

Final Report

Complaint by Mr and Mrs C (the complainants)

Trading in partnership as Y Life Pension Mortgage and Insurance Services (the firm)

My Position as Independent Investigator.

1. Under the provisions of the Complaints against the FSA Scheme (Amendment No. 2) Instrument 2005 the FSA having been informed of a conflict of interest on the part of the Complaints Commissioner requested the President of the Law Society to nominate a Solicitor to act as Independent Investigator. I was so nominated by the President on 1st November 2005. My nomination being approved by the Treasury it now falls to me to carry out the functions conferred on the Complaints Commissioner by the Complaints Scheme, which is established in accordance with Paragraph 7 of Schedule 1 to the Financial Services and Markets Act 2000 and generally referred to as COAF. I am required in so doing to adopt the methodology of the Complaints Commissioner.

The scope of my Investigation.

2. COAF provides for a two stage investigation into complaints against the FSA: Stage 1 being an in house investigation and report by a suitably senior member of staff who has not previously been involved in the matter, with a Stage 2 investigation and report being undertaken by the Complaints Commissioner or, in this case, an Independent Investigator, only if the complainant is dissatisfied with the Stage 1 report or the FSA has refused or neglected to undertake a Stage 1 investigation.

3. In this case there was a Stage 1 investigation and report carried out by Officer A, a Complaints Officer of the Company Secretariat of FSA, which was sent to the complainants on 20.06.05. The Complainants were dissatisfied with that report and wrote to the Complaints Commissioner on 13.07.05 requesting a further investigation into their complaint. A conflict of interest was identified and the complaint is accordingly referred to me.

The Complaint.

4. The original letter of complaint to the FSA from the complainants was dated 01.04.05 and headed "Incorrect Removal of Part IV Permissions 25 February 2003 from Y Life Pension Mortgage and Insurance Services No. XXXXX. The essence of the complaint was that the FSA failed to follow correct procedures in withdrawing the complainants' authorisation, thus causing them financial

loss, damaging Mr C's health and breaching their human rights. The letter from the complainants to the Complaints Commissioner on 13.07.05 again identifies the withdrawal of authorisation and failure to follow proper procedures as the subject matter of the complaint. The complainants have quantified their loss at £410,000.

5. From two telephone conversations I have had with Mr C on behalf of the complainants I have understood that he is dissatisfied with actions taken by the FSA in addition to the withdrawal of the firm's authorisation. However, he confirmed, as did his Solicitor, that it was the complainants' wish that I should carry out a Stage 2 investigation, i.e. to investigate and review the FSA's Stage 1 investigation and report, which was restricted to the issues of withdrawal of authorisation on 25.02.03 and alleged breach of Human Rights.

6. I should record that Mr C has specifically requested a meeting with me either alone or with his Solicitor. I gave careful consideration to this request as, in my experience a meeting is very often the best way of satisfying a complainant that his complaint is understood by the investigator. However having referred to the methodology of the Complaints Commissioner I was satisfied that such a meeting was inappropriate and informed Mr C that this was so.

My Investigation.

7. In carrying out my investigation I have had the benefit of the following:-

- a) Correspondence between the complainants and the FSA.
- b) A chronology setting out the history of the complainants' dealing with the FSA. (I annex this as a Schedule to this report).
- c) A copy of the FSA's Rules (or Handbook).
- d) A copy of the FSA's "Change of legal status pack".
- e) A copy of the judgment of the Honourable Mr Justice Peter Smith in case No. XXXXX of 21.12.04 and of the decision of the Financial Services and Markets Tribunal (the Tribunal) in Case No. FIN/2005/0009
- f) A copy of COAF.
- g) My correspondence and telephone calls with Mr C.
- h) The Partnership Act 1890 (PA)
- i) The Human Rights Act 1998 (HRA)
- j) The Financial Services and Markets Act 2000. (FSMA)
- k) Other relevant documentation supplied to me by the FSA at my request.

Findings.

