Complaints Commissioner

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Dear Complainant,

Complaint against the Financial Conduct Authority
Reference Number: FCA00050

Thank you for the recent emails. I am very sorry for the delay in responding, but your complaint has raised a number of complex issues on which it has been necessary to make further inquiries of the Financial Conduct Authority (FCA).

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.

You can find full details of how I deal with complaints at www.fscc.gov.uk. If you need further information, or information in a special format, please contact my office at complaintscommissioner@fscc.gov.uk, or telephone 020 7562 5530, and we will do our best to help.

Preliminary issue: involvement of the Solicitors Regulation Authority

When you originally contacted my office, your representative Mr T said that "I'd like to ask you to provide some assurance that you will be able and willing to carry out a proper examination of this complaint without prejudice arising from your lengthy role at the SRA". This issue relates to the role of a law firm, "Law Firm W", which previously employed you and was involved in the matters about which you have complained.

As you are aware, I was Chief Executive of the SRA from 2006 until January 2014. In that role, I was not a decision maker in relation to disciplinary matters – the SRA has adjudicators, and there is the Solicitors Disciplinary Tribunal which rules on disciplinary cases – although I did on occasions become involved in discussions about particularly complex or difficult cases. You will appreciate that the SRA deals with many thousands of complaints in the course of each year, and I was therefore inevitably unaware of the majority of them. I do not recall being involved in the Law Firm W case to which you refer, although it is conceivable that I was involved in discussions about the matter and have forgotten it since. I could only establish that by checking with the SRA, and I have not contacted them about the matter. Even if there had been discussion, I would not have been the decision maker. In your response to my preliminary decision you raised this issue again and indicated that you do not believe that I was not involved in the disciplinary action which the SRA brought against Law Firm W. I am sorry that my explanation has not reassured you, but the facts remain as set out above.

You will also recall that, before I undertook my investigation, I wrote to you and said that "I would be willing and able to carry out a proper examination of your complaint, and I can give you my personal assurance that I would not allow my previous role with the SRA to affect my judgement in relation to your complaint". I emphasised that the matters which you were asking me to look at related to the FCA's actions or inactions and not the actions of the SRA. However, I equally recognised that you might take a different view and for that reason, I drew your attention to paragraph 4.6 of the Complaints Scheme (http://fscc.gov.uk/complaints-scheme/) which states:

> 4.6 In circumstances where the Complaints Commissioner is unable to investigate a complaint, the regulators will ask the President of The Law Society to nominate a solicitor to carry out the functions conferred on the Commissioner by the Scheme. This appointment is subject to the approval of HM Treasury.

Although I made this offer to you, Mr T responded on your behalf to say that, as I had clarified several points relating to my past role with the SRA, you were happy for me to oversee the examination of your complaint.

I would also like to add reassurance that I have based my investigation into this complaint entirely on the papers which have been presented to me. The decision that the SRA made in respect of Law Firm W has not influenced my decision or my investigation in any way.

What we have done since receiving your complaint

We have now reviewed all the information the regulator has sent us. We have also carefully reviewed the comments which you and the regulator made when I shared with you my provisional decision, and have made some significant adjustments in the light of those comments.

My final decision on your complaint is explained below.

As you can find full details of how I deal with complaints at www.fscc.gov.uk I do not intend to set them out fully below.

Your complaint

From the material which you and Mr T have sent to us, I understand that your complaint can be summarised as follows:

- you state that, from your knowledge as a previous employee of Law Firm W, a large number of consumers were overcharged by HFC (and later HSBC after it acquired HFC) as a result of the way charges were added to the accounts of those who had defaulted on credit card payments. You consider that the FCA and predecessor bodies have failed in their duty to protect consumers both in terms of awarding redress and in preventing those responsible for the improper practices from being involved in financial services

- you consider that the FCA's decision to include in a letter to you unverified and unattributed information which HSBC had provided shows that the FCA is failing to protect consumers adequately and is colluding with HSBC.

My position

In considering this case, I have carefully reviewed both your complaint and the regulator's arguments for not upholding your complaint. Before analysing your complaint, I need to set out some preliminary points to help explain my approach.

