Complaints Commissioner

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3rd December 2012

Dear Complainant,

Complaint against the Financial Services Authority
Reference Number: GE-L01476

I refer to your email of 23rd September 2012 in connection with the above which I acknowledged by email on the 24th September 2012. I have also considered all the further submissions you have made following the issue my Preliminary Decision. I am now writing to advise you that I have 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 say that you are unhappy with the outcome of the FSA's investigation into your complaint about the Product X (the Scheme) you entered into with Bank B Channel Islands (Bank BCI) a subsidiary of Bank B. You also add that the Scheme has a similar structure to an equity release investment product which was banned by the Securities and Investment Board (SIB) in 1991 (and believe that the ban of such products remains in force as it has not been lifted by the FSA).
>
> You set out that, in early 2005, you were introduced to the Scheme by an independent financial adviser (IFA) from Firm A which was a Spanish based financial adviser. However, although Firm A introduced you to the scheme, you add that your decision to invest in the Scheme was influenced significantly by a presentation made to you by somebody you believed to be from Bank B. I do not doubt that that was an easy belief for you to be left with at the time, given that this was at a seminar Firm A were holding for potential investors.

You add that, although Bank B claim that it played no part in the recommendation of the Scheme (as this was the responsibility of Firm A), given that you believed one of Bank B's directors (although in reality that was not the case) delivered a presentation and offered you specific reassurances about the security of the Product you feel that this claim is invalidated. You further argue that, although Bank B have indicated that the arrangement was made through Bank BCI, which is based in Guernsey, because the loan facility, which was an integral part of the overall arrangement, was made through the London based (and FSA regulated) Bank B, you believe that Bank B, as a FSA regulated entity, must take responsibility for the introduction, marketing and overall suitability of the Scheme for *all* (my emphasis) the consumers who became involved. This, argument takes on an aura of improbability.

Consequently, you feel that the FSA is failing in its statutory duties as it is not upholding a SIB ban on a specific type of product and, is failing to instruct Bank B to offer you (and a large number of other affected investors) the appropriate redress. You add that you are now also looking for a remedy for the inconvenience, distress and the inaction of the FSA.

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 *directly* (my emphasis) caused you to lose your possessions. Essentially the issue you are complaining about relates to the advice you received from a Spanish IFA to enter the Scheme which was introduced and marketed by a non-FSA regulated company.

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 (both before and after its investigation into your complaint).

When considering your complaint, I am mindful that a significant part of your correspondence with the FSA has surrounded the issue of the regulatory status of those who provided you with advice. In this case, it is clear from both the FSA's correspondence and the complaint you submitted to Bank B (through your lawyers) that you were introduced to the Scheme by a Spanish IFA. Whilst it is accepted that the Scheme may well have been endorsed by an individual who was a director of Bank BCI, it must be remembered that although Bank BCI is a Bank B group company, Bank BCI is a *separate legal entity* (my emphasis) from Bank B. Additionally, as Bank BCI is not based in the UK, being based in Guernsey, it is authorised and regulated by the Guernsey Financial Services Commission (GFSC) *rather* (my emphasis) than the FSA.

It is accepted that Bank BCI is a group company or subsidiary of Bank B. However, Bank BCI is based in and operates from Guernsey and does not operate within the UK. As such, Bank BCI is subject to the rules and requirements imposed by the GFSC *rather* (my emphasis) than those set out by the FSA. Therefore, rules set by the FSA, as the UK regulator, do not have any direct impact or enforceability upon the actions of Bank BCI except where they apply to the regulated activities of Bank BCI when undertaking regulated activity within the UK (which for the avoidance of doubt Bank BCI does not do).

In relation to your complaint, it is clear that you were introduced to the arrangement (the Product) by an adviser from Firm A. The Product consists of a loan facility provided by Bank BCI's parent and a supporting investment contract provided by Firm L. In your correspondence with my office you have maintained that the Product was designed by Bank B. However, following my Preliminary Decision, I understand that you asked the financial adviser *who introduced you to, and ultimately arranged* (my emphasis), your arrangement/Product to contact me and to provide me with additional information. The information your IFA has provided indicates that the Product was designed by Firm P, an Isle of Man based asset management company, *rather* (my emphasis) than by Bank BCI as you suggested. I also understand that Firm P had designed the Package with the aim of reducing the prospective Spanish inheritance tax on Spanish properties owned by UK nationals who were resident in Spain.

