

19 September 2017

Dear Complainant

**Complaint against the Financial Conduct Authority  
Reference Number: FCA00374**

Thank you for your emails of 21 and 26 July 2017. I have now completed my review of the Financial Conduct Authority's (FCA) investigation into your complaint. Before finalising my decision, I invited comments from both the FCA and you. The FCA did not have any comments. You provided me with your comments on 11 September 2017.

**How the complaints scheme works**

Under the complaints scheme, I can review the decisions of the FCA's Complaints Team. If I disagree with their decisions, I can recommend that the FCA should apologise to you, take other action to put things right, or make a payment.

**Your complaint**

You complained to the FCA in July 2016 (in an email to Andrew Bailey) about the FCA's involvement in the voluntary redress scheme for the mis-selling of Interest Rate Hedging Products (IRHP), in particular that the FCA had failed to ensure that banks:

1. *'accept responsibility for their misconduct in connection with the mis-sale of Interest Rate Hedging Instruments;*
2. *accept responsibility for the misconduct of their business support division; and*
3. *provide adequate redress to the owners of businesses damaged by such misconduct.'*

In addition you made the following points:

4. *'It is inconceivable that the perpetrator of any form of mis-selling/misconduct can conduct itself fairly as both judge and jury in a review of its own culpability and to determine what compensation is payable to the customer as a result'.*

5. *That your personal dealings with Bank X have left you worse off as, although the Bank refunded all monthly IRHP payments previously made by your business with 8% interest added, the bank rejected your bespoke consequential loss claim.*

The FCA issued its decision letter on 25<sup>th</sup> April, but did not uphold your complaint.

In your letter to me, you say:

*The Regulator has proven by their entirely inappropriate and insufficient responses to my complaint, of which they even refused to provide a proper summary to me for over 6 months, that they are not fit for purpose as a Financial Regulator and have not provided proper oversight of the IRHP Review to ensure it delivers a legal, fair outcome for the businesses it has persuaded and invited to take part, on the basis that the process is fair, clear and straight forward and, that if the statutory and regulatory rules were not adhered to by the bank in question, it would return the customer to the position they would have been in had the mis-selling of the IRHP not taken place.*

### **My analysis**

It is clear from the documents I have reviewed that you have been through a very long and difficult process as a result of the IRHP mis-selling scandal. For reasons which I shall explain later in this letter, the FCA's handling of your complaint has exacerbated rather than mitigated your difficulties.

I should start by making clear a number of limitations upon this Complaints Scheme.

First, neither I nor the FCA can deal directly with complaints between customers and the banks (that is the role of the Financial Ombudsman Service (FOS)).

Second, the Complaints Scheme explicitly excludes complaints about the FCA's policies and rules. That means that, although I can look at whether the FCA has acted reasonably in applying its policies and rules, I cannot consider whether or not the policies and rules themselves are ones with which I agree.

Third, the FCA and I operate under strict laws and policies governing the confidentiality of information about its interactions with banks and other regulated firms. There is a helpful explanation of this on the FCA's website at <https://www.fca.org.uk/freedom-information/information-we-can-share>.

I consider the FCA addressed the first three points of your complaint reasonably in its decision letter dated 25 April 2017. You received a fairly detailed explanation of how and why the redress scheme was established. As I have explained above, the question of whether or not the agreement between the FCA and the banks was a good one is a policy matter which cannot be dealt with under this Scheme. It continues to be the subject of debate. The FCA deferred considering the third element of your complaint because of continuing court proceedings: I consider that it was entitled to do so in those circumstances. The FCA also explained that it had committed to undertaking a lessons learned review in due course, though I recognise that this will be of little use to you in terms of your quest for recompense.

