

CONFIDENTIAL

FINAL REPORT ON COMPLAINT GE-L0080

1. Introduction

1.1 This is the report of an investigation by the Complaints Commissioner of a complaint against the Financial Services Authority (FSA). The complaint falls partly to be considered under the Transitional Complaints Scheme and partly under the Main Complaints Scheme.

1.2 The substantive complaint, being the failure to receive compensation for the loss of the complainant's savings, is outside the jurisdiction of the Complaints Scheme. However, the following four components concerning how the complaint was investigated by the FSA have been considered.

First, whether the FSA handled the information provided by the complainant about X & Associates (and related issues) appropriately (the Transitional Scheme);

Second, whether the FSA handled the Stage 1 complaint appropriately (the Main Scheme);

Third, whether the FSA showed a lack of due care in referring the complainant to the FOS in 1998 (the Transitional Scheme); and

Fourth, whether there was any unreasonable delay or lack of care in respect of how the Personal Investment Authority [PIA]/FSA has dealt with the issues raised by the complainant over the period 1998 to 2004 (the Transitional and Main Scheme).

2. Background

2.1 X & Associates, a sole proprietorship, became the complainant's Independent Financial Adviser [IFA] on 22 May 1991 when both parties signed a Terms of Business letter.

2.2 In October 1991 the complainant was dismissed from his position with a company, V Ltd, and took action against them for unfair dismissal and Section 459 proceedings in the High Court to regain his share value in that company. X & Associates helped to coordinate a legal action against V Ltd. X & Associates was regulated by the Financial Intermediaries, Managers and Brokers Regulatory Association [FIMBRA] and was a member of FIMBRA from 14 December 1987 being authorised to undertake life assurance, unit trusts and pensions business¹. The complainant states that he assumed, by virtue of the FIMBRA logo on X & Associates' letterhead paper/terms of business that all X & Associates services were regulated by FIMBRA.

¹ X & Associates applied to resign from FIMBRA in February 1997 and ceased to be a member on 22 January 1998. The firm had previously joined a Network, becoming an appointed representative, on 22 July 1996. It ceased to be an appointed representative on 12 August 2003. It became directly re-authorised on 31 October 2004 to undertake mortgage business and on 14 January 2005 was also authorised to do general insurance business. The firm is not authorised for life and pensions business.

2.3 In 1993, V Ltd paid £438,367.53 to the complainant in an out of court settlement. This sum was transferred to the client account at the complainant's solicitors. The complainant authorised payment of £12,500 to Mr X, the sole proprietor, and instructed his solicitors to pay the team who had assisted in the legal action. Later in 1993, X & Associates invoiced the complainant for a further £32,500 for the earlier advice given, which was paid it is alleged without the complainant's permission.

2.4 The complainant paid off his mortgage and was then left with approximately £180,000 in cash. Mr X then recommended a number of investments including three insurance bonds at £30,000 each, one insurance bond of £25,000, an annuity of £12,000, £20,000 loan to Mr G, a director of a travel company, and a loan of £6,000 to Mr X at his request. In respect of the loan to Mr G it is alleged that he was advised by Mr X and his accountant that this would be beneficial for obtaining tax relief for his capital gain on the original sum he had received following the court settlement. In respect of the loan of the £20,000 to Mr G he would be given shares in SS Ltd of 13.5% and that he would be paid £120 interest per month tax paid. In addition, an agreement was made between Mr X and the accountant whereby 33% of the shares of SS Ltd were to be held by the complainant for three years.

2.5 In April/May 1995, the complainant alleges that Mr X advised him that an investment of £100,000 in SS Ltd would be a good investment and, again, his accountant advised him that this would be beneficial from a capital gains tax position. The complainant alleges that he was assured by Mr X that it would be a safe investment as SS Ltd had acquired an asset, being a property valued at approximately £155,000. In May 1995, the complainant having sold his own property (receiving approximately £140,000) made the loan of £104,000 to SS Ltd, which was described as a short term loan. Mr X negotiated an interest rate for the complainant to receive 1% per month tax paid.