I also understand that Firm P offered different versions of the Product to IFAs. Whilst the nature and aims of the different versions of the product were identical, they had different lenders and investment funds. The Product which you ultimately purchased, although designed by Firm P, was *marketed and recommended to you by an adviser from Firm A* (my emphasis). In your case, the adviser from Firm A recommended that you take out Firm A's version of the Product, which was known as SPAIRS, and which utilised the loan facility provided by Bank BCI supported by an investment in Fund O provided by Firm L.

I note that you also say the Product was, in effect, endorsed to you by a Mr D who you believed to be a director of Bank B. However, although you believed that Mr D was a director of Bank B, this is incorrect as he was in fact a director of Bank BCI (although he does undertake a role for Bank B which requires him to be approved by the FSA). I accept that the Scheme formed an integral part of the Product and that the Scheme was designed and operated by Bank BCI. I also accept that Mr D was a director of Bank BCI, and also has a role with Bank B. However, Mr D was representing Bank BCI and, other than Bank B acting as the lender/financier for the arrangement you entered into with Bank BCI, there does not appear to be any *direct* (my emphasis) link between the design and marketing of the Product and/or the Scheme and Bank B.

I appreciate that you feel that, because the loan facility was provided by Bank B, it is Bank B which is responsible for the overall arrangement. The FSA has explained, on page two of its decision letter, that it's "*investigation has not set out to examine the activities or products of* Bank B *or associated firms. The function of the FSA Complaints Scheme is to investigate allegations of misconduct by the FSA and we have set out to investigate whether the information you provided was considered properly by the relevant supervisors and if the appropriate action was taken*". The FSA also added that it had "*not formed an opinion on the conduct of* Bank B *or the suitability of the product you were sold and any inference you take from our letter below in this regard is not intended*".

However, whilst the FSA could not comment upon the 'suitability' of the overall Product (i.e. the Scheme and the investment), the FSA did provide you with its view of whether it (and indeed the FOS) had any jurisdiction to consider the actions of Bank BCI and/or Bank B in the context of the provision of the loan facility. It is clear that the FSA has considered the issue of jurisdiction in some detail and has provided you with its comments, on pages three and four of its decision letter. Given that I concur with the FSA's views that, as the arrangement was promoted by Bank BCI and *not* (my emphasis) Bank B itself, the Scheme falls under the jurisdiction of the GFSC and not the FSA.

I appreciate that you feel that because the Scheme (as the mortgage or loan facility) was ultimately granted to you by Bank B (rather than Bank BCI) it falls under the FSA's jurisdiction. However, from the papers I have seen, it appears to me that, you entered into the arrangement and applied for a loan facility under the Scheme upon receipt of advice from an adviser from Firm A. This resulted in you entering into a contractual arrangement with Bank BCI which required you to obtain a loan (by way of a charge on your property) from Bank B. I would add here that it appears that the provision of a loan by Bank B appears to be a term of the Scheme and as such, and in accordance with term (g) on page two of the application form, Bank B's only involvement in the arrangement was the provision of the loan.

I can to some limited extent understand why you may feel that, as the funding ultimately came from Bank B, the arrangement you entered into should fall under the FSA's jurisdiction. However, as I have set out above, the provision of the loan by Bank B was a term and condition of the contract which you entered into with Bank BCI (and not Bank B). Bank BCI as the designer and provider of the Scheme was able to set the terms and conditions of the arrangement and in this case indicated that applicants would be required to obtain a loan from either Bank B or through a third party finance company (Company F). As such, in my opinion, the manner in which funding was obtained was simply an internal commercial arrangement between Bank BCI and Company F and/or Bank B and is therefore not a matter in which either you or the FSA can become involved. Indeed, the application form clearly includes confirmation that "*the Lender [*Bank B *or* Company F*] has acted as the provider of finance only*". That statement could not be clearer to any objective reader. As the Scheme was designed, marketed and ultimately provided by Bank BCI, I believe that it is Bank BCI which is responsible for the arrangement. This view is supported by the fact that you are receiving correspondence in relation to the Scheme from Bank BCI (in Guernsey) rather than Bank B in the UK.

