Final report by the Complaints Commissioner dated 2nd January 2018

Complaint number FCA00269

The complaint

1. On 24 July 2017 you asked me to investigate a complaint about the Financial Conduct Authority (FCA) on behalf of your client's company.

2. The FCA had conducted an investigation into your complaint but had excluded one of the elements of complaint. My initial view was that the FCA decision to exclude this element of the complaint was wrong, as in my opinion, the FCA had misinterpreted your complaint. I referred the matter back to the FCA, who accepted the complaint within the Complaints Scheme on the revised basis. The FCA then issued a second decision letter on 13 October 2017 to you but did not uphold your complaint.

3. On 15 October 2017 you asked me to investigate your complaint and on 2 November 2017 you submitted further comments. You also referred me to your original letter of complaint dated 23 July 2017 in which you seek the following remedies: you wish me 'to direct the FCA to require bank X to remedy its breaches of the Redress Agreement to allow [the firm] to proceed with its claim for consequential loss' and 'to find in favour of [the firm] in relation to these complaints before you against the FCA and to award compensation. That should be the amount [the firm] would have received had its claim for consequential loss had not been blocked'.

What the complaint is about

4. In its decision letter of 26 April 2017, the FCA described your client's complaint as follows:

> *Element One*
> [Your client] is unhappy with what he claims was the FCA's refusal to consider directing [bank X] to deal with a claim [your client] has for consequential loss under the IRHP Compensation Scheme on 29 September 2015.
>
> *Element Two*
> [Your client] alleges the FCA's refusal to direct [bank X] to deal with [your client's] claim for consequential loss under the IRHP Compensation Scheme, against a background of what [your client] claims to be overwhelming evidence of the breach of undertakings, amounts to bias.
>
> *Element Three*
> [Your client] is unhappy that his letter to the FCA Chairman, John Griffith-Jones, was passed to a Technical Specialist in Supervision, who emailed [your client] a response on 24 August 2016.
>
> *Element Four*
> [Your client] alleges that the FCA has failed to ensure that the banks which entered the voluntary redress scheme accepted responsibility for their misconduct in connection with the mis-sale of Interest Rate Hedging Products (IRHP).

Element Five
[Your client] alleges that the FCA has failed to ensure the banks provide appropriate redress to the owners of businesses damaged by such misconduct.

What the regulator decided

5. The regulator decided that elements one and two of the complaint fell outside the scheme because they were directed against the bank rather than the regulator, and because the more appropriate way of dealing with them would be by legal action against the bank or a complaint to the Financial Ombudsman Scheme (FOS). At my suggestion, the FCA reconsidered these elements on the basis that they were directed against the FCA rather than the bank, but did not uphold them on the grounds that the FCA's actions had been reasonable.

6. In relation to element three of the complaint, the FCA said that the FCA Chairman's office receives a large volume of correspondence, and that correspondence was therefore forwarded to relevant departments to deal with, but that the correspondence should have been sent to the complaints team rather than a technical specialist. The FCA upheld this element of complaint and apologised for this.

7. In relation to element four, the FCA explained the actions which the FCA had taken in establishing and overseeing the voluntary redress scheme, and concluded that the FCA had 'ensured that the banks involved accepted responsibility and oversaw the banks' compliance with the voluntary agreements'. The complaint was not upheld.

8. In relation to element five, investigation was deferred pending the outcome of a 'lessons learned review' of the intervention on IRHPs.

Why your client is unhappy with the regulator's decision

9. You have made a number of representations to me about the FCA's decisions. The principal ones are:

    a. The FCA was wrong to exclude elements one and two of the complaint. The complaint was not against the bank, but against the FCA as a party to the agreement with the banks. Your argument is that bank X is in breach of the agreement and only the FCA, as the other party to the agreement, can tackle that;

    b. The apology in relation to element three is inadequate. Compensation should be considered;

    c. In relation to element four, you say that 'The FCAs [sic] suggestion that the setting up of the scheme and their so-called supervision of the Scheme through the Independent Review process is a sufficient discharge of their obligations is just not sustainable in relation to this case and where and I repeat, there have been serious breaches by [bank X] in the implementation of the Scheme in this case which the FCA does not deny.'

    d. In relation to element five, you say that 'The point simply is that [bank X] have improperly blocked and denied the firm its right and entitlement under the Scheme to make that claim. It cannot seriously be suggested in this case that the redress exercise was conducted in a conspicuously scrupulous way as is suggested by the FCA. [Bank X's] refusal to consider the claim for consequential loss in the circumstances of this case (to include a refusal even to name the Independent Reviewer) goes against all concepts of Natural Justice. The FCA patently refuse to act and to suggest that this Element should just await the

Holmcroft decision was and is wrong. The FCA should require [bank X] to remedy its breaches of the Agreement.'

e. The FCA delay in investigating your complaint has given rise to serious consequences for your client in his ability to pursue his claim under the Redress Scheme.

