Complaints Commissioner

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18th July 2013

Dear Complainant,

Complaint against the Financial Services Authority
Reference Number: GE-L01535

I write with reference to your email of 24th April 2013 in connection with your complaint against the Financial Services Authority (FSA). I have now completed my investigation and issue you with my Final 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 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 understand that:

- you were an 'investor' in the Group AW (which was trading as Firm A), which was a land banking scheme. As a result of concerns over the nature of the investments offered by the firm (and adverse press coverage) you contacted the FSA (as the then UK financial services Regulator) and provided it with information about your dealings with the firm.
- as a result of your initial contact with the FSA, you exchanged further correspondence with the FSA about your dealings with Firm A. You also offered to assist the FSA with legal proceedings it was bringing against Firm A.
- although you had offered to assist the FSA, you are disappointed with the manner in which it kept you updated on the progress of the legal proceedings and specifically the fact that it did not inform you that you were not required by it as a witness. You add that you did not know that the proceedings the FSA were bringing against Firm A had been heard in the High Court until it you saw a notice on the FSA's website.
- as you were unhappy with the FSA's conduct in this regard you complained to it. You are not satisfied with the outcome of the FCA's investigation into your complaint.
- you do not feel that the FCA has considered or addressed adequately all of the issues you raised in your complaint. Specifically you feel that the FCA has addressed the following sufficiently:
    - the FSA says that it attempted to contact you, it has not provided details of who tried to contact you and when these attempts were made.
    - you also say that you were asked to appear by the FSA as a witness in support of its case. With this in mind, you arranged annual leave for the date you were told the trial would take place so that you would be free to attend. You say that, although you had booked annual leave, the FSA did not keep you informed of developments, and ultimately did not call you as a witness. You indicate that, had you been aware that you were not needed as a witness you would not have taken the booked annual leave.
    - you add that the FCA, when responding to your complaint, did not comment about the issues you raised regarding the technical issues you say its website and electronic complaint reporting system was experiencing when you attempted to submit your complaint electronically.
    - As a resolution for your complaint you are looking for an apology and an ex-gratia payment in respect of the 'lost annual leave' and inconvenience of not being kept informed.

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 action taken by the FSA which is incompatible with the Human Rights Act 1998 or which has caused you any specific loss.

My Position

From your letter to my office you are dis-satisfied with the manner in which the FCA has investigated your complaint regarding the manner in which its predecessor, the FSA (as the UK's financial services Regulator) conducted itself and communicated with you prior to the proceedings being brought in the High Court.

From the papers presented to me it is clear that, once you became aware that the 'investment' you had made with Firm A may not have been quite what was advertised and as it was explained to you, you raised your concerns with the FSA. Additionally, as the plot of land you had purchased through Firm A was in the Newbury area, you also contacted the Newbury office of West Berkshire Trading Standards (WBTS). The FSA's records show that you first contacted it on 12th August 2011. I believe that, as a result of your contact with WBTS' Newbury office you were asked to provide a witness statement for use in the criminal case it was looking to bring against Firm A.

The FSA's file also shows that, as a result of the contact you made to the FSA, the FSA's Enforcement Division asked you to provide further information in the form of a questionnaire. This questionnaire (and associated information) was returned to the FSA in August 2012 (the FSA receiving it on 13th August 2012).

Following the return of this questionnaire you understood that you may be required as a witness in the proceedings you understood the FSA was bringing against Firm A and exchanged emails with the FSA (between 28th August 2012 and 4th September 2012) in respect of this.

In your email to the FSA of 28th August 2012 (timed at 08:48) you say:

> "*Following our conversation of a few weeks back I trust that you have received my completed questionnaire and documents.*
>
> *Can I confirm that the hearing is scheduled for 5 days week commencing 22nd October 2012? As you can appreciate I will need to book some time of work to enable me to attend the hearing if I am called as a witness*".

The FSA case handler responded to you on 4th September 2012 (timed at 17:05) in the following terms:

> "*Thank you for your email.*
>
> *The date of 22nd October 2012 is provisional, and could change at short notice. We will be in touch if a witness statement is needed, if you cannot take leave due to short notice, that is of course understandable*".

From your email to the FSA it is clear that it had not been confirmed that you were required as a witness and that you were seeking clarification of whether or not you would be required to attend as a witness. It is also clear from the FSA's response that the date of the trial was still provisional and that at that stage it had not decided if it would require you to attend.

I accept that it may have been helpful if the FSA had set out, in specific terms, whether you were or were not required as a witness. Nevertheless, it is clear from the drafting of the email that, at that time, the FSA has not decided whether it would call you as a witness. If it decided that it would, it stated that it would contact you again initially to request a witness statement from you which would be submitted to the High Court. It also indicates that unless it requests a witness statement and clarifies your availability for attendance at the High Court hearing you would not be called as a witness for the FSA.