8. In making my findings I adopt the balance of probabilities (i.e. the normal civil standard) as the standard of proof and regard the burden of proof as

being neutral between the FSA and the complainants. I am bound by the Rule 1.5.15 of COAF to accept as conclusive any findings of fact made by a Court or Tribunal as defined in such rule. For the sake of convenience I set out my findings alphabetically:-

- a) The firm which had commenced trading in 1987 was originally a member of FIMBRA. In July 1998 it became regulated by the PIA which required individual registration of all principals, managers and advisors. The PIA regularly issued updates which included those to its Rulebook.
- b) Between June 1998 and 01.12.01 when the FSA became the sole regulator there was a transitional period during which the PIA delegated to the FSA its regulatory function although retaining responsibility for regulated firms. The FSA issued Regulatory Updates to keep those regulated informed of the details of the transition and application of the FSA Handbook and rules. This was done on a monthly basis from May 2001 continuing throughout 2002 by sending CDs together with hard copy summaries of changes.
- c) On 16.07.02 Mrs C wrote to Mr C:-

“Dear Partner,

Ref:Y’s Life and Pensions Partnership

With reference to my current standing in the partnership I wish to inform you that with effect from 1st August 2002 I tender my resignation as a partner. I pass all my current holding over to you with effect from that date.

A copy of this letter has been sent to our Chartered Accountants X Y & Z & Co, Derby for their attention.

Yours sincerely”

- d) On 01.08.02 the partnership of Y Life, Pension, Mortgage and Insurance Services was dissolved under the provisions of s.26 of the Partnership Act 1890. No notice of this was given to the FSA
- e) On 13.11.02 after written warning to the complainants on 01.10.02 the Enforcement Division of the FSA sent to the complainants a Supervisory Notice under section 45 of FSMA as a result of their failure to comply with decisions of the Financial Ombudsman Service (FOS).
- f) On 29.11.02 the complainants through their solicitors Robinson referred this matter to the Tribunal who on 13.12.02 at a pre-hearing reinstated the complainants’ permissions pending the outcome of a full hearing. The reference to the Tribunal was subsequently withdrawn by notice served by Robinsons on 01.04.03 at the invitation of the FSA who by letters of 10.02.03 and 26.02.03 pointed out that there was no longer an authorisation in place for the Tribunal to consider. The warning, and proceedings by the Enforcement Division and the proceedings before the Tribunal, although regular on the face of it, were all a nullity as the firm and its authorisation had ceased to exist on 01.08.02.
- g) On 08.01.03 Mr C wrote to the FSA in the following terms:-

“ 8 January 2003

Dear Sirs

Mrs C – Resignation from the Partnership of Y’s Life & Pensions

With reference to the above, please see attached copy letter. This has come about after discussion with our Accountants over a period of time as Mrs C is due to retire from full time Business commitments.

Please acknowledge receipt of this letter, and amend me to currently Sole Trader Status.

I look forward to hearing from you.

Yours sincerely

Mr C, IFA“

- h) Prior to the letter of 16.07.02 being written neither Mr C or Mrs C had been in contact with the FSA with regard to Mrs C’s retirement, nor had any representative on their behalf. Indeed there was no notice given to the FSA of the change in status until Mr C wrote on 08.01.03 enclosing a copy of the letter from Mrs C that I have set out above. This was a breach by the complainants of Principle 11 set out in section 15.3.7 of the Handbook which requires a firm to deal with its regulators in an open and

co-operative way, and to disclose to the FSA appropriately anything relating to the firm of which the FSA would reasonably expect notice. The dissolution of the partnership falls within that principle.

