Complaints Commissioner

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18 December 2018

Dear Complainant

You complained on behalf of your client about the FCA's oversight of the IRHP scheme and the FCA did not uphold your complaint. You referred the matter to me and I issued a decision on your complaint on 2 January 2018 (http://frccommissioner.org.uk/wp-content/uploads/FCA00269-FR-02-01-18.pdf). My recommendation to the FCA was that it reconsider the matter, make inquiries of bank X, and then inform you and me about its conclusions, and in particular:

1. Whether bank X's decision to close your client's claim at the end of the 40-day period was consistent with the agreement;
2. Whether it agrees with me that the bank's initial letter was internally inconsistent, and that its second letter wrongly claimed that the first letter had warned your client that the case would be closed at the end of the 40-day period;
3. In the light of those conclusions, what steps the FCA has taken to establish whether other claimants under the Redress Scheme may have been disadvantaged.

The FCA's response (https://www.fca.org.uk/publication/corporate/response-complaints-commissioner-report-fca00269.pdf) was that it would further consider the matters in 1 and 2 above. In relation to recommendation 3, it said:

> *the FCA has engaged with Bank X to establish whether any claimants under the IRHP Redress Scheme might have been disadvantaged by the bank's application of the 40 day time limit for notifying consequential loss claims referred to in the bank's offer letters to claimants. Bank X has confirmed to the FCA its view that no claimants have been placed at a disadvantage.*

On 16 August 2018 the FCA wrote to you (copied to me) with an update on its considerations of recommendations 1 and 2.

In relation to recommendation 1, the FCA said that bank's decision to close your client's case at the end of the 40-day period was consistent with the agreement for the reasons it gave, reported in my decision letter.

In relation to recommendation 2,the FCA agreed that the first letter did not specifically warn your client about the consequences of not sending a consequential loss claim within the forty-day period. However, it felt '*the letter read in conjunction with the Consequential Loss Guidance sent in the pack with the redress offer, which customers were advised to consider carefully, did make it sufficiently clear to customers that, if they wanted to submit a consequential loss claim, they should do so within 40 days, as otherwise Bank X would be*

able to make the BRO 'final' and not consider any further claims, including for consequential losses.'

The FCA said it considered that there was no inconsistency in the messages being given to customers that, on the one hand, responses and consequential loss claims should be sent to the bank within 40 days but, on the other, the Basic Redress Offer would remain open for acceptance until the closure of the Scheme.

You did not agree with the FCA's reasons and asked me to re-open your complaint. The remedy you seek is for the FCA to instruct the bank to allow your client to submit a consequential loss claim.

I then wrote to the FCA with four points as follows:

1. The first point related to recommendation 1. I wanted a clear statement from the FCA as to whether or not the FCA considered that the bank's imposition of a hard 40-day deadline for sending a consequential loss claim was consistent with the terms of the agreement between the FCA and the bank. My concern was that it could be argued that the imposition of that kind of hard deadline was inconsistent with the purpose of the scheme – particularly where (see further below) the terms of that deadline had not been adequately explained, and where the bank had been inconsistent about how it was handling the claim.
2. The second point related to recommendation 2. The FCA's position is that, although the bank's second letter was inaccurate in saying that the first letter had made it clear that there was a 40-day deadline, there was guidance accompanying the first deadline which had made it clear. I considered that the guidance only said that the bank "may" not consider claims outside the 40-day deadline (i.e. it was a discretion); and I also considered that the letter was unclear (giving an impression that the offer (not properly defined) would remain open until the whole review was complete).
3. I also noted that under the terms of the agreement, the bank was supposed to get FSA approval for all communications with consumers – I asked whether that had happened.
4. Finally, I commented that the FCA's position throughout the handling of the complaint appeared to focus upon defending the bank's position, rather than considering whether something had gone wrong.

The FCA has now responded to these points. It has not directly addressed the point of whether the imposition of the hard deadline is consistent with the scheme directly, although it has said that it was not its role to approve the bank's communications with customers, and that there will be a 'lessons learned' review of the IRHP exercise.

The FCA's view that it has to take the complainant's actions into account when determining if the bank operated the IRHP scheme fairly. The FCA refers to the fact that your client made it clear that his claim was not within the redress scheme and that he would start legal

proceedings against the bank to recover losses. Therefore, the FCA argues that it is not unfair for the bank not to allow him to submit an consequential loss claim.

I have considered this point but I do not agree with it. There is no evidence to suggest that the bank has relied on the FCA's arguments when dealing with the company: from the information available to me, the bank rejected the claim on the basis that the 40-day time limit had lapsed.

The FCA strongly disagrees that it has been focusing on defending the bank's position, but has not provided a satisfactory explanation of why it has advanced a possible justification for the bank's actions which is simply inconsistent with the bank's justifications.

In relation to point 2 above, the FCA reiterated its reasons as set out in its letter of 16 August 2018 that *the second letter did not, on its own, 'warn' the complainant of the consequences of the 40-day deadline, but taken with the Consequential Loss Guidance, we are satisfied that the consequences were clear to the complainant.*

I do not think the FCA has satisfactorily addressed my concerns – clearly backed by evidence – of the inadequate nature of the bank's communications.

With relation to point 3 above, the FCA has replied that

> *It was not part of the FCA's oversight role to approve the communications from Bank X; and*
> *It was the function of the Skilled Person to approve Bank X' communications with customers.*

The FCA has stated to me that it 'was not part of the FCA's oversight role' to approve the bank's communications with its customers. This statement appears to be in direct contradiction with the paragraph 4.1 of the Appendix to the scheme, (https://www.fca.org.uk/publication/archive/irhp-initial-agreement.pdf), which states

> *4.1. The Firm will agree with the FSA, in advance, the content of all customer communications and other key documents used in connection with the review undertaken pursuant to this Appendix.*

This matter has been bedevilled by the complex financial and legal background to your client's dispute with the bank. It is not my role, nor is it the role of the FCA, to intervene in that dispute. However, it is my role, and it is the FCA's responsibility, to look at matters which might suggest that the redress scheme is not operating as well as it might.

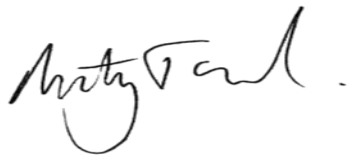
In my view, there is considerable material to suggest that the information between the bank and its customers was not as good as it should have been. In my view, that ought to have been a matter of legitimate concern to the regulator, not least because of its responsibilities for oversight of the scheme.

I am concerned that the FCA's approach throughout this matter has been to advance arguments for why the bank's rejection of your client's claim might have been justified

(which is not its role), rather than addressing the systemic issues which the complaint raised (which is). I can only hope that the FCA will undertake its lessons learned exercise in a more open-minded fashion.

I have taken this matter as far as I can under the Scheme. I intend to publish this on 15 January 2019 as an addendum to my final report.

Yours sincerely,



Antony Townsend
Complaints Commissioner
18 December 2018