



Neutral Citation Number: [2021] EWCA Civ 557

Case No: A3/2020/1184

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
FINANCIAL SERVICES AND REGULATORY SUB-LIST
Sarah Worthington QC (Hon) sitting as a Deputy High Court Judge
FS-2018-000009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16th April 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE PHILLIPS
and
LORD JUSTICE WARBY

Between :

MR CLIVE RICHARD DAVIS
- and -
LLOYDS BANK PLC

Appellant

Respondent

DAVID McILORY & LLOYD MAYNARD (instructed by Mayo Wynne Baxter LLP)
for the **Appellants**
JAVAN HERBERG QC & SIMON PRITCHARD (instructed by Addleshaw
Goddard LLP) for the **Respondents**

Hearing dates : 30th and 31st March 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10am on Friday 16th April 2021.

Lord Justice Lewison:

Introduction and issues

1. Mr Davis bought two interest rate swaps in 2002 and 2005 respectively from Lloyds Bank plc (“the bank”). He participated in a review process under an arrangement made between the bank and the Financial Conduct Authority. As a result of the review the bank offered him compensation in respect of both financial products. Mr Davis accepted the basic redress offer in relation to the 2002 swap; but not in relation to the 2005 swap. He says that he is entitled to bring an action for breach of statutory duty against the bank in relation to the swaps. The alleged breach is not the original alleged mis-selling of the interest swaps; but relates to the bank’s conduct of the review process.
2. The obligations on which he relies are obligations contained in a Chapter of the FCA Handbook entitled “Dispute Resolution: Complaints”. Those obligations come into operation following the making of a complaint (as defined).
3. That claim led to the formulation of two preliminary issues. They were:
 - i) Issue 1: “Did the Claimant make a complaint for the purposes of the rules in the Chapter of the FCA Handbook entitled 'Dispute Resolution: Complaints' (“DISP”) in relation to the sale of the interest rate hedging products which are the subject matter of the proceedings?”
 - ii) Issue 2: “If so, was the Defendant bound by the statutory duties under DISP 1.4.1R to assess the Claimant's purported complaint in accordance with the terms of what had been agreed between the Defendant and the Financial Conduct Authority regarding the Defendant's review process into interest rate hedging products?”
4. Mr Davis needed to succeed on the first of those issues if his underlying claim was to progress to a full trial. If he succeeded on that issue, but failed on the second, then the scope of any trial would be more limited. The trial of those preliminary issues came before Dame Sarah Worthington DBE QC (Hon), sitting as a judge of the Chancery Division. She decided both issues against Mr Davis. In her judgment she held that Mr Davis had not made a complaint sufficient to trigger the DISP rules; and that even if he had, those rules did not require the bank to deal with the complaint in accordance with the review procedure agreed between the bank and the FCA. Her judgment, which contains a fuller account than is necessary for the resolution of this appeal, is at [2020] EWHC 1758 (Ch). Mr Davis now appeals. At the conclusion of the first day of the hearing, we informed the parties that we had not been persuaded that the judge was wrong on the first issue; with the consequence that we did not need to hear argument on the second issue, and that the appeal would be dismissed. We said that we would give reasons in due course. These are my reasons for joining in that decision.

Factual background

5. Mr Davis and Mr Watkins were the ultimate beneficial owners of property in the City of London, legal title to which was held by Valleymist Ltd. In 2002 they entered into a loan agreement with the bank for £8 million. A few days later they entered into a 10-year interest rate swap with the bank. In 2003 Mr Davis bought out Mr Watkins’

interest; and in January 2005 Valleymist was replaced by Deanweald Ltd as holder of the legal title. On 26 January 2005 the 2002 interest rate swap was broken, with break costs of £177,000-odd. Those break costs were embedded in a new swap; which was for an 18-year term. Apparently this is called “blend and extend” in the jargon. The loan was refinanced at the same time. Payments were made until January 2010 but payments due in April 2010 were not. Mr Davis says that this was because of difficulties with the tenant of part of the property. The bank made a formal demand for payment in June 2010; and appointed LPA receivers. In July 2010 the bank terminated the 2005 swap. The break costs were £1.4 million-odd which were debited to Deanweald’s account. In 2011 the receivers sold the property; and the net proceeds of sale were credited to Deanweald’s account. There is a dispute about the state of the account following those debits and credits.

