Complaints Commissioner

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19th March 2010

Dear Complainant

Complaint against the Financial Services Authority
GE-L0905

This letter now sets out my final decision on the complaints you have raised.

I am charged, under Paragraph 7 of Schedule 1 of the Financial Services and Markets Act 2000 (the Act), with the task of investigating those complaints made about the way the FSA has itself carried out its own investigation of a complaint. The investigations I undertake are conducted under the rules of the Complaints Scheme (Complaints against the FSA - known as COAF) which is a Statutory Instrument which derives the powers it contains from the Act. I have no power to enforce any decision or action upon the FSA. My power is limited to setting out my position on your complaint based on its merits and then if I deem it necessary I can make recommendations to the FSA. Such recommendations are not binding on the FSA and the FSA is at liberty not to accept them. Full details of Complaint Scheme can be found on the internet at the following website; http://fsahandbook.info/FSA/html/handbook/COAF

I should also make reference to the fact that my powers derived as they are, from statute contain certain limitations in the important area of financial compensation. The Act stipulates in Schedule One that FSA is exempt from "liability in damages". It states:

> *"(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 of 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 of omission was unlawful as a result of section 6(1) of the [1998 c.42] Human Rights Act 1998."*

COAF nevertheless then goes on to provide that in paragraph 1.5.5 that:

> *"Remedying a well founded complaint 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 the FSA decides not to uphold a complaint, it will give its reasons for doing so to the complainant, and will inform the complainant of his right to ask the Complaints Commissioner to review the FSA's decision."*

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 respectively in Article 8 and Article 1 of the First Protocol set out in the Human Rights Act of 1998. Article 8 provides:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

While 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. I deal with the issue of Article 8 later in this decision.

Background

The relevant facts are easily set out. The FSA have noted in documentation to you that you are the sole director and shareholder of Firm A, a mortgage broker operating in Yorkshire. With effect from 16th February 2007 you were approved to perform prescribed controlled functions. Your wife, Mrs X, is an employee of Firm A.

On the 10th April 2008 investigators from the FSA made an unannounced visit to your home address, serving you with a First Supervisory Notice, this notice removed all regulated activities from Firm A with immediate effect. You were both also served a Warning Notice, proposing to prohibit you both from performing any function in relation to a regulated activity. On the same day your home was searched by the FSA. Following information you provided that morning, another address was searched at a nearby business park. The search of your home is a key element of your complaint, and I shall return to this issue later.

On the 9th July 2008 a second Supervisory Notice and a Decision Notice was served on Firm A. Decision Notices were also served on you and your wife, which informed you of the decision to make a prohibition order against both of you.

On the 11th August 2008, Final Notices were issued in respect of the Decision Notices already issued to you. The Final Notices informed you that you had not referred the Decision Notices to The Financial Services and Markets Tribunal (the Tribunal) within twenty eight days of the date on those decision notices as was your right. It should be noted that as you did not refer the matter to the Tribunal, the Regulatory Decision Committee (RDC) and the FSA are entitled to regard the allegations put forward by the FSA against you and your wife as being "undisputed". The effect of this is that the permissions of Firm A have been cancelled and both you and your wife are currently subject to Prohibition Orders.

The Complaint

The FSA split your complaint into four elements, which it investigated, and in its decision letter 10th July 2009 the FSA provided you with its position on those four elements. It should be noted that in its letter of 11th November 2008 the FSA set out these four elements of complaint and asked you whether its assessment of your complaint was correct. On 22nd November 2008 you responded stating that you "confirm understanding of our complaint" although you later noted that you may bring elements one and two to this office for consideration. You then provided further comment on elements three and four. The FSA's four elements of complaint were;

1) You allege that the FSA's Enforcement team did not follow the correct procedures when carrying out their investigation.

2) You allege that you were not offered the opportunity for early settlement by the FSA's Enforcement team.

3) You allege the FSA's Enforcement team illegally executed a search warrant at your home address.

