

18th July 2008

Dear Complainant,

Complaint against the Financial Services Authority
Our reference – GE-L0831

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>.

In the circumstances of your complaint, I feel it is useful to set out 1.4.1 of COAF which governs the coverage and scope of the scheme:

- 1.4.1 (1) The *complaints scheme* provides a procedure for enquiring into and, if necessary, addressing allegations of misconduct by the *FSA* arising from the way in which it has carried out or failed to carry out its functions. The *complaints scheme* covers complaints about the way in which the *FSA* has acted or omitted to act, including complaints alleging:
- (a) mistakes and lack of care;
 - (b) unreasonable delay;
 - (c) unprofessional behaviour;
 - (d) bias; and
 - (e) lack of integrity.
- (2) [deleted]
- (3) To be eligible to make a complaint under the *complaints scheme*, a *person* (see COAF 1.2.1 G) must be seeking a remedy (which for this purpose may include an apology, see COAF 1.5.5G) in respect of some inconvenience, distress or loss which the *person* has suffered as a result of being directly affected by the *FSA's* actions or inaction.

Your Complaint

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

1. For a period of several weeks, prior to 13th September 2007, both the board of Firm A and the FSA were in possession of the following information, but failed to announce it to the market:
 - a) Firm A was in advanced discussions with the Bank of England (BoE) for a rescue line of credit without which it would not be able to meet its obligations as they fell due (in your opinion this means that Firm A was effectively insolvent).
 - b) Firm A had been engaged in serious discussions with a major high street bank about a rescue takeover.
 - c) Firm A had, in your opinion, no realistic prospects of meeting market expectations for profits for the financial year in question.
 - d) As Firm A's share price had fallen substantially, on what you feel was rumour and speculation regarding the above, you believe that it should have made a clarifying statement to the market.
2. You believe that the announcement made by Firm A on 14th September 2007 was incorrect and misleading. You also believe that the FSA was aware of this, and did nothing to prevent its release nor did it make Firm A issue a clarifying statement.
3. You also believe that the statement issued on 14th September 2007 by the BoE, the FSA, and the H. M. Treasury (collectively referred to as the Tripartite Authority) was also incorrect and misleading.
4. You also tell me that you purchased shares in Firm A on both 13th and 14th September 2007. In your letter rejecting my preliminary decision of 2nd June 2008 you explain your purchase on the 13th September as follows:.

“As regards the (purchase on 13th September) clearly there had been a substantial movement in the Firm A share price and there had been substantial rumour and speculation, including in the national press, that Firm A could not meet its profit expectations and was in discussion for a rescue takeover It is therefore reasonable for an investor to assume, as I did, that as no announcement had been made they were not true and therefore the market was discounting problems that did not exist”

and that the second purchase on 14th September arose because you

“relied upon the statement issued by Firm A and the Tripartite Authorities on 14th September which was misleading in that:

1. The Tripartite Authorities' statement stated without qualification that Firm A was solvent which it clearly was not.
2. Firm A gave revised earnings expectations for the year which were overly optimistic and misleading.

3. Firm A confirmed payment of a dividend, a very strong indication of solvency and board confidence, which was reversed a week later. It was on the issue of this particular reversal that I realised that the market was being systematically misled and sold all of my shares.”

You disposed of the shares on 26th September 2007, and in doing so incurred a loss of £46,188.38. As you believe that the failures listed above were, to an extent, responsible for this loss, you are looking for the FSA to make a payment of £46,188.38 plus interest to you.

Background

You initially complained to the FSA on 15th November 2007 highlighting your concerns. The FSA subsequently investigated your complaint and provided you with its response in a letter dated 17th January 2008. As you were unhappy with the FSA’s findings, on 18th January 2008, you referred the matter to me for review.

Upon reviewing your complaint, it became apparent that the FSA had not addressed two of the issues you raised. I asked the FSA to review its decision and address the issues it had omitted to do in its earlier response. The FSA subsequently reviewed its findings and responded to you by letter dated 3rd March 2008. In this letter, the FSA provide you with answers to the outstanding issues and confirmed its reasons for not upholding your complaint.