Regulation

6. Financial services are regulated by the Financial Services and Markets Act 2000 (“FSMA”) as amended; and regulations made pursuant to powers conferred in it. The relevant regulator in this case is the Financial Conduct Authority (previously called the Financial Services Authority “FCA”). The FCA has power to make rules: FSMA s 137A. The relevant rules are contained in the FCA Handbook. Among the rules contained in the FCA Handbook are the Rules on Dispute Resolution and Complaint Handling (“DISP”). If there is a breach of the rules, then in principle a private person may bring an action for breach of statutory duty; unless the rule in question has been specified as being one to which that principle does not apply: FSMA s138D. The definition of a “private person” was left to subordinate legislation; and the definition is to be found in regulation 3 of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001. It is common ground that Mr Davis is a private person as defined. It is not a pre-condition to bringing an action that the claimant has made a complaint (as defined); but the usual statutory provisions about limitation periods apply.
7. The FCA has wide powers to require the provision of information and documents reasonably required in connection with its exercise of functions conferred on it by or under the Act: FSMA section 165. It also has power to require a skilled person to provide it with a report on any matter about which the FCA has required or could require in exercise of its power to require information or documents: FSMA section 166.
8. Section 384 of FSMA enables the FCA to require a provider of financial services to make redress where that person has contravened a relevant requirement; and has either profited from the contravention, or has caused another person to suffer loss. That power is a power to require a provider of financial services, in accordance with such arrangements as the FCA considers appropriate, to pay to the appropriate person or distribute among the appropriate persons such amount as appears to the FCA to be just, having regard to various factors.
9. Part XVI of FSMA provided for the establishment of an ombudsman scheme, which is called “the Financial Ombudsman Service” (“FOS”). Its purpose was to have certain disputes resolved quickly and with minimum formality by an independent person: FSMA s 225. The extent of FOS’s jurisdiction is contained in rules made by the FCA. In relation to FOS’s compulsory jurisdiction, rules are limited to regulated activities. It

is not usually possible to bring a dispute before FOS unless the customer has first made a complaint (as defined). But the review agreement did provide for this possibility.

10. Section 404 of FSMA enables the FCA to require a provider of financial services to set up a consumer redress scheme. It provides:

“(1) This section applies if— (a) it appears to the Authority that there may have been a widespread or regular failure by relevant firms to comply with requirements applicable to the carrying on by them of any activity; (b) it appears to it that, as a result, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings; and (c) it considers that it is desirable to make rules for the purpose of securing that redress is made to the consumers in respect of the failure (having regard to other ways in which consumers may obtain redress).

...

(4) A ‘consumer redress scheme’ is a scheme under which the firm is required to take one or more of the following steps in relation to the activity.

(5) The firm must first investigate whether, on or after the specified date, it has failed to comply with the requirements mentioned in subsection (1)(a) that are applicable to the carrying on by it of the activity.

(6) The next step is for the firm to determine whether the failure has caused (or may cause) loss or damage to consumers.

(7) If the firm determines that the failure has caused (or may cause) loss or damage to consumers, it must then— (a) determine what the redress should be in respect of the failure; and (b) make the redress to the consumers.”

The agreement between the bank and the FCA

11. Following widespread concern about the possibility that sophisticated financial products might have been mis-sold to consumers, the regulator carried out an investigation. As a result of the investigation, it identified serious failings in the sale of such products. It therefore entered into review agreements with a number of banks, including Lloyds. Those agreements provided that each bank would review its sales of interest rate hedging products to “non-sophisticated customers” during the period from 1 December 2001 and provide appropriate redress where mis-selling had occurred. In June 2012, the Financial Services Authority announced the existence of the review but not its terms. Those remained confidential until February 2015, when they were made public by the Treasury Select Committee.
12. As was held in *CGL Group Ltd v Royal Bank of Scotland* both at first instance ([2016] EWHC 281 (QB) at [39]) and in this court ([2017] EWCA Civ 1073, [2018] 1 WLR 2137 at [86]), the review agreement was one made between the bank and the FCA by

way of compromise; and as an alternative to enforcement proceedings. An agreement of this kind between a bank and the FCA is a voluntary arrangement. It is not a statutory consumer redress scheme imposed by the FCA under section 404 of FSMA.

