

The complaint

Ms M's complaint relates to the Dual Currency Deposit ('DCD') account she opened in 2008 with Bank of America Merrill Lynch International Designated Activity Company – hereafter referred to as 'ML' and, as respondent to the complaint, Bank of America Europe DAC ('BAE'). She says:

- ML did not properly advise her about the DCD product. [issue 1]
- Misguided her and gave her unsuitable advice, between July and September 2008, on high value USD to GBP exchange transactions that she sought to make through the account. The misguidance and unsuitable advice happened through the four tranches of exchange transactions proposed to her by ML during this period. [issue 2]

She says, mainly as a result of issue 2, she exchanged her funds at less favourable rates, which was avoidable, and incurred *lost opportunity for value* of around £423,000.

Ms M has also expressed her dissatisfaction with the overall level of service she received from ML (including her allegations that ML's conduct and conflicting representations confused her, that ML placed undue pressure upon her in the transactions and, with regards to her complaint, ML unreasonably refused to engage in mediation). However, her claim is for *reasonable compensation* in the context of issues 1 and 2, and in the context of the lost opportunity for value that she has referred to.

BAE disputes the complaint.

What happened

Ms M mainly says:

- She wanted to exchange her USD funds in the account into GBP, she was not in any particular rush to do so and no wider matter was dependent on the exchanges so she was prepared to have the pursuit take place over time and at the most favourable exchange rate achievable. Her engagement with ML in this respect began in July 2008.
- Her initial contact at ML ('ML1') advised her to wait for around six months, as he anticipated USD appreciating against GBP over this period to the extent of \$1.75/£1 (which would have benefited her given that the rate was higher at the time) but his advice was unofficial and she could not follow it because he was a EURO (not GBP) specialist, so she was referred to a GBP specialist ('ML2'). ML2 was unduly aggressive/hostile and dominating, he also did not appear to be competent and he gave conflicting advice (including the view that USD was likely to depreciate against GBP to the extent of \$2/£1 or higher), so she complained about him and ML replaced him with another official ('ML3'). ML did this on conditions that she felt coerced to accept. The conditions included that she had to follow ML3's advice exclusively and that she could not discuss her pursuit or take advice on it externally (including her family).

- Initially ML3 also advised that USD was likely to appreciate and that the USD/GBP rate was likely to reach \$1.75/£1. His view was that this was likely over a period of time until around December 2009. Despite knowing her objective for the most favourable rate achievable and despite the absence of any rush on her part, ML3 thereafter behaved in a conflicting manner by abandoning these elements (and his initial view) and by recommending four rushed transactions at the less favourable rates of \$1.95/£1, \$1.90/£1, \$1.85/£1 and \$1.80/£1.
- The loss of value she incurred resulted from following this recommendation and then finding out that more favourable rates soon thereafter emerged in the market, as ML1 had initially advised. This was proven by comparable high value exchange transactions conducted by her family members, through other firms, at much better rates. One family member did this in October 2008 at the rate of \$1.6418/£1, another did so in the same month at the rate of \$1.5444/£1, another did so in November 2008 at the rate of \$1.5920/£1 and another did so in May 2009 at the rate of \$1.5150. Had her transactions been based on such rates she would not have lost the value she has referred to.

BAE's position is mainly as follows:

- There is no evidence of the conflicting advice that has been alleged and no evidence that ML2 said USD was likely to depreciate against GBP to the extent of \$2/£1 or higher. To the contrary, Ms M concedes that ML1 advised that USD was likely to appreciate over time, and she has also conceded that ML3 advised the same (for a period up to around December 2009). ML3's advice was the bank's position at the time, it was clear and it was supported by the following evidence – its 'FX Weekly' publication dated 5 August 2008 which forecast \$1.75/£1 for December 2009; and Bloomberg data which showed that *"As of 4 August 2008 the median average forecast for Q3 2008 (i.e. 30 September 2008) was \$1.96 and for Q4 2008 (i.e. 31 December 2008) was \$1.90. For completeness, the median average forecast at that time for rates over the following four years was as follows: \$1.82 for end of 2009, \$1.81 for end of 2010, \$1.80 for end of 2011, and \$1.81 for end of 2012"*.
- These indicators were the basis on which ML3 recommended the four transactions which were to be triggered when each rate was reached in the market, this was designed to assist Ms M to benefit from the forecast appreciation in a conservative manner *"... whilst recognising that the foreign exchange market (like any market) does not necessarily follow forecast predictions"* and this strategy was wilfully agreed by her. Evidence of her agreement was recorded in ML3's notes for his meeting with her on 4 August 2008, which included –

"Strategy agreed

Explained that our view is that the long terms prospects for USD/GBP are 1.75.