My Investigation of your complaint identified in 1 to 4 above and comments thereon

I have now had the opportunity to review the complaint you made to the FSA, together with its investigation file. In addition, I have also considered the contents of the FSA’s decision letters (dated 17th January and 3rd of March 2008) and the Report (the Report) issued by the Treasury Select Committee (TSC) on 26th January 2008 entitled “The Run on the Rock”. The responses I received from both you and the FSA to my Preliminary Decision have also been considered when arriving at my Final Decision.

I deal first with **paragraph 1 (a) and (b)** of your complaint. When the inter-bank lending and other financial markets froze in July/August 2007, the Report indicates that the FSA put measures in place to monitor all of the businesses that it believed might be at risk. To allow it to do this, in the case of Firm A, the FSA entered into daily (and in some cases twice daily) telephone contact with the firm and asked for updates on its financial positions.

In the case of Firm A, its management identified that it might experience future liquidity problems and discussed this issue at a board meeting held on 10th August 2007. Following the board meeting, on 13th August 2007, Firm A contacted the FSA to inform it that if the financial markets continued to remain closed to it for an extended period of time it may experience liquidity problems in the future. As such, Firm A and the Tripartite Authority (not just the FSA) discussed a number of ways Firm A may alleviate the problems it faced. These options included:

- i. Firm A resolving its liquidity problems through its own actions in the short-term money markets and by securitising its debt (i.e. using some of its existing mortgages as collateral to obtain funds to offer further loans to customers)
- ii. Firm A being taken over by a major retail bank

- iii. Firm A receiving a support facility from the BoE guaranteed by the Government.

At the time of these discussions, whilst it is clear that there were concerns that Firm A may experience operational difficulties, these related to the manner in which it obtained liquidity (or funding to refinance existing loans from the wholesale money market) rather than over Firm A's ability to meet its liabilities (i.e. solvency). In as much as the firm did, and continues to have, assets of greater value than liabilities, as well as the liquidity assistance of the Bank of England, Firm A was and is able to meet obligations as they fall due. Further, to date, no insolvency proceedings under the Insolvency Act 1986 have been invoked against Firm A.

You take the view that Firm A had an obligation to disclose to the market that it was in takeover discussions with a major high street bank, but in the context of the issue and sensitivity of timing at that stage, I disagree. Although I accept that Firm A's advisers did approach a number of financial institutions about the possibility of acquiring Firm A, only two financial institutions expressed any interest. Subsequently, only one of these, a major high street bank, showed any real interest in the possibility of acquiring Firm A. However, it appears that the major high street bank's interest did not last more than a few days.

I would add that it is common for two firms to conduct high-level but informal discussions about a possible takeover before making a formal declaration of interest or announcing a takeover bid. I would go further and say that preliminary discussions are inevitable in such situations. In this instance, as the acquisition of Firm A was only considered for a few days, it supports the view that the firms were not in serious takeover discussions. It should also be noted that the premature disclosure of information could prejudice an issuer's legitimate interests. With this in mind, I do not believe it was necessary for these discussions to have been disclosed.

When conducting my investigation I also considered paragraph 2.2 (specifically sections "a" and "e") of 'The City Code on Takeovers and Mergers'. The code states

2.2 When an Announcement is Required

An announcement is required:—

- (a) when a firm intention to make an offer (the making of which is not, or has ceased to be, subject to any pre-condition) is notified to the board of the offeree company from a serious source, irrespective of the attitude of the board to the offer;
- (b) immediately upon an acquisition of any interest in shares which gives rise to an obligation to make an offer under Rule 9. The announcement that an obligation has been incurred should not be delayed while full information is being obtained; additional information can be the subject of a later supplementary announcement;
- (c) when, following an approach to the offeree company, the offeree company is the subject of rumour and speculation or there is an untoward movement in its share price;

