

19th April 2007

Dear Complainant

Complaint against the Financial Services Authority
Reference Number: GE-L0676

I am writing to advise you that I have now completed my investigation into your complaint.

At this stage I think it would be worth explaining my role and powers. Under the Complaints Scheme (Complaints against the FSA - known as COAF) my role is as an independent reviewer of the FSA's handling of complaints. 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>.

From your correspondence with my office, I understand your complaint relates to the following points:

1. You feel the FSA took insufficient or no action to ensure that your pension review was carried out in 1999.
2. You allege the lack of action on the part of the FSA has led to you having to take legal action against the firm to settle your pension review.
3. You also allege the FSA incorrectly allowed the firm to close whilst your claims against it were unresolved.
4. You also feel that a previous regulator, FIMBRA, allowed the firm to trade between October 1989 and March 1991 without authorisation. This action meant that you were not given the protection of the Financial Ombudsman Service (FOS) or the Financial Services Compensation Scheme (FSCS).

5. You have informed the FSA that three people who appear on its approved persons register (namely Mr X, Mr Y and Mr Z) have failed to conduct the remedial action requested by the FOS. Although the FSA has told you that it has referred the actions of these individuals to its Supervision team, it will not tell you what specific action it has taken against these individuals. As you were directly affected by their conduct, you would like to know what action the FSA took against these individuals.

Before I address your concerns, I must first make you aware that many of the issues you have raised relate to events which occurred prior to midnight on 30th November 2001. This date is important as this is the date when the Financial Services and Markets Act 2000 (FSMA) came into force. As such, although your complaint can be investigated under COAF, it falls under the transitional complaints scheme. Under paragraph 2.1.3 of COAF a complaint which falls into "*the transitional complaints scheme* does not make provision for compensatory payments to be made to complainants". Effectively that means that whatever my views or no matter how much I may sympathise with your case I am not able under the law to make any financial award in your favour.

As part of my investigation into your concerns I have considered the information provided by you and also reviewed the FSA's complaint files. The FSA's files show you first contacted it in November 1999 and asked for its assistance in ensuring that the financial advice you received between August 1988 and June 1991 was appropriate for your personal financial circumstances.

From the FSA's file it is clear it corresponded regularly with both you and the advisers who provided you with financial advice. From the file I also believe the FSA's actions resulted in the DBS network reviewing the pension advice you received from Mr Y in June 1991. The FSA's investigation file also shows it exchanged a considerable amount of correspondence with Mr X, Mr Y and Mr Z in relation to the review of your pension arrangements. The file also shows the FSA requested that these individuals should review the pension advice they gave you between August 1988 and November 1990.

Whilst you say the FSA should have been more proactive in ensuring that the review of your pension took place, I do not believe this to be the case. The FSA has finite resources and operates a risk based approach to regulation. As a result of this it is unable to pursue every issue which is brought to its attention. Instead, it places the onus on firms (and Approved Persons) to comply with its requirements (in this case undertaking the pension review).

The FSA's file shows it instructed the three individuals concerned (Mr X, Mr Y and Mr Z) to undertake a review of the advice you received. However, it also shows there was some doubt over who should actually complete the review of the advice you were given.

Although Partnership A gave you pension advice in 1988 and 1989, part of the partnership was later sold to Mr X and Mr Y. Due to the legalities of this sale, it was not possible for the FSA to clearly establish which of the individuals should undertake the review. To try to assist you, the FSA wrote to all three of the individuals instructing them to complete the review. I believe that by instructing the three Approved Persons to complete the appropriate review, the FSA has discharged its duty of care under the FSMA.

In your letter to my office you also say the FSA allowed one of the firms involved, Partnership B, to close whilst the review of your pension arrangements was still outstanding. When considering this claim, I have had to take into account the regulatory position of the firm involved when the advice was given to you.

The copies of the letters exchanged between Mr X and Mr Y, you have provided, show that each of the parties disputed responsibility for the completion of the review of your pension arrangements. In my opinion, this supports the view that it was unclear to the FSA who was responsible for the completion of the review of your pension arrangements.

Subsequently, from the letter sent to Mr X (and copied to you) by Ms W, at the FOS, it was established that the advice given to you, prior to October 1989, was the responsibility of Partnership A. As a result of this, the partners in this firm at the time (who were Mr X and Mr and Mrs Z) are, as partners in the firm, both jointly and severally liable for this review. However, whilst these individuals are responsible for the review of the advice you were given prior to October 1989, they are not responsible, as partners in this firm, for the advice provided after this date.

The advice you were given between October 1989 and November 1990 was provided by Partnership B. Whilst Partnership B started trading in October 1989 it did not become authorised by FIMBRA (the then regulator) until March 1991. This means that Partnership B was not regulated when it provided you with pension advice between October 1989 and November 1990. This fact is important when establishing who has a liability for completing the review of your pension arrangements as the FSA cannot instruct a firm to review the suitability of the financial products it sold when it was not authorised and therefore regulated.

