Complaints Commissioner

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Mr Nicholas Wilson
C/o Mr Ben Tomeo

By email to mail@bentomeo.com

STRICTLY CONFIDENTIAL

18th September 2015

Dear Mr Wilson,

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).

This letter sets out my Preliminary Decision (explained more fully below), which is **confidential** and must not be communicated to anyone else except for the purpose of taking advice. If you do take advice, your adviser must also keep it confidential. Any advice you seek will be at your own expense.

I am aware that the media has been alerted to the fact that the issue of my Preliminary Decision is imminent and I must therefore emphasise that, as set out in Paragraph 7.10 of the Complaints Scheme, if this Preliminary Decision is released (either in full or in part) to the media I may decide to bring my investigation to an end without producing the Final Decision which will set out my overall findings on your complaint.

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.

When you originally contacted my office Mr Tomeo 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."

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 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.

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 Tomeo 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.

What we have done since receiving your complaint

We have now reviewed all the information the regulator has sent us. My Preliminary 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.

As my decision is a "Preliminary Decision" one it means that I am seeking your views, and the views of the FCA, before I reach a Final Decision. Please look at my Preliminary Decision carefully, and let me have any comments **before** 16th October 2015. If I do not hear from you, by email or letter, before then, I will assume that you do not wish to comment upon my findings.

When I have considered any comments which you and the FCA have sent me, I will produce my final decision and send it to you. I intend to publish my final decision on my website (but with all of your personal details removed so that you cannot be identified). If you have any concerns about this please let me know in your response.

Your complaint

From the email Mr Tomeo sent to us on your behalf, I understand that your complaint can be summarised as follows:

- you believe that a large number of consumers were overcharged by HFC and HSBC 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. 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.

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 is 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 and identified four cases in which clients had been 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.

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 who considered whether it needed to take further action. 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.

As any regulator can only act within its legal jurisdiction (or powers) 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. 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 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 this request that the FCA realised that the referral to the OFT had not been made and – in a move bordering on the farcical – referred the matter to the OFT just weeks before it 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 – the risk was not, therefore, a continuing one;
3. 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;
5. even if it wished to, the FCA 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;
6. matters of fraud were principally for the police.

My assessment of the regulatory process

Each of those reasons is potentially a valid one as a justification for taking no further action, 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 the only four customers 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 only four customers were affected, and 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

Having studied the FCA's papers in considerable detail, it is clear to me that the FCA looked at all these issues before concluding that further investigations were not justified. I recognise that that decision is debatable, but it is not my role to substitute my judgement for the FCA's. The FCA has to consider how to deploy its limited resources, and I do not consider that the FCA's decision can be said to be manifestly unreasonable or unprofessional.

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 any legal jurisdiction to supervise the conduct of HFC (or its parent HSBC) in respect of consumer credit activities. It therefore it 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.

As the FCA wanted to assist you and provide as much information as possible, its Information Access Team (IAT), which is responsible for responding to FoIA requests, discussed your request with a number of other areas within the FCA before deciding to approach HSBC, HFC's parent organisation, for additional information which it required in order that it could respond to your request.

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. Whilst I can understand why the FCA approached HSBC for information it did not possess, it 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. 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 as a very unfortunate error by the FCA, I can find no evidence that the FCA set out to mislead you. I understand that the FCA has apologised to both you 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.

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

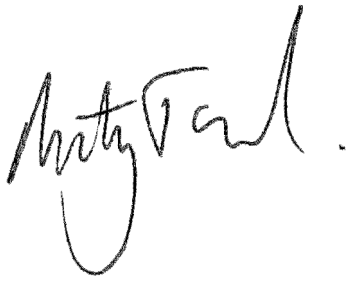
- it failed properly to address the core issues of your complaint. I have attempted to address them above. To some extent, the FCA was constrained by the fact that it needed to protect the confidentiality of its continuing consideration of the matter, but its decision to confirm to the Treasury Committee 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.

Accordingly I recommend that the FCA should apologise for the manner in which it considered and responded to your complaint, on the basis of my analysis of its failures as set out above

As I explained at the start of this letter, if you wish to comment upon my Preliminary Decision please do so **before** 16th October 2015.

Yours sincerely



Antony Townsend
Complaints Commissioner