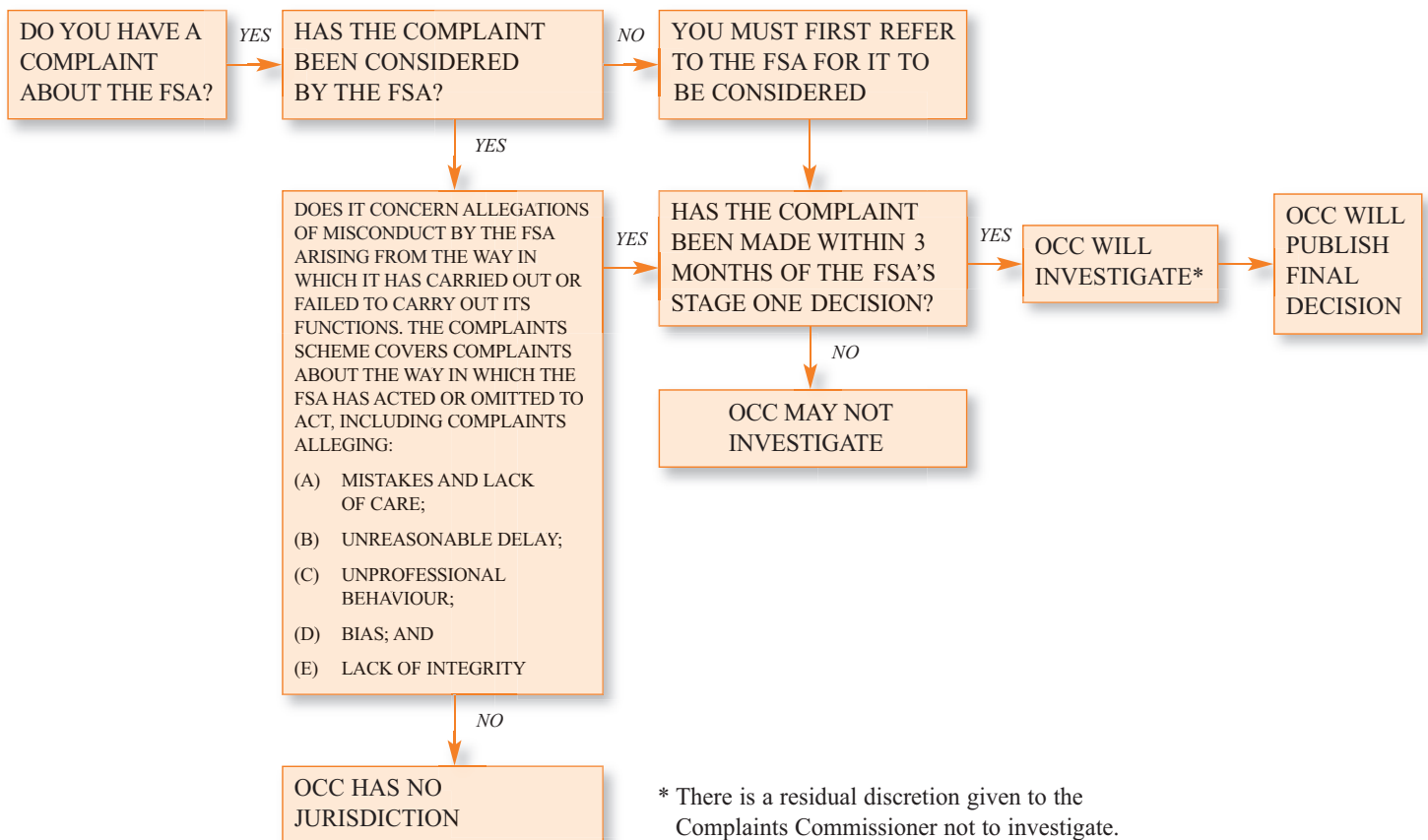


Office of the Complaints Commissioner Annual Report for 2007 / 08





Sitting from left to right: Ivona Poyntz, Deborah Clarke and Karen Perry
Standing from left to right: Andrew Richardson, Sir Anthony Holland and Roderic Glyn-Thomas

