

28 March 2019

Follow-up to final report on FCA00465

1. On 31 August 2018, I issued a final report in this case, which was published on 18 September – see <http://frccommissioner.org.uk/wp-content/uploads/FCA00465-FR-300818-for-publication.pdf>.
2. In procedural terms, my formal investigation into your complaint ended with my Final Report. I can, however, and do monitor the FCA's responses to my recommendations, since it is clearly important that people can see that the Complaints Scheme works effectively. For that reason, I am publishing this document as an addendum to my final report.

Background

3. The background is set out in my final report, but it concerned your dealings with a bank with whom you had a loan, and which culminated in court proceedings.
4. I concluded that the FCA had not responded adequately to the information which you had supplied, despite your repeated attempts. My recommendations were that:
 - a. the FCA apologise to you for the shortcomings which I have identified;
 - b. the FCA report to me periodically, and in any event at least quarterly, on the progress which it makes in pursuing its further inquiries with the bank.
5. The FCA accepted these recommendations.

Some preliminary points

6. Your complaint has taken up a large amount of your time, my time, and the FCA's time. From a regulatory perspective, the FCA might well argue that it is not a complaints resolution body, that it has to focus its limited resources on the areas of highest risk, that it cannot pursue every possible case of alleged maladministration by the banks, and that it has spent an unusually large amount of its regulatory time dealing with your complaint.

7. I would agree with all those points. However, if the FCA had provided you with better responses at the earlier stage of your correspondence, and/or provided me with a convincing explanation as to why, having considered the information which you had provided and assessed its risk, it did not consider that a regulatory intervention was justified, the matter would have finished long before now, and I would have concluded that the FCA was exercising its discretion appropriately. The problem has been that the FCA did not satisfy you (or me). The result of this has been the unnecessary prolongation of the complaint and its follow-up.
8. This addendum report is my final comment on these matters.

The FCA's follow-up to my recommendations

9. The FCA issued the apology.
10. On 5 December 2018, the FCA reported to you on the outcome of its inquiries with the bank. The core of the response was as follows:

As agreed on our call of 5 October, we asked [bank X] to review your case. We have, in turn, reviewed the response and supporting documentation from [bank X]. I am now in a position to let you know our findings.

We have found no evidence that [bank X] agreed bespoke terms with you, nor that [bank X] acted improperly in respect of reducing credit lines available to you. In terms of Credit Reference Agency reporting, we have found that [bank X]'s reporting of your accounts is consistent with industry guidelines.

With regards to your offer of Full and Final Settlement to [bank X], this was a commercial proposal between you and [bank X] in respect of the debt forgiveness that was requested. As such, there was no obligation for [bank X] to agree to the request, nor is it a matter that we are able to intercede on.

Finally, with regards to [bank X]'s delays in the handling of your Court case, we are unable to evidence that this was a deliberate act on the part of [bank X].

Given the findings of our review, we will not be seeking further intervention from [bank X] in respect of your specific complaint and consider this matter closed. We are sending a separate update to the Complaints Commissioner.

11. You were dissatisfied with this response.

12. The FCA sent me a fuller report, the key part of which was as follows:

We are satisfied that [bank X] has carried out a thorough review of the customer's treatment and interactions, evidenced by a comprehensive response and supporting documentation. [Bank X]'s view is that they have acted appropriately and have not found any instances where the customer was not treated fairly. Our assessment concurs with their view and I do not consider that the customer's complaint is valid, nor have there been any Regulatory breaches, based on the following:

- *There is no evidence that [Bank X] agreed to the **bespoke Terms & Conditions** as outlined by the customer. [Bank X] have shared the letter dated 24th October 2013, which the customer alleges was when [bank X] agreed to the bespoke Terms, and there is no reference to Terms and Conditions.*
- ***Credit line reduction / withdrawal** – The reduction in credit limit on the customer's Credit Card (from £9,000 to £4,500) took place very shortly after a personal loan was granted to the customer. The loan was used to clear both the outstanding overdraft (£2,646), and the credit card (balance £3,984). It is unclear whether the credit limit reduction was a condition of the loan, but [bank X] have shared the letter advising the customer of the decrease, so the customer was notified of the change. The overdrafts were withdrawn following non-payment and limit breaches (supported by customer communications). We would expect the Bank to consider appropriateness of credit lines in light of the customer's circumstances and purpose of the loan. Our assessment is that [bank X]'s actions were appropriate from a Responsible Lending perspective.*
- ***Credit Reference Agency reporting** – [Bank X] have shared copies of the Agreements which the customer signed. Within these agreements and / or supplementary General Terms is the provision for data-sharing with Credit Reference Agencies (CRAs). Our assessment is that the customer accepted the Terms and Conditions (including the provision for [Bank X] to share data with the CRAs), and that [Bank X] were entitled to report account level data to the CRAs. We have found that [bank X]'s reporting of the customer's accounts is consistent with industry guidelines.*