2.6 In September 1995, a second charge on the property was placed on the asset in SS Ltd, which was when the complainant found out that the property actually belonged to the directors personally not the company. He alleges that Mr X knew of this at the time he lent the funds as Mr X had also arranged a mortgage with a building society for those directors. As the complainant had not been repaid the money lent by the agreed date, the charge became the matter of proceedings to realise his security. The property was eventually sold by court order and produced a shortfall on the complainant's investment of £57,776. The costs of the proceedings were approximately £36,000. During these proceedings the complainant's accountant was dismissed from his firm and the director, Mr G, of SS Ltd became bankrupt.

2.7 On 14 March 1996, Mr X wrote to both the complainant and the director of SS Ltd stating that

"As there seems to be a slight altercation between yourself and (name of the director of SS Ltd), and, as the Financial Adviser to both of you, there is an obvious conflict of interest which necessitates my drawing away.

“Therefore, until your differences can be resolved, please note that I cannot advise you on any associated financial matters and I strongly advise you both to seek financial advice from another Practitioner.”

2.8 Notwithstanding the above, on 26 April 1996, Mr X introduced the complainant to another individual, Mr W, who it is alleged, Mr X assured him would assist him in recovering his loan of £104,000 if he used his insurance bonds to act as collateral to support Ski Scandinavia Ltd. The complainant agreed and the complainant alleges that the bonds² were lodged with the bank in the autumn of 1996. On the strength of the funds the bank advanced money to the company, but subsequently the company failed and the bank seized those funds.

2.9 In January 1997 it is alleged that the complainant was persuaded to sell his shares in SS Ltd for £1, in return for which SS Ltd would give financial and evidential support to the complainant in proceedings against the previous director, Mr G, of SS Ltd.

2.10 The complainant was suspicious of the actions of Mr X, X & Associates, and Mr W so gave up his job to investigate the situation himself.

2.11 On 6 March 1998, the complainant wrote to X & Associates to complain about the advice he had been given. Not receiving a response he wrote again on 13 March 1998 and again on 17 March 1998 asking for details of their professional indemnity insurers. X & Associates acknowledged all three letters on 23 March 1998 advising him that solicitors had been instructed to act on their behalf.

2.12 The complainant sent details of his complaint to the PIA on 28 July 1998 and received a reply from the PIA/FSA Public Enquiries Office on 2 September 1998, stating that the papers had been sent to the PIA Ombudsman Bureau [PIAOB] for review, referred the complainant to the Trading Standards Office and the Office of Fair Trading, and gave general information on how a firm should disclose first, the nature of its business and second, make a charge for its services.

2.13 The PIAOB advised the complainant that his complaint was outside their jurisdiction by letter dated 29 September 1998.

2.14 The complainant commenced legal proceedings against X & Associates in 1999.

² Correspondence that the Commissioner has seen from X & Associates to the PIAOB dated 21 May 2001 indicates that these bonds, that were purchased in 1993, were en-cashed in 1996/1997 when the complainant received back his original investment having also withdrawn approximately 10% per annum from the funds prior to doing so. This is substantiated by correspondence from the Financial Ombudsman Service dated 22 November 2001 that the Commissioner has seen which states –

“ My understanding is that the complaint is about (name of X & Associates) advice to invest the proceeds from an insurance bond of between £100,000 and £115,000 into a company called (name of SS Ltd) run by (name of Mr W). However, the investment in the company was, in effect, a loan to the company for which you would receive a regular payment of interest...”

The letter goes on to explain why the complaint was outside the jurisdiction of the FOS.

However, the complainant denies that he ever en-cashed his bonds

2.15 The complainant wrote to the FSA again on 23 September 2000 submitting further information that was acknowledged by the Correspondence Executive on 20 October 2000 which again referred the complainant to the PIAOB.

