



3rd October 2012

Dear Complainant,

Complaint against the Financial Services Authority
Reference Number: GE-L01458

I refer to your email of 20th July 2012 in connection with the above. I am now writing to advise you that I have now completed my investigation into your complaint.

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 your complaint relates to the following issues:

You state that in 2007 you approached Firm A, a firm of independent financial advisers (IFA), whom you believed had been granted an Investment Services Directive (ISD) passport by the FSA to conduct regulated activity in Spain, for advice on an income producing investment. You add that you selected this IFA as you believed that the ISD passport meant that the firm had to adhere to the FSA's rules and requirements and that it would also allow you to have recourse to the Financial Ombudsman Service (FOS) and Financial Services Compensation Scheme (FSCS) in the event that you were unhappy with the advice you received.

In 2010 you became concerned that the IFA had either misrepresented the product to you or had failed to explain correctly/fully the charges associated with the product it had recommended to you. When you contacted the firm by telephone to complain I understand that it failed to deal adequately with your complaint. When you subsequently complained in writing you were informed that the firm had cancelled its FSA authorisation and was no longer trading.

When you tried to refer your complaint to the FSCS you were told that, at the time you sought advice from the IFA, it no longer held an ISD Passport and as a result the FSCS cannot consider your complaint. As you believe that the information you were provided with at the time you received advice was misleading you complained to the FSA which has rejected your complaint.

As you remain unhappy with the outcome of the FSA's investigation into your complaint you have referred the matter to my office.

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."*

I have seen no evidence of any act of bad faith on the part of the FSA which would have the effect of bringing 3(a) above into play.

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. There is no act taken by the FSA which is incompatible with the Human Rights Act 1998 which caused you to lose your possessions as the issue you are complaining about relates to the advice you received from an IFA.

Chronology

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|-------------------------------|---|
| 20 th July 2004 | Firm A receives an Investment Services Directive (ISD) passport allowing it to undertake investment mediation activity in Spain |
| 14 th January 2005 | Firm A receives an Insurance Mediation Directive (IMD) passport allowing it to undertake insurance mediation activity in Spain. |
| Mid 2005 | Firm A produces a brochure/flyer which indicates that it has received an ISD passport from the FSA and is now able to offer financial advice in Spain and in so doing offer consumers the same protection they would receive in the UK. |

- Mid to Late 2006 Firm A sets up a Spanish subsidiary and applies for authorisation from the Spanish financial services regulator the Comisión Nacional del Mercado de Valores (CNMV).
- Firm A produces a further brochure/flyer which reiterates that it holds an ISD passport from the FSA which enables it to offer financial advice in Spain and in so doing offer consumers the same protection they would receive in the UK.
- 18th September 2006 Firm A's ISD passport expires and it is no longer authorised by the FSA to provide investment advice in countries within the EEA.
- 21st June 2007 You approach Firm A for investment advice.
- August 2007 Firm A arranges your investment with Irish Life International.
- 1st November 2007 A new European Law, the Markets in Financial Instruments Directive (MiFID), came into force which replaced the ISD.
- 17th February 2010 You make a formal written complaint to Firm A's UK offices.
- 8th March 2010 Firm A's Part IV Permissions (which allow it to undertake regulated activity) are withdrawn.
- Firm A's IMD permissions are cancelled by the FSA (although the FSA's website continues to show that Firm A can undertake insurance mediation activity in a number of EEA countries under its IMD passport).
- 9th February 2012 You make a formal complaint to the FSA.
- 21st May 2012 The FSA issues you with its decision letter which sets out its findings.
- 10th June 2012 You challenge the FSA's findings.
- 29th June 2012 The FSA updates its website removing Firm A's IMD passport.
- 10th July 2012 The FSA finalises its investigation into your complaint.
- 20th July 2012 You refer your complaint about the actions of the FSA to my office.

My Position

As part of my investigation into your concerns I have obtained and reviewed the FSA's investigation file. I have considered the comments you have made when corresponding with the FSA.

Before I comment upon the regulatory status of the adviser I have noted from your correspondence with the FSA that you are unhappy with the investment that Firm A arranged for you and have raised specific concerns that investment fund switches are not carried out in a timely manner. If, as you suggest, you feel that the investment is not being administered correctly then you should complain directly to the investment provider (Irish Life International) about this. If you remain unhappy with the outcome of Irish Life International's own investigation into your complaint you may be able to refer your concerns to the Irish Financial Services Ombudsman. Irish Life International will be able to provide you with details of how to do this.

I appreciate that you feel you were misled about the regulatory status of Firm A, but from the information you have provided, the assurances you received prior to you obtaining financial advice from Firm A appear to have come from Firm A itself and the local (Spanish) office of British Chamber of Commerce and *not* (my emphasis) the FSA. Whilst Firm A was authorised by the FSA at the time it provided you with financial advice, this authorisation was limited to its UK activities; further it is the firm and *not* (my emphasis) the FSA which is ultimately responsible for the advice you received.