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ANNUAL REPORT for 2007 / 08

This is the Seventh Annual Report of the Office of the Complaints Commissioner
It covers the period from 1 April 2007 to 31 March 2008

Matters covered in its content are:

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Sir Anthony Holland

Sir Anthony was appointed as the Financial Services Complaints Commissioner on 3rd September 2004 for a three year term. He has been re-appointed as the Complaints Commissioner for a further three years from 3rd September 2007. The position of the Complaints Commissioner was created by the Financial Services and Markets Act 2000 to provide an independent means by which the regulated community could have an independent adjudication on complaints against the Financial Services Authority.

During his varied career Sir Anthony has served as the Chairman of a Social Security Appeal Tribunal, President of the Law Society (1990-91), Governor of the College of Law (1991-97), on the Council of JUSTICE (British Section of the International Commission of Jurists, 1991-2001), as Chairman of the Executive Board of JUSTICE (1996-99), member of the Council of the Howard League for Penal Reform (1992-1999), member of the Criminal Injuries Compensation Appeals Panel (2000-2005), Chairman of the Northern Ireland Parades Commission (2000-2005) and Chair of the Northern Ireland Legal Services Commission (2004-2007). His appointments in the financial services industry include a period as a first instance Chairman of the Securities and Futures Authority (1993-2000) and Principal Ombudsman to the Personal Investment Authority Ombudsman Bureau (1997-2000).

In addition to his position as Complaints Commissioner, Sir Anthony was the Chairman of the Standards Board for England (2001-2008), a lay member of the International Governing Council of the Royal Institution of Chartered Surveyors (2002-2008), and appointed a member of the Board of the Pension Protection Fund in July 2007.

Overview

Since 1 April 2007, the Complaints Commissioner (the Commissioner) received 137 allegations and complaints. Individual consumers account however for an increased 70% of overall complainants compared to only half of complainants last year, the remainder being made up of solicitors on behalf of their regulated clients, MPs and firms. In the majority of cases individual complainants approach us with dissatisfaction about the Financial Service Authority (FSA)'s role in regulating or dealing with particular firms in the financial services industry, which in turn have allegedly caused the individuals stress, inconvenience or financial loss. The sharp increase in individual consumer complaints this year is attributable to market developments such as the FSA's decision to grant a waiver to certain financial services providers with respect to dealing with complaints about charges applied to current banking accounts, and the reattribution of orphan assets by a large financial services provider, which have prompted a heightened response from consumers. Other themes arising from complaints are analysed elsewhere.

Background to the Complaints Scheme

The FSA is required by the Financial Services and Markets Act 2000 (FSMA) to operate a Complaints Scheme for investigation of complaints against itself. The Scheme came into operation on 3 September 2001. The relevant rules are set out in Complaints against the FSA (COAF) and which are made pursuant to Paragraph 7 of Schedule 1 to FSMA. As part of the complaints arrangements there must be a Complaints Commissioner who is independent of the FSA and able to conduct impartial investigations. The current Commissioner is Sir Anthony Holland who was appointed on 3 September 2004 for a three year term and reappointed on 3 September 2007 for a further three year term.

Statutory Information

Chairman and Director Sir Anthony Holland

Company Secretary Ivona Poyntz

Statutory accounts have been lodged at Companies House.

Statistics from 1 April 2007 to 31 March 2008

Enquiries and complaints in progress at start of year	18
New enquiries and complaints received during year	137
Deferred cases	2
Enquiries and complaints concluded	143
Enquiries and complaints in progress at end of year	10

Complaints were investigated promptly during the year. On average, the majority of complaints were dealt with within the internal service standard of 20 days, with only a small number of cases requiring an extended investigation due to specific circumstances. At no time has there been any backlog of complaints where the investigation has not started.

The following issues help clarify the framework within which the Commissioner is able to deal with complaints.

Compensation

Many complainants believe that the Commissioner presides over a full compensatory scheme similar to the Financial Services Ombudsman. That is not the case. If the issue of compensation is explained and clarified at the outset, experience shows that many complainants may realise that referring their complaint to the Commissioner is not the appropriate avenue for financial recompense.