4) You are unhappy with the tone of the letter you received from a member of the Enforcement team.

After receiving the FSA's decision letter 10th July 2009, you wrote to this office with your concerns about the FSA decision and have made some further points to this office. I will turn to these in due course.

The FSA Position re Element One

In its letter of 11th November 2009 element one was noted as being that "You allege that the FSA's Enforcement team did not follow the correct procedures when carrying out their investigation". The FSA, in that letter, have stated that it is unable to investigate this element of complaint as it is "excluded" from investigation under COAF clause 1.4.3 which states;

> ***"The FSA will not investigate a complaint under the complaints scheme which it reasonably considers could have been, or would be, more appropriately dealt with in another way (for example by referring the matter to the Tribunal or by the institution of other legal proceedings)."***

My Position re Element One

When the FSA do not investigate complaints, it is my role to look at the reason given for not investigating and to decide whether it has been applied correctly or not. If I take the view that the clause of COAF has been correctly applied, then I will take no further action with regard to that element. However if I take the view that it has been incorrectly applied I can then investigate the matter myself or ask the FSA to investigate the matter.

With regard to this element the FSA has taken the view that this refers to the entirety of the actions taken by the Enforcement team in relation to the investigation of your case. In your complaint to me, it is clear that the remedy you seek, both generally and with regard to this specific element of your complaint, is to have the decisions made by the RDC to be overturned. These decisions being based upon evidence put forward by the FSA which, in turn have emanated from the Enforcement Investigation of you and Firm A. Neither the FSA, nor I, have the powers to overrule a decision made by the RDC. Furthermore, as the Tribunal process includes a full appraisal of all evidence put forward, and through the adversarial process can test all evidence put to it, it is clearly the correct process for you to follow in order to overturn the RDC decisions. Your comments in reply to my preliminary decision did not address in any coherent way my rationale for upholding the approach of the FSA to this element of your complaint. Instead you start off your response by stating:

> "I still have an issue in the matter (presumably Element One) as the FSA did not follow the set procedures as set out in their own enforcement manual and flowchart issued with the complaint."

The remaining parts of the paragraphs under this heading include a number of assertions some of which are obliquely relevant but most of which are not. You have, further to your comments in reply to my preliminary decision, sent in a considerable amount of documentation. I have carefully read it. Having done so I am bound to say that it does not add to your case save to indicate that I find it clear beyond doubt that you are attempting to use the process that I undertake as a means of reopening issues that were the concern of the RDC. It is not so much a complaint about the FSA as about the fact that you do not accept the decision of the RDC. Cumulatively what I refer to amounts to a generalised attack on the FSA's enforcement procedures all of which I concluded, in my preliminary decision, were matters that you contested in writing with the RDC but then chose not to challenge the decisions it had made in this area before the Tribunal. Nor, I might add, did you chose to appear personally before the RDC, both options being the better way forward than seeking to challenge what happened after the event by utilising the FSA complaints process.

In the documentation you sent with your letter of 4th March however you sent a document numbered 20 which is an FSA note of a telephone call on the 14th May 2008 and, according to that note, was in the presence of Enforcement Officer M, Enforcement Officer N, Enforcement Officer O, Enforcement Officer P and Enforcement Officer Q. It was a 19 minute telephone call. In the light of what the note contains I have considered its "flavour", as you describe the content of the same telephone conversation in your own note, described by you as an "FSA Contact Diary". I take the view that both the FSA note and your own "Diary" note basically coincide. I set out below part of that FSA note regarding the conversation that took place with you:

> "EON explained that it is not a question of making "full" disclosure. We have material in our possession that we have not yet reviewed that could become evidence if we carry on our investigation. CW explained again the process (interviews, PIR, etc) that we would follow should we be asked to undertake a more detailed investigation.
>
> Comp asked whether he has everything that we have at this stage.
>
> EON said no – he has everything that the FSA case team wishes the RDC to rely on at this stage.
>
> Comp asked when he would be able to get his laptops and other computer hardware back from the FSA.
>
> EON explained that we are entitled to retain the laptops for 3 months and as yet have no plans to return them before that period.
>
> Comp expressed concern and said that it was inconvenient not to have a laptop.
>
> EOO said that he appreciated that but that the laptops constitute evidence and so cannot be released at present."
>
> (EON is Enforcement Officer N; Comp is yourself and EOO is Enforcement Officer O).