Preliminary points

10. I make two preliminary points before setting out my analysis. First, despite your request, I cannot 'direct' the FCA or the independent reviewer in this matter. All I can do is make recommendations to the FCA.

11. Second, it is not my role to determine whether or not your client's claim should succeed. All I can do is consider is the reasonableness of the FCA's response to the points you have made.

My analysis

12. I have looked carefully at your complaint, and the FCA's documents.

13. The background to your client's complaint can be summarised as follows:

- On 17 October 2014, bank X informed your client that it was not within the scope of the IRHP review.
- On 12 March 2015, your client commenced legal proceedings against bank X.
- On 15 April 2015, bank X made the company a basic redress scheme offer and invited the company to respond within 40 days with any representations.
- On 23 April 2015 your client wrote to the bank. I have not seen that letter, but the FCA says that your client rejected the offer in favour of continuing to pursue a legal claim outside the review. You claim that your client's then solicitors wrote a letter to bank X saying that in the light of the bank's letter of 17 October the Scheme did not apply, but notwithstanding that your client was prepared to proceed broadly under the Scheme.
- The bank does not appear to have acknowledged the letter dated 23 April 2015.
- On 26 May 2015 the bank wrote to your client to say that the forty-day period for a response had expired and that the bank would no longer consider any further representations. The bank asked your client if it wished to accept the basic redress offer which had already been made.
- In September 2015, your client submitted a claim for consequential losses via the redress scheme. Bank X informed your client that its case was already closed in the IRHP Review and for this reason a claim for consequential loss could not be made.

14. The heart of your complaint is that the bank's redress letter to your client was misleading in respect of the bank's 40-day limit, and that that limit was contrary to the agreement reached between the FCA and the banks; and that the FCA should therefore intervene.

15. I have seen the bank's letters to your client dated 15 April 2015 and 26 May 2015 and it seems to me that your allegation that these letters are not clear and/or are misleading has some merit. As far as I can see, the initial letter to your client did not say that, in the absence of a reply within 40 days, your client would lose the right to make a further claim – indeed, the letter implied that the offer would remain open after the 40-day limit.

Furthermore, when the bank sought to close the matter at the end of the 40-day period it claimed – wrongly – that its earlier letter had said that in the absence of a response the case would be closed.

16. I have made several attempts to persuade the FCA to address this point, but I have not been successful. The FCA's focus seems to have been on your client's actions and motivations, rather than upon its own actions.

17. The FCA rejected your complaint for the following reason:

> *By rejecting an offer, regardless of deadlines, customers permanently exited the IRHP Review and were no longer able to submit a consequential loss claim (logically, there needs to be agreement in respect of what direct losses were incurred before claims for indirect consequential losses can be considered).*

18. The FCA has provided additional justification for its view as follows:

- *This case was first brought to the FCA's attention on 22 September 2015. The concern raised was that his company missed out on the opportunity to have its consequential loss claim assessed within the IRHP Review because the bank had previously told the company that it was not included in the IRHP Review. As such, when the company received a redress offer in April 2015, it considered that the IRHP review had no application to it, disregarded the offer, and also disregarded the opportunity to submit a consequential loss claim within the IRHP Review.*

- *The Supervision team followed-up on this concern at the time and responded to [the complainant] on 29 September 2015. Based on the information it saw, notwithstanding the fact that [bank X] had previously told the company in error that it was not included in the IRHP Review, the Supervision team concluded that the company was aware that it had received an offer from the IRHP Review. The bank's other letter in April 2015 had explained why the bank now considered that the company could in fact make a claim under the Redress Scheme. Rather, the Supervision team was of the view that the company, with the benefit of legal advice, made a conscious decision to reject the offer in favour of continuing to pursue its claim through litigation.*

- *It was subsequent to this that [the complainant] suggested another reason the company missed the opportunity to submit a consequential loss claim within the review, because of issues in relation to the application of the bank's 40-day time limit. This appears to contradict the reason initially put forward by [you] on behalf of [the complainant].*

- *The Supervision team considered the new reason but its view was that this did not change their 29 September 2015 conclusion. That is, they concluded that the company did not miss the opportunity to submit a consequential loss claim within the review because of confusion over whether company was in the review in the first place, or alternatively any confusion about the 40-day time limit. The Supervision team was of the view that the company made a conscious decision, with the benefit of legal advice, to reject the offer in favour of continuing to pursue its claim through litigation.*