Personal Hearings

Recently, a number of complainants have requested a meeting with the Commissioner to discuss their complaints, the investigation or the Commissioner's findings. The Commissioner has declined these meetings as he conducts his investigations on the basis of an inquisitorial approach based on the documentation presented to him. The Commissioner holds the view that, if he were to have meetings, then both parties would have to be present possibly with lawyers attending. In the Commissioner's opinion, this would then be only a short step to this making the Commissioner's inquisitorial investigation, into a quasi-adversarial one, but without the safeguards that such a process involves in a court situation.

The Complaint Scheme

The Commissioner continues to publicise the Complaints Scheme both in the FSA and in the market place and has been involved in a number of initiatives in order to take this forward. These initiatives included talking to groups of senior individuals representing industry and consumers.

Complaints Brought to the Office of the Complaints Commissioner

When a complainant contacts the Commissioner, he should ensure that he has checked that the complaint falls within the jurisdiction of the Commissioner and that the Commissioner is able to investigate his concerns. Details of the types of complaints the Commissioner can investigate can be found in a 'General information Leaflet', a link to which can be found on the 'About' page of the OCC website.

The complainant should also ensure that the complaint has first been referred to the FSA and that it has provided the complainant with a substantive response, as it is unlikely that the Commissioner will investigate a complaint which the FSA has not had the opportunity to investigate.

The complainant should also ensure that, when referring the complaint to the Commissioner he does this within three months of the date of the FSA's substantive response and provides arguments explaining why he feels the FSA's substantive response is incorrect. If a complainant simply asks the Commissioner to review a case without giving an argument why he feels the FSA's decision is incorrect, then it is difficult for the Commissioner to be able to find against the FSA. Similarly, if the complainant intends to submit further evidence in support of his complaint, then this should be done at the outset. Providing information to the Commissioner at intervals throughout the course of the Commissioner's investigation is unhelpful and will result in the time the Commissioner takes to consider the complaint being increased.

COAF

The Complaints Scheme rules are constantly monitored and the latest ones were published in January 2008 with some amendments. The main amendments are in relation to confidentiality. When corresponding with the Commissioner's office, prior to receiving its Final Decision, all the parties involved in the complaint (the complainant, the FSA and the Commissioner's office) should realise that all correspondence will remain confidential and will not be communicated to other parties except for the purpose of taking legal advice. In these circumstances the legal adviser is also under a similar obligation of confidentiality. The reason for this is that during an ongoing investigation any one of the parties involved in the case may still have to provide additional evidence, which may change the outcome. The Commissioner's view on a case plainly can and does change up until the time of his Final Decision. It is unsatisfactory from any viewpoint for any ongoing views to be communicated to a third party or published in the media prior to the issue of the Final Decision otherwise it could be detrimental to the integrity of the investigatory process

Themes

During the course of the last year, the Commissioner has dealt with a variety of complaints, some that fell within his jurisdiction and others that were not ones that he could investigate and where the complainant was re-directed to the appropriate organisation. A number of recurring themes emerged during the course of the year, listed below.

Reporting Issues

1. Cancellation of Part IV Permissions of Firms after 31st March deadline

There have been a number of complaints to the Commissioner's office concerning firms having to pay annual fees due to their cancellation notice not being received by the FSA until after the deadline (31st March). Many of these complainants provide no reasoning as to why firms believe they should not pay the fee other than it's 'unfair'. Further many complainants admitted that the appropriate form missed the FSA cancellation deadline by some months.

Ultimately the position is that the firm has agreed to the rules and guidance laid down in the FSA handbook in signing its original application for authorisation. The onus is subsequently on the firm to know and abide by the FSA's rules and guidance, and in these cases, submit the cancellation form before the deadline. All firms who wish to cancel their Part IV permissions (authorisation) to carry on regulated activities must formally apply to the FSA using the appropriate form.