In your recent letter to the FSA I note that you have commented upon the fact that the correspondence you have received from Bank BCI indicates that it is the "*Servicer and Agent of Bank B*" and I have noted your comments that this suggests that the Scheme was in fact designed by Bank B rather than Bank BCI. In my opinion, your view is, although possibly understandable, incorrect. The Scheme was designed by Bank BCI, but required a loan to be obtained from its chosen provider (either Bank B or Company F).

Given that the loan formed an essential part of the Scheme, and that funding was ultimately provided by Bank B (albeit indirectly) it is reasonable for Bank BCI to indicate that it is acting as agent in respect of the administration of the loan (as it did not directly provide the loan to you). As the funding came from Bank B, it is not inappropriate for Bank B to hold a charge against your property or for it to monitor the risk attached to the loan you hold with it. I should add this. From your IFA's comments, it is clear that the Product was designed by Firm P and that, in your individual circumstances, Firm A selected a loan facility provided by Bank BCI with an investment in Fund O from Firm L. It is also clear that it was Firm A who provided you with the specific advice that the SPAIRS scheme (as it was known to Firm A's clients) was appropriate for your individual financial circumstances. Bank B (either directly or through Company F) only provided the funding for the arrangement and *did not* (my emphasis) recommend or comment upon the suitability of the product. Neither Bank BCI nor Bank B recommended the specific investment vehicle as this was left to the Spanish IFA (albeit the selection of the underlying investment was subject to Bank BCI's approval involving the completion of credit checks).

You have disputed the view that I set out in my Preliminary Decision that it was your IFA who was ultimately responsible for the advice you were given (including the selection of the underlying investment fund). You maintain that your IFA was unable to select the investment funds (as only one fund was available) and that the Product was sold by Bank B with Firm A acting as an introducer. The information your IFA has provided, by way of a copy of Firm A's SPAIRS brochure, clearly disputes this view. The brochure indicates that the Product was marketed by Firm A and that the adviser and/or Firm A was ultimately responsible for selection of the investment fund in which you invested. Although only one fund, Fund O (in which I believe you invested) carried a capital guarantee, the brochure shows that other funds were available although these carried more risk. The copy document he provided, referring to the SPAIRS scheme states that

> "*Apart from Fund O which has a 100% capital guarantee there are no such capital guarantees with the other two investment funds. Although the funds have been selected very much with SPAIRS in mind, there is a risk, however small, that the capital growth of any fund will not, over time, achieve growth rates which will cover the interest costs of the loan*".

The application form you signed (my emphasis) clearly sets out that Firm A is acting for you and *not* (my emphasis) the ultimate lender (Bank B). I would also add that although I have considered the comments made, upon your request, by the financial adviser (whom I believed arranged the actual SPAIRS product for you that you took out) it is clear that the Scheme (or loan) application form was completed and sent to Bank BCI by Firm A. I hold this view as you indicated to my Senior Investigator in your email of 7th November 2012 that:

> "*we do not have a copy of the original application dated 20th September. We do have a copy of the revised version we signed dated 13rth March 2006, but we never received the copy signed by Bank B. We understood from Firm A that when they did get the signed copy back, there were changes that had not been approved by them or us and they returned it for it to be put right (sic)*".

In my opinion, the statements contained in the brochure together with the fact that there was correspondence between your IFA and Bank BCI (in relation to the completion of the application form) indicates to me that your IFA was acting for you and as such had a duty of care to ensure that the SPAIRS arrangement was wholly appropriate for your individual circumstances. Bank B played no part at all in any of this detail.

If my understanding of the funding arrangement is incorrect, I believe that the FSA's decision letter clearly explains that, even if the loan facility had been granted to you directly by Bank B (and not as part of a contractual arrangement you entered into with Bank BCI), the arrangement would not fall under the FSA's jurisdiction. I hold this view as the loan (or mortgage) *does not amount* (my emphasis) to a regulated mortgage arrangement as defined in the Act. The FSA can usually only intervene when a firm undertakes regulated activity.