Your diary note says this on these same issues in recording, although in a somewhat briefer form, the same telephone conversation:

> "Queried 3) Return of laptops as have been seized confirmed in conversation with Enforcement Officer O on 6/5/08. Advised by Enforcement Officer N that they are insisting to hold onto the computers as evidence for up to 3 months as is their right in an ongoing investigation.
> Full flavour of the phone call was to get Firm A to admit to the allegations and for Part IV permissions to be cancelled.
>
> Also stated on the phone call you have the opportunity to progress this further to the RDC and markets tribunal which could trigger a full investigation of a 150 page document and potential financial penalties."

Despite the fact that the respective notes were made by different people I believe that yours does indeed capture the "flavour" of the FSA's note. Given further therefore my conclusions on that matter, is there sufficient evidence to substantiate the gravamen of your complaint to the effect that "we were receiving pressure from the Enforcement Team not to refer the matter further"? Those are your own words in your complaint dated 7th September 2009.

My decision is that there is insufficient evidence to substantiate that complaint since all that the FSA note indicates, supported by your own "diary" note, is that the FSA gave you correct factual answers to your queries. I find that there is no evidence of any "pressure" from the FSA in this area. The giving of the factual information cannot of itself amount to pressure as you seek to maintain. You have I am afraid not, in the context of this element of your complaint, produced any rationale or evidence to challenge the preliminary decision in this area which I therefore now adopt as my final decision.

It is my clear view that the rationale for this element not to be investigated has been properly applied. I should add however that the FSA complaints team should in future be more mindful about its wording in such decisions as the word "excluded" in relation to COAF has very specific meaning and should not be confused with complaints it does not investigate. I note in its response to my preliminary decision that the FSA accepts this recommendation.

The FSA Position re Element Two

In its letter of 11th November 2009 element two was defined as being "you allege that you were not offered the opportunity for early settlement by the FSA's Enforcement team".

The FSA has not investigated this element of complaint. It has utilised COAF 1.4.2A which states:

> ***"The FSA will not investigate a complaint under the complaints scheme which it reasonably considers amounts to no more than dissatisfaction with the FSA's general policies or with the exercise of, or failure to exercise, a discretion where no unreasonable, unprofessional or other misconduct is alleged."***

The FSA has gone on to say that:

> "However, while we cannot treat the issues you raise in elements one and two as a 'complaint against the FSA' we will endeavour to provide further information to you in our next letter."

My Position re Element Two

Your complaint to me is that you were not offered any form of early settlement.

In its response to my preliminary decision the FSA concedes that "we did not provide further information to (the Complainant) as we stated in our letter of 11th November 2008. We should have made reference to this in our substantive response and apologise for this." The FSA has then in its response to my preliminary decision gone on to say by way of explanation this:

> "We agree that we should have provided a fuller explanation to (the Complainant) as to why COAF 1.4.2A applied. The explanation is as follows. (The Complainant) complained that he was not offered an early settlement. The FSA's policy on early settlement is directed at financial penalties. (The Complainant) did not allege (and could not reasonably allege) that in not applying the policy in the circumstances of his case, where the FSA took urgent preventive action, the FSA was influenced by unprofessional or other misconduct. It therefore seemed to us that the complaint fell squarely within COAF 1.4.2A."