In this instance, Firm A appears to have applied to the FSA for ISD and IMD passports to enable it to provide financial advice in a number of EEA countries. From the information the FSA has provided to me it is clear that the FSA granted Firm A with an ISD passport on 20th July 2004 and an IMD passport on 14th January 2005. I would add that Firm A applied to the FSA for two different passports (an ISD passport and an IMD passport) to allow it to undertake differing regulated activities in EEA countries. The ISD passport allowed Firm A to undertake investment activity (which would include the arrangement of investment contracts including investment bonds such as the one which it arranged for you). The IMD passport would allow Firm A to undertake insurance mediation activity (which would allow it to arrange protection and non-investment contacts).

Although the FSA granted Firm A with an ISD passport, the passport it provided only allowed Firm A to undertake investment activity during the period 20th July 2004 until 18th September 2006. If Firm A wished to continue to provide investment advice in Spain (or any other EEA country) after 18th September 2006 then Firm A needed to apply to the FSA for an extension to its existing ISD passport. As Firm A did not apply for an extension to its ISD passport, its ISD passport lapsed on 18th September 2006.

I would add for the sake of completeness that, as Firm A did not apply for an extension to its ISD Passport (which lapsed on 18th September 2006), the FSA has confirmed that it removed reference to Firm A's ISD passport from its register on the same date. As such, when you first contacted Firm A, in July 2007, and indeed when you received advice from Firm A, August 2007, Firm A was not authorised to conduct investment activity in Spain (or any other EEA country) by way of an ISD passport issued by the FSA.

I appreciate that you have stated, in your response to my Preliminary Decision, that no one had previously explained to you that there was a difference between an ISD and IMD passport. This is unfortunate. However, whilst it is unclear from your correspondence that I have seen whether you sought guidance on what specific activities Firm A could undertake in Spain under an ISD and IMD Passport, given the comments you made in response to my Preliminary Decision I understand that you did not seek such guidance.

I can understand why you feel that the FSA's website should have included further details of what activities a firm can undertake under an IMD or ISD passport. However, I would point out that the FSA's website confirms that, under a IMD Passport a firm can carryout regulated activity which can be described as "*Insurance Mediation or Reinsurance Mediation*". Given this description, in my opinion, it is clear that an IMD passport relates to insurance rather than investment activities.

I would also add that you say that, when deciding upon an IFA, you relied to a large extent upon the information provided to you by the Firm A. It is unfortunate that Firm A appears to have still held itself out as holding an ISD Passport (granted to it by the FSA) *after* (my emphasis) this had actually lapsed. However, this is not the fault of the FSA. As I have set out above, the FSA cannot be responsible for the actions (or comments) of an authorised firm unless the FSA itself has acted inappropriately and provided a consumer with incorrect or misleading information.

I appreciate that you have said that, when you made contact with Firm A (in June 2007) and when you accepted Firm A's advice (in August 2007), you believed that Firm A was still able to arrange investments in Spain (under its FSA authorisation by way of an ISD Passport). Although you say you held this impression, it appears that you held this view as the result of comments and information given to you by both Firm A and other organisations (based in Spain) *rather than* (my emphasis) the FSA. Indeed, I understand that, on 18th September 2006, the FSA's website was updated to reflect the fact that Firm A had not requested the renewal of its existing ISD Passport and, as a result, the FSA's register indicated that Firm A no longer held an ISD Passport and showed that Firm A now *only held* (my emphasis) an IMD passport. As such, any loss you have incurred as a result of your decision to invest a considerable amount of money in arrangement recommended by Firm A would, in my opinion, be the fault of Firm A itself and not the FSA.

Although Firm A itself was no longer able to conduct regulated investment activity in Spain under a ISD Passport after 18th September 2006, it is worthy of note that Firm A had created a Spanish subsidiary, and had applied for authorisation for this subsidiary directly from the Spanish regulator, the CNMV. Whilst it is clear that Firm A itself was no longer authorised (by the FSA) to conduct investment activity in Spain, it may be that Firm A's Spanish subsidiary had received authorisation to undertake this type of activity. As such, given that it appears that the individuals employed by Firm A may have worked for both Firm A and its Spanish subsidiary, it is possible that the investment Firm A arranged for you was actually arranged by Firm A's Spanish subsidiary *rather* (my emphasis) than by Firm A itself. If this was the case then you may be able to seek redress through the Spanish version of the FSCS.