2.16 The complainant submitted his complaint form to the PIAOB, dated 7 December 2000. In that form he specified that his complaint was -

“Overcharge of £32,500 on contract breach plus interest from 11-8-93. The rest of my claim I am told is not P.I.A. business and is being pursued by legal proceedings. If however you deem that you can help in the non registered part of my complaint I will be only too willing to provide details. I still feel that the advice to sign my bonds to the company is PIA business.”

On 20 February 2001, he received an initial response from the Financial Ombudsman Service [FOS] (which was the successor of the PIAOB) Customer Contact Division that expressed doubts as to whether his complaint was within their jurisdiction and sought further information. The complainant replied but a further letter was sent to him on 3 June 2001 again raising doubts about whether his complaint was within the jurisdiction of the FOS and asked for clarification of the nature of the investment complained about. This letter also raised the question of the legal proceedings that the complainant was pursuing and advised the complainant that the Ombudsman could not consider a complaint when legal proceedings were pending.

2.17 The complainant discontinued his legal proceedings in July 2001 and on 17 July 2001 his complaint was referred within the FOS for formal adjudication.

2.18 The FOS gave the initial view that the complaint was outside its jurisdiction on 22 November 2001 and reconfirmed this by letter of 21 December 2001.

2.19 On 8 March 2002, the FOS gave a final decision that the complaint was outside its jurisdiction.

2.20 Following correspondence with the FSA in March 2002, he was advised that he could take the matter to the Independent Assessor at the FOS.

2.21 The complainant wrote to the Independent Assessor on 4 June 2002, 26 June 2002 and 24 July 2002.

2.22 In the meantime the FOS wrote to the complainant on 11 July 2002 and stated -

*“Fees charged for advice, and that advice itself, can both come under the jurisdiction of the Financial Ombudsman Service, or before it the PIAOB. However, these **must** relate to advice given about products regulated by the Financial Services Act, if they do not, then neither the PIAOB nor the FOS are able to investigate the complaint.*

“We warned you that this case might not fall within our jurisdiction in our letter of 3 June 2001, the same letter containing our advice that we could not consider a complaint that was the subject of legal action. In addition, our

records indicate that in September 1998, you were informed by the PIAOB that it did not believe that it could assist you following referral of your papers to the PIAOB by the FSA.

“The crux of the matter is whether or not the product of which you complained was one which was within our jurisdiction, or that of the PIAOB before us, and it is only after that that we can consider any breach of the rules that may have occurred. The Ombudsman supported the adjudicator’s initial view that your case did not, which in turn confirmed the doubts previously expressed when we received your complaint.”

2.23 The complainant wrote to the Complaints Commissioner by letter of 4 June 2002 and the Commissioner sent a response dated 21 June 2002 stating that the complaint was outside the jurisdiction of the formal Complaints Scheme. The complainant wrote again on 24 July 2002 stating that he had sent his complaint to the Independent Assessor and was awaiting his response. The Commissioner replied on 16 August 2002 again reiterating that his complaint was outside the remit of the Scheme. The complainant continued to copy in his correspondence to the Independent Assessor, the FOS and the FSA.

2.24 The Independent Assessor, by letter dated 8 August 2002, did not uphold his complaint against the FOS as to how the matter had been investigated: he concurred that the substantive complaint was outside the jurisdiction of the FOS. Not accepting this finding the complainant wrote again on 27 October 2002 and the Independent Assessor replied on 4 December 2002 again confirming that he had no evidence that the FOS should have responded to the complaint differently. However after further correspondence with the complainant in January and February 2003 he concluded by letter dated 4 March 2003 that whilst he believed the FOS had acted correctly there had been unnecessary delays and awarded compensation to the complainant of £450. This has not been accepted by the complainant.