- i) The FSA responded to Mr C on 07.02.03, ie. some 29 days after receipt of the letter of 08.01.03 which was stamped as received on 09.01.03. This is outside the provisions of the FSA's present target response time. The letter clearly sets out that the FSA authorisation ceased from the date of dissolution and the reasons for this, at the same time giving formal notice that the firm was no longer authorised – apparently from the date of such letter, i.e. 07.02.03. It stated that if Mr C intended to continue to conduct regulated activities as a sole trader a fresh application would have to be made and reminded him that the appropriate forms could be downloaded from the FSA website.
- j) There was thereafter correspondence between the FSA and the complainants' Solicitor. That correspondence and further correspondence and negotiations between the FSA and Mr C did not resolve the matter, notwithstanding that on 01.05.03 Mr C wrote to the FSA enclosing an exchange of correspondence with Mrs C dated 19.02.03 and 21.02.03, the former purporting to rescind her resignation and the latter confirming acceptance of such rescission. These letters had not previously been provided to the FSA.

Conclusion

9. In considering the circumstances of the complaint and deciding whether or not it is well founded I am required to have regard to the FSA's statutory obligations and in particular the considerations set out in sections 2(3) and 73(1) of the FSMA.

10. His Honour Mr Justice Peter Smith indicated in his judgment a degree of sympathy with the complainants. I too have sympathy for their position. As a regulated firm they were required to have professional indemnity insurance in place for the mutual benefit of themselves and their clients to cover the provision of financial advice, which carries with it considerable risks. For reasons of which I am unaware such cover was not effective and the complainants found themselves personally faced with substantial liabilities to at least two of their clients.

11. The retirement of Mrs C which caused the partnership to be dissolved was clearly agreed on with the benefit of professional advice. Mr C's letter of 08.01.03 to the FSA notifying them of Mrs C's retirement with effect from 01.08.02 states:- "This has come about after discussions with our Accountants over a period of time". The complainants were presumably seeking in some way to secure their future. I am satisfied that at that time neither complainant was aware of the legal implications that would flow from Mrs C's retirement.

12. That however was not the fault of the FSA which I am satisfied was correct in its legal interpretation of the facts, namely that Mrs C's resignation with effect from 01.08.02 dissolved the partnership, which ceased to exist at that date, as

did its Part IV authorisation. Mr C then continued the business as a sole trader without Part IV authorisation from the FSA.

- 13.** It can only be open to speculation as to what would have happened if Mr C had contacted the FSA on or about 16.07.02. His attention would no doubt have been drawn to the implications of dissolution and it may well have been that Mr and Mrs C would have agreed before 01.08.02 to continue in partnership. What is however clear from the facts as I have found them to be is that no mention of this was made until 08.01.03 by which time it was no longer possible to rescind the resignation or in any other way overcome the implications of dissolution. The decision that Mrs C should retire was taken by the complainants with the benefit of advice from their Accountants, and the complainants' failure to give timely notice to the FSA or to obtain and complete the "Change of legal status application pack" caused the loss of authorisation and was a breach of principle II to which I have referred above.
- 14.** Against facts as I have found them to be I have to consider whether or not the FSA should have acted in a way other than that in which it did. It is the case that when Mr C's letter of 08.01.03 was received the FSA were already in the process of seeking to withdraw the firm's authorisation for failure to comply with two awards of the FOS. It is, of course, possible that were it not for that situation the matter could have been resolved expeditiously. That again can be no more than speculation as on account of the failure to comply with the FOS awards or to challenge them by way of Judicial Review there could be no easy acceptance by the FSA of an application for authorisation by Mr C as a sole trader.

15. I have given careful consideration to the response of the FSA's enquiries and application department to the letter of 08.01.03 and note that before replying legal advice had been sought. The reply was in accordance with the advice received. I have also noted the correspondence between the Enforcement Division and the complainants' Solicitors – again I can find no error in law in the position taken by the FSA,

16. That the decision for Mrs C to retire and the delay in communicating that decision to the FSA has been a disaster for the complainants there can be no doubt. However the complainants appear to have acted on the advice of their Accountants in the matter of the retirement, and no explanation from the complainants as to the delay in notifying the FSA, a clear contravention of Principle II which requires such notification, was offered at that time. Mr C has subsequently written to me on 23.01.06 stating that the FSA was not notified at the relevant date because he did not accept his wife's resignation and that she had continued working as a partner in the business. This explanation however is implausible in view of the terms of his letter of 08.01.03 which I have set out above.