The FSA has now provided a rationale to its application of this clause of COAF. I have explained to the FSA in the past the importance of providing some form of rationale when applying such clauses, because without such rationale the validity of the application of the clause is called into question. In this case the validity of the application of COAF in this case was further undermined by the fact that the FSA had committed itself to providing further relevant information on this point in its letter of 11th November 2008 but did not do so. This particular element's handling by the FSA was unsatisfactory but has now been satisfactorily explained and an apology given. In the circumstances of this particular element I propose to leave the matter there. I note that you made in your letter of 4th March what amounts to a series of allegations against members of the FSA which could amount to bias but there is no independent evidence to substantiate what are effectively assertions on your part. For that reason I am not able to come to any other conclusion than to note that the FSA has apologised now for its failure in connection with this element 2 of your complaint.

The FSA position re Element Three

The FSA has defined element three as;

> *"You allege the FSA's Enforcement team illegally executed a search warrant at your home address."*

The FSA has stated in its decision letter of the 10th July 2009 its position, which contains a number of points that you have taken issue with. Considering the points you have contended (in bold in the following quotation) it is worthwhile quoting the entirety of the FSA's decision on this point. The FSA has stated that;

> *"We understand that on 10 April, two uniformed PC's exercised their powers under the warrant to gain entry to the premises, in order to conduct a search on the premises for the information specified on the warrant.*
>
> ***Shortly after arriving at the premises you made the FSA investigators aware that the information which was specified on the warrant was not at the premises,*** *but available elsewhere at the Business Centre.* ***The FSA was unaware of the second premises. Even though you stated that you had previously provided the FSA with this information, there was no record of it.***
>
> ***At the time, the investigators were faced with having to make a quick decision in the interests of securing any possible evidence.*** *This was to obtain a separate warrant to search the Business Centre premises.* ***For reasons relating to the possibility of a breach of the peace, both PC's went with some of the FSA investigators to the Business Centre, leaving two FSA investigators at Firm A.***
>
> *The FSA accepts that the FSA investigators who remained at the property and continued to execute the warrant, in the absence of the PC's, acted unlawfully, it being a requirement that a constable should have been present throughout the search. We accept that the investigators were faced with a difficult and unexpected situation of having to decide whether to leave the PC's at the premises or have them accompany them to the Business Centre.*
>
> ***As stated above, in view of the possibility of a breach of the peace, the decision to have the PC's accompany the investigators was understandable. However, this does not excuse the fact that the search warrant for Firm A was executed unlawfully.*** *We fully accept that searching a home is a very intrusive action, and those who are the subject of the procedure are entitled to expect compliance with applicable legal safeguards. That did not happen here, and we apologise on behalf of the FSA for this.*
>
> ***In relation to the way in which the search was carried out, before the search commenced, Mrs X was given the opportunity, on several occasions, to ask a family member or friend to be with her whilst the search took place. But Mrs X said she did not want anybody else to be with her.***
>
> ***We have noted at no point did Mrs X ask the FSA investigators to leave the property,*** *the FSA's investigators found that Mrs X was not only helpful, but friendly and made a statement on her own initiative to one of the investigators, while the other investigator made a search of the premises.*

We believe the search was carried out in a totally professional manner. The search conducted was thorough and meant that the FSA investigators had to look in private areas of your property. This is nothing out of the ordinary and the FSA investigators are trained to search thoroughly when conducting a search. ***Mrs X observed the search of at least one of the bedrooms and at other times was moving freely around the house while the search was undertaken.***

We are not aware of any objections raised at the time of the search being made and our findings are that Mrs X was afforded every opportunity to accompany the FSA investigator whilst the search was taking place. Mrs X was with the FSA investigator when property was taken, such as the blackberry that was taken from the kitchen where Mrs X was sitting and she was also present when the laptops where taken out of their cases in the front room and placed in evidence bags.