That was not a prediction and there is no guarantee that such will be reached let alone time scale.

A phased transfer in 4 stages 195 -190 -185 -180."

- The strategy also matched her objective, which ML3's notes recorded as – *"Twin objectives 1. convert gradually from USD into GBP. 2. maximise returns in the meantime through the use of DCD s."*

- The transactions that were executed have been misrepresented and should be clarified. Its records show that the first transaction was based on a DCD Ms M entered during the meeting of 4 August and at the first trigger point of \$1.95/£1 (the execution exchange rate was \$1.9465/£1). Record from this meeting also shows she was given all relevant information about DCDs and examples of how they worked. The next trigger point of \$1.90/£1 was reached on 12 August when the second transaction happened – at the execution exchange rate of \$1.9047/£1. The third and fourth trigger points (\$1.85 and \$1.80/£1) were reached on 26 August and 3 September when the third and fourth transactions happened (at the execution exchange rates of \$1.8525 and \$1.7954/£1), but both transactions were thereafter cancelled/reversed after Ms M complained (on 10 September) because she was displeased they were carried out during her absence on holiday and she considered them unauthorised. A fifth transaction was carried out on 10 September but this had no involvement or advice from ML, it resulted solely from Ms M's instructions and it was executed at the rate of \$1.7667/£1. No other *conversation* transactions happened and, contrary to her claim, the two transactions on 22 September she has referred to were for the transfer of a USD sum, in USD, to a GBP account she held elsewhere. Receipt of the sum in that account was shown in GBP, but that was only because GBP was the account's base currency, not because it was a conversion or DCD transaction.
- Nothing was rushed in Ms M's case, the strategy was based on the agreed trigger points and the fact that those trigger points came around sooner than expected does not mean the process was rushed.

One of our investigators looked into the complaint and concluded that it should not be upheld. She was broadly persuaded by ML's position on and evidence of its engagements with Ms M and the transactions that took place. In addition, she also said:

- There is evidence from the notes of Ms M's meeting with ML on 4 August that it discussed with her how DCDs worked; the terms and conditions for the DCD account that she was given informed her about the account, including notices that she might not get back the amount invested, that she should ensure she fully understands the terms and risks associated with transactions in the account, that prices and other terms in those transactions are individually negotiated and may not represent the best price or terms available from other sources and that the applicable rates of exchange "... shall be determined by the Bank in accordance with the Confirm". A copy of the Confirm for her first transaction clearly shows the selected exchange rate.
- Ms M also signed a Global Derivatives Suitability form on 16 July 2008 which confirmed she had received a derivatives risk warning notice and was aware of the special risks associated with the account.
- Overall, evidence shows Ms M was reasonably informed about the workings of the DCD product, its associated risks, the rates applicable in transactions and that those rates might not be the best available.
- There is a lack of evidence that Ms M was under pressure or rushed in the transactions or that she was told not to discuss her pursuit with anyone else, and her request to reverse the third and fourth transactions suggests she had input on how the conversions happened.

Ms M disagreed with this outcome. She mainly restated the key points in her claim and she disputed ML's claims about giving her suitable advice and about giving her the USD forecast

that it now claims. She says, if what ML now says was its view at the time, not only was that not shared with her it also adds merit to her claim that ML misled her, because it told her something different and conflicting at the time. She also disagreed with the investigator's comment that ML could not have reasonably been expected to predict the resulting USD/GBP rate movement. She said others in the sector at the time did so and were predicting \$1.6/£1, and that at the very least ML should have made its forecast clear to her (not conflicting, as it was) and should have advised her to wait until the rate was heading in the direction of its forecast (which is what she suggested at the time, but her suggestion was dismissed by ML3).

The matter was referred to an ombudsman.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I have reached the same conclusion as the investigator's and I do not uphold Ms M's complaint. I also endorse and incorporate the investigator's core reasoning.

The first point to note is about evidence in the complaint. In her submissions to this service, since 2020, Ms M has referred to her recollections of exchanges she had with ML's officials about the DCD account and about the transactions. However, these events happened almost 14 years ago to date (or around 12 years before 2020).

It is not implausible that the passage of time could have affected the accuracy of Ms M's recollections. I have not determined that this is certainly the case, and it is *possible* that her recollections are accurate. However, there are no recordings of telephone conversations or other discussions available – understandably so, given the passage of time – so none exist to support the exchanges she has described, and her recollections face competition in the form of relatively contemporaneous documentary evidence from the time(s) of the events. I have found more weight in the latter because, overall, they appear to be more consistent with the events that unfolded.