- (d) when, before an approach has been made, the offeree company is the subject of rumour and speculation or there is an untoward movement in its share price and there are reasonable grounds for concluding that it is the potential offeror's actions (whether through inadequate security or otherwise) which have led to the situation;
- (e) when negotiations or discussions are about to be extended to include more than a very restricted number of people (outside those who need to know in the companies concerned and their immediate advisers). An offeror wishing to approach a wider group, for example in order to arrange financing for the offer (whether equity or debt), to seek irrevocable commitments or to organise a consortium to make the offer should consult the Panel; or
- (f) when a purchaser is being sought for an interest, or interests, in shares carrying in aggregate 30% or more of the voting rights of a company or when the board of a company is seeking one or more potential offerors, and:
 - (i) the company is the subject of rumour and speculation or there is an untoward movement in its share price; or
 - (ii) the number of potential purchasers or offerors approached is about to be increased to include more than a very restricted number of people.

My investigation therefore of your complaint set out in 1(a) and 1(b) drove me to the conclusion that at the start there was no obligation to make a statement to the market.

In **paragraph 1(c)** of your complaint you believe, due to the changes being made to inter-bank lending and the financial wholesale market freeze, Firm A's senior management was aware it was unlikely it would achieve its forecasted profits and should therefore have issued a statement in that context to the market. In investigating this aspect of your complaint, I would draw your attention to Firm A's half-year results issued on 25th July 2007. You say that Firm A did not make the market aware that it was unlikely to achieve its forecasted profits. My investigation has not driven me to that conclusion. I will endeavour to explain why.

When issuing its half-year results, Firm A confirmed, on page 6 of the press release, that:

“Underlying profit before tax grew by 26.6% and underlying profit attributable to shareholders of £223.7 million grew by 28.9% compared with the first half of last year, partly reflecting the timing of gains on disposals. Growth in 2007 full year underlying profit attributable to all shareholders is anticipated to be in line with mean consensus (sic), around 15% reflecting the full year effect of increases in interest rates and competitive pressures for new mortgage lending as lenders delayed passing on increased rates to borrowers.”

I accept that Firm A stated that it believed that its “*underlying profit attributable to all shareholders is anticipated to be in line with mean consensus (sic)*”. However, I believe that it also gave an indication that full year profits were, to a certain extent, dependent upon the cost of loans available from other banks and the financial markets. This view is confirmed by the inclusion of the comment “*...reflecting the full year effect of increases in interest rates and competitive pressures for new mortgage lending as lenders delayed passing on increased rates to borrowers.*” In addition, I would draw your attention to the second paragraph of the Chief Executive’s statement that:

“The outlook for the full year is being impacted by sharp increases in money market and swap rates seen in the first half. This has resulted in a negative impact on net interest income as mortgage pricing in the market generally has lagged behind increases in funding costs in the year to date.”

Collectively, against a background, in the summer of 2007, of the wholesale money market seizure (from where the organisation concerned obtained the majority of its funding) it would be apparent to any investor that this part of the Chief Executive’s statement was particularly pertinent and deserved close attention being paid to it. It is not something that the FSA is responsible for at that point. It is worth mentioning again that my role is to investigate complaints against the FSA only, and complaints against individual firms do not fall under my jurisdiction. Therefore, I am unable to investigate any concerns about the Firm A’s statements. Whilst you say that Firm A had provided incorrect information to the market on its expected profits and its intended dividend payments, it was Firm A which made these statements and not the FSA. Likewise, although you also say that the FSA was aware that Firm A was misleading the market, in my opinion, there is insufficient evidence to support this claim. I would add that it is not the FSA’s role to ‘audit’ or to ask a firm to provide confirmation of its assumptions when making a market announcement.

You believe in **paragraph 1 (d)** of your complaint that Firm A should have made a statement to the market with an explanation of why its share price had fallen considerably (which you feel resulted from rumour and speculation about its solvency). Although I accept that Firm A’s share price had fallen considerably throughout the first half of 2007, there was no requirement for Firm A to issue a statement to explain this fall.