By way of background to the overall situation, the FSA has also confirmed that, the High Court applied certain conditions to the way in which the FSA and WBTS could present its joint case. One of these conditions was to limit the number of witnesses who could be called. Although the case being considered within the High Court covered a number of land-banking schemes the FSA and WBTS were only allowed to call a combined total of 15 witnesses to give oral evidence in the hearing in respect of *all of the cases being brought* (my emphasis). This unfortunately meant that not all of the 150 consumers who had been in direct correspondence with the FSA (in addition to those which had purely been in contact with WBTS) were required to attend the High Court as witnesses.

It is unfortunate that the FSA did not keep you informed of developments, but it is clear from the FSA's email to you of 4th September 2012 that unless it contacted you again you would not be required as a witness. Given that the FSA *could only* (my emphasis) confirm the provisional date for the hearing, and emphasised that it was entirely possible that the date of the hearing could change at short notice it is unclear why you booked annual leave. Likewise, it is also unclear why, if you had booked leave for the High Court hearing, given that the actual hearing date was not confirmed to you by the FSA, you did not cancel this leave. I would also add that the fact that the FSA neither requested its own witness statement from you nor formally confirmed that you would be called as *its witness* (my emphasis) supports my view that there is nothing to suggest that the FSA misled you over your required attendance.

I know that you feel that the FSA did not keep you sufficiently informed. The FSA's email to you of 4th September 2012 sets out the FSA's position and, in effect, endeavoured to manage your expectations. I know that you feel that the FSA should have kept all those who had contacted it regarding Firm A fully informed of developments, but given the numbers involved (there were over 1,200 affected consumers and 150 who it had been in direct contact with) this was not possible.

However disappointing it may be that the FSA did not personally contact you to update you on the position, I believe that the FSA acted appropriately in this regard given the manner in which it is funded and its statutory objective of utilising its resources (resources of both a financial and human nature) wisely. You will appreciate to contact over 1,200 affected consumers would take a considerable time and incur the regulator with significant expense.

I appreciate that you believed you expected to be called as a witness in the case which was jointly being brought by both the FSA and WBTS. As I indicated above, I am aware that you provided WBTS with a witness statement. Whilst I have not been provided with details of the correspondence which WBTS exchanged with you (as my jurisdiction does not extend to considering the actions of bodies other than those which regulate the UK's financial services industry), I understand that your WBTS witness statement was included in the bundle of documents which was provided to the High Court by WBTS. With this in mind, although I am happy that the FSA did not mislead you, I cannot comment on what impression WBTS may have given you over your requirement to attend the High Court as its witness.

You say that the FSA did not respond to your emails of 22nd October 2012 and 5th March 2013. I appreciate that you say you emailed the FSA on 22nd October 2012 and did not receive a reply. While I can understand that this was disappointing, it should be remembered that the date when you say sent this email was when the FSA was actively involved with the High Court proceedings against Firm A. Whilst this should not have prevented the FSA from responding to you, given that the High Court case would take priority, a delay in responding would have been inevitable.

Although the FCA has undertaken a search for this email, it has been unable to trace its receipt. I do not dispute that you say that an email was sent to the FSA only that the FCA (as the body replacing the FSA) has been unable to trace its receipt. Without further details of to whom the email was sent, the FCA is unable to investigate further this particular matter.

Nevertheless, the FSA's file indicates that it did attempt to respond to all correspondence it received from consumers in relating to Firm A (either by telephone or by email) I believe overlooking such correspondence would have been unusual. In any event, it is unlikely to have had any significant impact upon your personal situation given that you had already invested with Firm A and the FSA was simply attempting to obtain some form of 'recovery' for consumers such as you..

The FSA's file indicates that your email of 5th March 2013 was sent to a member of the FSA's staff who was no longer involved in the Firm A investigation. The file also shows that the member of staff involved forwarded the email to a member of FSA staff who was still involved in the Firm A investigation. The FSA's records show that this member of staff called you back and left a voice mail asking you to return his call. I appreciate that you dispute receiving the voice mail.

There is therefore a clear difference of views over what actually took place. It is difficult for me to adjudicate on this point as my investigation is based upon a review of the documentation presented to me. Whilst I would normally ask the Regulator to clarify the events with the individual concerned, in this case this has not been possible, as the individual who made the call no longer works for the FCA. It is therefore not possible for me to comment further on what occurred, other than it is understandable that you are unhappy with the situation. I could allude to a number of possible explanations but these would be pure supposition on my part and nothing would be gained by me doing this.

