Complaints Commissioner

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1st October 2013

Dear Complainant,

Your complaint against the Financial Services Authority
Reference: GE-L01573

I write with reference to your email of 3rd September 2013 addressed to the Office of the Complaints Commissioner. Please accept my apologies for the delay in issuing you with my Decision Letter. This delay has been caused by me requesting further information from the Financial Conduct Authority (FCA), one of the regulators which has replaced the Financial Services Authority (FSA).

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 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 together with what you suggest is reluctance by the FCA to take action against a regulated firm, 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 email I understand that you are unhappy with the outcome of the FCA's investigation into your complaint. Specifically, I understand that your complaints relate to the fact that:

- You were injured in a road traffic accident in 2006 and were suffered "*a very serious injury that needed rapid and multi-disciplinary treatment to either (a) put the injury into remission or (b) prevent the injury from becoming more severe, more debilitating and chronic*".

- You add that the "*liable insurer, part of Group A, (obviously one of the FSA's regulated businesses) undertook to treat me directly, however, as I have recently found out, this business had a pre-meditated plan not to treat me and that this was solely done so as to reduce their business costs. On top of this, the [Group A] involved in the despicable scam, inflicted deceit, incompetence, systems failure and (as the Police are investigating) even fraud against me. All the evidence of their pre-meditated plan and failures are contained in attached documentation – all the evidence is from their own documents and logs which I have managed to obtain*".

- You continue that *"[despite] being obligated to treat me, and despite promising to treat me, this Group A business carried out their secret pre-meditated plan not to treat me and deceitfully hide this from me – this has resulted in the injury becoming more serious and chronic*".

- You also allege that *"[when] I have taken the mass of evidence to the FCA they have, as all great British institutions do, done whatever they can do to do nothing about it*".

- You summarise this by stating that the "*fact is - as all the recent scandals, financial scandals, abuse scandals, Hillsborough etc - it is because our great British institutions do not do their jobs, they are stacked with people who fear to the right thing because they dare not question a 'respectable' figure/business that is committing abuse or committing a crime, that so many criminals and abusers have been able to flourish (sic)*".

- You also set out that your "*complaint is that the FSA/FCA failed to regulate (unlike many other non-financial institutions who have recognised the needs of vulnerable people and put in place appropriate regulation) businesses that deal with vulnerable people who are open to abuse as well as failing to police (regulatory failure) areas that they knew were open to abuse and that these spectacular failures allowed the terrible and evil failures that were inflicted on me by a 'regulated business' that has resulted in an agonising and chronic injury*".

- Continuing "*[furthermore], when these issues have been brought to their attention, has the FCA has had self-interest at heart by not wanting another scandal to sully the reputation of the shiny new FCA which is run by the same people who failed so catastrophically in the FSA? Not once has the FCA properly answered any of the far-reaching questions I have put to them (sic)*".

- Finally, you summarise that the complaint you would like me to consider is your view that the "*FCA final response to my complaint to them is that they believe I should have a view that I am 'disappointed' in the failures of the FCA and because I am only disappointed this is not something the FCA is obliged to investigate – these people are, in my view, a disgrace – to call the allowance of infliction of an agonising life-time injury solely so one of their regulatory charges can increase their bonuses and profits a 'disappointment' surely indicates a total lack of integrity, care, understanding and commitment to the responsibilities of their office*".

- Although you are clearly unhappy with the outcome of the FCA's investigation into your complaint, you do not set out, in clear terms, what outcome you are looking for as a result of my investigation.

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 investigation into your complaint commenced and when the events about which you are unhappy occurred. 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 (or a subsequent regulator) which is incompatible with the Human Rights Act 1998 or which has caused you to lose any possessions. Although you are clearly experiencing considerable pain as a result of the road traffic accident in which you were involved, this was neither the fault of Group A nor the Regulator.

It would appear to me that the pain you are suffering was the *direct result* (my emphasis) of the road traffic accident and the care you received immediately after this accident. I would add here that an insurance company *cannot* (my emphasis) provide health care immediately after an accident as this is the role of health care professionals.

Additionally, whilst you state in your letter that you hold Group A responsible for the pain you are suffering, it is unclear how Group A can be directly responsible given that you state that although you were "*innocently injured in a road traffic accident on the 4th October 2006 and, unbeknown to me at the time, I was the recipient of a very serious injury that needed rapid and multi-disciplinary treatment*". If such treatment was needed then this is, in my opinion, something which should have been given or recommended by health care professionals rather than an insurance provider.

My Position

From your letter to my office, and the considerable correspondence you have sent to the FSA and later to the FCA, I can appreciate why you are unhappy with the events which occurred. From this correspondence it appears that you are unhappy with the 'settlement' you received from Group A and the manner in which this settlement was 'agreed' with you. You also have concerns over the 'controls' Group A had in place and the manner in which it undertook an 'audit' of its dealings with you.