- *[Bank X]’s refusal to accept the customer’s **Full and Final Settlement Offer** – The customer offered £3,424.50 as Full and Final Settlement against unsecured debts with [Bank X], which at the time totalled £14,033.72. The customer also stipulated a condition of the settlement that all adverse credit be deleted from the CRAs. In light of the high proportion of debt forgiveness being requested (75% of the debt), [Bank X] declined the offer. Our assessment is that there was no obligation for [Bank X] to agree to the request, nor is it a matter that we are able to intercede on.*

- *Finally, regarding the **Court case** brought by [the complainant] against [Bank X], [Bank X] do not dispute that Court documents were issued to them (at their Y branch) on 21st November 2016. They also acknowledge that these documents were not actioned by their litigation function until 22nd March. They have provided no mitigating explanation for this delay and have previously acknowledged this inactivity. We have not seen evidence that this was a deliberate act on their part, as opposed to an oversight. As you know, the court decided that the default judgment should be reversed.*

We estimate that around 15 days of front-line Supervision resource has been utilised in investigating this individual complaint in detail.

As we have no findings to substantiate the customer’s complaint, we will not be seeking further intervention from [bank X] and are closing our file on this matter.

Supervision have now concluded their review of how the bank has handled [the complainant’s] case. They will however continue to monitor how Bank X respond to legal claims by their customers.

Preliminary points

13. I recognise that your ultimate objective is to achieve recompense from bank X for what you consider to be their failure to adhere to agreed terms and conditions. However, as I have explained to you, that is not something I can deal with. My concern is with whether or not the FCA has done, or failed to do, something which has had an adverse impact upon you or upon the public interest more generally.
14. The FCA has already apologised to you for its failure to follow up on the concerns about bank X which you raised with them. That matter is, therefore, closed. What I

am now concerned with is the question of whether the response which you received from the FCA on 5 December 2018, quoted in paragraph 10 above, and the rather fuller response to me which I have set out in paragraph 12, are sufficient.

15. In order to consider this matter, I asked for, and was supplied with, confidential papers which the FCA had received from bank X; and having received these, I asked some supplementary questions to ensure that I had understood the matter properly. This has led to a delay in this report, for which I apologise.

My analysis

16. My first comment is that the FCA's response (as quoted in paragraph 10) fails to reflect both the extent of the FCA's investigation (the FCA tells me that it spent 15 days on it), and the complexity of the issues which you have raised. Given the problems which arose with your earlier interactions with the FCA, I would have expected a much fuller response. Indeed, had the contents of the report to me (quoted in paragraph 9) been sent to you, it would have at least indicated that an attempt had been made to analyse your concerns.
17. I consider that FCA's response to you was insufficient to reassure you that the FCA had taken significant steps to address your concerns.
18. Turning to the substance of the FCA's follow-up, the three key concerns I identified in my report were:
 - a. failure to act in response to court proceedings;
 - b. misleading a court, causing your small business serious detriment;
 - c. an apparent failure to resolve the matter.

My original concern was that, *if substantiated*, the allegations might *suggest* a systemic problem with the treatment of small business customers which would merit further inquiry.

19. The FCA's response to you addressed (understandably, since you had raised the matters) the question of whether or not you had agreed bespoke terms with the bank, questions to do with credit limits and credit agency reports, and issues surrounding your offer of a full and final settlement. The FCA concluded (see paragraph 12 for the fuller explanation) that there was 'no evidence' that there had been bespoke terms agreed with the bank, and that the bank's actions had been acceptable.