I have also noted that you feel the FSA did not address your concerns over technical issues with the FCA's on-line complaints reporting system. It is unfortunate that you say you did not receive an acknowledgement email, but it is clear from the papers presented to me that you did receive confirmation that your complaint had been submitted (by way of the 'Thank You' page which you have printed out). I would add that the FCA's complaint file clearly shows that it did receive your complaint and had commenced its investigation *before* (my emphasis) it received your paper based complaint form.

I appreciate that you raised concerns over this in your paper based complaint form by stating that you "*submitted an online complaint form on Thursday 28th March 2013 – my complaint was never acknowledged or looked into*". As your paper based complaint form was submitted the working day after your online form it was, in my opinion, unreasonable to expect the FCA to be able to answer fully your complaint within this time period. I would, for the sake of completeness, also add that the paper based form simply rehearsed the information contained in your online submission with the exception of the additional issue (relating to the online reporting) and the utilisation of a different email address.

As part of the FCA's investigation it made enquiries of other areas to establish if you had complained previously (i.e. before you submitted an online reporting form on 28th March 2013). No record of a previous complaint could be found, and in light of the confirmation given to you during your telephone call of 15th April 2013, it appears that the FCA did not believe that further comment was necessary. I concur with this view. I would also add that, as the FCA had already commenced an investigation into your complaint it does not appear that you have been adversely affected in any way.

I appreciate that you have requested an *ex-gratia* payment as part of the resolution you are seeking for this complaint. In assessing whether I believe such a payment should be made I have to assess a number of factors which include, but are not limited to, the FSA's actions, how the impact the alleged actions have adversely affected the complainant, the impact the FSA's actions (or inactions) had on the complainant and the possible remedies available to a successful complainant (as set out in paragraph 6.6 of the rules of the complaints scheme). Paragraph 6.6 (under the sub-heading of "*[w]hat are the possible outcomes for the complainant?*") states:

> 6.6 Where it is concluded that a complaint is well founded, the relevant regulator(s) will tell the complainant what they proposes 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.

I also have to be mindful of the requirements placed upon me by paragraph 7.5 of the rules of the complaints scheme under the sub-heading of "*Stage 2: Conduct of investigations by the Complaints Commissioner*"). Here Paragraph 7.5 states:

> 7.5 In deciding whether a complaint is well founded and, if so, in deciding what steps he should recommend the regulators to take, the Complaints Commissioner will have regard to matters such as the source of the funds to make the payment as well as the desire for the regulators to be efficient and economic in the use of their resources.

The complaints scheme does not provide a legal right to compensation and it is clear from the paragragphs set out above that both the FCA and I have a discretion on whether it should make such a payment. The FSA (as the predecessor to the FCA) consulted publicly on this issue on a number of occasions before, during and after the drafting of the Act. Given that the consultation paper (CP12/30) issued in relation to the revised complaint scheme set out at paragraph 1.5 that:

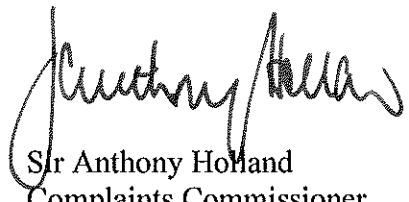
> "*In operation for over a decade, the FSA complaints scheme has been an effective and efficient way of dealing with complaints. Recognising how closely the requirements set out in Part 6 of the Bill [now the 2012 Act] mirror those in FSMA, we propose adopting a very similar approach for the new Scheme*".

Given this requirement, I believe that the FSA's Board's view, that the FSA should retain a wide discretion on whether it will make a compensatory payment on an *ex-gratia* basis following a complaint investigation, is still relevant. For the avoidance of doubt, I continue to concur with view particularly having regard to the way that the FCA is funded and the impact such payments will ultimately have on the regulated community and, therefore, indirectly, on the consumers who purchase financial services products or use services provided by regulated firms.

In this instance, although it is clear that you believe that the FSA failed to provide you with the level of service which it was reasonable for you to expect, there is insufficient, if any, evidence to show that this was the kind of case that merits any *ex-gratia* payment by the FCA. Quite apart from the factual position I have referred to the FSA's records show that it responded quickly to all the correspondence it received and, where possible (and where it was reasonable for it to do so), kept you fully appraised of developments. I would finally add that there is nothing to suggest that you have been adversely affected as direct result of the Regulator's actions or that the financial losses you say you have incurred (loss of annual leave) is a direct result of information provided to you by the Regulator.

I am sorry that I am therefore not able to help further in this matter.

Yours sincerely,



Sir Anthony Holland
Complaints Commissioner