2.25 The complainant wrote to the FSA on 8 April 2003. It was analysed that his complaint had two elements: first that the FSA failed to regulate the firm involved in his dispute and second that the FSA was wrong to refer the complainant to the PIAOB in September 1998. He received a substantive response to his complaint from the Company Secretariat, which is the department that is responsible for the formal Complaints Scheme, on 11 September 2003.

2.26 The complainant wrote again on 17 September 2003 and received a reply from the FSA on 24 September 2003.

2.27 In the course of the investigation, the Commissioner has obtained and has considered written representations from the complainant and documents and correspondence provided to him by the complainant and by the FSA. Interviews have been held with both the complainant and members of the FSA staff. However, the FSA have not been able to find the entire file on X & Associates and in particular correspondence on the supervision of the Network in relation to X & Associates after the correspondence from the complainant was received in July 1998. The Commissioner has been advised that following the Stage 1 process of the investigation, when the file was considered by the senior independent member of staff that had undertaken the review, the relevant papers were mislaid and, although a search has been

made, it has not been possible to locate these. No information was withheld by the FSA for confidential reasons.

3. Findings

3.1 On the first component of the complaint, **whether the FSA handled the information provided by the complainant about X & Associates (and related issues) appropriately**, the following is the information that the Commissioner has been given -

(a) On 28 July 1998, the complainant sent details of his complaint to the then regulator, PIA, and the substantive response was sent to him on 2 September 1998 by PIA/FSA Public Enquires Office and the original complaint forwarded to the PIAOB. On 2 September 1998, the FSA Public Enquiries Office also sent a copy of the correspondence with a covering memorandum to the “*PIA Monitoring Coordinator – Team 9*”. The Commissioner has seen a subsequent note dated 9 September 1998 that was sent from the recipient of this memorandum at Team 9 to the PIAOB asking it to let the writer know the outcome of the review of the complaint.

(b) The independent senior member of staff who undertook the Stage 1 investigation on behalf of the FSA stated in her report -

“I have also obtained the supervision files relating to the period from 1999 onwards. These show that the team responsible for the supervision of (name of the Network) were aware of the complaint from (name of the complainant) against (name of X Associates). Correspondence with (name of the Network) shows that they asked to be updated on progress. This therefore demonstrates that the information provided by (name of the complainant) to the PEO (sic Public Enquiries Office) was passed to the relevant supervisory team within a reasonable timescale. As noted above, I have not investigated their reaction to this information, as this is a regulatory decision.”

The Commissioner has requested sight of these files to see for himself how the information given by the complainant was assessed but unfortunately these have been mislaid within the FSA. The quote above indicates that the supervision team “*..were aware..*” of the complaint but he has no knowledge of how the FSA undertook any further investigation to enable him to comment on whether the action taken was proportionate to the information given by the complainant. The Commissioner accepts that any decision to act or not to act on information is a regulatory decision which is not within the scope of the Complaints Scheme but without sight of the supervision file he is unable to make an informed judgement on whether the FSA handled the information supplied to it appropriately. The Commissioner is, therefore, not able to make a finding on this element of the complaint. This is a matter for regret in the view of the Commissioner.

3.2 On the second component of the complaint, **whether the FSA handled the Stage 1 complaint appropriately**, the Commissioner has considered the following –

(a) Following his initial letter of 28 July 1998, the complainant had been in correspondence with the FSA since 2000 concerning his complaint about X & Associates. However, it was not until his letter of 8 April 2003 (received 10 April 2003) that he formulated his complaint against the FSA following his rejection of compensation by the Independent Assessor. The FSA acknowledged this correspondence on 14 April 2003 and enclosed a leaflet explaining the formal Complaints Scheme. The complainant replied on 16 April 2003 expanding on his complaint and sent a further letter on 25 April 2003 advising that he had copied in the Complaints Commissioner.