13. The agreement recited that the FCA had found evidence of poor practice in the bank's sale of interest rate hedging products to retail clients or private customers. The bank agreed to provide a written undertaking to the FCA in the terms set out in Annex A to the agreement. Those terms were, in effect, the agreement to conduct a review, and the method by which that review was to be carried out. Clause 8 of the agreement was headed "No Precedent," and stated that the agreement was "a unique solution to a specific set of FCA concerns". Clause 9 provided that no third party had any right to enforce any term of the agreement. Clause 11 provided that the terms of the agreement were confidential to the parties and their legal advisers; and were not to be disclosed to third parties.
14. By the undertaking, the bank agreed to carry out a review in accordance with the terms set out in the Appendix. The Appendix fleshed out this obligation. One critical component of the review was the role of the Skilled Person. That was an independent third party, approved by the FCA. The Skilled Person was to design, in conjunction with the bank, the methodology for the past business review. The Skilled Person was also to review the bank's assessment of appropriate redress in any given case; and the bank agreed not to issue a redress determination unless and until the Skilled Person had agreed with it. The Skilled Person was to report to the FCA in accordance with section 166 of FSMA; but under the terms of the agreement, the Skilled Person's role was much more extensive than could have been imposed under section 166.
15. The undertaking required the bank to review sales of interest rate hedging products made on or after 1 December 2001. Customers who bought interest rate hedging products that were not structured collars or caps described in the Appendix as "Category B Business". The swaps that Mr Davis bought fell into this category. The agreement envisaged two types of customer in relation to Category B Business: those who met the sophisticated customer criteria and those who did not. The bank was to assess each type of customer. In either case the bank's assessment was to be approved by the Skilled Person. If a customer met the sophisticated customer criteria, then the bank was to write to that customer. The letter was to inform the customer that they were not eligible to request a review; but were entitled to make a complaint. If a complaint was made, the bank would deal with it under its usual complaints handling procedures including DISP, if applicable.
16. If, on the other hand, a customer did not meet the sophisticated customer criteria, the bank was then to write to that customer asking if they wanted their sale reviewed; and if so, carry out a review. If the review found a breach of regulatory requirements, appropriate redress was to be provided, based on what was fair and reasonable in the circumstances. Customers who fell within this group did not need to make a complaint in order to be included in the review. All that they had to do was to ask to be included in the review when contacted.
17. The review was intended to run in parallel with dispute resolution under the FCA Handbook, at least as regards sophisticated customers falling within Category B Business and Category C Business (customers who bought an interest rate cap on or after 1 December 2001). As noted, eligibility for review in relation to Category B

Business was not dependent on the making of a complaint in the case of a customer who did not meet the sophisticated customer criteria. If the Skilled Person decided that the customer did not meet those criteria, then the bank was to follow the review process described in the Appendix. If, on the other hand, the Skilled Person decided that the customer did meet those requirements, and the customer made a complaint; then the bank was to deal with the complaint according to its usual complaints handling procedures “and, if applicable, DISP”: paragraph 3.8.1.3. Customers for Category C Business were dealt with by paragraphs 3.17 and 3.18 of the Appendix, both of which depended on receipt by the bank of a complaint (as defined). Complaints made during the period of the Skilled Person’s appointment by customers who did not meet the sophisticated customer criteria, and any complaint after the period of the Skilled Person’s appointment, were to be dealt with in accordance with the bank’s usual complaints handling procedures “and if applicable DISP”. The Appendix defined “complaint” as:

“any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a Customer about the provision of, or failure to provide, a financial service which alleges that the Customer has suffered (or may suffer) financial loss, material distress or material inconvenience.”

18. Once the bank had conducted the review, the methodology of the review would lead, in an appropriate case, to an offer of fair and reasonable redress. Fair and reasonable redress might include offering the customer the option of exiting the interest rate hedging product at no cost, and a refund of all charges paid by the customer. This was known in the jargon as a “full tear up”. Redress potentially had two components: Basic Redress and Consequential Loss. Basic Redress was intended to place customers in the position they would have been in if they had not bought the product. Consequential Loss could include loss of profits, bank charges, legal expenses and net tax costs. When the bank made its redress determination, the customer had three options. Option A was to accept the determination in full and final settlement of all claims. Option B was called a split settlement. That enabled the customer to accept an offer of Basic Redress, while remaining free to pursue a claim for Consequential Loss. Option C applied if the customer did not accept either Option A or Option B. Option C would lead to the offer of a combined settlement, which could only be accepted together as part of a package. If the customer did not accept, they were free to pursue their legal and regulatory rights.
19. The bank’s final redress determination was to be treated as the bank’s final response for the purposes of DISP 1.6.2R.