20. The central issue here is the existence, or otherwise, of agreed bespoke terms. You have supplied me with your arguments on this, but the fundamental problem is that there is no convincing written evidence to support your view. You have offered to make a sworn statement. The FCA's claim that there is 'no evidence' is not strictly correct, since there is your personal evidence; but against that, there is nothing in writing to substantiate your claim, nor is there apparently anything in the bank's records. On this matter, I have to say that I think that the FCA's position is not unreasonable: there is not sufficient evidence to justify regulatory intervention on this basis. It is really a matter between you and the bank.

21. The associated issues concerning credit limits, credit agency reports, and your offer of a full and final settlement were not the focus of my investigation, and the FCA has looked at those. I consider that they have been dealt with adequately.

22. I turn now to the matter of the bank's admitted failure to respond to the service of court documents. The FCA's explanation to you (paragraph 10) was cursory. The explanation to me (paragraph 12) was slightly fuller:

[Bank X] do not dispute that Court documents were issued to them (at their [yyy] branch) on 21st November 2016. They also acknowledge that these documents were not actioned by their litigation function until 22nd March. They have provided no mitigating explanation for this delay and have previously acknowledged this inactivity. We have not seen evidence that this was a deliberate act on their part, as opposed to an oversight. As you know, the court decided that the default judgment should be reversed.

23. This explanation troubles me for several reasons. First, it suggests that there was only a single incident of mislaid documents – in fact there were several documented incidents. Second, the FCA reports that there was 'no mitigating explanation'. Third, while it would clearly be a particularly serious matter if the documents had been deliberately 'mislaid', repeated failure to deal with obviously significant legal documents is a serious matter even when inadvertent. The absence of any explanation from the bank, or at least an explanation of attempts to uncover the cause or steps to prevent a recurrence, seems to me to be unsatisfactory.

24. On the second issue – misleading the court – the FCA's response is silent. Your contention is that a telephone call you received from an unidentified person in the bank's litigation department demonstrates that in fact the litigation department had

known about the court proceedings far earlier than the bank admitted. This would, of course, be a serious matter, since it would undermine the explanation which the bank gave to the court. Neither the FCA nor the bank appear to have pursued this in any detail.

25. Finally, there is the question of whether the bank should have taken steps, following the court case, to tackle your complaint. The FCA's initial responses did not cover this at all. When I asked the FCA what its position was on this matter, I was initially told that you had made no complaint following the court proceedings. On further inquiries, I was told that

With regards to the issue surrounding whether a further 'complaint' was made to [bank x] following the Court date, [bank x] did reference the letter of 23 May Whilst [bank x] was copied in on the correspondence, their view is that the dissatisfaction was aimed at the outcome of the Court Hearing and the ruling of the District Judge, not [bank x]'s actions. On this basis, they chose not to respond to [the complainant].

26. I have two things to say in respect of this. First, it seems to me that irrespective of whether the 23 May letter was directed at the bank or the court, the matter was clearly one which needed consideration. Second, there is an email of 26 October 2017 on the file from you to bank x, repeating the complaint. It appears that you received no response.

Conclusion

27. The FCA has to make difficult judgements about whether to pursue information, and it is rightly given considerable discretion about how it does this. Furthermore, when it does make further inquiries or take other action, it is frequently constrained in what it can tell people about that action.
28. Within those constraints, it is important that it gives members of the public confidence that it is undertaking its role thoroughly.
29. My published final report drew attention to shortcomings in the way in which the FCA had handled information which you had supplied, and the FCA apologised and accepted my recommendation to make further inquiries.
30. In those circumstances, I would have expected that the FCA would have made a special effort to give you as full as possible an explanation of what it had done in the

15 days of staff time which it devoted to this task. As will be apparent from what I have written above, I consider that although it devoted considerable resources to following up the matters I had raised, it fell short in providing you with an adequate response.

31. I hold no view on whether or not your financial claims in respect of the bank have any merit and, as I have explained, I consider that the FCA's explanation in relation to those is not unreasonable. I am, however, surprised that the incontrovertible issue of repeated failings by the bank to deal with court documents has not resulted in a fuller explanation of what might be done to prevent a recurrence, bearing in mind the potential effects upon vulnerable customers, though I take some comfort from the fact that the FCA has undertaken to monitor this.

32. There are no further steps which I can take in this matter.

Antony Townsend

28 March 2019