(b) The FSA Company Secretariat responded by letter dated 12 May 2003. It confirmed that the FSA was always willing to review any information people provided about allegations of wrongdoings by a regulated firm but that as the complainant's substantive complaint was his failure to gain compensation for the mis-selling of unregulated products by the IFA in question, the FSA would not usually become involved with such cases as that was the role of the FOS. The FSA acknowledged that the complainant had pursued his case through both the FOS and the Independent Assessor and noted that he had not been able to secure compensation. It was suggested that there may still be the avenue of independent legal action through the courts or a possible approach to the police if he had evidence of criminal action by the IFA. The FSA concluded that the information provided by the complainant had been passed to the supervisory team of the firm and asked that if the complainant wished to provide any further details then he could send them direct to that source.

(c) The complainant replied by letter dated 20 May 2003 expressing his views strongly that the FSA had not responded to his complaint and that he remained dissatisfied with their lack of action. He copied in the Complaints Commissioner.

(d) The Complaints Commissioner wrote to the complainant on 12 June 2003 in response to his copy correspondence and whilst reminding him that the Scheme had no jurisdiction over matters relating to the FOS, its predecessor body the PIAOB or the Independent Assessor, it was understood that the complainant had expressed discontent about some of the actions of the FSA which might fall within the remit of the Scheme. However, the Commissioner's conclusion was that it was not entirely clear whether he was making a formal complaint specifically about the FSA or whether he was simply expressing dismay at the financial services regulation in general. It was suggested that in the first instance he should outline exactly which of the actions (or inactions) of the FSA he was dissatisfied with and the reasons for that dissatisfaction and submit that to the FSA for comment. A copy of the letter was sent to the FSA.

(e) The complainant then formalised his complaint to the FSA by letter dated 24 June 2003 and received a response dated 14 July 2003. The FSA analysed his complaint into two parts, namely, that the FSA had failed to properly regulate the firm involved in the complainant's dispute by unreasonably allowing it to remain

authorised and that the FSA mistakenly referred him to the PIAOB/FOS in 1998. Both elements of the complaint were entered into the Transitional Complaints Scheme.

(f) The complainant responded on 22 July 2003 expressing his concerns again and sent a further letter dated 30 July 2003, enclosing a copy of his earlier letter as he had not received any acknowledgement. He sent another letter dated 31 July 2003 outlining two specific concerns. On 4 August 2003, the letters were acknowledged by the FSA, confirming that they had been passed to an investigating officer. The complainant wrote again on 6 August 2003 enclosing a copy of a letter he had written to his solicitors seeking advice, and again on 12 August 2003 and 18 August 2003 with further enclosures.

(g) On 26 August 2003, the FSA sent a holding letter to the complainant regretting the delay in providing a substantive response and gave an indication that it was hoped that such a response would be sent within the next two weeks. The substantive response was sent by letter dated 11 September 2003 and did not uphold either element of the complaint. The complainant was not content with the result and wrote again on 17 September 2003 and received a reply dated 24 September 2003.

(h) The Scheme procedures in 2003 required an acknowledgement to be sent within five working days of receipt of the complaint and, if entered into the formal Scheme, a substantive response within eight weeks of receipt. The complainant received the acknowledgement to his letter of 24 June 2003 within 14 working days and the substantive response within 12 weeks. The substantive response from the FSA of 11 September 2003 did not specifically give an apology for the delay. However, the holding letters sent by the FSA of 4 August 2003 and 26 August 2003 did explain that they had not met their deadlines and referred to the “*..significant amount of case history that needs to be reviewed.*” The substantive response did copy the correspondence to the Commissioner.

(i) The Commissioner acknowledges that the FSA undertook the investigation correctly by using a senior member of staff who had not been previously involved in the complaint and they kept the complainant advised of progress although in their final substantive response they did not apology for the delay, they had made the complainant aware of their service standards and the reasons for any delay. When they received further correspondence from the complainant dated 17 September 2003 they responded promptly on 24 September 2003.

