



2<sup>nd</sup> April 2012

Dear Complainant

**Complaint against the Financial Services Authority (FSA)**  
**Reference Number: GE-L01385**

I write further to your email and enclosures of 27<sup>th</sup> January 2012 in connection with 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**

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

1. You are unhappy that despite bringing, what you describe as strong evidence of fraud, and maladministration on the part of regulated firm, the FSA will not investigate the matter.
2. You add that due to the impact this is having upon your family, you feel that the FSA should be made to hold that firm to account and are looking for me to recommend to the FSA that it undertakes an investigation into the fraud and maladministration that you describe..

**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". I formally record at this point given the above statutory provisions that I have found no evidence of bad faith nor have you suggested that the FSA has been guilty of bad faith on its part.

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.

### **My Position**

I have now had the opportunity to consider the contents of your emailed letter and enclosures which you sent to my office and also to review the FSA’s file relating to your complaint. From this it is clear that you have been in contact with both the FSA’s Consumer Contact Centre (CCC) and the FSA’s Complaints Team. It is also clear from the correspondence that the FSA has explained, in detail, its powers and how it conducts investigations into suspected wrong doing by the firms and individuals it authorises.

In this case the FSA has explained that under the Act it is charged with the supervision of the UK’s financial services industry. Whilst your dealings with the firm did not fall under the umbrella of a regulated activity (as commercial loans are governed by the Office of Fair Trading), as the firm was authorised and regulated by the FSA, concerns like the ones you have raised fall into the FSA’s operational area.

In this case, I understand that you originally raised your concerns with the FSA, by email, on 28<sup>th</sup> August 2010. The FSA subsequently responded to this email on 14<sup>th</sup> September 2010, where it acknowledged email, confirmed that it had passed your concerns to the relevant email (which was the firm’s Supervision Team) and that although it had done this it was unlikely to be able to provide you with any further information of what action, if any, it had taken as a result of your referral.

The FSA, as the UK’s financial services regulator, has four statutory duties which are set out in Section 2 of the Act and are described 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 does not set an order of prioritisation in which its statutory objectives must be considered and provides the FSA with a discretion over how it prioritise its objectives and how it carries out its duties stipulating only that it must 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.
- (c) the need to use its resources in the most efficient and economic way.

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 and in so doing also have regard to the manner in which it uses its resources (including both financial and human resources). In effect the FSA has to balance sensitivity and careful judgement with the statutory requirements of all of its regulatory objectives. Issues like the ones raised in your complaint therefore will inevitably involve a consideration of difficult and differing courses of action for any regulator when seeking to deal both with prudential regulation and consumer protection.

As the FSA has explained, when undertaking its statutory obligations the FSA obtains information (or intelligence) from a number of sources, including consumers. Whilst the FSA has to consider all of the information it obtains, ultimately the FSA has a discretion over how it uses this information and what further action it takes. In this instance, although the information you provided to the FSA was of a serious nature and was referred to the firm's FSA Supervision Team, upon consideration of this information (and the other information it held about the firm) it felt that it did not, *at that time* (my emphasis), feel that it was necessary to make further enquiries of the firm.

I would add here that, even if the FSA had felt that it needed to make further enquiries of the firm, these enquiries would have been limited to examining the firm's practices and conduct. Any further enquiries the FSA undertook *would not* (my emphasis) have offered you assistance in either stopping the ongoing action the firm was taking against you or help you resolve your ongoing dispute with the firm (which could be regarded as a complaint) as, under Section 348 of the Act, the FSA's findings would remain confidential (unless formal disciplinary or Enforcement action was taken and a Final Notice issued).

Parliament, in 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 exceptions, 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).

Whilst I can and do appreciate why you are unhappy that the FSA did not undertake a formal review of the firm's actions, as I have set out above the FSA considered your concerns (along with other information it held about the firm) and as a result of these deliberations felt that at that time further enquiries were not needed. Additionally, as I have set out above, even if the FSA had undertaken an investigation of the firm's actions, the FSA's investigations would not have assisted your individual case as the FSA *cannot* (my emphasis) involve itself in an individual dispute between a consumer and a regulated firm (even where there is an allegation of fraud and maladministration). Additionally, under section 391 of the Act until a Final Notice is published the FSA is simply not able to make an announcement to the general public (which includes an affected consumer who may have alerted the FSA to the concerns) of its findings and/or what action it has taken or is intending to take.

I am sorry, but, in my opinion, you have supplied insufficient, if any, evidence to show that the FSA has failed to take sufficient action to assist you. As I have indicated above, under the Act, any investigation the FSA took would be with the aim of enabling it *to take action against approved individuals and authorised firms which fail to comply with the FSA's rules* (my emphasis) and are *not* (my emphasis) to assist a consumer bring a claim against a firm (or stop a firm bringing action against the consumer).

Additionally, I also have to be mindful of the FSA's statutory requirement of using its resources (both its personnel and finances) wisely. Although you have made allegations which are of a serious nature, and submitted evidence which you believe supports your claims, I have to be mindful that undertaking an investigation is both a time consuming and expensive exercise. As such the FSA has to consider all of the evidence it holds *before* (my emphasis) undertaking such an investigation. As such, whilst the FSA clearly considered (and retained) the information you supplied, upon consideration it felt that *at the current time* (my emphasis) an investigation was not warranted.

I appreciate that in response to my Preliminary Decision you have provided, what you describe, as further examples of the firm concerned tampering with documents. Whilst you have provided this additional information, as I have set out above, although the FSA may consider this, the FSA will only be able to use this information to assist it with *any investigation in may decide it needs to undertake with the aim of enabling it to take action against approved individuals and authorised firms which fail to comply with the FSA's rules* (my emphasis) and are *not* (my emphasis) to assist you with your claim against the firm (or stop the firm taking legal action against you).

### **Conclusion**

I can understand why you feel that the FSA has not assisted you but as I have set out above, any investigation it undertook into the firm's actions would have been purely for its purposes and it would ultimately have been unable to assist you with your claim and complaint. It is clear from both your complaint and my email that you are unhappy with the actions of the firm and believe that it has acted inappropriately. I appreciate that you feel that the FSA should have acted upon the information you provided to it and whilst I can understand why you have reached that view I am happy that, upon consideration of this information, the FSA reached a decision which was reasonable in all of the circumstances and particularly having regard to the other information available to it and given its objectives of using its resources economically (taking into consideration that the FSA is solely funded by levies placed upon the UK's Financial Services industry).

From the information the FSA has provided (which I have set out above), I am satisfied that the FSA has acted appropriately when considering your referral. I am sorry that I am therefore not able to help further in this matter.

Yours sincerely



Sir Anthony Holland

Complaints Commissioner