Previous cases

20. The courts have on a number of occasions considered what legal rights a customer might have arising out of the review process. As Mr Herberg QC, for the bank, rightly says it has already been determined that:
 - i) A bank does not owe its customers a contractual duty to comply with the terms of the review: *Elite Property Holdings Ltd v Barclays* [2018] EWCA Civ 1688, [2019] Bus LR 129;

- ii) A bank does not owe its customers a common law duty of care to comply with its terms: *CGL Group Ltd v RBS* [2017] EWCA Civ 1073, [2018] 1 WLR 2137;
- iii) A complaint about the review is outside the jurisdiction of the Financial Ombudsman Service: *Mazarona Properties v Financial Ombudsman Service* [2017] EWHC 1135 (Admin);
- iv) A decision by the skilled person cannot be challenged by judicial review: *R (Holmcroft Properties Ltd) v KPMG LLP* [2018] EWCA Civ 2093, [2020] Bus LR 203;
- v) A settlement of basic redress does not compel the bank to accept a claim for consequential loss and does not preclude the bank from disputing an allegation of mis-selling: *Norham Holdings v Lloyds Bank Plc* [2019] EWHC 3744 (Ch).

DISP

- 21. There are two potentially relevant provisions of DISP. The first is the definition of a complaint which must be made in order to trigger DISP. That is defined (so far as relevant) in the glossary to DISP as:
 - “any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service or a redress determination which:
 - (a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and
 - (b) relates to an activity of that respondent ... which comes under the jurisdiction of the Financial Ombudsman Service.”
- 22. The glossary also states that reference to a complaint includes “part of a complaint”. Paragraph (b) of the definition is absent from the definition of “complaint” in the review agreement.
- 23. The other provision is DISP 1.4.1R which requires a complaint to be assessed “fairly, consistently and promptly ... taking into account all relevant factors”.
- 24. If a service provider receives a complaint, certain time limits are triggered. Thus under DISP 1.6.2 the service provider must send the complainant a final response upholding or rejecting the complaint within 8 weeks of receiving it. The 8-week time period is repeated in DISP 1.6.7. The making of a complaint may also have the effect of extending time for a reference to FOS under DISP 2.8.2. An extension of time for bringing a dispute before FOS was also achieved by the deeming provisions in the review agreement to the effect that the bank’s assessment was to be treated as its final response for the purposes of DISP 1.6.2R. Those deeming provisions also enabled a customer to approach FOS without first having made a complaint.
- 25. It is important to note that whereas entry into the review scheme was initiated by invitation from the bank, the triggering of the DISP rules is the making of a complaint by a customer. I agree with HHJ Waksman QC in *Day v Barclays Bank plc* [2018]

EWHC 393 (QB) that acceptance of an invitation to participate in a review and the subsequent conduct of the review cannot, without more, be treated as a complaint for the purposes of DISP. It is because the triggering event for the application of DISP is a complaint (as defined) that in order to invoke DISP 1.4.1R Mr Davis must show that he made a complaint, as defined in DISP.

26. In *Mazarona* Mitting J held that an agreement between the FCA and a bank providing for a review in terms similar to the agreement in our case was not a statutory redress scheme imposed under section 404 of FSMA. The inclusion of a complaint about a “redress scheme” in the definition of “Complaint” in DISP did not, therefore, include a complaint about the review. It followed that FOS had no jurisdiction to consider a complaint about the review. Mr McIlroy, for Mr Davis, did not challenge the correctness of that decision.

Mr Davis’ engagement with the review

27. Between June and October 2013 the bank sent letters inviting Mr Davis to participate in the review; but only in relation to the 2002 swap. On 21 October 2013 Mr Davis telephoned the bank. The call was recorded; but the judge found that it contained little of substance; and nothing that suggested that at that stage Mr Davis was making a complaint. Having read a partial transcript of the call, I agree. He did, however, raise the question whether the 2005 swap would be included in the review, although that question seems to have been misunderstood by the bank at that time. What he learned from that call was that his case was being handled by Mr Alchin at the bank. It was common ground that in the course of that conversation Mr Davis accepted the bank’s invitation to participate in the review as regards the 2002 swap. All Mr Davis’ remaining communications with the bank were in writing. Although he gave evidence about what they were intended to mean, they must speak for themselves.