My role

Because this matter is very complicated, I think it would be helpful if I set out my role in considering complaints, so that it is clear what I can, and cannot, consider.

First, it is not my role to substitute my regulatory judgement for that of the regulator. Regulators are, for good reason, given wide discretion within which to operate.

Second, my principal role is to consider whether the regulator's handling of a matter is fair, effective, and reasonable. Matters I can consider include mistakes and lack of care, unreasonable delay, unprofessional behaviour, bias, and lack of integrity.

Third, even though it is not my role to substitute my judgement for that of the regulator, I can study all of the regulator's records (including confidential papers) and can say whether or not, in my opinion, the regulator's handling of a matter, including its exercise of discretion, fell within what would be considered reasonable.

It is on that basis that I have considered your complaint.

The regulatory complexities

It is also necessary to highlight the exceptional complexity of the regulatory arrangements surrounding your complaint.

The matters about which you complain concern consumer credit arrangements during the period 2003 to 2010. Consumer credit was the responsibility of the Office of Fair Trading (OFT) until 1st April 2014, when the FCA assumed that role. However, although consumer credit was the responsibility of the OFT, the Financial Services Authority (FSA) was responsible for the supervision of HSBC (although not its consumer credit activities) until its demise on 31st March 2013, when the FCA took on the FSA's functions that relate to this case. Furthermore, although the OFT's regulatory powers changed in 2013, these changes did not extend to allowing the provision of redress. Finally, the statutory arrangements for regulating consumer credit changed again when the FCA took over consumer credit from the OFT on 1st April 2014; and the FCA inherited the responsibility for the relevant legacy issues (including complaints handling) from both the FSA and the OFT.

As I shall explain later, these complexities have affected the way in which this whole matter has been handled.

The heart of the matter

Your complaint arises from a relatively simple point. From 2003 to 2010 HFC's practice was to levy a charge on clients for the cost of recovering arrears on credit payments. In the case of HFC, the charge was calculated not on the basis of the actual cost of recovery – as it should have been – but as a percentage of the sum to be recovered. The impropriety of such a charge was established in Solicitors Regulation Authority proceedings in 2007, and subsequently by the OFT in 2010, when measures were agreed with the bank to discontinue the practice. That much is, I believe, uncontentious.

You have added that, in your view, the charges were not merely improper, but unlawful. My understanding is that the OFT did not rule that the collection charges were in themselves unlawful. However, since there is no argument about the fact that they were improperly calculated, and since the issue of the lawfulness of the charges is a matter for the courts rather than me, I have not considered that issue further.

Your principal concern is that, despite these facts having been established, insufficient action was taken both to hold those responsible to account and to redress the consumers who were affected.

The FCA's position has been that, for a variety of reasons set out more fully below, regulatory action is not justified. You do not agree. Your complaint is both about the lack of regulatory action and about the way in which the FCA conducted its interactions with you.

What happened before the FSA and FCA became involved

From the OFT papers which I have studied – which do not seem to be very comprehensive – it is apparent that the OFT uncovered the improper practice and decided to work with the bank to put it right. It is important to emphasise that at that time the OFT did not have powers to order redress. However, the papers suggest that HFC undertook some form of exercise which I believe was to establish if HFC, through its lawyers, were adding more to consumers' accounts than was necessary to cover the costs of recovery. The papers also suggest that the review exercise which HFC conducted showed that in most cases the charges which were applied did not exceed the reasonable costs associated with the costs of recovering arrears from these consumers, but made adjustments where this was shown to be the case. The papers also state that HFC discovered in four cases consumers had been significantly overcharged and issued refunds. What is not clear from the papers is how comprehensive this exercise was, nor what steps the OFT took to verify it. I am aware that you have alleged that there were many more disadvantaged clients. However, I understand that the improper practice ended and that that, as far as the OFT was concerned, was the end of the matter. It is also worthy of note here that HFC had also informed the OFT that during its review it had removed the excessive charges from all of its customers' accounts, although I am again unable to verify what steps, if any, the OFT took to verify this.

