

Ombudsman Determination

CIFO Reference Number: 16-001286

Complainants: [The complainants]

Respondent: [Bank X]

It is the policy of the Channel Islands Financial Ombudsman (CIFO) not to name or identify complainants in any published documents. Any copy of this determination made available in any way to any person other than the complainant or the respondent must not include the identity of the complainant or any information that might reveal their identity.¹

[The complainants] complained that [Bank X] sold their entire portfolio without authorisation, causing financial loss.

Background

[The complainants] held [an overseas] portfolio with [Bank X], valued at approximately USD 730,000. They wanted [Bank X] to reallocate approximately USD 296,000 from [an overseas] fund to a more conservative investment in advance of their retirement.

[The complainants] were told by [Bank X] that the [overseas] fund had closed on 6 July 2015 and had already been switched. They were informed of this a year after its closure, on 10 October 2016.

The complainants thought that the cash from this sale was held in a money fund in the [overseas portfolio's] account wrapper which had a negative yield, despite [the overseas fund's] equities performing well during the period. As a consequence, they tried to encash the money fund to stop their losses and instructed [Bank X] accordingly.

Instead of cashing out only the money fund, [Bank X] sold their entire [overseas] portfolio. This caused further losses and resulted in surrender penalties.

In response, [Bank X] confirmed they had made an error and offered two possible options for redress. A decision had to be made by the complainants as to which of the following options they preferred within 24 hours, by the end of 18 November 2016:

1. Restore the portfolio to its position at the surrender date of 31 October 2016, apart from the money fund which the complainants

¹ Financial Services Ombudsman (Jersey) Law 2014 Article 16(11) and Financial Services Ombudsman (Bailiwick of Guernsey) Law 2014 Section 16(10)

had asked to be redeemed. [Bank X] would reverse any surrender penalties.

2. Leave the money in the account at redemption value. The complainants would have to pay surrender penalties and [Bank X] would cover them for any losses until they informed the bank of their decision. This had to be done before the end of the 24-hour window.

[The complainants] indicated to CIFO that option 1 would be their preference, but they were concerned that the market value of the repurchase of the shares would be lower than the redemption value of 31 October 2016.

[Bank X] advised the complainants that, although they would cover any losses if the market value was higher than the redemption value, they would not offer them any profit made if the market value was lower. [The complainants] considered that this was unfair because [Bank X] would have profited from the mistake of selling their entire portfolio.

As a fair and reasonable resolution to the complaint, [the complainants] wanted their policy reinstated to its position on 31 October 2016, all surrender penalties removed, and any gains made to be invested in additional shares or deposited in their current account.

The case handler upheld the complaint. He concluded that [Bank X] should restore the portfolio to its position at the surrender date of 31 October 2016, except for the money fund which the complainants had asked to be redeemed. Any associated surrender penalties should also be refunded or waived by the bank. The case handler also concluded that [Bank X] should provide the complainants with any profit made on the repurchase of the portfolio to correct the error.

Subsequent submissions

Complainants

[The complainant] agreed with the case handler's conclusions but queried the value of the money fund. [The complainant] believe the value should have exceeded USD 296,000.

[The complainant] invested in the [Bank X] [overseas] fund within the [overseas] portfolio in 2012. The fund was discontinued in July 2015, more than a year before his request to redeem. According to [the complainant], he was not informed by [Bank X] that the [overseas] fund was discontinued and he continued to believe the money was invested in [the overseas fund's] shares.

When the fund was encashed the amount was USD 296,000, representing the value of the [Bank X] [overseas] fund in July 2015 at the time when the fund was discontinued; however, [the complainant's] view was that if this amount had remained invested in

[the overseas fund] from July 2015 until November 2016, it would have been worth more.

[Bank X] offered a settlement of USD 10,292.29. The bank had proposed to benchmark an equivalent [overseas] fund, but actually used an index benchmark [redacted for anonymisation purposes] to the benefit of the complainant. The bank then extrapolated the gains during the period of July 2015 to October 2016 to the money fund. The bank also offered £500 for any inconvenience caused.