I do not find grounds to uphold the complaint about issue 1 and, like the investigator (and for the reasons she gave) I am satisfied that Ms M was reasonably well informed about the DCD account, about DCDs, about how they worked and about the risks associated with them. The terms and risk warnings she was issued and agreed/signed show this, as does the 5 August dated notes of her meeting with ML3 on 4 August which included:

"In meantime look to enhance yield using DCD s where strike is around desired conversion level

Talked through DCD s and how they work, specifically what happens if converted"

and,

"Discussed a no of DCD s as follows (Spot at 1.9653)

<i>Strike</i>	<i>Yield pa</i>	<i>Investment</i>	<i>PC</i>
1 9645	5 1276	USD ...	0 5
1 9645	7 2808	USD ...	0 5
1.9465	7 3638	USD ...	0 5

This last of three was agreed upon and deal was phoned through ... from the meeting room at 16 30

... heard [Ms M] confirm that she wished to trade, all details above being repeated back to her"

Overall and on balance, I have not been persuaded not to rely on these notes, especially as they were made a day after the meeting – in contrast to recollections 12 to 14 years after the meeting.

Similar findings (and reasons) apply to issue 2.

My consideration begins with ML3 because it was his advice that led to the beginning of the transactions. I have considered the background Ms M presented with regards to ML1 and ML2, but her claims about them are in dispute and there is a lack of undisputed or undisputable evidence about her contacts with both officials to determine what probably happened. However, the same does not quite apply to her contact with ML3.

As quoted earlier, in the previous section of this decision, the 4 August notes refer to ML informing Ms M about its long-term forecast for USD/GBP being \$1.75/£1. This is consistent with the part of Ms M's solicitor's submissions, on her behalf, to ML which confirmed that ML3 told her about this forecast being projected for the period up to around December 2009. This forecast is also consistent with ML's FX Weekly publication of 5 August, a copy of which has been shared with us, which shows this exact rate as forecast for December 2009. As such, there is evidence of Ms M essentially agreeing that ML3 advised her about this rate and evidence that his advice was supported by ML's firm wide FX forecast for USD/GBP at the time.

Furthermore, Ms M's argument that others in the sector had different forecast which suggested the likelihood of USD appreciation even up to the level of around \$1.5/£1 is not supported by the Bloomberg data from the time. I have considered that data, which has been shared with us, and, as summarised by ML and quoted above (in the previous section), none of the median forecasts from 2008 to 2012 went this far (or even near such a level).

I appreciate that Ms M recalls things differently and that she says ML3 was unclear and/or conflicting in his advice, but she also accepts that he gave her this specific advice about the long-term projection for \$1.75/£1 and his notes say the same so, on balance, I consider that his advice in this respect was clear.

There is also evidence on the strategy being agreed with Ms M – which the meeting note confirms – and on the fact that it was based on trigger rates which, once reached in the market, would prompt each relevant transaction. In this context, it appears to have been implicit that each transaction would happen *whenever* the relevant trigger rate was reached, so I do not consider that criticism of there being pressure or a rush, by ML, to transact can fairly be made in this issue. The transactions were not time based. They were essentially based on market rate movements and agreed rate triggers, and neither party had any control over the former.

Besides the notes of 4 August, there is additional and implicit evidence of Ms M's agreement with the strategy in her actions over the two transactions that were reversed. Both appear to have been executed at even better rates than the two that preceded them, yet evidence suggests that she complained about them because she considered them unauthorised, and they were reversed. I am persuaded that, on balance, the absence of such action for the preceding two suggests that they met with her agreement (and reflected her agreement with the strategy ML3 recommended). I am also persuaded that her objection to the two reversed

transactions indicates she was not under ML's or ML3's control as she says or suggests, otherwise such an objection would probably have been unlikely and/or ML's reversal of the transactions would probably have been unlikely (if it had the total control that has been suggested).

The strategy met Ms M's objective and, for the reasons addressed above, I do not consider that it was unreasonable. I have not seen evidence to support and/or establish, on balance, her claims about conflicting advice, undue pressure and/or hostility from ML and/or some of its officials, so I do not uphold the service related aspect of her complaint. ML/BAE was/is entitled to determine its own position on any matter of mediation proposed to it. In another case, reasonableness of such a position might (or might not) be relevant, but in this case I do not consider that necessary. The key issues in the complaint have been determined, they have not been upheld and I do not find cause to make a separate finding on Ms M's claim that ML was unreasonable in refusing to engage in mediation with her.

My final decision

For the reasons given above, I do not uphold Ms M's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms M to accept or reject my decision before 7 April 2022.

Roy Kuku
Ombudsman