For the loan/mortgage to fall under the FSA's jurisdiction it has to meet the criterion set out within the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO) the arrangement. In this case "*a contract is a 'regulated mortgage contract' if, at the time it is entered into, the following conditions are met-*

> *(i) the contract is one under which a person ("the lender") provides credit to an individual or to trustees ("the borrower");*
>
> *(ii) the contract provides for the obligation of the borrower to repay to be secured by a first legal mortgage on land (other than timeshare accommodation) in the United Kingdom*"

Clearly, whilst a loan or credit has been provided to you, as borrowers, there could be debate about whether this was provided by Bank B, Company F or Bank BCI in view of the interactions and internal arrangements between them. However, whilst condition (i) could give rise to an arguable position, condition (ii) has clearly not been met as the land (property) is in Spain *rather* (my emphasis) rather than in the UK. Given this, together with the fact that the loan agreement you entered into refers to the property being subject to the laws of Spain (with only the investment being subject to UK law) it is unclear how the UK based firm is able to have jurisdiction in this matter.

It is also abundantly clear from the papers particularly recently presented to me that neither Bank BCI nor Bank B directly marketed the Scheme, instead it was marketed by a number of Spanish based IFAs. When marketing the product, the Spanish IFAs gave the Scheme their own names (Firm A referring to the arrangement as SPAIRS) and recommended what they believed to be the most appropriate underlying investment funds (with Firm A recommending the Luxembourg based Investment Fund L). Although Bank BCI considered the suitability of the investment fund in accordance with its own risk profile, Bank BCI did not comment upon the overall suitability of investment for the consumers personal circumstances (as this was the role of the IFA). Additionally, I am informed that other funds could have been used *if* (my emphasis) they met with Bank BCI's credit risk profile assessment. Given that the SPAIRS brochure made reference to other investment funds it is unclear from the information available to me whether the adviser considered other investment funds and/or why he selected Fund O from Firm L as being the most appropriate investment fund for your circumstances.

I would also add that the documentation presented to me clearly indicates that the Scheme was not being promoted by Bank BCI or Bank B. Whilst I accept that Bank BCI may have place advertisements in publications, only publications which would not attract significant, if any, attention or distribution within the UK, were selected as the Scheme was *aimed entirely* at non-UK resident Spanish property owners and ultimately marketed by Spanish IFAs. The advertisements also directed consumers to Bank BCI rather and not Bank B.

In your response to my Preliminary Decision, you suggested that I should review the PowerPoint presentation slides which you say supported the hour long presentation Mr D gave to IFAs from Firm A. I have therefore done that and having viewed the slides for the presentation given in February 2006 it is clear that the presentation Mr D gave was not intended to be seen by potential investors but was purely for the IFA community. Indeed the first slide clearly states:

"FOR IFA USE ONLY – NOT FOR CIRCULATION TO THE PUBLIC"

Given this, it is clear that the presentations were for purely for IFAs to give them an overview of the Scheme and to the other services Bank BCI offered. The presentations were clearly not designed for investors. It is also unclear from your correspondence whether you attended the IFA presentation.

Likewise, despite your assertions that Mr D was acting on behalf of Bank B rather than Bank BCI the slides clearly indicate that the presentation was being made by Bank BCI and that, in making the presentation, Mr D was acting for Bank BCI and not Bank B itself. Despite your assertions that you believed that presentation (and indeed the Product) was made by Bank B, in addition it clearly makes reference to Bank BCI in that the last slide states that:

> "*Bank BCI is licensed by the Guernsey Financial Services Commission under the Banking Supervision (Bailiwick of Guernsey) Law 1994 and the Protection of Investors (Bailiwick of Guernsey) Law 1987 to accept deposits and carry out controlled investment business in Guernsey. It is not authorised under the UK Financial Services and Markets Act 2000 and accordingly the protection provided by the UK regulatory system for private clients will not apply, nor will compensation be available under the UK Financial Services Compensation Scheme. Bank BCI does not provide any advice regarding legal, tax or investment matters and all clients are advised to seek independent advice as to whether the Scheme is appropriate for their own particular circumstances prior to entering into such a facility*".