I have also noted your comments that the liquidity problems Firm A was experiencing, together with the higher cost of its borrowings, should have alerted Firm A’s board to the fact that its profits were likely to fall as a consequence of this a profit warning was needed. In addressing this view, I would draw your attention to the comments I have made above regarding the outlook for the full financial year, as these indicate that profits may be affected by the increased borrowing costs. I would also add that it is the firm which makes an announcement regarding expected future profits and not the FSA. As such, even if the firm had inflated expectations over possible future profits (which from the papers I have seen I do not think that it had) this would not be the fault of the FSA at the immediate time the announcement was made.

You consider, in **paragraph 2** of the complaint that Firm A breached UK Listing Authority (UKLA) rules by not disclosing that it would potentially have operational difficulties. Under UKLA rules (which apply to the all firms whose shares or financial instruments are traded on a UK market), which are contained within the FSA’s ‘Disclosure Rules and Transparency Rules’ (DTR) handbook (<http://fsahandbook.info/FSA/html/handbook/DTR>), a firm has a discretion which allows it not to make an immediate disclosure to the market of if this could adversely affect the running of the firm, providing that a number of conditions are met.

However, when granting this exception, the rules do state that the firm must regularly review the position and, if the situation changes, the firm must then immediately make a statement to the market. The FSA rule which is relevant here is

DTR 2.5 Delaying disclosure of inside information

Delaying disclosure

DTR 2.5.1 An *issuer* may, under its own responsibility, delay the public disclosure of *inside information*, such as not to prejudice its legitimate interests provided that:

- (1) such omission would not be likely to mislead the public;
- (2) any *person* receiving the information owes the *issuer* a duty of confidentiality, regardless of whether such duty is based on law, regulations, articles of association or contract; and
- (3) the *issuer* is able to ensure the confidentiality of that information. [**Note:** Article 6(2) and (3) *Market Abuse Directive*]

Legitimate interests and when delay will not mislead the public

DTR 2.5.2 (1) Delaying disclosure of *inside information* will not always mislead the public, although a developing situation should be monitored so that if circumstances change an immediate disclosure can be made.

(2) Investors understand that some information must be kept confidential until developments are at a stage when an announcement can be made without prejudicing the legitimate interests of the *issuer*.

DTR 2.5.3 For the purposes of applying **DTR 2.5.1 R**, legitimate interests may, in particular, relate to the following non-exhaustive circumstances:

- (1) negotiations in course, or related elements where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure. In particular, in the event that the financial viability of the *issuer* is in grave and imminent danger, although not within the scope of the applicable insolvency law, public disclosure of information may be delayed for a limited period where such a public disclosure would seriously jeopardise the interest of existing and potential shareholders by undermining the conclusion of specific negotiations designed to ensure the long term financial recovery of the *issuer*; or
- (2) decisions taken or contracts made by the management body of an *issuer* which need the approval of another body of the *issuer* in order to become effective, where the organisation of such an *issuer* requires the separation between these bodies,

provided that a public disclosure of the information before such approval together with the simultaneous announcement that this approval is still pending would jeopardise the correct assessment of the information by the public. [Note: Article 3(1) 2003/124/EC]

- DTR 2.5.4** (1) **DTR 2.5.3 R (1)** does not allow an *issuer* to delay public disclosure of the fact that it is in financial difficulty or of its worsening financial condition and is limited to the fact or substance of the negotiations to deal with such a situation. An *issuer* cannot delay disclosure of *inside information* on the basis that its position in subsequent negotiations to deal with the situation will be jeopardised by the disclosure of its financial condition.
- (2) The legitimate interest described in **DTR 2.5.3 R (2)** refers to an *issuer* with a dual board structure (e.g. a management board and supervisory board if and to the extent that decisions of the management board require ratification by the supervisory board). An *issuer* with a unitary board structure would be unable to take advantage of **DTR 2.5.3 R (2)** and, therefore, **DTR 2.5.3 R (2)** should only be available to a very limited number of *issuers* in the *United Kingdom*.