Additionally, whilst Firm A's ISD passport had lapsed, Firm A still held a IMD passport which remained in force until Firm A's Part IV permissions were removed on 8th March 2010. As such, any review of the FSA's website between 18th September 2006 and 8th March 2010 would have correctly indicated that Firm A did hold an IMD Passport which allowed it to undertake insurance mediation activity in EEA countries such as Spain. I appreciate that you have raised concerns over the fact that, despite Firm A having its Part IV permissions withdrawn on 8th March 2010, the FSA's register continued to show that Firm A had retained its IMD Passport.

The FSA has explained that due to a computer error Firm A's IMD passport was not cancelled at the same time as its Part IV Permissions were cancelled. I am particularly disappointed that the this error occurred as the FSA is required to keep an up to date and precisely accurate register of those authorised to conduct regulated activity. Likewise, given that you have been corresponding with a number of areas of the FSA for a considerable time; it is equally disappointing that the FSA itself did not identify this error which I find highly regrettable.

Whilst I am disappointed that the FSA's register was incorrect, I would stress that the error was limited to Firm A's IMD passport. As I have explained above, Firm A's IMD passport simply related to its ability to arrange insurance based contracts in EEA jurisdictions under its FSA authorisation. As it *does not in any way* (my emphasis) relate to the arrangement of investment contracts, the fact that the register was incorrect could not have impacted upon the position you now find yourself in. Similarly, as Firm A was no longer trading, I believe that it is unlikely that any consumers would have been adversely affected by the FSA's error in this regard.

I would add that whilst, as I have mentioned above, Firm A continued to produce marketing literature which possibly appears to have been factually incorrect, this is not the fault of the FSA. The FSA sets rules by which firms must operate which cover all business activities including the production of marketing material.

Whilst the literature you have provided could possibly be construed on a *prima facie* basis to be misleading (as it suggests that Firm A was still able to arrange investments under an ISD passport after 18th September 2006) this is not the fault of the FSA. Under the FSA's rules the production of accurate and not misleading marketing literature is the responsibility of the firm producing it.

Given the large number of firms which the FSA regulates, it is simply not possible for the FSA to review each and every piece of marketing literature FSA authorised firms produce before they are issued to consumers. Instead, the FSA delegates responsibility for the authorisation of marketing material to the firm's Compliance Officer. The Compliance Officer is a senior individual (who himself has received approval from the FSA to allow him to undertake that role). However, although all of the firm's marketing literature will not have been approved by the FSA, the FSA will review a firm's marketing literature as part of the periodic inspection visits it undertakes of the firms that it authorises.

Conclusion

I appreciate that you are unhappy with the advice you received from Firm A (or its Spanish subsidiary) but as I have set out above, whilst a firm may be authorised by the FSA, it is the firm rather than the FSA who is responsible for the advice provided to consumers. In this case, it is clear that you dealt with a FSA authorised firm which had previously been granted an ISD passport which allowed it to undertake investment activity in a number of EEA countries (including Spain). However, at the time you received advice Firm A, its ISD passport *had expired* (my emphasis) and as a result it was no longer authorised by the FSA to conduct investment activity in other EEA jurisdiction.

I appreciate that you say that you believed that it still held this approval, but from the information you have provided, this confirmation appears to have been given by Firm A itself and the local (Spanish) office of British Chamber of Commerce rather than directly from the FSA. As such, whilst it is unfortunate that the information you were given appears to have been incorrect, this would not, in my opinion, be the fault of the FSA.

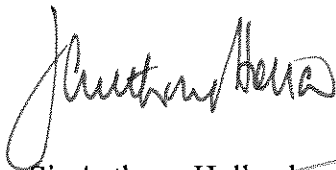
As I have indicated above, although you say you believed you were dealing with a UK based firm, I understand that Firm A had created a Spanish subsidiary and that this firm was also providing advice to consumers. As the FSA has indicated in its correspondence with you, whilst you believed you were dealing with the UK based firm, it is possible (as it appears that the individuals may have worked for both the UK and Spanish parts of Firm A) that in fact you received advice from Firm A's Spanish subsidiary. If this was the case then you may be able to seek redress through the Spanish version of the FSCS.

I am sorry but whilst you may have believed that you were dealing with a firm which was authorised by the FSA to undertake regulated (investment) activity in Spain, from the information provided to me it appears that, at the time you received advice from Firm A it was no longer authorised by the FSA to conduct this type of activity outside of the UK. I appreciate that you say that you remain a British citizen but unfortunately, as the investment was arranged outside of the UK the firm's UK authorisation is of little assistance.

As I have set out above, it may be that the firm you dealt with was actually Firm A's Spanish subsidiary and as such you may have recourse to the Spanish version of the FSCS. However, if this was not the case then an offence may have been committed as an investment contract was arranged by a firm which was not authorised to conduct this type of activity and you should seek guidance on whether you have any protection under Spanish law. I would add here that any legal advice you obtain would be at your own expense.

I am copying this letter to the FSA.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Sir Anthony Holland', written in a cursive style.

Sir Anthony Holland
Complaints Commissioner