17. I have given the most careful consideration to the complaint that the FSA acted otherwise than in accordance with its rules or as stated in the original letter of complaint (01.04.05) "incorrectly immorally and unfairly" but can find no evidence that any of its actions were otherwise than in accordance with its regulatory functions under the provisions of the FSMA. Law does not have to be moral or fair, it provides a series of rules which citizens in the United Kingdom are required to observe.

Human Rights

- 18.** In the original complaint letter of 01.04.05 it was claimed that the complainants' Human Rights had been infringed by the actions of the FSA. In the Stage 1 report this was not found to be supported but was dealt with very briefly. In fairness to the complainants it needs to be considered rather more fully.
- 19.** The FSA must be regarded as a public authority established by Act of Parliament and therefore bound by section 6(1) of the Human Rights Act 1998 which reads:- "It is unlawful for a Public Authority to act in a way which is incompatible with a Convention right". That is to say a right given by the European Convention for the Protection of Human Rights (ECHR). Although it is not spelt out in the complaint or subsequent correspondence I understand the complainants to allege that their rights under Article 8 of ECHR have been interfered with, i.e. their right to respect for their private (which includes business) and family life.
- 20.** The complainants' Article 8 rights are however subject to qualification in Article 8(2) which excludes interference which is in accordance with the law and is necessary in the interests of the economic well being of the country and the protection of rights and freedoms of others. It has been established by the European Court of Justice that such interference must not only be lawful but also proportionate.
- 21.** The Complainants had an established business which must be regarded as part of their private life to the extent that Article 8 is engaged. The FSA in first

seeking to terminate their authorisation and subsequently recognising its termination on the dissolution of the Complainants' partnership was acting in accordance with the law (the regulating provisions of FSMA) and in the interests of protecting the rights and freedoms of others, i.e. their right to be advised by properly regulated financial advisors so that their transactions would be secure. The steps taken by the FSA were in my judgment proportional to its duties under the Act and for this reason this complaint cannot be upheld.

Summary

22. The cessation of the firm's authorisation to carry out regulatory activities occurred on 01.08.02 on the dissolution of the firm following the retirement of Mrs C. The FSA in no way influenced Mrs C's decision to retire, and indeed remained wholly unaware of it until 08.01.03 when Mr C sent them a copy of her letter of resignation. The firm had ceased to exist on her retirement under the provisions of the Partnership Act 1890 and authorisation had ceased at that time under the provisions of section 32 of FSMA. Although it is clear from the evidence before me that the relationship between the Complainants and the FSA was strained and did not enjoy the confidence that should exist between the Regulator and the regulated, it is however the case that the FSA did not and could not have influenced the manner in which the firm's authorisation ceased on 01.08.02.

Decision

- 23.** The complainants complain of the FSA's incorrect removal of Part IV provisions on 25.02.03. Whilst I accept that the FSA Register indicates that that was the effective date on which authorisation ceased it is in my view incorrect and I will make a recommendation that it be amended to show the actual date on which authorisation ceased, namely 01.08.02
- 24.** For the reasons given I conclude that the complainants' complaint is not well founded.

Recommendation

- 25.** I have noted from the chronology that Mrs C's letter of 08.01.03 was received on 09.01.03 but was not acknowledged or responded to until 07.02.03, some 29 days later. I have also noted that since that time the FSA has adopted service standards which require a response to such correspondence within 10 days. If it had not already done so I would have recommended that such a service standard be adopted.
- 26.** I am however concerned that the FSA Register shows 25.02.03 as the date of the firm's cessation of authorisation, which is misleading. The firm's authorisation ceased on its dissolution on 01.08.02 and I recommend that the Register be suitably amended to reflect this.

Publication

27. This report will be published in full as neither party has made representations to the contrary.

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Date.....

David M W Simpson. Independent Investigator