DTR 2.5.5 An *issuer* should not be obliged to disclose impending developments that could be jeopardised by premature disclosure. Whether or not an *issuer* has a legitimate interest which would be prejudiced by the disclosure of certain *inside information* is an assessment which must be made by the *issuer* in the first instance. However, the *FSA* considers that, other than in relation to impending developments or matters described in **DTR 2.5.3 R**, there are unlikely to be other circumstances where delay would be justified.

As the firm was suffering liquidity problems and not financial (solvency) problems, both DTR 2.5.1 and DTR 2.5.2 apply. I have noted in this investigation your comments in your response to my Preliminary Decision that you believe that DTR 2.5.1 meant that the firm should have disclosed details of the discussion it was having with the Tripartite Authority in relation to its liquidity problems. However, as I have explained above, I believe that DTR 2.5.2 still applies and accordingly this allowed Firm A to delay such an announcement. Likewise, I would also draw your attention to DTR 2.5.3, together with the guidance contained in DTR 2.5.4 and 2.5.5, which sets out the *FSA*'s views on how, in practice, these provisions should be applied.

As Firm A was undertaking a number of initiatives that may have avoided the need for it to seek emergency funding from the BoE, in my opinion, I believe that it has complied with the appropriate rules. Similarly, when it became clear that a material change to the way in which it obtained funding was necessary (i.e. by seeking and being granted a loan facility from the BoE), Firm A immediately made a statement disclosing this to the market; this is the statement which was made on the morning of 14th September 2007. The TSC report supports my views on this particular element of your complaint (and I would draw your attention to the statements from the Governor of the BoE, senior executives from the *FSA* and senior executives from Firm A contained in pages 55 to 68 of the Report).

When investigating how the disclosure provisions applied to Firm A, the FSA has informed me that it considered a number of factors including:

- whether the receipt of significant lending assistance by Firm A constituted inside information;
- the significance of this in terms of the information which Firm A had previously released to the market about its sources and costs of funding; the impact which the BoE facility would be likely to have on its trading performance and financial results for the remainder of 2007; and its published trading statements and indications of profits for the year; and
- the valuation of structured credit products on Firm A's balance sheet.

Based on its analysis, the FSA was satisfied that Firm A had complied with its disclosure obligations under the rules in DTR. I concur with that view. My reasons for that concurrence are:

- a) disclosure of sensitive information in a complex matter involving a volatile market and the continuing, and apparently indefinite at that stage, freezing of the wholesale money market is invariably going to be a matter of judgement. Suggesting with the benefit of hindsight things might have been dealt with differently is easy to allege but difficult to justify. I do not accept that you have established this aspect of your complaint in that context;
- b) the FSA has a statutory objective of market confidence and premature disclosure of a running tableau of urgent and important developments can equally be criticised as can late disclosure. The judgement call is not an easy one to make, and an erroneous call as you allege, and which is open to argument anyway, does not bring into play COAF 1.4.1 referred to earlier. The evidence would only justify, at best, an erroneous judgement made for good reasons and now only challengeable with the benefit of hindsight;
- c) you have stated that you believe, by not disclosing the information, the FSA allowed a false market in Firm A's shares to develop. You also add that, had Firm A disclosed these potential problems to the market in August 2007, the overall outcome of events would ultimately have been the same. Whilst I accept that an earlier disclosure may not have affected the overall outcome for Firm A, this does not mean that the FSA's decisions were incorrect at the time;
- d) when a situation develops, the FSA, as the regulator, has to decide what action to take based on the information available to it. When doing this, the FSA has to consider the impact the issuing of a statement to the market may have on the firm (and/or the firm's efforts to resolve the potential problems it faces) as well as the potential impact to investors. As such, it is paramount that the FSA, before deciding on what action to take, obtains sufficient information to allow it to make an informed choice. In my opinion, the FSA undertook a number of initiatives to ensure it had sufficient information, which was regularly updated, on the potential problems faced by Firm A. Based on the up to date information held by the FSA, and the efforts Firm A was making to resolve the situation itself, I believe it was reasonable for the FSA to allow Firm A time to try to resolve the situation before making a statement to the market.