When the items were being sealed, ***Mrs X was invited to sign an exhibit book to confirm that three items were taken from the premises; she was also invited to sign the search record to confirm no damage was made to the property.*** *Mrs X was not told to sign, quite the contrary, she was advised that she did not have to sign both records if she did not want to. However, Mrs X did sign both the exhibit book and the search record.*

We found that the FSA investigators were professional and courteous in their approach to the search, for example one of them drew attention to the fact that they had knocked a shelf under the stairs and apologised for this. They also asked Mrs X if she wished to accompany them through the property whilst they conducted the search. ***But Mrs X declined and sat at the kitchen table for the duration of the search with the other investigator. Although the investigators were not accompanied by a constable we have found no evidence to suggest that they 'tampered' with the evidence. We also understand that no material taken from Location 1 was used as evidence in the subsequent proceedings.***

You stated in your letter of 22 November that, when you queried with the FSA that a PC was not present whilst the search was taking place at Location 1, they said that one of the investigators used to be in the Metropolitan Police and was capable of undertaking the search. *We believe you misunderstood what the investigator was saying to you. They did not mean to suggest that the individual's former role meant they had the power to carry out a search, they were simply saying that the investigator had the experience and capability to carry out the search effectively.*

For the reasons stated above, we uphold Element Three of your complaint. We believe that all those FSA investigators involved were conscientious and professional in their approach. While the continued execution of the warrant in the absence of a PC was unlawful, the investigators acted in good faith throughout."

My Position re Element Three

The FSA has upheld already your complaint about its failure to comply with the correct process in the context of the search carried out at your home being that part done in the absence of a police officer. There is no doubt that the search carried out at your residential house was illegal. The FSA accepts that and the presence of a former police officer is irrelevant. I take the view that it is not a question of who was present during the search at your residential house, whether or not whoever was were "conscientious or professional in their approach" and whether or not whoever was there acted "in good faith" but rather that the search itself was illegal due to the absence of a police officer. That is my starting point.

That illegality arose due to the operation of section 176 of FSMA and also involved a breach of your human rights under Article 8 of the European Convention on Human Rights as set out in Schedule 1 of the Human Rights Act 1998. These are in themselves serious matters. The FSA discharges a public function and in that role must ensure that its staff are fully aware both of that and the obligations it imposes upon them. While mistakes may occur they must be seriously guarded against. In this case there was a mistake involving experienced professionals acting as a result, for whatever reason, from a failure to understand important legislative conditions which they should have been fully aware of in all their detail, causing them to be in breach of the privacy of a residential house in the presence of a young child.

In summary, therefore, the FSA acted illegally through its own failings in a number of areas which I identify as a failure to train its staff in this important area effectively as well as a failure to record and/or check important information that it possessed prior to obtaining a warrant as to the exact location of premises to be searched. It is the issue of checking the location of all premises and training with which I am most concerned in upholding your complaint. The powers that the FSA has been given by Parliament are unusual in that they allow the FSA, subject to conditions, to enter a residential house. It is essential, therefore, as a public body, that the FSA puts in place detailed training as to the conditions under which these particular powers can be exercised. I am satisfied that as a result of this incident the training will be rigorously supervised and kept up to date to prevent a repeat of what occurred on this occasion.

I was minded to make a recommendation for an award of £300 on an *ex gratia* basis to you and your wife jointly. In the context of that preliminary finding you have replied:

> "I welcome your comments that the FSA carried out a search of our home that was illegal, and note your offer of an *ex gratia* payment of £300 however I must state I find this offer derisory and reject the offer".

It was of course not an "offer" but a recommendation of an award but given the strength of your feelings I note that you no longer wish to benefit from it and I refrain from including it in my final decision. I therefore make no recommendation for an award. The FSA has upheld your complaint, made an apology and to which I had added, as I mentioned above, a recommendation of an award of an *ex gratia* payment that you have rejected as derisory. I need to deal with the issue of "derisory" for the sake of completeness even though such a recommendation is no longer extant.