Having now had the opportunity to review FCA's complaint investigation file I note that, although the FCA has considered your concerns, and confirmed that it has challenged Group A over its conduct (and the processes it had in place) it did not confirm what action, if any it would undertake as a result of your referral to it.

However, although the FCA provided you with confirmation that it had considered the information you had provided to it about Group A, it felt that ultimately this was not something which it was able to consider under the rules of the Transitional Complaints Scheme. I believe that the FCA has relied upon paragraph 3.5 of the rules of the Transitional Complaints Scheme, as it felt that your concerns amounted ultimately to dissatisfaction with the manner in which the FSA had supervised Group A and Group A's conduct when agreeing a compensation package with you.

Having viewed the papers presented to me, as you have not provided any evidence to suggest that the Regulator has acted unreasonably, unprofessionally or alleged any other misconduct on its part, I concur with the FCA's view that it can correctly rely upon the provision contained within paragraph 3.5 of the rules of the Transitional Complaints Scheme. For completeness, paragraph 3.5 of the rules of the Transitional Complaints Scheme states:

3.5 Circumstances where the regulators will not investigate

The regulators will not investigate a complaint under the Scheme which they reasonably consider amounts to no more than dissatisfaction with the regulators' general policies or with the exercise of, or failure to exercise, a discretion where no unreasonable, unprofessional or other misconduct is alleged.

Although the FCA relied, correctly upon paragraph 3.5 of the rules of the Transitional Complaints Scheme not to investigate fully your complaints I note that the FCA provided you with additional information in relation to what enquiries it made and the outcome of these enquiries.

Although I am satisfied that the FCA undertook what I consider to be the appropriate action before (my emphasis) the matter was referred to both the FCA's Complaints Team and my office, I feel it may be beneficial if I provide you with some further details, by way of background, of the FCA's role and the procedures it adopts.

The role of the FCA, along with the other UK financial services regulators, is to regulate the UK's financial services industry. The regulators do this by setting rules and regulations with which regulated firms must comply. Given the number of firms which operate within the UK's financial services industry, the regulators are unable to monitor each and every interaction which takes place between a firm and consumer, instead a firm's Compliance Officer is charged with ensuring a regulated firm's day to day compliance with the regulators rules and regulations.

I would also add that, the investigation of individual disputes and/or complaints about the actions or conduct of regulated firms, under both the FSMA and the 2012 Act, is passed to the Financial Ombudsman Service (FOS) *rather* (my emphasis) than the regulators (which for the avoidance of doubt includes the FCA and previously the FSA). As such, any specific complaint relating to the conduct of Group A during your compensation negotiation process would fall outside of the Regulator's jurisdiction. However, whilst the Regulator is unable to consider specifically a complaint about the conduct of a regulated firm, it welcomes the provision of information from consumers about concerns they may have and will consider this information as part of its usual supervisory activities.

Unfortunately, in this case, as you were making a third party claim (under an insurance contract) against Group A (rather than a policyholder of Group A), concerns over Group A's conduct also falls outside of the FOS' jurisdiction. Likewise, as I have indicated above, the Regulator does not consider specifically complaints about the actions of firm and as such is simply unable to intervene specifically as a result of the information you have provided. However, although the Regulator cannot, under the relevant legislation, intervene in your complaint and consider specifically your concerns, it is able to consider the information you have provided as part of its usual supervisory activities and, if it deems it appropriate, act upon the information on a generic basis. This is what the FCA indicated it would do here.

I would also emphasise that this is what the Chairman of the FCA confirmed to you in his letter of 2nd August 2013. Here he stated that, following the letters both you and your MP sent, the information was passed to Group A's supervisory team which considered the information and made a number of enquires of Group A. He added that once Group A's supervisory team had received replies it would assess whether it felt further enquiries/investigation of Group A was necessary.

I appreciate you believe the evidence you have provided amounts to a systemic failure on the part of Group A and the regulator must therefore take action. However, whilst you hold this view the Regulator cannot act upon each and every referral it receives and it must assess carefully the information it receives. I would add here that neither the 2012 Act nor the FSMA set out how the Regulator assesses the information only that it places an obligation on the Regulator to assess the information.

What I can say is that the information you presented to the Regulator was considered at Board level and, as a result, was assessed carefully by the relevant Supervision Team. I would also add that the relevant Supervision Team was required to report back its findings to the FCA's Board.

I appreciate that you feel the Regulator, to your knowledge, has neither instigated a formal investigation nor taken action against Group A, it is not ensuring that regulated firms comply with its rules. As I have indicated above, the taking of action against a firm (and the level of any sanction applied as a result of that action) is a matter for the Regulator's judgement following consideration of all of the evidence available to it. In this case, I (like the FCA itself) can confirm that it considered thoroughly the information you provided (together with other information it holds (some of which it may not be possible to place in the public domain due to the confidentiality restrictions imposed upon the Regulator by both the FSMA and the 2012 Act). I would also add that my role is to review the manner in which the relevant Regulator has investigated a complaint rather than to review decisions and judgement the relevant regulator made as part of its regulatory function.