It is a far cry from all that to suggest that the FSA allowed a false market to arise in Firm A's shares. That indicates a passive policy designed to mislead whereas in reality fast moving developments during a relatively compact period of time indicates to me that the actions of the FSA represented a reasonably good judgemental approach to the problem of disclosure generally.

I would add this, that the disclosure obligation is, in the first instance, on the firm (i.e. Firm A). The FSA can only intervene if it considers that the 'problems' faced by the firm are something that should be disclosed to the Market, and the firm is unwilling to make an announcement. In this case, as I have already explained, in my opinion DTR 2.5.2 gives a firm (and the FSA) a discretion to delay issuing a statement if it is believed that it will not adversely affect the public or investors. As I believe that Firm A's problems related to liquidity, rather than solvency, in my opinion, the decisions taken by Firm A (and the FSA) not to make any announcements, did not mislead the public. In the context of the events I have referred to and the issue of timing I believe that the decisions taken by Firm A were reasonable at the time ignoring the benefit of hindsight. However, when it became apparent that it would need to seek a financial support in the form of emergency loans from the BoE, in accordance with DTR 2.2.1, Firm A immediately issued a statement to the market informing it of this.

Paragraph 3 of your complaint concerns the statement by the Tripartite Authority. You have expressed in your letter to me 6th June 2008 your complaint in the following way:

"It is my contention that this was not done for the specific reasons that they wished to bolster confidence in Firm A in order to prevent a run on the bank which in any event occurred and that it was feared that the proper qualification would have damaged the confidence of depositors. In other words it was their intention to mislead the market"

In my investigation I carefully read the statement you have referred to. You have not produced sufficient substantial evidence to satisfy me that it misleads or is incorrect beyond your mere assertion to that effect. I accept that liquidity problems faced by Firm A caused operational problems. There appears to be no end in sight to the freezing of the wholesale money markets upon which Firm A relied to continue its business (and which as an investor you could be fully aware of). I also accept that one of the purposes of the statement was "to bolster confidence" in Firm A and in my view that was a perfectly valid and legal objective. You cannot make the quantum leap, in my reasoning, that the intention was to mislead. Such an intention cannot be adduced from the facts that I have identified both here and earlier in my decision and you have provided no evidence for me to conclude that there was such an intention.

In summary, given that the thrust of both your complaints identified in **paragraphs 2 and 3** it has not been shown to my satisfaction that the statements made by Firm A or the Tripartite Authority were either incorrect or misleading in the context of the background at the time, the public knowledge of the wholesale money market position and the importance of maintaining market confidence.

I come now to **paragraph 4** of your complaint. I appreciate that you say you have lost a considerable amount of money due to the fall in Firm A's share price. However, from your submissions to me, you have not provided any evidence either to support this loss or to show that this loss was incurred *as a direct result* (my emphasis) of the actions (or inactions) of the FSA. In your response to my Preliminary Decision you disagree with my views as you feel that the statements issued by both Firm A and the Tripartite Authority were incorrect and misleading as in your opinion:

- i. Firm A was insolvent;
- ii. The revised earnings expectations issued by Firm A included in its July statement (half yearly results) and again with its statement of 14th September were incorrect and misleading;
- iii. you feel that the inclusion of confirmation that Firm A was to pay a dividend in its statement of 14th September shows that it was misleading the market.

At this point, I return in greater depth to your allegation that the Tripartite Authority "*stated without qualification that Firm A was solvent which is untrue*". The statement made by you that relates to the solvency of Firm A is made without any knowledge of the actual position at that time. You have produced no substantive evidence that Firm A was insolvent. Inference and assertion is not evidence. In that context you have, in your submissions to me, referred to section 643 of the Companies Act 2006. However, this section relates to a reduction of capital by private companies supported by a solvency statement. The section is preceded by section 642 which contextualises section 643. Further, the concept of being able to meet one's debts for a 12 month period comes from accounting standards, being the condition which should be met when directors and auditors form the view that a company's financial statements may be prepared on a going concern basis without qualification. A regulator would be more likely to consider as relevant the solvency tests in sections 122 and 123 of the Insolvency Act 1986. That would be, if appropriate, the relevant background to this issue. I, for the reasons I have explained above, and in the light of the background, do not consider that the Tripartite Authority's statement of 14th September 2007 was incorrect or misleading. As a further rationale in this context I should make it clear that I do not believe that either my role or my jurisdiction imposes upon me an obligation, in the absence of clear evidence to the contrary, to second guess either the FSA's belief in Firm A's solvency or the sharing of that belief by the Tripartite Authority.