28. On 4 November 2013 Mr Davis emailed the bank. He began by saying:

“I thought it might be useful to share my thoughts with you at this stage, which I therefore do in what follows. I start by voicing some basic questions.”

29. The email includes the following statements which are said to amount to a complaint:

“1. Would I have been better off had the hedges not been in place? Perhaps not surprisingly, the answer to this question is emphatically yes.

2. By how much? I do not know but with your help think we could have a fair stab at determining it. I set out the information I see as pertinent in this respect later in this email.

3. Why did I enter into the hedges? ... I do not recall any particular conversation about them one way or the other. It was simply assumed from the outset that it was a fundamental requirement of the overall arrangements that the risk of an increase in interest rates be protected; in the same way as a full legal charge over the property forming the security would be

required, or that the Bank would have the right to call in the loan if an event of default occurred.

4. Would I have entered into the hedging agreements if I had not understood them to be a requirement of the overall arrangements? The answer here is ...undoubtedly I would have sought some protection in the different form I briefly mentioned to you, in which respect please see below.

5. I am a cautious man and would therefore have [sought] to avoid the risk of a default occurring. Regretfully I do not have the documentation to hand (it was a long time ago) but, if I recall correctly, this would have been the case if the overall interest charge exceeded the rent roll.... However, on reflection, the specific hedges entered into were not the appropriate instruments ...

6. The more suitable hedge would have [been] ... a 'cap and collar' or perhaps 'cap and floor'. The governing factor in all cases would have been the rent roll. ...

7. Why I did not pursue this option at the time is a fair question ... but there was a very great deal going on in my commercial life at the time ... [with a long explanation of that]... Perhaps a more significant question is why was it never explored and offered by the Bank? I would like to know the answer to that question.”

30. Having asked for further information, Mr Davis then wrote in the same email:

“With this information to hand I think we will be able to start to determine the extent, if at all, to which my net worth has been eroded as a result of entering into the hedging agreements under review and whether therefore it is worth pursuing. I look forward to hearing from you accordingly.”

31. In his email of 6 November 2013 Mr Davis said that he had been able to tabulate the various interest and swap costs debited to the companies' accounts. He concluded:

“I would like to take you up on your offer to meet, together, perhaps with the “Independent reviewer” you mentioned, but I suggest we leave matters until the documentation is to hand and you have had the opportunity to gather the facts as you see them. I have to say that, having been put on enquiry, the potential sums involved do indeed appear to merit serious examination and I commend the Bank and the Regulator for bringing the matter to my attention.”

32. There was further correspondence with the bank in the early part of 2014. Mr Davis had queried whether the bank was going to review the 2005 swap as well as the 2002 swap. The bank's first reaction was that only the 2002 swap was included in the review.

On 2 May 2014 the bank notified Mr Davis of its Basic Redress Determination in relation to the 2002 swap. That was calculated on the basis of a “full tear up”.

33. On 10 May 2014 Mr Davis emailed the bank. He said that he needed time to consider the offers that the bank had made. He continued:

“An initial point that mystifies me however is why the Valleymist Limited arrangements have been reviewed but you say those involving Deanweald Limited are not eligible for review. Are you able to enlighten me as to why you say this?”

34. The Valleymist arrangements were the 2002 swap; while the Deanweald arrangements were the 2005 swap. He repeated his mystification in his emails of 12 May and 16 May.

35. On 22 May 2014 Mr Davis emailed again. He said that he thought that he and the bank had been at cross purposes. He continued:

“I now understand that your review concerns the 2002 product and its novation. However, I believe there is another product that should be reviewed and this is the one entered on 26 January 2005 ... Having looked back over the correspondence, it seems we may have been confusing the novation of the 2002 product with the new 2005 product which may be why this has been missed.

I confirm that I would like the new 2005 product ... to be reviewed and can see no reason why the conclusion would not be the same as that the Bank has reached for the 2002 product.”

36. He continued by elaborating on why he thought that there was no difference between the two swaps, concluding that:

“Consequently I cannot see any difference in the status or nature of the 2002 and 2005 products (excluding the novation) and the respective parties so that if one is deemed non-sophisticated and eligible for review, it follows that the other must be.

Could you please confirm that you are separately reviewing the 2005 product ... and that it is non-sophisticated and eligible for review?”

37. On 23 May 2014 the bank confirmed that the 2005 swap would be investigated. On 2 June 2014 Mr Davis accepted the bank’s basic redress determination for the 2002 swap under Option B, leaving him free to pursue his claims for consequential loss.