I appreciate that this may appear to be an unsatisfactory position for a complainant however, when commenting on this, my starting point must be FSMA itself (as this was the legislation which was in place when you first referred the matter to the Regulator and is the basis for the current legislation). Section 2 of the FSMA sets out the Regulator'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 Regulator 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 Regulator's regulatory powers (and a judgement concerning how it acts) and the protection of consumers. In effect the Regulator had 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 Regulators have now presented to me when I examined your complaint in all its detail.

Next I turn to the issue of disclosure of what action the Regulator took. A complainant may pose the question "*why did the Regulator not take action to safeguard fully my interests?*" In answering that question however Parliament has imposed real restrictions upon both the Regulator and myself by the imposition of section 348 of FSMA as to how that question can be answered in the case of a complainant. I would add that these restrictions have been repeated in section 18 of Part 2 of Schedule 12 of the 2012 Act and apply to all of the new Regulators.

In summary, Parliament by virtue of Section 348 of FSMA (and section 18 of Part 2 of Schedule 12 of the 2012 Act) imposes upon the Regulators (both past and present) 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 Regulator 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).

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 Regulator has done (and may be continuing to do). 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, from the information the Regulator has freely provided to me, it does appear that it has carried out appropriately its duties under both the FSMA and the 2012 Act. Although I cannot comment in depth on what action and why it arrived at the decision it did, I can confirm that the information provided to me indicates that the Regulator considered in considerable detail all of the information presented to it. Following its own enquiries I believe that the Regulator undertook what I consider to be reasonable course of action and arrived at a judgement which does not, to me, appear to be irrational.

Whilst I am limited in respect of what additional detailed information I can provide to you, I feel that I should set out that I am particularly drawn to this view as a result of the information which the Regulator has given to me and the issues which you have raised. It is clear from your complaint that you are unhappy with the conduct of Group A, but is unclear to me how Group A's actions have directly resulted in the position you now find yourself as a result of your injury which arises directly from a road traffic accident. However, I am aware that you are unhappy with the settlement process and feel that Group A has acted inappropriately in this regard.

For the avoidance of doubt I would reiterate here that the FCA *has considered* (my emphasis) the information you have provided and, as a result of its consideration and enquiries, taken a course of action which does not to me appear to be unreasonable or irrational. I appreciate that you remain unhappy but, as I have set out above, *the legislation does not allow* (my emphasis) the Regulator to intervene in a dispute between a consumer and a regulated firm.

I would also add that whilst you have indicated that you are unhappy with Group A's actions in respect of your injury, it is unclear what remedy you are seeking from the Regulator. I appreciate that you feel there have been systemic breaches of the Regulator's rules and that you have suggested that the Regulator should instigate an investigation into Group A's actions.

I must add here, for the sake of completeness, that even if the FCA's enquiries did suggest that Group A had breached its rules and regulations, any investigation which was undertaken would *not* (my emphasis) result in a review of the compensation you received. As such if you feel that the compensation you received did not address adequately your injury then this is something which you would need to challenge Group A about yourself. I would also add that as Group A has indicated that the compensation paid it has already paid to you was paid in full and final settlement (which I know is something you do not accept) then I can only suggest that you obtain legal advice on this particular issue. Any legal advice you obtain will be at your own cost.

Although I have concurred with the FCA's decision that in accordance with Paragraph 3.5 of the Transitional Complaints Scheme this is not something which can I can consider there is a further point that I feel I should make. Given that there is nothing to indicate that you have suffered any "*inconvenience, distress or loss*" resulting directly from the regulators' actions (as the inconvenience you have suffered was caused by the driver of a car insured by Group A) your complaint is not, in my opinion, something which I can consider under the rules of the complaints scheme. 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 FCA will not confirm publically what action it has taken against Group A in response to the information you have provided suggesting that what had happened to you was "*not primarily a financial crime, it has been about A Firm, in a pre-determined strategy, injuring someone purely for greed for bonuses and profits – and The Regulator has created and fostered the environment in which these 'evil acts', that are divorced from civilised humanity, have occurred*". While I may have some sympathy with that view it does not bring the issue into my complaints scheme.

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. It may be that this view may change in the future but on the evidence currently available, that remains my view.

> 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. On what I have read there is no evidence of any wrong doing by the regulator, the firm or indeed the reviewer. Whilst you remain unhappy with the position, the FCA, as the Regulator, has considered your comments and set out its position.

I am sorry, but there is nothing to indicate that the FCA has failed to investigate adequately your complaint or that it has failed to act appropriately upon the concerns you have raised. With this in mind, I do not feel that further investigation or comment by me is necessary and I am therefore filing my papers.

Whilst I concur with the FCA's decision that this is not something which can be investigated under the rules of the Transitional Complaints Scheme I hope that my comments have provided you with further clarification and understanding of the events which transpired in this unhappy matter.

Yours sincerely,

Sir Anthony Holland
Complaints Commissioner