In your comments upon my provisional decision, you complained that "you have accepted for the purposes of your decision that only four customers were affected." That is not correct. The position – which is highly unsatisfactory – is that from the papers which I have studied I am unable to establish how thorough HSBC's and OFT's inquiries were.

What happened after you contacted the FSA and (subsequently) the FCA

The records held by the FCA are much clearer.

You first contacted its predecessor, the Financial Services Authority (FSA), on 14th December 2012 to alert it to your concerns about the conduct of HSBC and HFC. The FCA's records indicate that it made you aware that, although it was grateful for the information, the governing legislation would prevent it from informing you how it acted upon the information you were providing.

The records provided to me also indicate that your concerns were immediately passed to the Supervision Team responsible for HSBC (as HSBC had acquired HFC and was now responsible for the HFC's previous conduct). Following consideration of the information, HSBC's Supervision Team concluded that, as the information related to the conduct of HSBC (or rather its subsidiary HFC) under the Consumer Credit licence it held, it fell outside of the FSA's regulatory remit.

The decision the FSA made at this point does not appear to me to have been unreasonable. Your concerns clearly related to the conduct of HSBC (and its subsidiary HFC) in relation to consumer credit activities which were activities which at the time were regulated by the OFT.

However, the FSA failed to follow through the logic of its own conclusions. The allegations you were making were significant ones and, if the FSA's view was that OFT was the appropriate regulatory authority to consider them, it should have referred the matter to the OFT. The FCA's decision letter in response to your complaint implicitly criticises you for not referring the matter to the OFT: that criticism should have been directed at the FSA and, to a lesser extent, the FCA rather than you. I shall return to the decision letter later.

Despite having been told that the legislation did not allow the regulator to explain to you what, if any, action it was taking, you contacted the FSA again in February 2013, who told you that the matter was confidential. Undeterred, in October 2013 you approached the FCA (which had replaced the FSA). The FCA looked into the matter and – clearly prompted by your continuing inquiries – recognised that the matter should have been referred to the OFT, and decided to do so. Unfortunately, despite having belatedly made the right decision, they failed to make the referral.

In February 2014, you submitted a Freedom of Information (FoIA) request. It was only after that request that the FCA realised that the referral to the OFT had still not been made and – to complete a series of events bordering on the farcical – referred the matter to the OFT just weeks before the FCA was to assume the OFT's responsibilities.

Having assumed the OFT's responsibilities for consumer credit on 1st April 2014, the FCA continued to struggle both with the information which you had supplied, and your complaint about the way in which it had been handled. The complexities created by the age of the events and changes in jurisdictions and responsibilities which I described above, coupled with the errors in handling by both the FSA and the FCA, made this a difficult matter to tackle.

Put crudely, the FCA's final decision was to take no action on the following grounds (which I list in no particular order):

1. the matters complained of were very old;
2. they related to HFC, which was no longer involved in consumer credit;
3. the FCA's assessment of the situation suggested that there was no evidence of a significant number of continuing complaints;
4. the matters related to a time when consumer credit had been regulated by the OFT, and the OFT had taken the action available to it at the time, which did not include powers to require redress;
5. matters of fraud were principally for the police.

My assessment of the regulatory process

If correct, each of those reasons would be potentially valid in reaching a conclusion that no further action was justified, and – as I explained earlier – it is not my role to substitute my regulatory judgement for the FCA's. However, the weight to be given to those factors depends upon the underlying facts. Put simply, there are two possible descriptions of the original events: the first is that there was a poor practice which was identified, put right, and, following corrective action, the only four customers adversely affected were recompensed; the second is that there was deliberate, widespread overcharging and there remain many customers who have never been recompensed.

Regrettably, the records from the OFT era are not particularly helpful, and there is little evidence that the OFT checked to see whether the HFC (and subsequently HSBC) had done a thorough job in trying to identify how many customers had suffered a detriment. From the file records passed to me, it would appear that HFC claimed that it had undertaken a review which involved it making corrections to inappropriate charges which had been applied and, in the case of four customers, the payment of compensation; the OFT chose to accept that. From the records, I am in no position to determine whether or not the OFT's inquiries were sufficient.