38. On 10 June 2014 the bank sent a letter to Mr Davis. It was headed:

“Complaint in relation to Interest Rate Hedging Product...”

39. Having said that Mr Davis’ email of 22 May had been passed on, the letter continued:

“We acknowledge that you disagree with the Bank's findings that [Deanweald] is not eligible for inclusion in the [Review] ...

Your 'out of scope challenge' has been logged as a complaint, and we will investigate this taking into account all of the points that you have raised. We will endeavour to provide you with our full response as soon as possible.

As part of our Complaints Handling policy we have enclosed a copy of the Bank's leaflet “How to Voice Your Concerns” which details information about resolving your complaint.”

40. Mr Davis replied on 13 June. He said that he had asked for the 2005 swap to be included in the review, but was not aware that the bank had reviewed that product at all. He continued:

“... consequently, I am not sure why you say I am unhappy with the finding that it is ineligible.”

41. Later in his letter he said:

“If, however, your letter means that the Bank has reviewed it already – a fact, as I say, I was unaware of – and found it ineligible, I confirm I do wish the issue to be dealt with as a formal complaint. Moreover, if that is the case, I would also like to know the detailed reasons for the Bank's finding, not least because the position is completely at odds with the finding in respect of [the 2002 swap].”

42. The Complaints Handling Team replied on 19 June 2014 indicating they would add this letter to “the complaint file”. On 25 July 2014 the Complaints Handling Team wrote to Mr Davis again, saying that they had requested that the trade be assessed in order to determine whether it was eligible for inclusion in the review. On 31 July the bank confirmed that it would be reviewed. The bank duly reviewed the 2005 swap and issued its final redress determination on 28 February 2017. Mr Davis is dissatisfied with that determination and in consequence has begun these proceedings. The claim form was issued in July 2018, some 13 years after the 2005 swap was entered into; and some four years after the bank had agreed to review that swap.

43. In the Particulars of Claim served on his behalf it is alleged:

“41. In around October 2013, Mr Davis made a complaint to the Defendant under the IHRP Redress Scheme about the 2002 Swap. ...

42. By letters dated 22 May 2014 and 13 June 2014, Mr Davis made a complaint under the IHRP Redress Scheme to the Defendant about the 2005 Swap.”

Did Mr Davis make a relevant complaint?

44. Mr McIlroy drew attention to the observation of Ouseley J in *R (British Bankers Association) v FSA* [2011] EWHC 999 (Admin), [2011] Bus LR 1531 at [38] that the definition of “complaint” in DISP is a broad one. So indeed it is, but it is still a defined term. There are three relevant aspects to the definition. First, so far as the form of a complaint is concerned, there must be an expression of dissatisfaction. Although the definition does not say so in terms, it is obvious that the expression of dissatisfaction must be one that is communicated to the provider of the financial service. Second, it is not just any expression of dissatisfaction that qualifies as a complaint. The expression of dissatisfaction must be about “the provision of, or failure to provide, a financial service or a redress determination”. The conduct of a review under an agreement such as the one in this case is not the provision of a financial service: *Mazarona* at [31]. It must also be a complaint about something which comes under the jurisdiction of FOS. A complaint about the review process does not come under FOS’s compulsory jurisdiction: *Mazarona* at [30]. Third, a complaint must also allege that the complainant “has suffered (or may suffer) loss” etc. It is common ground that because the definition of “complaint” includes part of a complaint, a complaint (as defined) may be contained in a series of communications.
45. Whether a communication or series of communications meets this test is a question of interpretation. The ultimate question is: what meaning would be conveyed to a reasonable recipient of the communication or series of communications? In determining that meaning, the context in which the communication was made is of the utmost importance. As Lord Hoffmann said in *Kirin Amgen Inc v Hoechst Marion Roussel Ltd* [2004] UKHL 46, [2005] RPC 9 at [64]:

“No one has ever made an acontextual statement. There is always some context to any utterance, however meagre.”
46. The context in which all the relevant communications were made is that of the proactive review of business that the bank had agreed to carry out. In the case of Mr Davis, that review was to be carried out without the need for a customer to make a complaint. When considering what meaning would have been conveyed to a reasonable recipient in the position of the bank the context is fundamental. That is not to say that a customer cannot make a complaint (as defined) during the course of a review. Nor does it mean, as Mr McIlroy argued in reply, that one is inserting “except in the course of a review” into the definition of a complaint. It is simply a question of interpreting communications in context.
47. It is also of note that various time periods under DISP are triggered by the making of a complaint. It is therefore important to be able to identify when a complaint was made without a retrospective sift through a mass of material. Although it is possible for a complaint to be contained in more than one communication, I do not consider that it is permissible to attempt to construct a complaint by a mosaic of acontextual statements made in the course of a series of communications.
48. Mr Davis places particular reliance on the email of 4 November 2013. His primary case is that this email amounts to a “complaint” as defined by DISP. The original pleaded case does not specify this email in terms, but Mr McIlroy submitted (and I am prepared to accept) that it is covered by the phrase “in around October 2013”; and it is specifically

pleaded in Mr Davis' Reply. That plea, however, relates only to the 2002 swap and not to the 2005 swap. Mr Davis' alternative case is that if the email does not amount to a complaint read on its own, then it does when read in conjunction with subsequent communications. The particular subsequent communications on which he relies are the emails of 6 November 2013, 10 May 2014, 22 May 2014 and 13 June 2014. I have set out all the relevant parts of those emails above. The latter two are pleaded as amounting to a complaint about the 2005 swap.

49. The context in which the email of 4 November 2013 was written was in response to the bank's invitation to send it information for the purposes of the review. That was not a communication that was initiated by Mr Davis. A person conducting the review would have understood that to participate in the review, it was not necessary for a customer to make a complaint. That is important when considering what meaning the email would convey.
50. Mr McIlroy argues that the first of the numbered paragraphs in the email of 4 November 2013 is making a complaint, as clearly as a layman could. If a lay person says that they would have been better off without a certain product, that means that they are dissatisfied with it. It is clear, however, that when Mr Davis said that he would have been better off without the policy, what he was referring to was his "net worth", as appears from the concluding part of the email. I do not agree that the mere fact that someone's net worth has been diminished by the purchase of a product is itself an expression of dissatisfaction with that product. It depends on what the product is. I may insure my house against fire for a year. If during that year my house does not suffer any fire damage, then I would have been better off in terms of my net worth if I had not taken out the insurance policy. My net worth will have decreased by the amount of the premium. But that does not mean that I am dissatisfied with the policy. The point of the policy was to protect me against risk; and the fact that the risk did not eventuate during the period of the policy has no bearing on whether I am dissatisfied with it. The purpose of the interest rate swaps was to deal with the risk that interest rates might move. The fact that, with hindsight, they moved in the wrong direction, thus meaning that Mr Davis was worse off in net worth terms than he would have been if he had not entered into the transaction, does not amount to a complaint about the fact that he was sold the product in the first place.
51. Mr McIlroy argues that if there is any ambiguity in the first of the numbered points in that email the ambiguity is resolved by points 5 and 6. In those paragraphs Mr Davis said that the particular products were not appropriate, and that a cap and collar or cap and floor would have been. The out-turn was that he bought the wrong product in the light of the dramatic fall in interest rates over the lifetime of the swap. But to say that, in retrospect, Mr Davis bought the wrong product does not, in my judgment, amount to a complaint about the provision of the financial service in the first place.
52. A further requirement of a complaint, as defined, is that it must allege that the complainant "has suffered (or may suffer)" loss etc. The email of 4 November 2013 did not allege that Mr Davis had suffered loss. It concluded by saying that with the information he had requested "we will be able to start to determine the extent, *if at all*, to which my net worth has been eroded as a result of entering into the hedging agreements under review and whether therefore it is worth pursuing." That is not an allegation that he had suffered loss.

