FSA's views on the documentation which was sent.

I now come to your concerns about the FSA's decision to send the WN to the City M address. In its decision letter of 2nd November 2011, it is clear that the FSA does not dispute that it sent two copies of the WN to the City M address but has set out, in some detail, why it felt that it should do so.

It is clear from your correspondence with the FSA that you believed that the FSA was aware, from previous litigation and from information held by Companies House that Mr X no longer resided in the UK. Whilst it was clear that the FSA was aware that Mr X was no longer resident in the UK, I understand that the FSA was unclear as to Mr X's actual current address. The documentation the FSA had viewed showed three separate addresses (two in another country in addition to the City M address).

As you are aware, when responding to your complaint, the FSA set out that the Service of Notice Regulations (the Service Regulations) which govern the situation under consideration:

2 Methods of service

(1) This regulation has effect in relation to any relevant document given by a relevant authority to any person ("the recipient") other than a relevant authority.

(2) Any such document must be given by one of the following methods—

(a) by delivering it to the recipient, the recipient's nominee or the appropriate person;

(b) by leaving it at the proper address of the recipient, the recipient's nominee or the appropriate person, determined in accordance with regulation 4;

(c) by posting it to that address; or

(d) by transmitting it by fax or other means of electronic communication to the recipient, the recipient's nominee or the appropriate person, in accordance with regulation 5.

(3) For the purposes of this regulation, "posting" a relevant document means sending that document pre-paid by a postal service which seeks to deliver documents by post within the United Kingdom no later than the next working day in all or the majority of cases, and to deliver by post outside the United Kingdom within such a period as is reasonable in all the circumstances.

4 Proper address for service

(1) The proper address—

(a) in the case of any person who is required by any provision of or made under the Act to provide to the Authority an address of a place in the United Kingdom for the service of documents, is the address so provided, and

(b) in the case of a person to whom no such requirement applies and subject to paragraph (3), is any current address provided by that person as an address for service of relevant documents.

(2) In the case of any person who has not provided an address as mentioned in paragraph (1), the proper address is the last known address of that person (whether of his residence, or of a place where he carries on business or is employed), or any address under such of the following provisions as may be applicable—

(a) in the case of a body corporate (other than a limited liability partnership), its secretary or its clerk, the address of its registered or principal office in the United Kingdom;

(b) in the case of a limited liability partnership or any of its designated members, the address of its registered or principal office in the United Kingdom;

(c) in the case of a partnership (other than a limited liability partnership) or any of its partners, the address of its principal office in the United Kingdom;

(d) in the case of an unincorporated association other than a partnership, or its governing body, the address of its principal office in the United Kingdom;

(e) in the case of a member of a designated professional body, if the member does not have a place of business in the United Kingdom, the address of that body.

(3) Where the address mentioned in paragraph (1)(b) is situated in a country or territory other than the United Kingdom, a relevant authority may give a relevant document by leaving it at, or posting it to, any applicable address of a place in the United Kingdom falling within paragraph (2).

(I understand that, in relation to 2(b) Butterworth's describes "*nominee', in relation to any person to whom a document is to be given ("A"), means a person ("B") who is authorised for the time being to receive relevant documents on behalf of A, to whom relevant documents may be given providing that A has notified the Authority in writing that B is so authorised, by any relevant authority").*

In the papers presented to me the FSA states that, although it was aware that you were representing Mr X, and indeed had attended and represented Mr X at a number of meetings with the FSA, the FSA had not been provided with formal notification/authority that you and/or your firm were to act as nominees for Mr X in respect of the issue of WN as required by Sections 2(2)(b) and 4(1)(b) of the Service Regulations. I would add that you only confirmed that your firm was to act as Mr X's nominee under the Service Regulations on 2nd June 2011.

It is clear from the FSA's file that the FSA was aware that your firm was providing representation to Mr X and that the PIRs and SPIRs should be delivered to your firm's offices *rather* (my emphasis) than any of Mr X's residential addresses. However, I note that at paragraph 20.2(a) of your letter of 21st December 2011 that:

> *No effort was made [by the FSA] in this email or subsequently to ask us whether any documents to be served on Mr X personally could be served on us or any other address.*

Whilst it is clear that the FSA did not, during its interviews and the subsequent meetings which took place between your firm, Mr X and the FSA's Enforcement Division, establish where any subsequent WN should be issued, it is equally clear that, although your firm was providing representation to Mr X, you did not (until 2nd June 2011 which for the avoidance of doubt was after the WN had been issued) specifically inform the FSA that your firm was to act as Mr X's nominee under the Service Regulations should a WN subsequently be issued. I have noted the comments you make at paragraph 20.2(b) of your letter of 21st December 2011 where you state:

> *Consistent with usual professional practice, once a law firm has confirmed that they were on record for an individual client that means that the law firm is instructed to accept service of any relevant documents until further notice otherwise. The FSA can not have been in any doubt about this.*

Whilst it is clear that you were representing Mr X and had acted as the 'delivery address' for the PIRs and SPIRs, the requirements of the Service Regulations are clear (under the definition of a 'nominee') that the FSA must be notified that another person (in this case your firm) could act as nominee for Mr X in relation to the service of the WN. It appears from the documentation I have seen that, although it was likely that your firm may have been authorised to receive the documents, this had *not* (my emphasis) been confirmed to the FSA. I would add here for the sake of completeness that it appears that this is accepted by your firm given that, on 2nd June 2011 (i.e. after the WN were issued and before the FSA had completed its investigation into your complaint and the Complaints Team issued you with its decision letter), your firm wrote to the FSA to inform the FSA that your firm was to act as Mr X's nominee under the Service Regulations. While I understand your reference to "*usual professional practice*" it is equally arguable that such practices are confined to litigation and do not necessarily apply to regulatory and/or disciplinary processes for the obvious reason that they are possibly punitive in the end result and it is therefore essential that the individual concerned is always informed personally unless he specifically states otherwise.

Given that the FSA had not received confirmation, until 2nd June 2011, that your firm was to be Mr X's address for the purpose of the Service Regulations (as set out in Sections 2(2)(b) and 4(1)(b) of the Service Regulations), the FSA felt that it should issue the WN both to the overseas address listed with Companies House and the last UK address the FSA held for Mr X. I would add that the FSA's decision to do this was based on its requirement to serve correctly the WN on the person who was subject to the investigation and in doing so to ensure that there could not be any future dispute whatsoever over any incorrect serving of the WN.

Whilst the FSA plainly was aware that your firm was representing Mr X, and as such a further copy of the WN was also issued to your firm for information, the FSA did not believe that this was sufficient to show that your firm was authorised by Mr X to accept service of the WN in accordance with the Service Regulations. Clearly, given the potential consequences of incorrectly serving the WN on Mr X, this, in my opinion, appears to have been a not unreasonable position for the FSA to have adopted.

The FSA has indicated in its decision letter that, prior to your firm's letter of 2nd June 2011, it has been unable to find any evidence to show that your firm had informed the FSA, prior to 26th October 2010 (when the WN were issued to Mr X), that it was to be regarded as Mr X's nominee for the purpose of Sections 2(2)(b) and 4(1)(b) of the Service Regulations. In your submissions to my office I note that you have not provided any evidence that such an authority or instruction was given to the FSA prior to the WN being issued. Given that Mr X was being advised by an individual who had considerable knowledge and experience of the FSA's Enforcement process and a good understanding of the FSA's working practice it is unfortunate that such an instruction or authority was not provided prior to the WN being issued.

Plainly as this is my Final Decision I need to pay further and particular regard to the further arguments in your letters of 1st March 2012. In essence they amount to the fundamental importance of preserving confidentiality in the context of communications such as a WN which you suggest is so important as to override other considerations. In that context you refer to a decision that I made in another case. It is important to appreciate however that each case depends on its own particular facts. I consider the essential issue in those cases gave rise to different considerations on the part of the FSA. What took place in that context should not, by assumption, be translated, in terms of actions required, into another different case scenario. That scenario carried with it different implications in the context of the Service Regulations primarily because of your client's multiple addresses as well as his overall position in the scenario in question. You add to the argument of the importance of confidentiality that there was possibly an ulterior motive on the part of the FSA in dealing with the issue of the WN in relation to the misuse of material that may have been legally privileged.

I take the view that the first argument while superficially attractive is not wholly persuasive to enable me to change my Preliminary Decision. Firstly, because in a technical sense it is axiomatic that the Service Regulations are strictly adhered to by the FSA and I do not believe that any 'nagging doubts' or otherwise persuade me that the FSA was unreasonable to act as it did. Secondly, I do not accept that "*the maintenance*" of confidentiality overrides the necessity in the case of WN the importance of complying with the Service Regulations.

The issues you raise for the first time in paragraphs 19 to 24 are presented to me in such a way that I am asked to address the issue of motivation on the part of the FSA without any reliable sustentative evidence. Indeed what is stated is, to a large extent, a matter of conjecture. There is the problem that such issues would also involve straying into an area currently before the Court. For those reasons I do not consider that they should lead me into changing my final conclusions.

