Complaints Commissioner

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Dear Complainant,

Your complaint against the UK's Financial Services Regulators
Reference Number: FSA01591

I write with reference to your letter and enclosures of 28th October 2013 addressed to the Office of the Complaints Commissioner.

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 charged 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, in relation 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

You set out that in 1986 who took out a unit linked whole of life (WoL) life assurance policy as you believed that a WoL policy offered better long-term benefits than a term-assurance policy. You add that although the cover provided and the premium and cover the policy provided increased annually the policy was also subject to five yearly reviews which assessed both the premium and level of cover the policy could provide. Although for the first 25 years the policy had performed as you had expected, the 2011 five yearly review highlighted that the policy, in its current form, was now unable to provide the expected benefits. Given this, the provider offered you two options, either increase (double) the premium to maintain the cover or reduce (halve) the cover provided by the policy.

As you felt that the policy had been mismanaged you complained to the Financial Ombudsman Service (FOS) which, I believe, did not uphold your complaint. As you felt that the situation came about as a result of the regulation of the UK's financial services industry, you complained to the Regulator. In your letter to my office you set out the complaint you made to the Regulator in the following terms:

- your belief *"that the insurance company has acted in the way that it has as a result of failing within the regulation system (sic)*";
- in your complaint to the FCA you "*alleged that, in this case, the principles of the FCA were not being upheld due to a lack of care, a bias towards endowment policies and a failure*".

In your complaint you set out your displeasure with the outcome of the FCA's investigation in the following terms:

- in the "*FSA's response 14th February 2013 they did not reflect upon our complaint accurately, they tried to represent it as a complaint against the FOS rather than the FSA. They said that they could not investigate our complaint due to the lack of evidence even though the online form did not allow for attachments and we had listed the evidence that could be made available (sic)*".
- the "*FSA letter having dismissed our complaint due to lack of evidence then goes on to describe the FSA's bias towards endowment policies in the further information section and tries further to justify it by claiming that people who have taken whole of life policies are a relatively minor group*".
- as "*we are not satisfied with the response we had received and felt the need to write again to the FCA*". You are unhappy that the FCA, in its response to you of 30th July 2013, summaries your complaint as general "*'dissatisfaction with the [Regulator's] general policies or with the exercise of, or failure to exercise, discretion where no unreasonable, unprofessional or other misconduct is alleged'.*
- you add that you do not accept this as:
    - you believe that "the regulation of an insurance company (sic) should not be at the discretion of the FCA".

- although "*the financial services sector is a large area for the FCA to cover and that they may need to prioritise their resources, we believe that consumers like ourselves should at the very minimum have the right to an effective complaints procedure that would addresses non-conformances and uphold the principles of the regulator (sic)*".
- you believe you "*had a valid complaint against our insurance company that should have been upheld by either the FCA or by the nominated complaints handler (the FOS)*".
- you "*believe the FCA have acted unprofessionally in not providing an effective complaints procedure*".
- you also add that you "*took out insurance policy out in good faith at a young age to provide long term financial security for our family at a time when we had relatively little income. We could have opted to take out a cheaper termed insurance and paid off our mortgage. We feel that have been let down and misled by the insurance company, that our complaint has not been properly addressed (sic)*". You also add that you "expect the next annual statement from the insurance company (sic) to continue to be in breach of several of the FCA's principles".

As you are unhappy with the situation you have referred the matter to me for attention.

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 you first raised your complaint and when the actions 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. I would add here for the sake of completeness that you have not alleged that the FSA (or the FCA) acted in bad faith nor have you 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 views in this matter, that Article 1 of the First Protocol has no application in your case. There is no act taken by the Regulators (either the FSA or the FCA) which is incompatible with the Human Rights Act 1998. The actions about which you are unhappy are, in my opinion, arose ultimately from the actions of the provider of your WoL life assurance policy, in relation to the manner in which it 'priced' your policy and your life assurance provider's decision, arrived at during the contractual 2011 review, that it was no longer able to provide the required cover at the current premium.

My Position

As part of my investigation into your concerns I have obtained and reviewed the FCA's investigation file. In reviewing your complaint I have considered the comments you have made when corresponding both with the Regulator's Complaints Team and my office.

I appreciate that you feel that the Regulator has a 'bias' towards endowment policies and feel that the Regulator should instigate a review of WoL policies as it did with endowments policies. Although I have noted your comments I feel that I should set out that the two policies *are completely different and have different aims and objectives* (my emphasis). It will be useful if I comment generally on the type of product you took out. I do this for the sake of clarity and in support of the comments I will make later in this Decision Letter.

The aim of a mortgage linked endowment policy is to provide life cover (equal to the amount of the mortgage advance) over the entirety of the term of the policy and then, at maturity, provide a lump sum which is aimed to be equal to or greater than the value of the loan. In other words, when the mortgage term finishes so does the life of the endowment policy and the proceeds of the latter recoup, in theory, the former. The aim of the WoL policy is to provide a lump sum upon the death of the life assured. The two policies are therefore totally different products and that needs to be clearly understood.

I would also add that I am aware that life assurance providers offer a number of different types of WoL policy which are designed to meet the needs of different consumers. From the papers presented to me it appears that, in 1986, you took out a joint life, first death WoL policy which had an investment element (purchasing units in the provider's "Managed" investment fund), provided increasing (index linked) cover but was reviewable. As I have indicated above a joint life first death whole of life policy is designed to provide a lump sum to the survivor on the death of one of the lives assured. Where a WoL policy has an investment element, the policy may accrue a surrender value and may also allow the provider to offer a lower premium (than those offered to similar non-investment based policies) as some or all of the any underlying investment (or surrender) value may be used to meet part of the cost of the life cover the policy provides.

