



15th May 2013

Dear Complainant,

Complaint against the Financial Services Authority
Reference Number: GE-L01531

I write with reference to your letter of 16th April 2013 in connection with your complaint against the Financial Services Authority. I have now completed my investigation and issue you with my decision in respect of your complaint.

Before I do this, I need to explain my role and powers. Part 6 of the Financial Services Act (the 2012 Act) requires the regulators to maintain a complaints scheme for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions. Section 84(1)(b) of the 2012 Act provides that an independent person is appointed as Complaints Commissioner with the task of investigating those complaints made about the way the regulators have themselves carried out their own investigation of a complaint that comes within that scheme. The appointment has to be approved by H.M. Treasury. I currently hold that role.

From 1st April 2013, as part of the changes implemented by the Government, the Financial Services Authority (FSA) was replaced by the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA) and the Bank of England as regulators of the UK's financial services industry. I would add that although the FSA has been replaced, transitional provisions have been put in place to enable the continued consideration of complaints against the FSA. As your complaint relates to the inactions of the FSA, in relations to its objectives and duties under the Financial Services and Markets Act 2000 (FSMA) your complaint has been considered by me under the new transitional complaints scheme.

As set out in the consultation paper (CP12/30 Complaints against the regulators) and confirmed in the policy statement (PS13/7 Complaints against the regulators), any complaints which have not been concluded as of 1st April 2013 will continue to be investigated by the FCA Complaints Team with the cooperation of the PRA if needed and my office. In practice, this means that, although the governing legislation will have changed there will be no change to the manner in which, or the terms under which, your complaint is investigated.

Your complaint

From your correspondence with my office, I take the view that your complaint relates to the following issues:

- You are unhappy with the outcome of the FSA's investigation into your complaint about the manner in which you were treated by the FSA both prior to and after it removed your firm's Part IV Permissions.

Coverage and scope of the transitional complaints scheme

The transitional complaints scheme provides as follows:

- 9.1 *The transitional 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 under FSMA. The transitional 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.*
- 9.2 *To be eligible to make a complaint under the transitional complaints scheme, a person must be seeking a remedy (which for this purpose may include an apology) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the regulators' actions or inaction.*
- 9.3 *The transitional complaints scheme does not apply to the Bank's functions under Part 5 of the Banking Act 2009 (overseeing inter-bank payment systems) as this was not previously subject to these complaints arrangements.*

I should also make reference to the fact that my powers derived as they are, from statute contain certain and clear limitations in the important area of financial compensation. FSMA (as the relevant legislation in place at the time) stipulated in Schedule One that the FSA is exempt from "liability in damages". It stated:

- "(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 referred to FSMA here as it was FSMA which was the relevant legislation when the FSA considered your complaint. This exemption has been rehearsed in sections 25(3) and 33(3) of Part 4 of Schedule 3 of the 2012 Act. You have not adduced 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.

The transitional complaints scheme nevertheless then goes on to provide in paragraph 6.6 that:

“Where it is concluded that a complaint is well founded, the relevant regulator(s) will tell the complainant what they propose to do to remedy the matters complained of. This 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 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 conclusions 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 or which has caused you or your client to lose any possessions. When removing your firm’s Part IV Permissions (which meant that you could not conduct regulated activity) the FSA was undertaking its statutory role. I would add that, although you had the opportunity to challenge the FSA’s decision you declined to do so. This decision meant that you accepted in full the case brought against you and the penalty the FSA intended to impose.

My Position

As part of my investigation into your concerns I have obtained and reviewed the FSA’s investigation file. I have also reviewed the previous complaints you have referred to my office.

From my review of both the previous cases and your recent correspondence with both my office and the FSA, it appears that the matters you are now referring to me are those which I have previously considered (under references GE-L00722, GE-L00953 and GE-L01257). Given that I have previously considered these issues, although I have reviewed my previous investigations, I must inform you that, as my views have not changed, there is nothing further I can add and as a result I do not believe that anything would be gained by me simply repeating my previous findings in this letter.

Although you have now raised this issue again, you, once again, have not provided any additional evidence to indicate that the matter should now be re-investigated by my office. Given that it is now almost five years since this issue arose, I do not feel that further investigation of this issue by me should be undertaken or is indeed warranted. I would also add that your comments relating to the manner in which you were portrayed to the Regulatory Decision Committee (RDC), and which is linked to your comments about the conduct of the Enforcement officers involved in your case, are not something I can consider under the complaints scheme.

You had the opportunity to respond to the FSA's comments about your conduct during the RDC hearing and later, should you have wished, to refer the matter to the Upper Tribunal (which at the time was known as the Financial Services and Tax Tribunal). As that would have been the correct arena for this issue to be addressed I am not intending to make any further comment on this issue. In arriving at this view I would reiterate that the powers, as given to me by Parliament, do not extend to considering events which transpire during a RDC hearing.