- *We agree that the bank's letters are not as clearly drafted as they might have been but, as we have set out … they were only one factor we took into account in assessing whether the bank had operated the Redress Scheme consistent with the agreed process and overall in a fair and reasonable way.*

19. It is not for me to determine whether or not your client's claim for compensation has any merit. However, I am concerned that, faced with information which suggested that a bank might not be following the agreement made for IRHP redress – information which *might* be symptomatic of a broader failure to ensure that customers are treated fairly – the FCA seemed unwilling to pursue some simple inquiries which would have established whether or not bank X's processes were or were not compliant with the agreement which had been established. This goes far wider than the particulars of your client's case. The FCA's view is that *'As the Supervision team had not received complaints from other customers of (bank X) within the Redress Scheme to the effect that the bank had unfairly relied on the 40-day letters, there was no information to indicate a "broader failure" of the bank to treat customers in the Scheme fairly.'* Whilst this may be true as a matter of fact, the crux of the matter is that your case has highlighted what appear to be standard letters used by bank X which put in question the bank's compliance with the redress scheme agreement.

20. I have carefully considered the FCA's statements above, but I have come to the conclusion that:

- The bank did not reject the company's claim on the basis that it was seeking litigation. The bank's letter of 26 May 2015 clearly states that the bank rejected the claim because the 40-day limitation period had lapsed.
- The heart of your complaint is that the bank's redress letter to your client was misleading in respect of the bank's 40-day limit, and that that limit was contrary to the agreement reached between the FCA and the banks; and that the FCA should intervene. The FCA has not addressed this complaint.
- The FCA has explained why it believes the bank was reasonable not to readmit the company into the redress scheme as it was pursuing litigation. However, bank X does not appear to have based its decision not to readmit the company into the redress scheme on the grounds that the firm was in favour of continuing to pursue its claim through litigation.
- The FCA has stated '*the FCA's Supervision team has considered whether the underlying concerns raised about the way the bank communicated the 40-day time limit represented a wider problem. As noted, the FCA has not received other complaints or concerns which raise the same issue as the company's complaint. Bearing in mind the size of the review, we think it highly likely that we would have been informed if other customers had been misled. Also, as the review has been closed for some time, we do not think we could justify undertaking further work on this single issue.* I have considered this point but I am unconvinced that a lack of complaints is sufficient justification for not revisiting an issue which may have disadvantaged consumers. This would have been particularly true in 2015, when the matter was first dealt with.
- The FCA agrees that the letters are not clearly drafted but it considers this fact on its own is insufficient to determine that the bank did not operate the redress scheme according to the scheme, and that other factors, when assessed alongside this, point to the fact that there was no breach of undertaking by the bank. 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.

21. This analysis covers elements one and two of the revised complaint, and four of your original complaint. Element five was deferred by the FCA, and I consider that to be reasonable.

22. Turning to element three, I consider that the FCA's apology for the misdirection of your original letter to the Chairman is sufficient. I do not think that your client suffered any significant detriment as a result.

23. In respect of your request for compensation, it seems to me clear that, while I have explained my concerns about the FCA's apparent unwillingness to consider possible systemic problems in the operation of the redress scheme, the cause of any loss sustained by your client is responsibility of bank X, not the regulator.

24. In your letter of 23rd July 2017, you raised further issues about the impact of the delays in the FCA investigation upon your subsequent dealings with the bank. Your position is that had the FCA required the bank to remedy its breaches of the Agreement in a timely manner your client would not have been forced into the position of accepting the basic award or losing it.

25. It is difficult to me to address this matter satisfactorily, for a number of reasons. First, the principal responsibility for the operation of the Scheme lies with the bank, not the FCA – for that reason, even if an intervention by the FCA might have resulted in a different outcome, that would not make the FCA liable for any losses which your client might have incurred. Second, despite my efforts to date, the FCA has been unwilling to address the question of whether the banks' letters were or were not compliant with the Scheme. Third, it is beyond the scope of this Scheme to assess whether there were any consequential losses which should have been compensated. For those reasons, I have made recommendations (below) which attempt to move the matter forward.

Recommendation

26. In the light of my analysis, I recommend that the FCA reconsiders the matter, makes inquiries of bank X, and then informs you and me about its conclusions, and in particular:

    - Whether bank X's decision to close your client's claim at the end of the 40-day period was consistent with the agreement;
    - 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;
    - 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.

Antony Townsend

2nd January 2018