I turn to the fourth element of your complaint. You wrote that 'It is inconceivable that the perpetrator of any form of mis-selling/misconduct can conduct itself fairly as both judge and jury in a review of its own culpability and to determine what compensation is payable to the

customer as a result.’ The FCA’s decision letter of 25 April 2017 gave an explanation of why the Scheme was set up, but did not explicitly address your concern about the banks reviewing themselves. However, the FCA has dealt with complaints of a similar nature in the past, and so have I. In the case of FCA00108 published on my website, the FCA explained to the complainant its reasoning for choosing to design the redress scheme as it did as follows:

*‘The FSA had to balance a range of factors in deciding on the action to take in light of problems coming to light in the sectors it regulated. These included the seriousness of the problem, the powers available to remedy it and the time taken to implement a solution. In the case of IRHPs, the FSA decided that the balance of factors came down in favour of proceeding by way of a negotiated agreement with the banks, in order to provide redress to borrowers more quickly, and with greater certainty, than if formal powers had been used. It is worth explaining here some of the factors which show that proceeding by way of an agreement was a reasonable response to the IRHP problem. For formal action, firms are given detailed procedural rights under FSMA and access to an independent Tribunal; in a complicated case or series of cases, the exercise of these rights and following these processes may take well over a year. In the case of the Redress Scheme, the FSA decided to investigate in March 2012 and the agreements with the major banks were concluded within 4 months. The Redress Scheme was also significantly more favourable to borrowers than a formal scheme under section 404 FSMA could have been. This is because, as a formal scheme is limited to “private persons”, most business borrowers covered by the Redress Scheme would have been excluded. Also, while the Redress Scheme extended its reach as far back as December 2001, a formal scheme would have had to allow for legal restrictions on the period covered by any scheme. The Redress Scheme also provided for the banks to do or not do certain things which would have been outside the scope of a formal scheme; for example, forbear in relation to distressed borrowers and in relation to future sales of IRHPs. While we note your views on our application of paragraph 3.5 of the Scheme, our view remains that this element of your complaint remains in substance an expression of dissatisfaction with the way the FSA and the FCA have exercised their discretion in a complicated situation, where the effectiveness of formal powers was uncertain. We consider therefore that this element is not suitable for investigation under the Scheme.*

I agreed with the FCA’s position above, and in my view it is a reasonable response to the fourth element of your complaint.

I now turn to the fifth element of your complaint - the losses you say you have suffered due to Bank X’s rejection of your bespoke consequential loss claim.

As I explained above, individual complaints, including claims for redress, are a matter for the Financial Ombudsman Service (FOS), or for the Courts.

If you were eligible for a redress offer but were not satisfied with it, your options are to re-approach the Bank, appeal the decision by bringing your case to the FOS, or take legal action. I have sympathy for your situation, but unfortunately, there are no other options available to you and the Complaints Scheme is not the forum to progress your claim.

In your comments in response to my preliminary decision, you urge me to reconsider my position since, in your view, you should have received compensation for consequential loss. I

have carefully read your email, and the attachment, and understand your argument, but it does not change the position: this Complaints Scheme does not deal with claims against the banks.

Having said that, it is clearly important that the FCA does not ignore information of the kind which you have supplied. While it does not become involved in the resolution of individual complaints, if the FCA receives information that suggests that there may be problems arising in the conduct of regulated firms, it should consider using that information to make further inquiries. Having studied the documents, it is clear that the FCA did look both at your specific allegation of malpractice by the Bank and your complaint about its handling of your claim. Because of the confidentiality restrictions described above, I cannot say anything further about what was done, but I am satisfied that the information was not ignored. I do, however, note that your allegations were not transferred to the appropriate department at the FCA until March 2017 – one of the delays which I shall now comment upon.

### *Delays*

The handling of your complaint was badly delayed. I drew attention to the general issue of delays in complaint handling at the FCA in my recent Annual Report – see page 4 of <http://frccommissioner.org.uk/wp-content/uploads/OCC-Annual-Report.pdf>. While the FCA has responded to my concerns and significantly improved its performance recently, your complaint was unfortunately one which was caught in the backlog. Reading the email exchanges between you and the FCA, it is clear that your repeated requests for a revised summary of your complaint were ignored for some time, and then the complaint was not really gripped until March 2017 – some eight months after you had originally complained.

These delays inevitably added to the distress you were suffering in a difficult situation, and should not have occurred.

### **Conclusion**

For the reasons given above, I do not uphold your complaint.

I appreciate you will be disappointed with much of this decision, but I hope you will understand why I have reached it.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Antony Townsend', with a large, stylized flourish at the end.

Antony Townsend  
Complaints Commissioner