To avoid incurring fees for 2008/09 the deadline for submission of the appropriate form was 31st March 2008. This is applied consistently to all FSA regulated firms. It is of little consequence whether a firm has been carrying out the regulated activity or not during this time. The onus is upon the firm and it must bear the responsibility for its own failings. Unless a firm can demonstrate evidence which shows that the FSA received the appropriate form correctly filled in prior to the deadline, or some other exceptional as well as substantial reasoning for not paying the appropriate fee, it is unlikely that the Commissioner will consider making a recommendation to the FSA to alter its position.

2. Notification of changes to numbers of Approved Persons in Firms

A number of firms still do not appreciate that the level of annual fees a firm pays is directly related to the number of approved persons it has and this is a concern. If the firm does not notify the FSA of a reduction in the numbers of its approved persons prior to the deadline of 31st December then it has only itself to blame. It should be noted that the firm is obliged to complete a Form C within seven business days of the staff member leaving the employ of the firm.

Dissolution of a partnership

A partnership is a body, which differs from a limited company in that each partner, is both jointly and severally liable for the liabilities of the partnership. Some members of a partnership do not appreciate that, unlike a limited company, they remain accountable for any liabilities, which occurred whilst they were a member of the partnership, even if they have left and are no longer a member of the partnership (unless on leaving an indemnity has been obtained from the complainant concerned or run off insurance has been taken out on an individual liability basis).

An indemnity from an incoming partner or a limited company taking over the partnership does not bind a prospective litigant who later alleges poor service in the past when the former partner was a partner.

Clearly, before anybody either incorporates a company or enters into a partnership, they should obtain full legal advice about the consequences (present and future) of doing such a thing. It is of concern that either individuals are not seeking this advice, or do not understand the potential consequences of the action they are taking.

Bank and Building Society Complaint Handling Waiver

In mid 2007, the FSA granted a waiver, in respect of the normal complaint handling rules explained in the FSA's DISP handbook, to those banks and building societies, which chose to apply for such a waiver. This was to await the resolution by the High Court of a test case, brought by the Office of Fair Trading.

The test case revolved around the issue of the fairness of some of the various charges made by banks and building societies to customers who exceeded their overdraft limits sometimes unintentionally. A number of consumers were unhappy with this postponement arising out of the waiver, and also with the FSA's decision not to rescind the waiver when they complained.

It is clear from the correspondence that the Commissioner received that these complainant's do not appreciate the types of complaints the FSA can investigate under COAF and that COAF specifically excludes certain issues, such as those which relate to the use of the FSA's legislative powers (including guidance) under the Act, this from the scheme. The only issue that this waiver can give rise to is that of immediate financial hardship, in which case a reference should then on those grounds be made to the Financial Ombudsman Service.

Reattribution of a firm's orphan assets

The FSA's role in this process is to ensure that the Policyholder Advocate and the firm are able to conduct, and have conducted, a full and fair negotiation. Once this has happened, and the firm is in the position to make an offer to affected policyholders, the FSA will then scrutinise independently the fairness of the proposals. If the FSA concludes that the proposals are unfair, it will challenge the firm using its regulatory powers. Similarly, if the reattribution involves a court process the FSA is required to inform the court of its views on the fairness of the settlement.

Whilst the FSA has set out its position in matters such as this, many consumers do not appear to appreciate its role in this exercise. Similarly, from the papers submitted to the Commissioner it is clear that many consumers believe that, rather than simply overseeing the process, the FSA is party to, and heavily involved in, the discussions, and is also able to impose a settlement on the firm.

As the agreement of the settlement is a matter between the firm, its shareholders and its policyholders it is inappropriate for the FSA to become directly involved in this matter until the negotiations have been finalised. Once the negotiations have been finalised, if the FSA does not believe that the proposed settlement is fair it can then intervene; alternatively, if the policyholders are unhappy with the proposed settlement, then they are free to challenge this by legal means through the court process.

Firms receiving a passport to conduct business in the United Kingdom

Firms from other European Economic Area states, which already hold authorisation from their home state regulator, are able to apply for authorisation to conduct regulated business within the United Kingdom. This authorisation is provided by the home state regulator and means that the firm does not have to go through the usual FSA authorisation process.

Where a firm has received an 'inward services passport' the FSA is only able to regulate how it conducts its business in the United Kingdom. The FSA does not regulate or approve the firm, as this is something the home state regulator continues to do.

