Complaints Commissioner

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Dear Complainant

Complaint against the Financial Conduct Authority
Reference Number: FCA00135

Thank you for your letters of 26 and 27 January 2016. I have completed further inquiries of the Financial Conduct Authority (FCA), and have reviewed all the papers you and the regulator have sent to me. My decision on your complaint is explained below. Before finalising this decision, I invited comments from you and the FCA on my preliminary decision. You did not comment. The FCA did, but, its comments have not significantly changed my preliminary decision.

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.

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. 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.

Your complaint

From your email correspondence and the papers submitted to me by the FCA I understand that your concerns relate to the decisions of the FCA (and its predecessor body the FSA) not to publish its agreements with the banks about redress for the mis-selling of Interest Rate Hedging Products (IRHPs). These agreements were entered into in June/July 2012 and revised in January 2013, but were not published until 12 February 2015 following the intervention of the Treasury Select Committee. You accepted and received individual redress in October 2014 but consider that you would have been able to negotiate a more favourable settlement had the agreements been in the public domain. In particular you would not have accepted SWAP for SWAP redress.

Your complaint to the FCA was first considered by the IRHP Project Team under rule 5.7 of the Complaints Scheme (Local Area response). You questioned this approach and I return to this below. Your complaint was rejected on the basis that the agreements could not have been published sooner because the banks did not give their consent to publication before February 2015. You were told that it would have been a breach of protected confidentiality and also a

criminal offence for the FSA or FCA to have published the agreements without such consent. The complaint response informed you that this approach had been upheld by the Information Commissioner and a subsequent Tribunal decision in the context of a Freedom of Information Act 2000 (FOIA) request.

You were dissatisfied with this response and continued to the next stage of the FCA's complaints process (Stage 1). You were told that the IRHP team's response was correct. In addition, you were told that the banks had not in fact given their consent in February 2015, but that the Treasury Select Committee had decided to publish the agreement. You have asked us to look into this apparent contradiction in the responses you received and I return to this below.

You also asked the FCA to tell you what conversations went on between the banks and the FSA/FCA to encourage consent to publication of the agreements. The FCA said that this is also confidential information that it cannot reveal.

My position

FCA Complaint Process

The FCA said it applied rule 5.7 of the Complaints Scheme to your complaint because a Local Area response meant that your complaint could be dealt with quickly and easily. I am in favour of local resolution where this is appropriate. However, rule 5.7 states that a local area response "may be appropriate in circumstances where a complaint falls within the scope of the Scheme **but is considered to be low impact** (for example it is about a minor administrative mistake) **and** can be dealt with quickly and easily" (my emphasis). I am not satisfied that the use of rule 5.7 was the most appropriate way to deal with your complaint about a matter that was of considerable importance, with serious consequences for you personally, and where the more general issues had been well publicised and were highly contentious.

In addition, I consider that there was a lack of clarity in the FCA's letter dated 23 December 2015 about the process followed after you escalated your complaint to Stage 1. On the one hand the FCA told you that it had "investigated the matters raised in your correspondence in accordance with the complaints scheme (the Scheme)". On the other hand the letter said that the "outcome reached [at local area level] was not unreasonable and there is nothing further that a Stage 1 investigation could usefully add." Despite this confusion, I have concluded that the FCA intended to conduct a Stage 1 investigation, since their letter concludes that you can come to the Complaints Commissioner if "you are dissatisfied with the outcome of **this investigation**" (my emphasis). I have therefore dealt with your complaint under Stage 2 of the Scheme.

I am critical of the FCA's choice of approach and the lack of clarity about the process followed when considering your complaint. I **suggest** that the FCA looks again at the basis for referral to local area resolution under paragraph 5.7 and also reviews the clarity of language used at Stage 1 when it is endorsing a local area outcome.

FCA Complaint Outcome

As mentioned above, in your final response letter from the FCA (at Stage 1) you were told that the banks had not in fact given their consent in February 2015, but the Treasury Select Committee had decided to publish the agreement anyway. This contradicted the information you were given in the local response outcome. You have pointed out that, if what you were told at Stage 1 is correct, there has been no criminal action taken by the banks against the FCA, even though the FCA told you that it would be a criminal act to publish the agreement without the banks' consent.