(j) On the evidence before him, the Commissioner does not uphold this element of the complaint.

3.3 On the third component of the complaint, **whether the FSA showed a lack of due care in referring the complainant to the FOS in 1998**; the Commissioner has considered the following –

(a) The complainant wrote to the PIA Consumer Help Desk on 28 July 1998, which was received by the FSA Public Enquiries Office on 30 July 1998. His letter and supporting documentation outlined his complaints against X & Associates. In brief these were -

- (i) X & Associates had assisted the complainant to co-ordinate a legal action against V Ltd resulting in a payment of £438,367.52 being made to him in August 1993. X & Associates had made a charge for its services of £45,000 without his prior agreement.
- (ii) In April/May 1995 the complainant lent an amount of £104,000 as an investment in a company SS Ltd. He alleges that the IFA convinced him that this would be secure as the company had purchased an asset of a property at a cost of £155,000. An order for the sale of the property was made on 21 August 1997 and it was sold one year later. The complainant received £70,004.52 after costs, a shortfall he calculates as being £57,776.64.
- (iii) The complainant alleges that in undertaking the proceedings to obtain possession his costs were in the order of £36,000.
- (iv) The complainant alleges that various shares were purchased in SS Ltd on the advice of Mr X, when, in the complainant's view, Mr X knew that the company was in financial difficulty.
- (v) Mr X introduced the complainant to another individual, Mr W, who, the complainant alleges, Mr X knew had been a director of several companies that had been wound up and who advised the complainant to lodge his insurance bonds³ as collateral for a bank loan for SS Ltd.
- (vi) In his final paragraph of his letter of 28 July 1998, the complainant stated –

“As part of the advice that (name of sole proprietor, Mr X) gave to me was after July of 1996 when he registered with (name of the Network) may I please ask your advice on, notifying them of my complaints.”

(b) The FSA replied by letter dated 2 September 1998 apologising for the delay and explained that the FSA handled all public enquires on behalf of the PIA. In analysing the content of the letter, the FSA advised the complainant that commercial loans, acquisitions and the lending activities of firms were not classed as investment business under the Financial Services Act 1986 and that it would not be possible to consider such complaints. It directed him to the Trading Standards Office, which looked into complaints about activities under the Consumer Credit Act 1974 and suggested that if he wanted to obtain details of the Act he should contact the Office of Fair Trading and provided an address. The letter specifically stated -

³ Please see footnote 2 for details.

“Arranging deals in investments and investment advice are activities which constitute investment business and can be considered under the PIA’s complaints procedure. This is described in the leaflet that was previously sent to you and if you consider that you have not been able to resolve the matter with the firm, then you have the option of referring a case to the PIA Ombudsman Bureau.

“I enclose a further leaflet which explains how to do this and I have sent your papers directly to the PIA Ombudsman so that you do not have to copy them again. You will however, need to complete the form at the back of the leaflet and obtain confirmation from (name of the Network), which is the authorised firm responsible for (name of X & Associates), that the firm has issued its final decision in respect of your complaint.... (name of the Network) is the principal firm responsible for the activities of (name of X & Associates) and the PIA Ombudsman can only consider complaints once the matter has reached an impasse with the firm.”

The letter also explained that a regulated firm should give notice, via a terms of business letter, before charging a fee. It stated –

“Where a regulated firm intends to charge you a fee for its investment services, it must give or send to you a copy of its terms of business letter and after allowing you an interval of at least 24 hours in which to read the agreement, receive from you a signed copy before providing you with any investment service. The basis and structure of any charges must be included and if a firm wishes to refer to non investment services which it provides then it must do so and state that these are not regulated under the Act.”

He also suggested that the complainant may wish to seek advice from the local Citizens Advice Bureau on any legal action resulting from such a terms of business agreement.