The Commissioner brought to the attention of the FSA the uncertainty and even confusion experienced by the general public on the issue of regulation of an European Economic Area inward services passported firm's activities in the United Kingdom. The FSA has agreed to review how firms, in receipt of an 'inward services passport' conduct business in the United Kingdom. As a result of this review, a proposal was included in the FSA's March 2008 Quarterly Consultation Paper which proposes new rules to clear up consumer confusion about the regulatory status of European Economic Area financial firms that operate in the United Kingdom under an 'inward services passport'.

The proposed new rules will mean that European Economic Area firms operating in the United Kingdom but regulated in their home state will no longer be able to use the FSA logo on financial promotions and statements sent to United Kingdom customers. Only financial firms directly authorised by the FSA will be able to use the FSA logo in future.

Tribunal Hearings

If a firm, or affected individual, believes that the FSA has acted inappropriately or arrived at the incorrect decision, then they may be able to refer the matter to the Financial Services and Markets Tribunal. However, in making a referral to the Tribunal, they should be aware that it is unlikely that the FSA will fund their case as well as its own. Similarly, if unsuccessful in their claim, they should also be aware that the FSA is within its rights to make a request to the Tribunal for its costs. Whether the Tribunal will make such an award is a matter for the Tribunal.

Threat of Legal action against the FSA

In certain instances, complainants to the Scheme have threatened legal action against the FSA. In some cases, the FSA has treated such threats as a 'letter before action' and as such have chosen not to investigate the complaint as it feels it would be better dealt with in another way (under COAF 1.4.3). In addition the FSA feels that it needs in such circumstances to protect its legitimate rights as a potential defendant. COAF 1.4.3 provides:

"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)."

It has then transpired that this 'threat' had not been intended as such. The FSA accepts that where a letter is being capable of being misconstrued, it needs to be careful as to whether it should reject what is in reality a complaint.

Letters before action should be clearly identified as such. It should also be remembered that complainants are often upset about the events which they are complaining about and this may lead them to threatening legal action when, in reality, such a course of action is unlikely, based on the cost of such action when weighed against the (perceived) loss suffered. Clearly if the letter before action is from a complainant's solicitor and set out in due form then the FSA should treat it as such. If not then the FSA should use COAF 1.4.3 sparingly as in many cases all it will achieve is to delay the complaint being investigated.

Undertakings made to FSA

Individuals who enter into an undertaking with the FSA not to hold a controlled function thereafter for a certain number of years, cannot challenge the terms of the undertaking at a later stage. The view of the Commissioner is that when a settlement is made both sides take the risk that later events may make the settlement appear better or worse than at the time. However such events do not necessarily mean the settlement made was an unfair one at the time it was made. Consequently any individual considering making such an undertaking should ensure that sound independent legal advice about entering into such an undertaking has been sought and taken. Such advice should include terms in the undertaking in relation to how the undertaking is publicised at the time it is made and if and how it can be referred to by the FSA in future.

APPENDIX A

The Complaints Scheme

Extracts from the Office of the Complaints Commissioner Booklet

Bringing a complaint against the Financial Services Authority

What is the Financial Services Authority?

The FSA is the single statutory regulator for the financial services, general insurance and mortgage industry. Its existence and remit are set out in the Financial Services and Markets Act 2000 (FSMA).

The FSA Complaints Scheme

The scheme was set up in September 2001. It provides the arrangements required under FSMA for the FSA to investigate any complaints in connection with the FSA exercise of, or failure to exercise, its functions under FSMA, other than its legislative functions. The scheme is available on the FSA website (see end of leaflet for website address). The scheme provides an important source of information for the FSA to assess its performance as regulator and provides a system of checks and balances for its stakeholders. The FSA complaints handling arrangements are explained in a separate leaflet 'Bringing a complaint against the Financial Services Authority'.