53. Mr McIlroy makes the point that the kind of products in question are complex financial products. Even where it appears likely that loss has been suffered, whether or not that is actually the case; and, if so, quantifying the loss is a matter for experts. It would, he says, be perverse if the definition of complaint were to require a customer to know that they had suffered a loss and to have measured that loss before they could make a complaint. I do not, with respect, consider that that submission takes full account of the definition. First a complainant need only *allege* a loss. They do not need to *know* whether they have suffered a loss, still less to have quantified it. Second, a complaint is a complaint “whether justified or not”. Making an allegation of loss is not difficult and requires no expertise.
54. The judge said at [77]:
- “It is evident from C's email, and as C confirmed under cross-examination, at this stage C did not know whether he had suffered a loss and did not complain in his email that D's provision of a financial product had caused him loss.”
55. I agree. This e-mail thus fails to satisfy two of the three components of a complaint, as defined. Looked at overall, what this email does is to raise questions to enable Mr Davis to decide whether to participate in the review at all. Thus I also agree with what the judge said at [79]:
- “The more natural reading of C's communication to D is that C is simply expressing his desire to work with D within the Review framework, initially to determine whether indeed a loss may have been suffered such that it would be worthwhile having his transactions reviewed. C proposed that the loss would need to be assessed by comparing his position now with the position he would have been in had he selected, or had the Bank offered, a more suitable alternative.”
56. Mr McIlroy also points to the alternative (which the judge did not expressly consider, probably because it was not argued); namely that the complainant “may suffer” loss. In my judgment, however, that part of the definition looks to the possibility of future loss. It does not encompass uncertainty about whether loss has been suffered in the past. Simply as a matter of ordinary grammar, “may suffer” is not the same as “may have suffered”. There is no reason to give this part of the definition anything other than its ordinary grammatical meaning. This argument therefore takes the matter no further.
57. Mr Davis’ email of 6 November does not, in my judgment, take the matter any further either. Once again, it does not assert that he had suffered any loss: merely that the question was worth investigating. I might add that, far from containing any expression of dissatisfaction, on the contrary it commends both the bank and the FCA for bringing the matter to his attention.
58. The next possible source of a complaint seems to me to be Mr Davis’ email of 22 May 2014 (and, indeed, that is one of the documents relied on in the pleading). But all that that email does is to ask for the 2005 swap to be included in the review. It does not, in my judgment, amount to a complaint that he was sold that product in the first place; nor does it assert that he had suffered a loss.

59. In fact the bank subsequently acceded to that request; so to the extent that there was a complaint, it was resolved in Mr Davis' favour. That is important in considering the effect of the later communications. As Mr Davis said in his letter of 13 June, he was not aware that the bank had reviewed the 2005 swap and therefore was not unhappy. He would only have been unhappy if the bank had reviewed the 2005 swap and found it to be ineligible. At that stage, of course, the bank had not yet reviewed the 2005 swap; although it had agreed to do so. So there was in fact not yet anything to complain about so far as the review was concerned. But even if that letter could amount to a complaint, it was not a complaint about the original sale of the 2005 swap. At best it was a conditional and proleptic complaint about the outcome of a review that had not yet taken place; and even then it did not assert that Mr Davis had suffered a loss as a result of having been sold the 2005 swap. Moreover, to the extent that it was a complaint about the possible outcome of a future review, it was a complaint about an activity that was outside the jurisdiction of FOS; and for that reason also did not meet the definition of "complaint" in DISP.
60. Mr McIlroy argues that the 13 June letter was a complaint about the original sale of the 2005 swap. That is based on the argument that Mr Davis not only asked for that swap to be included in the review, but also said that the outcome of the review should be the same as that for the 2002 swap: i.e. a refund on a full "tear up" basis. Why, he asks, would Mr Davis have asked for the 2005 swap to be included in the review, if he did not believe that he had lost money? He made it clear that he was dissatisfied with the 2005 swap, which had caused him loss in the same way as the 2002 swap. Accordingly, the only reasonable conclusion is that Mr Davis' complaint was a complaint about the original sale of the 2005 swap, which met all the requirements of a complaint as defined by DISP.
61. That is certainly not how the bank understood it. Although they logged Mr Davis' "complaint", what is clear from the Complaints Handling Team's letter of 10 June 2014 is that they regarded the complaint as being one about eligibility for inclusion in the review, rather than a complaint about the original sale of the product. That is also how I would interpret Mr Davis' complaint. So did the judge. All that Mr Davis was complaining about was that the 2005 swap had not been included in the review. It was, therefore, a complaint about the scope of the review, rather than a complaint about the original sale of the 2005 swap.
62. In my judgment, the basic flaw in Mr McIlroy's argument is that it works backwards from Mr Davis' desired conclusion, rather than assessing what meaning would have been conveyed to the reasonable recipient of the communications in the sequence in which they were in fact received.

Result

63. Accordingly, in agreement with the judge, I consider that Mr Davis did not make a complaint about the swaps as defined in DISP. Consequently the second preliminary issue does not arise. It was for these reasons that I joined in the decision to dismiss the appeal.

Lord Justice Phillips:

64. I agree.

Lord Justice Warby:

65. I agree that the appeal should be dismissed for the reasons given by Lord Justice Lewison.