Complaints Commissioner

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Final report by the Complaints Commissioner

Complaint number FCA00367

The complaint

1. You first wrote to me on 27th June 2017, asking me to investigate a complaint which the FCA had considered but rejected in March 2017. Following further exchanges, it became apparent that the FCA had not addressed all the elements of your complaint, and they agreed to do so. In July 2017, the FCA rejected the remaining elements of your complaint and, following further correspondence between the FCA and you in August and October, in January 2018 you asked me to consider it.

What the complaint is about

2. Your complaint relates to the FCA's oversight of the banks' operation of the redress scheme for those adversely affected by Interest Rate Hedging Products (IRHP). In making its decisions, the FCA has described your complaint in the following terms:

Element One

You allege 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.

Element Two

You allege the FCA has failed to ensure the banks accept responsibility for the misconduct of their respective business support divisions. I believe you may be referring specifically to the FCA's decision to appoint a skilled person under section 166 of the Financial services and Markets Act 2000 (FSMA) to review the Royal Bank of Scotland's (RBS's) treatment of its business customers but not to carry out a similar review for other lenders.

Element Three

You claim the FCA has failed to ensure the banks provide appropriate redress to the businesses which suffered loss as a result of such misconduct.

Element Four

You alleged that [bank X] breached the moratorium that it would not foreclose on or adversely vary any lending facility without giving the customer prior notice of its intention and obtaining their consent (https://www.fca.org.uk/consumers/interest-rate-hedging-products/businesses-financial-distress). You set out how you believe the bank breached this in your particular situation.

Element Five

You asked to see evidence of how the CEO took personal responsibility and ensured your fair treatment; you asked how the CEO preserved value; you asked if the CEO can provide evidence that prior notice was given to you; you asked if the CEO can provide evidence of you giving consent to this.

What the regulator decided

3. The FCA did not uphold element one of your complaint. It gave you information about the agreement which had been reached between the FSA and the banks, including evidence that the banks accepted that they had behaved inappropriately and agreed to be bound by the IRHP redress scheme, the involvement of independent reviewers, and statistics showing that the large majority of cases reviewed under the scheme resulted in redress payments.

4. The FCA did not uphold element two of your complaint: it explained how it had considered the Tomlinson Report, and that it had carefully considered a number of options. It explained that, although it had decided not to use its s166 in relation to banks other than RBS, it had written to the CEOs of 13 other banks "to underline that behaviour of the type alleged in the report would be unacceptable". You have requested a copy of bank X's response to the FCA's letter. I have not reviewed this letter as part of my investigation. You may write to bank X or the FCA Freedom of Information team who will deal with your request as appropriate.

5. The FCA deferred consideration of element three because of a pending appeal in the courts, which has been scheduled for 23 May 2018. Further updates can be found here: https://casetracker.justice.gov.uk/getDetail.do?case_id=20161159.

6. In relation to element four of your complaint, the FCA said that in 2016, in response to a query from you, it had made inquiries of bank X, and had reported to you that it was satisfied that the bank had not breached the moratorium because the foreclosure in your case took place before the moratorium had been agreed between the banks and the FSA.

7. On element five, the FCA said that it could not share information with you since it fell under the confidentiality restrictions imposed by s348 of FSMA; and it suggested that you could make a subject access request to the bank.

Why you are unhappy with the regulator's decision

8. You are unhappy with the outcome of your complaint as you do not feel that the points you raised have been answered individually, and that instead the FCA has produced an all-encompassing generic reply. You could not see any evidence from the Data Subject Access Request information you received from the FCA that the FCA had engaged with the bank at all in assessing your complaint.

A preliminary point

9. Your complaint has become complicated because of a series of interactions between you and the FCA over a considerable period. In my view, the heart of your complaint is about what the bank did or did not do in relation to your companies, and in particular the question of whether you were entitled to consequential loss compensation – I understand that that matter is before the Financial Ombudsman Service (FOS), which is the correct place for individual complaints against financial services organisations to be determined (unless the matter needs to go to the courts).

10. In my analysis, below, I address two broad categories of issues: your general allegations about the IRHP Redress Scheme (elements 1-3), and your specific allegations (elements 4-5).

My analysis

Element One

11. You disagree with the FCA's rationale for not upholding this element of complaint. Your view is that the redress scheme was "woefully inadequate" and that the banks are allowed to act as judge and jury with no right of appeal.

12. The FCA's decision letter summarised the considerations which had led to the establishment of the scheme (see paragraph 3 above). This was a policy decision, and it is clear that the FSA weighed up a number of options before establishing the Scheme. Clearly, arguments could be made for alternative options, but in my view the FSA's decision was not unreasonable, and the FCA's explanation to you was adequate. I agree with the FCA's decision not to uphold element one of your complaint.

Element Two

13. You also complain that the FCA failed to take any action against bank A. The FCA addressed this matter in its decision letter to you dated 30 March 2017. You are dissatisfied with the FCA's reasoning but you do not say why. I have reviewed the matter and I believe the FCA gave you a reasonable response: as with element one, the FCA made a policy decision which does not seem to me to be unreasonable.

14. For those reasons, I do not uphold this element of your complaint.

Element Three

15. You do not agree the FCA should defer its investigation into element three of your complaint until the conclusion of the court case. However, the court case is clearly relevant to your complaint, and I agree with the FCA that it would be wrong to consider the complaint until the outcome is known.