Whilst the FSA did allow Partnership B to cancel its permissions (which allow it to conduct regulated business under FSMA) and close, in my opinion, it has not acted inappropriately in allowing this to happen. Under FSA policy, just because there is one outstanding complaint (or review) against a firm, this is not necessarily sufficient to allow the FSA to withhold its permission and prevent a firm from closing.

Additionally, it must also be remembered that the advice in question was given to you at a time when the firm was not regulated and the FSA therefore has no powers to instruct the firm to carry out a review before it was allowed to close. Had the FSA not granted the firm permission to close in January 2004, when the FOS established that advice fell outside the FSA's jurisdiction, the FSA would simply have allowed the firm to close in March 2006.

I also appreciate you feel FIMBRA (rather than the FSA) was aware that Partnership B, which was also known as Partnership C, was trading without authorisation. Although I can understand why you believe it took no action against the firm when it became aware that this was happening, I have to disagree with your view.

As previously explained, Partnership B was created when the Sunderland and South Shields offices of the Partnership A were sold to Mr X and Mr Y. When Partnership B began trading it appears it was initially using the registration details of the original firm (Partnership A). At this time the file shows that FIMBRA was unaware that Partnership B was a separate entity to the original firm.

When the sale was made, there was not a requirement to inform FIMBRA or provide it with a copy of the sale agreement. Therefore, there is no evidence to show that FIMBRA was aware of the sale and that the two partnerships which now existed were separate entities.

Likewise, although the headed papers used by Partnership B did show the FIMBRA logo, this does not show that FIMBRA was aware this firm did not form part of the original partnership. This view is also supported by the fact that the headed paper contained details of the other offices operated by Partnership A, the original partnership, which was contrary to the terms of the sale agreement and would also suggest that Partnership B still formed part of the original partnership.

In September 1990, FIMBRA became aware that a second firm, Partnership B, had been set up and there may be an intention for the two firms to trade independently of one another. It therefore opened discussions with both of the firms and provided details of what was required if there was an intention for them to trade independently. Subsequently, on 20th September 1990, Partnership B formally applied to FIMBRA for authorisation to conduct regulated investment business on its own.

It is clear from this that FIMBRA was not aware that Partnership A and Partnership B were to be separate entities until 20th September 1990. Additionally, there is nothing on the file to indicate that FIMBRA was aware that the two firms were actually trading independently of each other between 20th September 1990, when Partnership B applied for authorisation, and 29th March 1991, when FIMBRA gave it authorisation.

As Partnership B was not an authorised firm when you received financial advice from it, you are not offered the protection of the FOS or the FSCS. However, as partners in the firm, it would appear that Mr X and Mr Y are jointly and severally liable for the firm's actions. As a result of this, as they conducted regulated investment business without the appropriate authorisation, they are personally responsible for any loss you have incurred as a result of their actions. Should you wish to pursue a claim against either Mr X or Mr Y, for providing you with unregulated advice, you will have to do this yourself through legal means. You should however take legal advice on the issue of the limitation period being relevant in this instance

I also appreciate you are concerned that Mr X, Mr Y and Mr Z are still working in the financial services industry. I can also understand your concern that despite these individuals currently undertaking controlled functions, and appearing on the FSA's Approved Person register, they have failed to undertake the required remedial action (in the form of the completion of a review of your pension arrangements) requested by the FOS.

I can also sympathise with your frustration at not being told what action the FSA has taken against these individuals. Section 348 of FSMA impresses upon the FSA, as the regulator, a ruling of confidentiality in the context of disclaiming its response or position when acting in the discharge of its function as the relevant regulator. Although you have asked what action the FSA has taken against Mr X, Mr Y and Mr Z, I cannot therefore comment further on this due to the confidentiality restrictions set out in Section 348 which prevent the release of certain sensitive information such as this.

In your letter to me, you mention a case where the FSA applied Section 382 of FSMA (Restitution Orders) and took action against a firm which had failed to comply with an award made by the Personal Investment Authority Ombudsman Bureau (the predecessor to the FOS). You feel that, in a similar way, the FSA should have applied Section 382 of FSMA to enforce the completion of the review of your pension arrangements. Although Section 382 of FSMA is a tool the FSA can use to ensure redress is given to consumers, there are a number of differences between the case referred to in your letter and your personal circumstances.

In the case referred to in your letter, the firm had accepted responsibility for the sale of the plans concerned and was simply disputing the way the complainant's loss had been calculated. Your personal circumstances are different; responsibility for the sale was, and still is, being disputed. As responsibility for the sale was not clear to the FSA, and therefore as it could not prove that a customer from a specific firm (or Approved Person) was actually due redress, it was not felt that it was appropriate to use Section 382 of FSMA to obtain financial redress for you

I am sorry, but from the papers presented to me I am unable to find any evidence to show that the FSA (or any of the previous regulators) has acted inappropriately, or failed to discharge its statutory obligations under the powers it holds. I am therefore unable to uphold your complaint. I appreciate that you will be disappointed with my findings, but hope that you will understand why I have arrived at this decision. I can well understand your view that the entire matter is particularly unsatisfactory from your view point

Yours sincerely,

Sir Anthony Holland
Complaints Commissioner