As to the issue of liquidity, I would say only this. If I were to accept your analysis on the issue of liquidity it would, in effect, be a case of re-opening by another means the issue of solvency that I have already declined to do for the rationale that I have set out above. Further emphasis on liquidity regulation which some now feel desirable appears to be newfound and arising principally from the events in the wholesale money markets' seizure in 2007. It is not possible to jump, as your analysis seeks to do, by saying that the liquidity problem was a solvency issue concealed by the Tripartite Authority and therefore compensation for your loss plus interest is due to you from the FSA. It was, in any event, the operational business strategy of Firm A, in essence, which caused it to suffer from liquidity problems, and in a market environment shareholders as a whole given that awareness must be viewed as taking a risk from which they sought a reward and for which some are still paying a price.

In my analysis of your position, and by way of introduction to this aspect I would say this. In relation to the relevant share purchases, effectively you took a gamble on the share price recovering, substantially to your eventual benefit, and unfortunately, that did not turn out to be the case. This is often the situation in a torrid financial climate such as developed during 2007 both in the particular and the general, and which has endured since. Ultimately, investors invest knowing that certainty can never be one hundred percent and in the climate that subsisted in 2007, in particular, investors must have appreciated that any substantial investment such as the two you made, carried what can only be described as a considerably above average risk. It is not the case that either the FSA (or indeed the Tripartite Authority) can remove this risk having regard to the FSA's obligation in relation to minimising financial volatility, bearing always in mind the interest of, in no particular order, the company and the company's shareholders, the depositors, the company's customers and the public at large. I return to this issue again in considering my position under COAF. This however represents my overarching rationale in this area and should be borne in mind.

From the papers presented to me it is clear that the information Firm A included in its announcements of 25th July (its half yearly results) and of 14th September 2007 reflected Firm A's expectations of future profits and intentions with regard to future dividend payments at the time. The fact that these expectations and intentions may have changed shortly after the announcement of 14th September, although disappointing, do not on their own show that Firm A intentionally mislead the market, nor does this support your claims that the FSA allowed Firm A to do so. Whilst I am sorry that you may have lost a considerable amount of money through the purchase of Firm A shares, in my opinion you have not provided sufficient evidence to show that the loss you have incurred is the direct result of the actions of the FSA.

In your original submission to the FSA, you say that Firm A's share price had fallen considerably and you would have expected the firm to make an announcement to the market to explain this fall. As I have already stated, such explanations are not generally given particularly in a self evidently volatile market. Although you make this comment, despite Firm A's share price falling from £11.54 at close of business on 29th March 2007 to £6.68 at close of business on 12th September 2007, you still purchased 7,450 Firm A shares on 13th September 2007 at a price of £6.4395. On any reading that was a risky exercise. With this in mind, if you believed Firm A should have issued a statement to the market explaining its falling share price (which suggests that you had concerns over the future profitability of Firm A,) you do not explain why, despite the absence of such a statement, you still decided to purchase a large number of shares. I find that difficult to understand.

Similarly, following the announcements made by Firm A and the Tripartite Authority, on the morning of 14th September 2007, it is clear that that the market also had concerns over Firm A. This is view is supported by the fact that Firm A's opening share price on 14th September 2007 was £1.19 lower (at £5.20) than its closing price on 13th September 2007 (which was £6.39). In my opinion, it is clear that despite the market's concern (evidenced by the lower opening and still falling share price) and the concerns you clearly had, you nevertheless decided to purchase a further 4,250 shares (which you did at a price of £4.4495 some 75p lower than the day's opening price). Although you say that your decision to do this was based on the announcements, you have not provided any evidence to show how the announcement influenced or convinced you to purchase further shares in Firm A other than to continue with the strategy of the investment risk that you had decided to take.