In situations where the WoL policy is reviewable the providers *may have the contractual ability* (my emphasis) to review the underlying costs (i.e. the price of the life assurance), the premium and/or the cover the policies provide at these intervals. As I understand from your letter that your policy was reviewable and it was subject to five yearly reviews (after the first 10 years) your policy may fall into this category. I would add that such reviews are based upon the cost of providing the required level of cover, the premium being paid and the 'value' of the policy (which is related to the value of the underlying investment).

In this case, it appears that although the 2006 review showed that no alterations were required to the policy, when the 2011 review was undertaken, the provider felt that it was no longer able to provide the required level of cover unless the policy features (i.e. the premium and/or life cover) were altered, I presume, in accordance with the policy conditions. From the limited information provided to me it appears that the provider of the policy has acted in accordance with the terms of the policy.

It is unfortunate that the provider of your WoL policy was no longer able to provide the benefits that you expected from the current premiums, but given the information provided it does not appear to me that the Regulator has acted in appropriately. The policy is *designed* (my emphasis) to provide a lump sum on the death of one of the lives assured but, as it appears to be is subject to regular reviews, is therefore subject to alteration by the provider. Given that these are features of the product insufficient evidence has been provided to me to indicate that the review is the *direct result* (my emphasis) of any failure by the Regulator.

I would also add that if you feel that the possible implications of a five yearly review were not made sufficiently clear to you when you took out the policy then this is a matter which you should refer to the advisers who arranged the policy for you or, in the event of the firm no longer being trading, the Financial Services Compensation Scheme. Likewise, if you feel that the provider is not complying with the Regulator's principles then this is amounts to a dispute between the provider and you and is therefore not something in which the Regulator itself can become directly involved and, as a result, it is something which you need to raise with the provider and, if you remain unhappy, the FOS. I would however add that, although the Regulator cannot itself intervene in disputes like this, the information you have provided has been passed to the provider's Supervision Team for further consideration

I appreciate that you feel that the Regulator has not investigated this matter appropriately, but I must disagree. In situations like this, the Regulator's role is to assess the information it receives, and then to take the course of action it deems appropriate. In this case, I am satisfied that the Regulator, having assessed the information it received, has taken a course of action which appears appropriate in the circumstances. I appreciate that you say also that you do not feel that the Regulator should have a discretion over how it carries out its role. Whilst you are entitled to hold this view I would draw your attention to the Regulator's general duties which were set out in Section 2 of FSMA (as this was the relevant legislation which was in place at the time you first raised your complaint with the Regulator) and are described 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 FSMA required the Regulator to discharge the regulatory objectives, an order of prioritisation in which the statutory objectives must be considered by the Regulator was not set out within FSMA. Instead FSMA provided the Regulator with a discretion over how it prioritised its objectives and how it carried out its duties stipulating only, in Section 2(1), that it must act in a way which:

(a) was compatible with the regulatory objectives; and

(b) the Authority considered 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 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.

The manner in which the Regulator has acted is, in my opinion, fully consistent with these objectives and obligations. The Regulator has assessed your concerns and referred them to the appropriate area of the Regulator (namely your life assurance provider's Supervision Team). The fact that the Regulator has not taken the action that you hoped it would *does not* (my emphasis) mean that the Regulator has failed to comply with its statutory obligations.

Likewise, you also say that you believe you "*had a valid complaint against our insurance company that should have been upheld by either the [Regulator] or by the nominated complaints handler (the FOS)*" and that you "*believe the FCA have acted unprofessionally in not providing an effective complaints procedure*". Although you are clearly unhappy with the decision the FOS has made, this was a decision made by the FOS *rather* (my emphasis) than the Regulator. Under the relevant legislation (FSMA and the 2012 Act) the Regulator is charged with the regulation of the UK's financial services industry whereas *the legislation rather than the Regulator* (my emphasis) charges with FOS with the investigation and resolution of disputes between regulated firms and consumers. I would add that the Regulator has correctly set out that complaints about the actions of and decision made by the FOS cannot be considered under the rules of the new Transitional Complaint Scheme.

Conclusion

I have set out above, in considerable detail why I feel that the Regulator has acted appropriately when assessing your complaint. Whilst I can appreciate why you remain unhappy that the premium payable to or benefits available from your WoL policy must change I do not believe that the concerns you have directed to my office are ones that I can consider under the rules of the new Transitional Complaints Scheme. In addition, 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 can be broken down into two parts. The first is essentially your displeasure that the Regulator will not instruct the provider of your WoL policy to continue to provide the cover that it did prior to the 2011 review without increasing the premium. Secondly that the Regulator will not instigate the industry wide review that you believe is necessary in light of your own personal position and the recent experiences you have had as a result of the policy review which your life assurance provider carried out in 2011. While I understand your view, it does not bring the issue into the new Transitional Complaints Scheme.

I should point out that whether a complaint is within the new Transitional 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. On what I have read there is no evidence of any wrong doing by the Regulator as your complaint ultimately stems from your displeasure with the options your life assurance provider has given you following the contractual and periodic review it carried out in 2011 which ultimately related to the 'pricing' of the benefits available to you from your WoL policy.

I am sorry, but there is nothing to indicate that the Regulator has failed to investigate adequately your complaint, that it has failed in respect of the regulation of the industry or that it has failed to act appropriately upon the concerns you have raised in what, in my opinion, amounts to be nothing more than a dispute between you and the provider of your WoL assurance policy. With this in mind, I do not feel that further investigation or comment by me is necessary and I am therefore filing my papers.

Yours sincerely

Sir Anthony Holland
Complaints Commissioner