Element Four

16. You consider that the bank X breached its undertaking under the redress scheme when it sold two properties belonging to two firms – Y and Z - of which you were a director. The agreement signed between the then FSA and each individual bank can be found here:

https://www.parliament.uk/documents/commons-committees/treasury/Pro_Forma_Agreement_and_Undertaking_(June%202012).pdf

In particular, I believe you are referring to this section:

'I, *[insert name of CEO]* confirm that I will have responsibility for oversight of *[insert name of Firm]*'s conduct of this review and will take reasonable steps to ensure that it operates in accordance with the terms set out in the Appendix. This will include ensuring that *[insert name of Firm]* treats its complainants fairly. I will ensure that *[insert name of Firm]* prioritises any Customers who are in financial difficulty and, except in exceptional circumstances, such as, for example, where this is necessary to preserve value in the Customer's business, will not foreclose on or adversely vary existing lending facilities (without giving prior notice to the Customer and obtaining their prior consent) until *[insert name of Firm]* has issued a final redress determination and, if relevant, provided redress to that Customer.

Signed by: .....

[insert name]'

You believe that bank X's treatment of your firms and the two properties demonstrate that the CEO was not fulfilling his or her obligations.

17. There is no dispute that the bank appointed an LPA receiver for the properties in 2011, a year or so before bank X entered into the redress scheme in or about July 2012. Bank X appointed LPA receivers for the two properties in question (along with some others) in July 2011. Only company Z appears to have been sold an IRHP, and for that reason, I have only investigated the question of the sale of the Z property.

18. Your view is that although the LPA receivers were appointed in June 2011, given that the properties remained unsold on or around July 2012 when bank X would have signed the IRHP redress agreement with the FSA, the bank should have instructed the LPA receivers to stop the sale of the properties and you should have been given notice and an opportunity to consent before any future attempts at a sale/and or a sale were made.

19. In 2016, the FCA explained its understanding as follows:

> *… we understand that the actual foreclosure was triggered when the bank wrote to you on 18 March 2011 demanding repayment of your loans. The bank then appointed LPA receivers in July 2011. These events took place a year before the IRHP review and the commitment were agreed.*

20. In its 2017 decision letter, the FCA wrote:

> *…the foreclosure in your case was triggered on 18 March 2011, which as you will be aware was more than a year before the banks agreed to the moratorium.*

21. These two statements do not really address your question: they may be factually correct, but they do not say why – given that the property was unsold at the time of the 2012 agreement, and given that appears to have been nothing to compel a sale – the bank did not suspend the sale arrangements.

22. I can see nothing in the agreement between the FCA and the bank which prescribes what should be done in circumstances where an LPA receiver has been appointed/and or a foreclosure has been instigated, but the property not yet sold, at the date of the agreement. For that reason, I do not think that it can be categorically stated that bank X's actions contravened the agreement.

Element Five

23. It is clear from your correspondence with the FCA that you wished for an answer to the questions posed in element five. The FCA was right to say that if you wanted specific documents you were entitled to submit either a DSAR or FOIA request to the bank. The FCA was also right to say that there were confidentiality restrictions affecting what material it could release.

24. However, I think it would have been helpful if the FCA had given a general response to your questions. I cannot speak for the FCA, but in my view the agreement between the FCA and the banks does not compel the CEO of a bank to oversee each case personally, only the overall operation of the scheme.

25. As part of the redress scheme exercise you were able to submit a consequential loss claim to enable a review of whether the IRHP product sold to your firm Z was responsible for leading to the foreclosure procedures triggered by the bank in 2011. My understanding is that this has already happened and the bank did not find the sale of the IRHP was the reason for the foreclosure. I understand you have challenged this decision through the Financial Ombudsman Service which is the correct thing to do in your case.

26. You have asked me to further address the points you raised in your email of 4 September 2017. These have been addressed both by the FCA and in my report, apart from your request that the FCA obtain bank X's correspondence with the LPA receiver and yourself

about the properties. This information is not relevant to my investigation, which concerns the actions or inactions of the FCA. You should ask bank X for the information if you need it.

27. You also requested that I send you a copy of the FCA's response to my preliminary report. The FCA has not given me permission to share the response with you. Information shared with us by the FCA may contain confidential information which we would not be able to share with you. You are entitled to some of that information under the Data Protection Act 1998 – but not all. If you wish, I can arrange for you to be sent copies of the *personal* data contained in the correspondence, but that may not meet your needs.

Conclusion

28. In summary, I consider that the FCA's conclusions in relation to elements one to three of your case were reasonable.

29. In relation to element four, I think it is a moot point whether or not the actions taken following the appointment of LPA receivers for firm Z's property were or were not caught by the agreement. but nonetheless I cannot see that bank X's actions were clearly in breach. The FCA has taken a view that there has been no breach of the undertaking, which is not an unreasonable one in the circumstances. If you wish to argue a point of law, you would need to take the matter to the courts.

30. In relation to element five of your complaint, I think it would have been helpful if the FCA had said in general terms what it considered to be the CEO's responsibilities in respect of the oversight of the redress scheme, but in my view the agreement does not require personal oversight of every claim.

31. Finally, there is a mechanism, through the FOS, to challenge decisions on consequential loss, and it appears that you have been using that.

32. For these reasons, I am afraid that I do not uphold your complaint.

Antony Townsend

Complaints Commissioner

7 March 2018