Once again it is fair to say that that could not be clearer. It is clear that, despite not being an IFA yourself, if you were at the presentation which Mr D gave to IFAs, including those from Firm A, you would have been aware that the Scheme (or loan facility) part of the product was being provided by Bank BCI and *not* (my emphasis) Bank B (even though ultimately the loan funding to take part in the Scheme was coming from Bank B).

I also understand that reference was made in the advertisements to the interested consumer seeking specific advice about the suitability of the product from a Spanish IFA. Indeed, in the flyer you provided, which includes comments from Mr D, it is clear although the Scheme part of the Product was designed by Bank BCI, it was *marketed and recommended* (my emphasis) by IFAs and it was the IFAs who were responsible for the advice consumers received. I would specifically draw your attention the comments on the second page of the 'flyer' where Mr D is quoted as saying

"Bank BCI are please to be associated with Firm A and other financial advisers in Spain who will give financial advice tailored to the circumstances of each individual property owner. Best advice may in fact result in a recommendation not to proceed with an application.

Those who do apply will receive a written report from their nominated financial adviser detailing the potential benefits as well as the associated potential risks".

Although I have noted your IFA's comments, given that the brochure provided clearly indicates that Firm A (and the adviser himself) were responsible for the advice, any statement could be seen simply to be an attempt to direct responsibility for the advice elsewhere. From this, in my opinion, it is clear that, although the underlying Scheme may well have been devised by Bank BCI, the Product as a whole was designed by a third party, but *it was the nominated financial adviser* (my emphasis) who had actually packaged the product (by selecting the Scheme and the Investment) and who was therefore ultimately responsible for providing a recommendation to the consumer. The adviser had a responsibility to ensure that the SPAIRS product (the Scheme and the investment) was wholly appropriate for the property owners' circumstances. Where incorrect advice was given, responsibility ultimately falls on the adviser rather than the product provider (which, in any event, would be Firm P as the designer of the Product). It is clear from your lawyer's letter to Bank B that you were introduced to the scheme by an adviser from Firm A, it is therefore either Firm A or the adviser himself who is responsible for the suitability of the advice you received.

I appreciate that you feel that the SIB banned products which operated in a similar manner to the Scheme operated by Bank BCI but neither I nor the FSA have been able to trace such a ban being put in place. I would add here that despite your requests that the chairman of the Equity Release Council contact either my office or the FSA with details of the ban you believe was put in place in 1991, to date he has not done so. However, I should add here, for the sake of completeness that, even if the SIB, as a predecessor to the FSA, had turned out to have instigated such a ban, as the Product was developed by Firm P with the loan being provided by Bank BCI neither are subject to FSA regulation. Whilst Bank BCI may have a FSA regulated parent firm, this does not give the FSA jurisdiction to act, particularly as the product was not marketed within the UK and does not meet the requirements of a regulated product in accordance with the RAO. As I have indicated above the information provided to me indicates that Bank B's role was purely to provide the finance for the Scheme either directly or through Company F.

By entering into the Scheme (through Firm A's SPAIRS arrangement) you entered into a contractual arrangement with Bank BCI. As part of this arrangement you were required to obtain a loan (or mortgage) secured on your property from Bank B which would, I understand, then be invested in an investment policy recommended by your Spanish IFA (Firm A). With this in mind, it is clear that the suitability of the whole arrangement (including the loan and investment fund) was *only* (my emphasis) the responsibility of the Firm A rather than the responsibility of Bank BCI or Bank B as the ultimate provider of the funds. Likewise, in my opinion, Bank B's role in this matter was *solely* (my emphasis) to provide either directly, or through the Finance Company funding to those who applied for the Scheme.