How a complaint will be treated

A complaint should be referred to the Commissioner where you are dissatisfied with the decision of the FSA investigation into your complaint or where you are not satisfied with the progress made by the FSA in its investigation of your complaint. The Commissioner has complete discretion to decide whether the complaint falls within his jurisdiction, and if so, whether or not he will investigate the complaint. Furthermore if the complaint has not already been put to the FSA, the Commissioner may decide not to investigate until the FSA has had opportunity to investigate the complaint.

If, on the conclusion of the Commissioner's investigation, he decides that the complaint is well founded, recommendations may be made to the FSA and the complainant about how things might be put right. If the Commissioner does not uphold your complaint he will explain the reasons to you.

The Complaints Commissioner provides an independent review of complaints against the FSA and consequently aims to provide finality to the process. On occasion complainants' views differ from the Commissioner substantially and they persist with contacting the Commissioner after the issuance of his decision. However, the Commissioner is also accountable for the budgeting of his office and thus must ensure that this is spent wisely and achieves value for complainants and the wider public. Consequently there are occasions where the Commissioner has to use the discretion available to him not to investigate a complaint further. Where this happens a letter will be issued to the complainant explaining the Commissioner's stance. If the Commissioner's office is minded not to respond to any further contact from the complainant this will be explained within the letter.

APPENDIX A

Complaints the Commissioner can deal with

The Commissioner can deal with any complaint about the way in which the FSA has carried out, or failed to carry out, its role. This includes complaints about mistakes or lack of care, unreasonable delay, unprofessional behaviour, bias or lack of integrity by the FSA and its staff. The Commissioner will investigate your complaint with a view to completing it within 20 working days. If the investigation is going to take longer than that he will write to inform you and keep you updated.

The Commissioner draws his conclusions from the evidence available to him and provides them to both the FSA and the complainant for any further submissions that either party wish to make. Once such submissions have been reviewed a final decision is published. As the Commissioner provides conclusions to his independent investigation, based upon the evidence available to him, unsubstantiated allegations are unlikely to be successful.

Complaints the Commissioner cannot deal with

The Commissioner does not investigate complaints about firms. Complaints about firms should be directed to the firm in question. If dissatisfied with the decision or complaint to the firm is not possible, the complaint should be directed to the Financial Ombudsman Service (FOS).

The Commissioner does not investigate complaints about firms who no longer exist or cannot meet their liabilities. Such complaints should be directed to the Financial Services Compensation Scheme (FSCS).

The Commissioner cannot investigate complaints about the legislative functions of the FSA under FSMA. This includes the making of rules, issuing codes and general guidance.

If you have a general enquiry about the financial services industry this should be addressed to the Consumer Contact Centre at the FSA.

Is there a time limit for making a complaint?

Yes. Your complaint should be made to the FSA within 12 months of your becoming first aware of the circumstances giving rise to your complaint. If the complaint is made later than this you will need to demonstrate reasonable grounds for the delay. Complaints made to the Commissioner should be made within 3 months of the FSA decision.

How can I make a complaint?

Firms must make their complaint in writing to the FSA (email, fax or letter) and in turn the Commissioner. Individuals can make their complaint in any format, however, a written complaint is preferred (email, fax or letter). If you are in any doubt as to whether you have a complaint, approach the Commissioner via the contact details provided.

Does it cost anything?

Making a complaint to the FSA and the Commissioner does not incur any charge. However if you take specialist or legal advice you must meet these costs yourself, even if your complaint is successful.

APPENDIX B**Expenditure****Profit and Loss Account
For the year ended 31 March 2008**

	2008	2007
	£	£
Administrative expenses	(475,781)	(422,770)
Other operating income	472,702	421,044
Operating Loss	(3,079)	(1,726)
Interest receivable	3,079	1,726
	-----	-----
Profit on ordinary activities before taxation	-	-
Tax on profit on ordinary activities	-	-
	-----	-----
Profit on ordinary activities after taxation	-	-
	=====	=====

All amounts relate to continuing operations.

There were no recognised gains and losses for 2008 or 2007, other than those included in the profit and loss account.

The audited accounts for the period ending 31 March 2008 are available from the Registrar of Companies, Companies House, Crown Way, Maindy, Cardiff, CF14 3UZ. The company's auditors are PKF (UK) LLP.