[The complainant] rejected this proposal, because he wanted a third party to review the calculations.

[Bank X]

[Bank X] sought a determination to clarify whether the profit and loss of unit calculation should be made until 31 October 2016 and not the date of the case handler's conclusions in November 2017.

Findings

The general approach of this office to resolving complaints is to put individuals back into the position they would have otherwise been had the loss not occurred. The complainants' preference for option 1 above - [Bank X's] offer to restore the portfolio to its position as of 31 October 2016, together with removing any surrender penalties - appears consistent with this approach.

I acknowledge that the option provided by [Bank X] to restore the portfolio to its position on 31 October 2016 was not, in itself, unreasonable; however, it would have been reasonable for the complainants to have had a longer period of time than 24 hours to consider and accept or reject the offer made by the bank. A further month from when the offer was made by [Bank X] on 18 November 2016 would have been an appropriate amount of time for the complainants to consider the options put forward, and this is reflected in my final decision.

Furthermore, whilst CIFO seeks to put individuals back into the position in which they would have otherwise been, this will only be done if it is fair and reasonable in the circumstances. I recognise that if the converse had been the case and the market value of the shares was higher than the redemption value, [Bank X] would have covered the additional cost and the shares would have then belonged to the complainants at a higher price.

In addition, there are other factors which CIFO is required to take into account. One of these is whether the bank should profit from an error, however innocently it was made. I am of the view that to profit in such a way effectively rewards a mistake made by the bank.

The money from the sale was money belonging to the complainants. When the portfolio was sold, it remained their money. The mistake was discovered and the money can be used to repurchase the shares, which would then belong to the complainants. If there is some money left over, I consider that [Bank X's] repurchase of the shares does not change the essential character of this remaining money. It remains that of the complainants.

Based on the above, it would be reasonable to conclude that any profits made following the repurchase of the shares belong to the complainants rather than [Bank X].

Insofar as the redeemed USD 296,000 from July 2015 is concerned, I am of the view that the methodology used by [Bank X] is appropriate and that the figure of USD 10,292.29 represents a reasonable amount with which to compensate [the complainant] for the time that the money fund was not invested between 6 July 2015 and 31 October 2016.

Final decision

My final decision is that I uphold this complaint.

[Bank X] should compensate [the complainants] as follows:

1. Restore the complainants' [overseas] portfolio to the position as at 31 October 2016, whilst removing or refunding any surrender fees.

If the repurchase of the shares costs more than the previous redemption value, [Bank X] should cover the shortfall.

Any windfall gain made by the bank as a result of the repurchase if the repurchase of the shares costs less than the previous redemption value, should be paid to [the complainants].

2. Pay USD 10,292.29 for the time the money fund was redeemed but not invested between 6 July 2015 and 31 October 2016.
3. Pay £500 for distress and inconvenience caused in relation to this matter.

[The complainants] must confirm whether they accept this determination either by email to ombudsman@ci-fo.org, or letter to Channel Islands Financial Ombudsman, PO Box 114, Jersey, Channel Islands JE4 9QG, by **21 March 2018**. The determination will become binding on [the complainants] and [Bank X] if it is accepted by this date. If we do not receive an email or letter by the deadline, the determination is not binding. At this point [the complainants] would be free to pursue their legal rights through other means.

If there are any particular circumstances which prevent [the complainants] confirming their acceptance before the deadline of 21 March 2018, they should contact me with

details. I may be able to take these into account, after inviting views from [Bank X], and in these circumstances the determination may become binding after the deadline. I will advise both parties of the status of the determination once the deadline has passed.

Please note there is no appeal against a binding determination, and neither party may begin or continue legal proceedings in respect of the subject matter of a binding determination.

Douglas Melville
Principal Ombudsman and Chief Executive

Date: 21st February 2018