As part of my investigation into your complaint, I have consulted the relevant wording from the Treasury Select Committee. This can be found at:
http://www.publications.parliament.uk/pa/cm201415/cmselect/cmtreasy/204/20406.htm

Under the heading "Transparency of the Voluntary Agreements", paragraph 117, the Committee states: "*On 12 February 2015, following its eventual disclosure to the Committee by the FCA, a generic copy of the agreements between the FCA and banks was published by the Committee. This was following the FCA obtaining permission for publication from all banks participating in the IRHP review*." This makes it clear that the Treasury Select Committee published the agreements only after the banks first consented to publication. I hope that this now confirms and clarifies the position for you. I have concluded that there was a significant error in the Stage 1 response you received from the FCA for which you should be offered an apology.

I turn now to the more substantive issues that you raised. Under section 348 of the Financial Services and Markets Act 2000 (FSMA) the FCA is limited as to what information it can disclose to consumers. The confidentiality restrictions contained within s348 are the underpinning for the FCA's position that it could not publish the agreements without the banks' consent nor could it require the banks to consent to publication. The FCA's answer to your complaint was that it was only when the banks agreed to publication that the agreements could be, and were, published. It told you that its approach had been endorsed by the courts in the context of a FOIA request.

The FCA is correct in asserting that the Tribunal upheld the FSA's approach.

In relation to the FOIA request the predecessor body, the FSA, said that section 44 of that Act provides an absolute exemption. Therefore, if information is covered by s44 it is exempt from disclosure and there is no need for the FSA, or now the FCA, to consider whether there might be a stronger public interest in disclosing the information than in not disclosing it. Given the decision of the Tribunal, which it is not for me to challenge, it is clear that the FCA did require the banks' permission before disclosing details of the agreements. It is also clear from the papers I have reviewed that the FSA and FCA made more than one attempt to seek the banks' consent before this was ultimately obtained.

That being the case, it seems to me that I could only uphold your complaint if I were to conclude that the FCA should never have entered into voluntary agreements with the banks, or that it unreasonably delayed or failed to pursue the issue of permission for disclosure more aggressively. I understand the FCA's position to be that the public interest is best served by reaching prompt agreement on voluntary redress schemes, and that this can only be achieved if the participating parties can rely on confidentiality. That position is clearly arguable, but I do not think that it is manifestly wrong. In the circumstances, I cannot uphold your complaint.

Having reached that conclusion, I nonetheless wish to add some more general comments. I have previously expressed my concern that there is a risk that the FCA's current approach results in s348 getting in the way of proper scrutiny of the effectiveness of the system. The Treasury Select Committee seems to have shared some of these concerns and I note that its report concludes with the observation that "*The FCA should come forward with suggestions as to how such difficulties could be prevented in future."* The fact of the matter is that, however good the intentions of the FSA were in entering into the agreements with the banks on the basis of confidentiality, ultimately the nature of the agreements has been exposed, but too late for you and others like you to consider whether those agreements should inform your approach to obtaining redress. In the light of that experience, I consider that the FCA should reflect upon whether the previous approach remains the most effective way of securing consumer protections. I recognise that there are difficult competing arguments to be considered, but in situations which are of high public interest transparency at an early stage may carry significant advantages.

Conclusion

In conclusion, for the reasons set out above, I do not uphold your complaint. However, the FCA should not have used rule 5.7 to seek to resolve your concerns at local area level and should have been clearer in the process applied at Stage 1. I have **suggested** that the FCA looks again at the basis for referral to local area resolution under paragraph 5.7 and also reviews the clarity of language used at Stage 1 when it is endorsing a local area outcome. I am pleased to note that, in responding to my Preliminary Decision in this matter, the FCA has agreed that the complaint should not have been considered low impact to you and should therefore have been dealt with as a Stage 1 complaint in the first instance. The FCA has confirmed that it will ensure this is borne in mind when assessing future complaints.

In addition, the FCA should have not have provided you with conflicting information about the facts relating to its decision. I have **recommended** that the FCA offers you an apology for this error. Again, I am pleased to note that in response to my Preliminary Decision the FCA has noted the inconsistencies contained in its letter to you of 23 December 2015 and agrees that it should apologise to you for the confusion and inconvenience caused.

I also encourage the FCA to consider the broader concerns I have raised in this decision.

I am unable to help you further under the Complaints Scheme and, although I appreciate that you will be disappointed with my decision, I hope that you will understand why I have reached it.

Yours sincerely

Antony Townsend
Complaints Commissioner