I did not consider a larger figure was justified for a number of reasons. Firstly, your failure to challenge facts (that you now endeavour to do) when you had an opportunity to do so both before the RDC by a personal appearance and thereafter before a Tribunal. The consequence of the RDC process is that the facts that lay behind the RDC's findings are undisputed and therefore the professional conduct of yourself and your wife is relevant in the context of the circumstances of the necessity of making the search. Inevitably therefore any award I might recommend was going to be somewhat limited.

Secondly, the FSA, in its response to my preliminary decision, urged upon me two factors that I should consider if I was minded to make a recommendation for an award. The first is that there is judicial authority that awards cannot be justified by a supposed need to deter the authorities or to vindicate a Convention right. The authority that the FSA relied upon (Cullen v Chief Constable of the RUC, 2003. UKHL), and on the basis that the FSA was in breach of section 8 of the Human Rights Act 1998, is that the principles relative to financial awards in the context of any breach of a person's Human Rights is far from clearly established by the European Court of Human Rights at Strasbourg which is the Court relevant to such issues. In particular it was stated in that case, by the House of Lords, that:

> "The practice of the European Court is therefore inconsistent with an award of either modest or nominal damages in a case where neither pecuniary or non pecuniary damage is established. It follows that such an award cannot be justified by a supposed need to deter the authorities of the State ....."

The second factor put forward by the FSA is that if there was any loss meriting an award it was "caused by the unchallenged decisions made by the RDC and not be (sic) the execution of the warrant". I do not fully accept the second factor in that the illegal search of itself could, and you state did, cause distress. I deal with this issue as my third point but before turning to that I do accept that the purpose of any award I might have recommended not be "to deter" but could have been (had you not rejected it) to reflect that there was an unnecessary additional distress factor that you endured as a result of the flawed process carried out by the FSA.

Thirdly, and in that context the lack of any evidence of any specific distress or damage either in relation to yourself or your wife. In that latter case you had raised during our correspondence the issue of her health. It was only after I had sent my preliminary decision that I, at last, received a report from your wife's medical practitioners. The relevant part states that there are no records of consultations in April 2008 and also indicates that any medical problems of your wife were of a long-standing nature and in my opinion were unrelated in particular to the search by the FSA, the subject of your complaint.

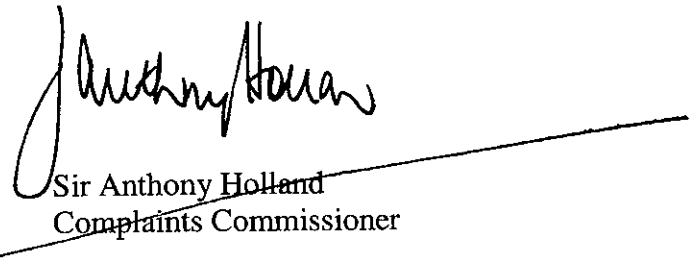
The FSA in its response to my preliminary decision has provided further argument concerning the issue of whether it had been notified by you that your office address now included another location. My preliminary decision stated that the complainant had, despite the FSA's statement to the contrary, notified and confirmed that the FSA was aware of the second address. The FSA's own investigation failed to uncover the fact that you had had a conversation with it about the existence of second premises. That was unfortunate.

While I note that argument is now advanced about the nature of what is, or is not, the principal place of business my concern remains that the FSA has not recognised the importance of logging *all* (my emphasis) places where relevant information may be stored given that all such places need to be included in any search warrant and the appropriate number of police officers engaged in any subsequent search. I make these observations given the FSA's concluding remarks on this issue:

> "We have passed your comments regarding the FSA recording all firms' addresses, or addresses where files may be kept to the relevant business area. They are satisfied that the information firms provide to the FSA under its current rules is sufficient for the FSA to deliver its regulatory responsibilities. Their current view is that the cost to the FSA and firms of capturing the addresses for all locations at which a firm operates, or where files are kept, outweighs the benefit of this additional information."

As this now represents my final decision it concludes my involvement in your complaint and once this decision is published I will close my file on the matter.

Yours sincerely,



Sir Anthony Holland
Complaints Commissioner