It is clear that you feel that the FSA should have confirmed with your firm whether or not it was authorised to accept delivery of the WN under the Service Regulations. Ultimately, it is, in my opinion, the person who is subject to the FSA's Enforcement investigation to notify the FSA that that person has appointed a nominee to act on his or her behalf. It is clear that given that Mr X was residing overseas, was receiving representation from your firm (where you had acted as the 'delivery address' for the PIRs and SPIRs) that there may have been some doubt over the correct UK address for service, the FSA could possibly, (in line with the recommendation it made in its decision letter of 2nd November 2011) have obtained confirmation from Mr X (or yourselves) over the address to which the WN should be sent. However that is as far as the arguments presented take me. Given that the FSA has recommended that further consideration is given to establishing the appropriate delivery address in the future, I do not feel that further comment is now required from me.

Conclusion

Whilst I appreciate that you maintain that copies of the SPIR were sent to the City M address, ultimately as a result of my investigation I have to conclude that, upon the balance of probabilities, that was not the case. Whilst I do not dispute Mr X's ex-wife's recollection of the events, I have to base my findings upon all the information that I hold. In this case it is clear from her statement that she returned two packages to the FSA. Based on the comments contained in her statement and the information the FSA has provided to me it appears that the documents Mr X's ex-wife received were clearly the WN and not the SPIR.

In the absence of an instruction that the WN should have been issued to your firm, as Mr X's nominee, or to the address shown on the Companies House register, the FSA, correctly in my opinion, issued the WN to the UK address it held for Mr X. Whilst Mr X appears to have moved overseas from his City M address in early 2007 the FSA was not formally notified of this move. Mr X was of course under no obligation under the FSA's rules to notify the FSA of a change of his personal residential address.

I accept that the FSA had information to indicate that Mr X no longer resided at the City M address, the fact remains that, by not formally informing the FSA, its records still showed this as his UK residence. Whilst it was aware that Mr X was divorced, the FSA, in my opinion, acted correctly by issuing the WN to the only UK address it held for Mr X. Likewise, whilst it was unfortunate that WN were sent to the City M address, I have been unable to find anything to indicate that the FSA, by doing this has acted inappropriately. The FSA clearly has a duty to comply with the requirements placed upon it by the Service Regulations. In sending the WN to the City M address the FSA has done this in an attempt to ensure that the WN were correctly served.

You have suggested that the FSA has been inconsistent as it clarified the addresses to which Mr Y's and Mr Z's PIRs, SPIR and WN should be served. Whilst the FSA accepts that it did clarify the address to which Mr X and Mr Y wished to have the PIRs and SPIRs delivered, it did not do this in respect of the WN. The FSA tells me it clarified the address to which the PIR and SPIR were to be sent as neither Mr Y nor Mr Z were at that time receiving legal representation.

I am sorry, but having considered the matter, I am unable to find sufficient and unarguable evidence to indicate that the FSA acted inappropriately by sending the WN to the City M address. Given the potential risks failing to issue the WN to the appropriate addresses (together with the conflicting information it held), I believe that the decisions the FSA made appear reasonable in all the circumstances of this complaint for the reasons I have set out..

Whilst I accept that it may have been beneficial for the FSA to have clarified to which addresses the WN should be issued, the FSA was under no obligation to do this. I would also add at this point that, whilst you and Mr X have gone into great lengths to raise in considerable detail, your concerns over the issue of the WN to the City M address, given that these were *returned to the FSA unopened and therefore not read by any third party* (my emphasis), it is unclear to me how Mr X has been directly affected by the FSA's actions.

I have set out, at some length, my reasons for not upholding your client's first complaint against the FSA. I hope that those reasons do not appear to be in breach of the overarching demand of rationality when taken in the round. It is my view that the FSA's requirements when serving WN must in all circumstances comply with the Service Regulations. That must be its primary concern and while, with the benefit of hindsight, certain enquiries might have been made the failure to do so does not justify a decision by me to uphold your client's complaint. It could also be argued that, there were faults on both sides at the way the issue of service was left at large, namely on the part of the FSA in failing to establish whether your client had appointed your firm as a nominee and by your client/your firm by not informing the FSA that given his overseas residency your firm was to act as the nominee under the Service Regulations. One could also argue that, given that you felt that the FSA had sent the PIRs and SPIRs to your client's ex-wife's City M address in August/September 2010, your firm could (and may be should) at that point have contacted the FSA to reiterate that it was acting for Mr X and was to be his nominee for the delivery of all documents and for service under the Service Regulations. Given, that there appear to be failings on the part of both parties, my conclusion is that, when considering this matter, reliance on and compliance with the terms of the Service Regulations should therefore overall take primacy.

Nevertheless, as a result of this complaint, I am aware that the FSA has made a recommendation that where "*there is any doubt in respect of the correct address for service [of a WN under the Service Regulations] in the future, and taking account of any exceptional circumstances, the FSA should consider obtaining confirmation from the relevant party*". I concur with this recommendation.

Yours sincerely,

Sir Anthony Holland
Complaints Commissioner