

6th February 2014

Dear Complainant,

Your complaint against the Financial Services Authority
Reference Number: FSA01602

I write with reference to your email of 21st January 2014 addressed to the Office of the Complaints Commissioner.

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 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 Financial Services Authority (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 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 (together with any complaints made about the FSA after this date) 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 recent letter, I understand that you are unhappy with the Regulator's decision to rely upon paragraph 3.3 of the rules of the Transitional Complaints Scheme not to investigate your complaint about the actions of your firm's bank (Bank L). Specifically you appear to be unhappy with Bank L's decision to appoint an LPA receiver together with the subsequent decisions taken by Bank L and the LPA receiver to seek to take control of your business.

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 views in this matter, that Article 1 of the First Protocol has no application in your case. There is no act taken by the FSA (or indeed by the FCA) which is incompatible with the Human Rights Act 1998 which directly caused you to lose your possessions.

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. My rationale for arriving at this decision is set out below.

My Position

As part of my investigation into your complaint I requested a full copy of the Regulator's complaint investigation file. From the papers presented to me I understand that your complaint ultimately relates to the actions of and decisions taken by a regulated firm to appoint an LPA receiver to your business as the result of what I assume was a default on a loan which was secured upon your business.

I would add that it also appears that the actions about which you are unhappy occurred in 2011. This is important as, in accordance with paragraph 3.3 of the rules of the Transitional Complaints Scheme, a complainant has 12 months to refer their concerns to the Regulator. For the sake of completeness paragraph 3.3 of the rules of the Complaints Scheme states:

“3.3 Complaints should be made within 12 months of the date on which the complainant first became aware of the circumstances giving rise to the complaint. Complaints made later than this will be investigated under the Scheme only if the complainant can show reasonable grounds for the delay”.

From the information you have provided it is clear that the conduct about which you are unhappy occurred in early to mid-2011 and that, whilst you may have asked the Regulator for some guidance at this time, you did not complain to the Regulator until December 2013. As such, given that you did not formally complain for around 18 months after the events about which you are unhappy occurred, I believe that the Regulator has correctly relied upon paragraph 3.3 of the rules of the Transitional Complaints Scheme to not investigate your complaint.

I would also add that, although you are understandably unhappy with the decisions taken by Bank L, it is the actions of Bank L and the LPA receiver *rather* (my emphasis) than the actions of the Regulator which ultimately resulted in your bankruptcy. Whilst the Regulator is charged with overseeing the UK's financial services industry, the Regulator cannot oversee each and every interaction and exchange which takes place between a regulated financial institution or firm (in this case Bank L) and UK consumers (such as you). Where a consumer is unhappy with a regulated firm's conduct then the consumer should refer the matter to the Financial Ombudsman Service (FOS) which is the body charged by Parliament with the adjudication of disputes between financial services firms and their consumers.

From the information *you have provided* (my emphasis) I believe that you have referred the matter to the FOS and that the FOS has confirmed that Bank L acted appropriately given the information presented to it. I appreciate that you dispute this decision but, regrettably, this is not a decision which I can review under the legal jurisdiction which Parliament has given to me. I would add that, whilst you maintain that Bank L's actions breached a number of the Regulator's principles of business, this would not appear to be a decision with which the FOS concurred.

When assessing this complaint, I am also aware that you have referred to the findings Lawrence Tomlinson's reached in his 2013 report entitled *“Banks' Lending Practices: Treatment of Businesses in distress”*. Whilst I do have some sympathy for the position you now find yourself in, given the findings made by the FOS, there is nothing to indicate that Bank L (or the LPA receiver) acted inappropriately. Additionally, as I have indicated above, given that the issues giving rise to your complaint appears to be a dispute between a financial institution and a consumer (which includes small and medium sized enterprises (SME)), it is a matter in which the Regulator is *unable* (my emphasis) to intervene.

For the avoidance of doubt, even if Bank L had made inappropriate decisions in relation to the appointment of an LPA receiver and the takeover of your business in 2011 (and I must stress here that this is not something which I have considered as it falls outside of my legal jurisdiction) then the Regulator *would not* (my emphasis) be able to intervene. As I have set out above, under the governing legislation a dispute between an individual consumer (including a SME) and a regulated financial institution is a matter which falls under the jurisdiction of the FOS or alternatively is something which could possibly be challenged through the Courts (although this a step which should only be taken after independent legal advice has been obtained).

Conclusion

When arriving at my decision I have to consider the Regulator's jurisdiction, procedures and position together with the rules of the Transitional Complaints Scheme. In this situation, the Regulator has assessed its decision in line with the rules of the Transitional Complaints Scheme (i.e. as the complaint was not raised with the Regulator within 12 months of you being aware of the issue which gave rise to your complaint, the Regulator has excluded your complaint from consideration under the Transitional Complaints Scheme).

Additionally, as I have indicated above, whilst the Regulator has a statutory duty to regulate the UK's Financial Services Industry it is unable to intervene in what amounts to individual disputes between consumers (including SMEs) and financial institutions. If you felt that Bank L, in its actions, was breaching a number of the Regulator's principles of business (and has documentary evidence from the Regulator to support this view) then this is something which you should have raised with Bank L and the LPA receiver at the time. It is also something which should have been raised by you in the complaint you subsequently referred to the FOS.

I appreciate that you have also raised concerns over the Regulator's refusal to regulate commercial lending and the inability of the FOS to consider what amount to complex complaints. Unfortunately, as I have indicated above, these are not issues which fall within my jurisdiction. I would however add that the Regulator's powers and responsibilities stem from the governing legislation, the 2012 Act, which (as highlighted in evidence recently presented before the Treasury Select Committee) does not extend to the regulation of commercial lending. As the Regulator's powers are granted by legislation, Parliament's intervention is needed if the Regulator's jurisdiction is to be extended. This is not something the Regulator can do on its own.

Likewise, if you feel that the FOS made mistakes when considering your complaint you may be able to refer the matter to Amerdeep Somal who is the FOS' Independent Assessor. Ms Somal may be able to review the manner in which the FOS considered your complaint (although she will be unable to review the overall decision the FOS made). Ms Somal can be contacted as follows:

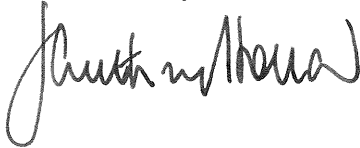
The Independent Assessor
PO Box 35738
London E14 9YU

email: independent.assessor@financial-ombudsman.org.uk

It is my Decision that I am unable to reach a conclusion that the Regulator's decision to relying upon paragraph 3.3 of the Transitional Complaints Scheme means that it did not adequately consider your complaint. I would also add that, from the papers presented to me, there is nothing to indicate that the Regulator should have (or indeed could have) intervened in Bank L's decision to appoint a LPA receiver or to take control of your business.

I am sorry but it is my Decision for the detailed reasons that I have set out above that the Regulator does not have any responsibility for the position in which you now find yourself. I am copying this letter to the Regulator.

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