(c) In a letter dated 24 June 2003 and reiterated in correspondence of 6 August 2003, the complainant states –

“As FSA gave me the only option of taking my complaints to the Ombudsman and events that surrounded that saga, which lost me my rights to further sue (name of the Network)’s appointed representative, I claim that redress for my losses should come directly from FSA, and or FOS leaving Financial Services to put its own house in order.”

In a letter subsequently sent to the FSA dated 17 September 2003 the complainant expands on the expression used of “only option” –

“You are perfectly aware, or should be, that the meaning of my phrase “only option” refers to the only option given to pursue FSA’s Member within Financial Services, and FSA’s initial attempt at passing my complaints and claims around within Financial Services, by FSA to FOS. “

(d) It is the Commissioner’s view that the response from the FSA analysed the complainant’s letter correctly as being primarily concerned about non-investment business and alerted the

complainant to the fact that this would not be within the PIA's jurisdiction but gave information as to which organisations may be able to assist him. It stated that arranging deals in investments and investment advice were activities that constituted investment business and could be considered under the PIA's complaints procedure and there was an option of referring the case to the PIAOB. Advice was given as to how the complainant should proceed with seeking to close his complaint with the Network before the PIAOB could review his file and, in order to be helpful, the correspondence was forwarded directly to the PIA Ombudsman for consideration. It gave general advice on when an IFA was able to charge fees for work to be undertaken and specifically referred to the situation if the IFA wished to include non-investment business. He closed the correspondence with further advice on how the Citizens Advice Bureau may be able to assist him if the complainant had a dispute over this aspect of his complaint.

(e) On the evidence before him, the Commissioner accepts that the FSA did show due care in 1998 when responding to his complaint and directing him to the PIAOB and providing him with other advice. The Commissioner accepts that it is for the PIAOB, not the FSA, to establish whether any part of the complaint came under its jurisdiction having sought clarification from the complainant as appropriate. For these reasons, the Commissioner does not uphold this element of the complaint.

- 3.4 On the fourth component of the complaint, **whether there was any unreasonable delay or lack of care in respect of how the PIA/FSA has dealt with the issues raised by the complainant over the last six years**, the Commissioner has considered the following –

Was there any unreasonable delay?

(a) The initial correspondence to the PIA of 28 July 1998 has been commented upon under paragraph 3.1 above. The timescale for the response was reasonable (an acknowledgement being sent on 3 August 1998 and the substantive reply on 2 September 1998) and the FSA showed due care in passing the information supplied by the complainant to the supervision team and sending his correspondence to the PIAOB. Subsequently, the complainant wrote again to the FSA on 23 September 2000 and this was acknowledged by the Correspondence Executive on 20 October 2000 who again referred the complainant to the PIAOB. In March 2002 following the FOS giving the final decision that his complaint was outside their jurisdiction, the complainant wrote to the FSA again and was advised by the Company Secretariat that he could take the matter of how his complaint had been handled by the FOS to its Independent Assessor.

(b) Following the finding by the Independent Assessor and correspondence with the Commissioner's Office, the complainant wrote to the FSA on 8 April 2003 stating his specific complaint against the FSA. After a number of holding letters, the FSA sent its substantive response on 11 September 2003. This correspondence has been commented on by the Commissioner under paragraph 3.2. When it received further correspondence from the complainant dated 17 September 2003 it responded promptly on 24 September 2003.

Was there any lack of care?

(c) The complainant has mentioned on a number of occasions in correspondence with the Commissioner how he understands from the FSA's letter of 2 September 1998 that the FSA has indicated Mr X had broken two of its rules but took no action themselves: first by not giving him written notice of any charges to be incurred prior to the work being undertaken and second by not disclosing that the advice he was giving the complainant did not come under the regulations of the FSA. **This, however, is not correct.** First, whilst due notice is required to be given to a client if the IFA is to charge a fee, this relates to investment services as defined by the Financial Services Act 1986 not the financial advice that was given to the complainant in assisting him with his court action. Second, the wording used by the FSA in the letter of 2 September 1998 mirrors that of the PIA Rule Book, on the subject of terms of business letters, As quoted from Chapter 4, Terms of Business (2)(a) Terms of Business must contain all the information set out in the applicable sections of Table 4. Section 1, paragraph (5) of that Rule Book states -

"A statement of the products or services provided by the Member, as permitted by PIA. (If the Member wishes to refer to non-investment services which it provides, it must do so in a separate paragraph and state that these are not regulated under the Act.)"