In considering your complaint, I have also considered the reference in the terms and conditions of the Scheme to the term "permitted purpose" and the impact this could have upon the Scheme as a whole. The terms and conditions of the loan describe the term "permitted purpose" as:

"*(a) to be paid to the Client's order in an amount of up to 5% of the Net Market Value; (b) to finance an investment in the Investment Fund; (c) to pay the Lender's legal costs and stamp duty incurred in perfecting security set out in paragraph 11; to pay the Arrangement Fee; and (e) to pay interest due under paragraph 5*".

I have also considered the implications of clause 3 Purpose as set out in the terms and conditions which states:

"*The First Tranche and the Second Tranche under the Facility [or loan facility that the lender makes available to the Client] will be used only for Permitted Purposes. Further Tranches may be used for any purpose*".

The FSA has considered whether clause 3 of the Loan's terms and conditions could be regarded as 'arranging deals in investments' pursuant to section 25 of the RAO. In the FSA's view this could be the case if the loan would have 'brought about' the specific transactions of buying the life assurance products. However, in the FSA's view this test requires an element of materiality in respect of the specific transactions and limiting the use of funds to buy a certain product does not seem to be material enough to bring about those specific transactions. Effectively the decision to buy the product had already been made (the Loan seems to have been merely providing finance) particularly as the product as a whole appears to have been packaged with an investment and recommended by an IFA in Spain

I have also noted your comments about the FSA's requirements of 'Treating Customers Fairly' (TCF). Whilst the TCF initiative is one which I applaud, the FSA is only able to enforce or monitor a firm's adherence to this where there is a relationship between a FSA regulated firm and a consumer. In this instance, as I have set out above, from the papers presented to me you *do not* (my emphasis) appear to have a direct relationship with Bank B as your relationship is with Bank BCI. Your relationship with Bank B is purely with it as a provider of funds under the loan facility. As I have set out above, given that the Scheme was designed by Bank BCI with BCI obtaining the funding for the arrangement through Bank B itself.

I appreciate that you feel that Bank B is ultimately responsible as, under DISP 1.1.4 "*Where a firm has outsourced activities to a third party processor, DISP 1.1.3 does not apply to the third party processor when acting as such, but applies to the firm which is taking responsibility for the acts and omissions of the third party processor in respect of the outsourced activities*". This is correct. However, in the circumstances to which you refer, it is Bank BCI which has introduced and marketed the Scheme, albeit through Spanish IFAs. As part of the contractual arrangement you have entered into with Bank BCI, you were required to obtain a loan from Bank B. In my opinion, this means that it was Bank BCI which effectively outsourced part of its activities (specifically the funding provision) to a third party (Bank B and/or Company F) and it is therefore Bank BCI which is responsible for the activities of Bank B (and/or Company F).

Although I, like the FSA, has not commented upon the suitability and workings of the Scheme itself, I hope that the considerable and detailed explanation I have set out above will assist your understanding of the reasons why I feel that the FSA does not have any jurisdiction to intervene in relation to your concerns.

I appreciate that you are unhappy that the FSA feels that it does not have any jurisdiction under the Act to intervene and feel that it has taken what Bank B has said in preference to the representations that you have made. I note from the FSA's decision letter that it has explained that it has considered fully the concerns you have raised and made a number of enquiries in relation to these concerns. I will deal with the issue of disclosure later in this letter although I can understand why you feel that that lack of disclosure indicates that the FSA failed in its statutory objectives and as a result has, amongst other things, resulted in the FSA failing to protect consumers.

I have noted your comments that you are unhappy with the situation and specifically what you believe to be the inadequate supervision of the firm and in addition that the FSA has failed to enforce a ban on a similar type of arrangement which was introduced by the SIB. From your comments it appears that you are suggesting that the FSA has 'colluded' with Bank B and that as a result ordinary consumers are not receiving adequate regulatory focus. I consider that approach wholly unsupported by any evidence. Indeed all the evidence I have referred to in what has gone before in this decision clearly indicates that your participation in the scheme was probably ill advised in the first place.

I am satisfied in that view by a further three factors:

i. you acknowledged in the documentation that the IFA was your agent and no one else's;

ii. you did not heed the statement in the document that you and your wife signed to take legal advice; and

iii. that you signed a mortgage deed over your Spanish property in a foreign language which you conceded you could not understand.