Whilst you may have considered the announcements, made on the morning of 14th September 2007, before deciding to purchase the shares, I believe that the announcements were factually correct and, more importantly, did not provide any investment advice or inducements to purchase further Firm A shares whatsoever. As such, when you decided to purchase the shares you did so from an informed position of the possible future liquidity (and profitability) problems facing Firm A. Likewise, as you are no doubt aware, the purchase of shares does carry a degree of capital risk. I am sorry that you may have lost a considerable amount of money through the purchase of these shares. However, from the evidence presented to me, it appears that the decision to purchase these shares was one taken by you and you alone. By deciding to purchase the shares, I conclude that you did so in full knowledge of the risks involved with such an investment and as such, you cannot hold the FSA responsible for your unfortunate choice of investment.

My Position under COAF

As I understand that you intend to proceed to a judicial review of my position (or that of the FSA) I should conclude in order to complete the entirety of my rationale additional reference to what I consider are overarching statutory objectives that I have taken into account in this final decision.

The statutory objectives of the FSA which include (a) market confidence, (b) public awareness, (c) the protection of consumers and (d) the reduction of financial crime. In that context, the Financial Services and Markets Act 2000 specifies that in “considering what degree of protection may be appropriate the (FSA) must (my emphasis) have regard to:

- (a) the differing degrees of risk involved in different kinds of investment or other transaction;
- (b) the differing degrees of experience and expertise that different consumers may have in relation to different kinds of regulated activity;
- (c) the needs that consumers may have for advice and accurate information; and
- (d) the general principle that consumers should take responsibility for their decisions.”

This means to me that ultimately in a case such as yours I must have regard to the general principles set out in (d) above bearing in mind at the same time the provisions of (a), (b) and (c). I also particularly bear in mind your own stated reasons for the share purchases. I have quoted these from your letter of 6th June 2008 in 4 on page 2 of this decision letter. In particular in the context of your stated reasons for the first purchase referred to I find your suggestion that:

“as no announcement had been made they (the reports you refer to) were not true and therefore the market was discounting problems that did not exist.”

a little surprising. It is surprising to me because in essence you were making a substantial as well as a risky investment primarily because you took comfort from the fact that media speculation was allowed to run unchecked and without contradiction. On any analysis, I do not believe that is a reasonable argument for you to present to me and to use as a basis to impose upon the FSA a direct responsibility for your investment strategy.

As to the second purchase on the following day again which I have referred to, I believe I have set out my reasoning in great detail earlier as to why I do not believe that the Tripartite Authority or the FSA can be attributed with responsibility for what was, on any evaluation, a risk laden investment by yourself. As I have already indicated and given the statutory position I have set out above, it is clear to me that, prior to the 14th September 2007 the FSA was closely monitoring the position of Firm A. In doing this the FSA was having regard for the both the interest of the firm, the interests of the public, as well as its statutory position and its rules. From the evidence I have seen, before it issued the statement on the morning of 14th September 2007, on behalf of the Tripartite Authority, I am satisfied that the FSA process had established that the contents of the statement represented both the actuality and the reality of the what Firm A's position was at that time.

From the explanations I have set out, I do not believe that the loss which you have suffered is as a result of being directly affected by the FSA's actions or inactions. From the papers presented to me, I am unable to find sufficient evidence to show that the FSA has not correctly dealt with your complaint. Likewise, you have not provided, nor have I been able to find, sufficient evidence to show that the FSA misled the public or acted in an incorrect or unreasonable manner over the possible problems facing Firm A during August and September 2007. I am therefore unable to alter the decision previously made by the FSA. I believe that I have set out at each appropriate point my reasons for my conclusions so that you understand why I have arrived at those conclusions. I appreciate that you will be disappointed with my findings, but hope that you will understand from the explanation I have set out at some length why I have arrived at this decision.

Yours sincerely,

Sir Anthony Holland
Complaints Commissioner