The choice as to whether an IFA promoted the fact that it also undertook non-investment business remained that of the IFA. It was only if the IFA **wished** to promote the fact that it undertook non-regulated business was it required to state so *"..in a separate paragraph and state that these are not regulated under the Act)"*.

As X & Associates were at the time regulated by the FIMBRA directly, albeit outside the jurisdiction of the Complaints Scheme, for completeness the Commissioner has reviewed whether FIMBRA had a similar wording to that of the PIA. The appropriate rule is that of 15.2 (3) that concern the content of a terms of business letter and states –

"A statement of the investment services you provide, as authorised by FIMBRA. (If you wish to refer to non-investment services which you provide, you must do so in a separate paragraph and state that these are not regulated under the Act."

Again, the choice is left with the IFA to decide whether to promulgate the fact that it undertook other types of business. The complainant maintains that he relied on the fact that the IFA's notepaper, on which the Terms of Business had been reproduced, carried the expression "Specialist assurance, Pensions, Investments, Mortgages and Financial Consultants" but the actual statement within the Terms of Business stated "X & Associates are authorised by the Financial Intermediaries, Managers and Brokers Regulatory Association (FIMBRA) to provide services as Investment Adviser Life Assurance, Unit Trust and Pensions Intermediary and is bound by the Rules of FIMBRA." The Commissioner can appreciate the concern of the

complainant that he had assumed that all activities of the IFA were governed by FIMBRA but he has no jurisdiction over that organisation nor does he have any jurisdiction over the rule making powers of the FSA.

(d) Subsequent to this investigation being undertaken, the complainant has commented on the fact that X & Associates had ceased to be an appointed representative on 12 August 2003 but then made an application to be directly authorised. The Commissioner has made enquiries as to the background to this application for authorisation. He has seen internal paperwork, which demonstrates that, in reviewing whether or not the application should be granted, the original complaint (which was disclosed by X & Associates on its application) had been considered by the appropriate FSA Committee. The Committee did agree to authorise X & Associates subject to it evidencing that it had compliant professional indemnity insurance [PII]. However, Mr X failed to demonstrate that he had PII and did not withdraw the application before the statutory deadline, so the application for life and pensions business was formally refused. X & Associates subsequently became authorised for mortgage business (31 October 2004) and general insurance business (15 January 2005).

(e) Notwithstanding the fact that the FSA cannot locate the supervision files for 1998/1999 to demonstrate how they reacted to the sensitive information being provided to them by the complainant (considered under paragraph 3.1 above), the responses to the correspondence provided by the FSA to the complainant do not show any unreasonable delays or lack of care in respect of the issues raised by him over the years.

(f) On the evidence before him, the Commissioner does not uphold this element of the complaint.

4. Recommendation

4.1 Given the unfortunate circumstances of this case from the complainant's view point, it is particularly a matter of regret that the FSA are unable to locate the relevant supervision files on the Network and in particular those that showed what happened following the receipt of the correspondence from the complainant dated 28 July 1998 which was passed to the appropriate supervision team. This would have allowed the Commissioner to make a finding on that element of the complaint (paragraph 3.1 refers). It is unsatisfactory to both the complainant and the FSA for the Commissioner not to be able to do so. The Commissioner recommends that the FSA instigate an overview of their on-site and off-site storage facilities to ascertain whether they are as effective as they should be.

4.2 The Commissioner has decided to publish this Report.

June 2005