In my provisional decision, I concluded that, despite the highly unsatisfactory features of this case which I have described above, I did not consider that the FCA's decision was manifestly unreasonable. While the FCA's decision was clearly debatable, it was not my role to substitute my judgement for the FCA's. I did, however, make further inquiries of the FCA, in part prompted by the representations which you made in response to my provisional decision.

In response to my further inquiries, the FCA has informed me that it has some concerns about the basis upon which the original decision to take no further action was taken, and it will therefore revisit the decision on whether it should undertake further work as a result of the allegations you have made about HFC's previous debt collection practices. The FCA's position is that powers to take action are potentially available in an appropriate case of this nature, notwithstanding the fact that the conduct happened at a time when the OFT was the regulator of the consumer credit business - although it should be noted that whilst the FCA may potentially have the power to take action in respect of conduct relating to consumer credit, this point has not yet been tested in court.

I welcome the fact that the FCA will revisit its decision. It is important to stress that the fact that the FCA will review the decision does not necessarily mean that further action will be taken. As I have indicated above, the FCA's decision not to take action was not based purely on the issue of jurisdiction, and it remains possible that, on re-examination, the FCA will continue to conclude that no further action is required.

As I set out in my conclusion, it is very important that, in reconsidering the matter, the FCA takes full account of the concerns which I have set out above

The FCA's handling of your complaint

I turn now to the FCA's handling of your complaint.

I accept the FCA's comments that, at the time you made your FoIA request in February 2014, the FCA did not have information on all of the matters to which your FoIA request related, and could not provide fully the information you had requested or answer the questions you had put to it.

The FCA has explained that, following your initial enquiries and in anticipation of the expansion of its remit to take on the regulation of consumer credit, the FCA approached HSBC, HFC's parent organisation, for additional information about your allegations. This information was then used by the FCA its response to your FOIA request. I consider that it was reasonable for the FCA to approach HSBC for the information – indeed, it would have been irresponsible for the FCA not to check matters with HSBC.

On 10th April 2014, when the FCA responded to your FoIA request, it included a direct quotation from information which HSBC had provided to it without either attributing the quotation or verifying its accuracy. This was an error: the FCA simply should not have quoted directly this information without first verifying that the information was correct.

When corresponding with the FCA you suggested that this amounted to the FCA colluding with HSBC, something which is denied by the FCA. In my view, for collusion to have occurred there must have been a deliberate, joint attempt by the FCA and HSBC to mislead you. It is clear that the FCA made an error and was negligent in the manner in which it responded to your FoIA request. It is also clear that the error is made worse by the fact that the information supplied by HSBC was wrong and – to anyone familiar with the matter – obviously wrong. It appears that the person at the FCA who incorporated the information in the letter to you simply did not know enough about the matter to spot this. Although this was a very unfortunate error by the FCA, I can find no evidence that the individual responding to your FOIA request or the FCA as an organisation deliberately set out to mislead you.

I understand that the FCA has apologised to both you (in its decision letter) and the Treasury Select Committee for the manner of its response, and specifically its decision to quote directly from the information which HSBC provided to it. I will, however, come back to this in my conclusion.

Finally, I turn to the FCA's decision letter in response to your complaint. I can summarise my views on this letter as follows:

- it failed properly to address the core issues of your complaint. I have attempted to address them above. To some extent, the FCA was constrained by the fact that it needed to protect the confidentiality of its continuing consideration of the matter, but its decision to confirm to the Treasury Committee that it was taking no further action means that those confidentiality considerations no longer apply

- it was too generous to colleagues' errors in respect of the delays. In particular, its attempt to minimise the serious failure to refer matters to the OFT by apologising for the fact that "on the balance of probabilities" the matter was not referred was unacceptable

- it underplayed the scale of the error in the "copying and pasting" of the information provided by HSBC

- its attempt to shift blame on to you by suggesting that you should have referred the matter to the OFT yourself was unacceptable

- its refusal to address directly your subsequent requests that it confirm that the unattributed quotation from HSBC was not only unattributed but also wrong was equally unacceptable.

