

7 June 2017

Dear Complainant

Complaint against the Financial Conduct Authority

Our reference: FCA00295

Thank you for your email of 30 March 2017. I have completed enquiries of the FCA, and can now write to you. Before finalising my decision I invited comments from you and the FCA on my preliminary decision. I did not receive comments from you. The FCA did comment on my preliminary decision: they pointed out that they had apologised to you for the delay in responding to your complaint, and argued that their decision letter had addressed your complaint more adequately than I had suggested. They also argued that my proposed payment for distress and inconvenience was not appropriate. I have accepted some of the FCA's points, as set out below.

How the complaints scheme works

Under the complaints scheme, I can review the decisions of the FCA 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 (email dated 17-07-16 to Andrew Bailey) about the FCA's involvement in the voluntary redress scheme for the mis-selling of Interest Rate Hedging Products (IRHP). You alleged that the scheme was 'blatantly unjust, set up and controlled by the banks themselves (rather akin to a burglar being appointed as the judge and jury in a case against him having burgled us)'.

You chose not use the voluntary redress scheme, but pursued legal action. You state that on the eve of the court action Bank X settled with you, and 'We were repaid everything (what else when they finally admitted the blatant miss selling?), but to date, refused to pay consequential losses.' You also say Bank X did not pay all of your legal costs. As a result of Bank X not paying consequential loss and all of the legal fees, you claim you were left thousands of pounds worse off.

The FCA accepted your complaint into the Complaints Scheme on 12 August 2016 and advised you that it would review your complaint as follows:

‘Element One

You allege the FCA has failed to ensure that the banks taking part in the redress scheme accept responsibility for their misconduct in connection with the mis-sale of Interest Rate Swaps.

We believe this element of your complaint is an allegation of an unforeseeable failure to exercise our powers to protect consumers on the part of the FCA.

Element Two

You claim the FCA has failed to ensure the banks provide appropriate redress to the owners of businesses damaged by such misconduct. We believe this element of your complaint is an allegation of an unreasonable failure to exercise our discretionary/statutory powers in relation to this matter on the part of the FCA.

The FCA went on to say that it would defer the investigation of element two of your complaint until the appeal in the Holmcroft case had concluded.

You wrote back to the FCA on 13 August 2016 to say that you disagreed with the FCA interpretation of your complaint, but you do not appear to have received a response to your representations.

The FCA finally wrote to you on 30 March 2017 and did not uphold element one of the complaint. You then referred your complaint to me.

My findings

The FCA received over 100 complaints about IRHP and a decision was taken within the Complaints Team to issue a standard response as many of the complaints were essentially identical. In general I do not think that such an approach is unreasonable. However, in doing so, the FCA should have ensured that its standard response fully addressed each complaint.

The FCA did not do so in your case. It failed to respond to your representations when you objected to the way it had summarised your complaint. Further, the Complaints Team took an inordinately long time to review the complaint, although it did keep you updated.

My understanding of your complaint is that it is two-fold:

1. that the redress scheme was not set up appropriately as the banks were effectively reviewing themselves and
2. that your personal dealings with Bank X have left you hundreds of thousands of pounds worse off.

I turn to the first element of your complaint. You wrote to me that your complaint is that the FCA ‘chose to allow the banks to not only run the redress scheme but to design it to suit themselves’. The FCA’s decision letter of 30 March 2017 gave an explanation of why the Scheme was set up, but – because it was a standard response - 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. You said you feel that the way the scheme redress was set up was ‘akin to appointing an alleged criminal to be the investigating officer in the case against him and going further, appointing him as the judge and jury in the trial.’ However, in my view the FCA’s explanation for its decision was not unreasonable.

How the voluntary redress scheme was designed and run is a separate matter, and on this point the FCA wrote to you that its investigation would be deferred until the Holmscroft case concludes, which I find reasonable.

I turn to your second element of complaint - the losses you say you have suffered due to Bank X’ actions. Whilst I have sympathy with your situation, the FCA does not involve itself in individual disputes between consumers and financial services providers. That is the remit of the Financial Ombudsman Service or the courts. Therefore, that element of your complaint is excluded from the Complaints Scheme.

Conclusion

My view is that neither element of your complaint falls within the scope of the Complaints Scheme for the reasons given above, save for one part which is deferred because of the Holmscroft proceedings.

Nevertheless, I consider that the delays in addressing your complaint were not justified, particularly since you were issued with a response which, while extensive, did not explicitly address on of your concerns. I therefore recommend that the FCA offer you an *ex gratia* payment of £100 for distress and inconvenience.

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