Any one of the above would mean you would be ill advised to proceed but the combination of all three made it fool hardy in the extreme.

On the general issue of protecting consumers I must go into more detail. I do that more as a need to give the fullest possible consideration to every aspect of your complaint albeit essentially what you were involved in was patently and completely outside the FSA's jurisdiction; save that the representative's position, in this unhappy investment from your perspective, might bear some investigation. That however is of no help to you. My starting point must be the Act itself. Section 2 of the Act 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 a 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. 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. That is the generic background to the issues raised by your complaint and I have borne in mind when examining in detail all the many records the FSA presented to me when I examined your complaint.

This now brings me to the issue of disclosure of what action the FSA has taken. Quite reasonably any complainant will then pose the question relevant to this issue "*well what exactly did the Regulator do when considering my complaint and the ban, which you say was introduced in 1991 by the SIB, on similar arrangements with a view to safeguarding the interests of consumers?*" In answering those questions however Parliament has imposed real restrictions upon both the FSA and myself by the imposition of section 348 of the Act as to how those questions can be answered in the case of a complainant.

As I have set out above, the FSA has been unable to trace any reference to the SIB introducing a formal ban on the arrangement of packaged investments such as the one you took out in Spain. Given this, neither I, nor the FSA, have considered the actions of either Bank BCI or Bank B in relation to the design of the product. However this does not stop the FSA considering the actions of Bank B and its subsidiaries in the context of its requirements of Treating Customers Fairly.

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 functions 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).

In this instance, while I do not believe that the exceptions apply and I cannot comment further, I do myself have the power to delve 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, although I can do this, limited, in most cases, as to the further disclosure of the details that I am informed about. I am therefore unable, directly, to answer the questions you have posed.

However, what I can say is that the FSA does appear to have carried out entirely appropriately its duties as the UK's financial services regulator. As the FSA explained in its decision letter, it made a number of enquiries of Bank B and also of the GFSC. I can appreciate that you would like me to provide further details of what enquiries it undertook (together with details of any further enquiries it may still be undertaking into Bank B), and why I have reached the conclusion that I believe the FSA was particularly active. Unfortunately, I simply am unable under the law as presently enacted by Parliament, to provide you with any further information other than to say that the FSA has given this matter a great deal of attention. I would also add that the FSA has indicated to me that it also continuing to take, what I deem to be, the correct course of action in relation to this matter. I can appreciate that all this is not the kind of answer you will wish to receive but it represents the position as I see it having regard to what I have established following my investigation. As such, given the restrictions imposed upon the FSA by Parliament through section 348 of the Act, there is little further I can add.

Conclusion

I know that you are annoyed with the advice you received to take part in the Scheme. Whilst it is clear that you believe that the arrangement may have been unsuitable for your personal situation as I have set out above, this is a concern you should raise with either Firm A and/or the specific adviser who recommended the Scheme to you. Although you feel that responsibility remains with Bank B (given that Bank B was the loan provider), but as I have explained the Scheme was designed and marketed by Bank BCI *rather* (my emphasis) than Bank B with specific financial advice being provided by Firm A.

Likewise, I can understand why you feel the FSA is not taking the appropriate action to enforce "the SIB ban". However, as I have set out above, the FSA has simply been unable to trace details of any such ban being introduced. Notwithstanding this, as I have set out above, the Scheme was designed and marketed to Spanish IFAs by Bank BCI with Bank B *only* (my emphasis) operating as financier. Given that Bank BCI is not a UK based firm, and is regulated by the GFSC, responsibility for the supervision of Bank BCI falls outside of the FSA's jurisdiction. As you entered into a contractual agreement with Bank BCI in Spain (with advice being given by a Spanish IFA) the FSA does not have any jurisdiction

I am sorry but from the information presented to me there is nothing to indicate that the FSA failed to investigate adequately your complaint or that it has failed to act appropriately upon the concerns you have raised. It is my Final Decision for the detailed reasons that I have set out that the FSA does not have any responsibility for the position in which you now find yourself. This now concludes my involvement in the matter.

I am copying this letter to the FSA.

Yours sincerely,

Sir Anthony Holland
Complaints Commissioner