The FCA should be transparent and, where it has made mistakes, freely admit it. In this case the FCA's defensiveness is wholly unsatisfactory.

Your further comments

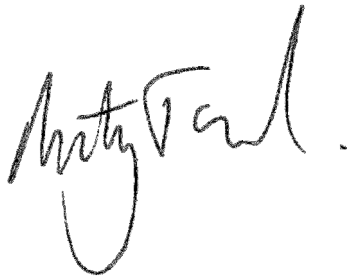
In your second response to my preliminary decision you also asked me a number of questions which had not previously been put to the FCA. Although I have sought to address the main ones in the explanation I have given above, a number of them are not part of the original complaint, and do not affect its outcome. I have, however, provided responses to those points in the annex to this letter.

Conclusion

1. The FCA's decision to reconsider its decision not to take further action is welcome. I recommend that that reconsideration takes full account of the points which I have made above. In particular, it is essential that the reconsideration includes a full analysis of the harm which was caused by the improper practices, including the number of customers affected and whether, as you allege, there is continuing overcharging – further inquiries may need to be made to establish this.

2. The failures in the handling both of your original complaint against HFC and HSBC and then your complaints against the regulators, were serious. Throughout, this matter has been characterised by delay and muddle. It cannot be satisfactory that the action which was eventually taken to investigate your concerns about HFC and HSBC only occurred because of your persistence; that the consideration of your complaint against the regulators was drawn out and badly handled; and that it was only following the lengthy inquiries, resulting from your complaint to me, that the FCA has now concluded that it should reconsider its original decision. For all these matters, I recommend that the FCA offers a full apology for its serial failings.

Yours sincerely



Antony Townsend
Complaints Commissioner

Annex

Additional points raised by the complainant in response to the Commissioner's preliminary decision (the number is that of the complainant)

1. Why has the Commissioner not considered the requirement of DISP (1.3.6G) where the bank is required to make its own investigation and the FCA assess the adequacy of its compliance.

I have not referred to DISP 1.3.6G as this is a FCA rule which applies directly to firms in relation to their handling of consumer complaints and does not relate to the investigation I have undertaken - I do not have any jurisdiction to consider the conduct of regulated firms. The adequacy of a firm's compliance with the FCA's rules is a matter for the FCA's Supervision Team. Additionally, as this is not something which was considered by the FCA as part of your previous complaint, I do not intend to make any further comments.

3. The FCA also considered that it "could not substitute its regulatory judgement for that properly taken by the OFT in 2010, nor could it impose redress provisions which were not available at the time of the events". In other cases the FCA has imposed a redress scheme on a company for conduct which took place prior to the FCA taking over responsibility for Consumer Credit. For example, in July 2015 the FCA announced that Cash Genie would provide £20 million of redress to 92,000 customers. This redress included elements relating to the practice of adding unfair/unauthorised charges to accounts in default. Linda Woodhall *(sic)*, acting director of supervision said "We expect all firms to notify us of any unacceptable past or current practices and provide appropriate redress to anyone affected." Wonga has also been required to provide redress for actions which took place between October 2008 and November 2010.

Although I believe that I have largely addressed your concerns over this in my final decision, I would like to clarify one further point. The concerns over HFC's practices were addressed in 2010: there was not, therefore, an open investigation when consumer credit was transferred to the FCA. The cases listed above were, I believe, investigations which, although started by the OFT, incomplete when the FCA assumed responsibility for consumer credit.

4. The FCA acknowledges that it has changed its approach to how it has dealt with whistleblowers. Where there may have been deficiencies in its previous approach to investigating allegations it should be upfront about these failings and order a new investigation.

The FCA's and the PRA's new rules on whistleblowing were introduced as a result of a recommendation from the Parliamentary Commission on Banking Standards that banks put in place mechanisms to allow their employees to raise concerns internally, and that they appoint a senior person to take responsibility for the effectiveness of these arrangements. The fact that there have been improvements to the arrangements for whistleblowing does not seem to me to be relevant to this complaint, so I have not considered this further.