I would also add that the decision to remove your firm's Part IV permissions was one taken by the RDC. The RDC was, under FSMA, established to consider the fitness and propriety of individuals (and firms) who wish to conduct regulated activity and where necessary decide upon the level of disciplinary action following an Enforcement investigation. In this case, it appears that, as the FSA felt that you were not adhering to its rules, Enforcement action was required. As a result of its investigation, the FSA (through its Enforcement Division) referred the matter to the RDC. I believe that, following a consideration of the facts presented to it, the RDC decided that your firm's Part IV permissions should be removed.

I appreciate that this may have caused you financial difficulties as you have no longer been able to conduct regulated activity (and therefore run your business). However, as I have explained above, this was the decision of the RDC based upon the representations made to it (for the avoidance of doubt this would have included any representations you wish to make). As a result, this is not something which I can consider under the powers given to me by Parliament under the both FSMA and the 2012 Act as this was a matter for the Tribunal.

Although I have not seen minutes of your RDC hearing, when considering a case, the RDC will have considered the representations made to it, the individual or firm's conduct, the remedy sought by the FSA and the potential impact this would have upon the individual and/or firm. I would reiterate that I am unable to comment on any of the specific representations made to RDC (either by the FSA or you) and the reasons why the RDC reached the decision it did. However, in reaching its decision to withdraw your firm's Part IV permissions, the RDC has carried out the functions given to it by FSMA.

I would add that, if you were unhappy with the RDC's decisions then you had 28 days to refer the matter to the Tribunal. I understand that you did not do so which leads me to the opinion that you must have accepted the RDC's findings. However, although you did not previously refer the matter to the Tribunal, I understand that it may consider referrals made to it outside of the 28 referral day period where there is a justifiable reason for the delay in referring the matter to it. I must however add that whether the Tribunal is willing consider such applications is a matter for the Tribunal to decide (although I would suggest that the Tribunal may now be unlikely to consider an application relating to decisions the FSA made almost five years ago).

I appreciate that you remain unhappy with the situation and the way you feel you have been treated by the FSA. If you felt that the FSA had acted inappropriately during the Enforcement process then the correct way to challenge that was by a representation at the RDC hearing or subsequently through the Tribunal. The Complaints Scheme which I operate is not the appropriate forum to review the actions (particularly as the events complained about occurred in 2008).

I know that you would like me to undertake a further full review of the FSA's actions but, having reviewed the papers presented to me, the issue you are raised appear to be the same as those which I considered when your previous complaints. My conclusions have not changed from those which I previously presented to you. I would also specifically draw your attention to paragraphs 6.14 and 6.8 of the complaints scheme which states:

6.14 The Complaints Commissioner will not investigate any complaint which is outside the scope of the Scheme, but the final decision on whether a particular case is so excluded rests with the Complaints Commissioner.

In my view, your complaint is essentially your displeasure that the FSA, with the agreement of the RDC, withdrew your Part IV Permissions which has had the result of you being prevented from continuing in the industry. FSMA provided clear and specific ways in which this type of decision could be challenged and it appears that you chose not to pursue these.

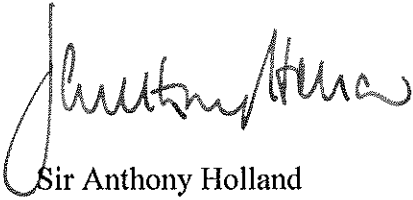
I should point out that whether a complaint is within the complaints scheme is at my sole discretion. Currently, for the reasons explained above, I do not believe that this case justifies an investigation by me.

6.8 Complainants who are dissatisfied with the outcome of an investigation, or who are dissatisfied with the relevant regulator(s)' progress in investigating a complaint, may refer the matter to the Complaints Commissioner, who will consider whether to carry out his own investigation.

This is a relevant provision as it gives me an unfettered discretion as to whether or not I carry out an investigation. I am bound to say that on what I have read the issues are the same as those which have previously been presented to me and which I have considered in some considerable detail. Given that there does not appear to be any new evidence I believe little, if anything, would be gained by further investigation by me.

I am sorry that I am therefore not able to help further in this matter. I am copying this letter to the FSA. In closing however, I would add that, I now regards my office's correspondence with you in relation to this matter as closed and as such will not enter into to any further correspondence. This is not because I wish to be unhelpful or am indifferent to your situation, simply that the issues you are raising either have been considered some considerable time ago or simply fall outside of the jurisdiction given to me by Parliament.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Sir Anthony Holland". The signature is written in a cursive, flowing style.

Sir Anthony Holland
Complaints Commissioner