

The complaint

Mr D complains that he was wrongly charged trail commission by Coutts & Company because it wasn't providing ongoing advice.

What happened

In 2001 Mr D was advised to invest £200,000 into an investment bond that invested in the Clerical Medical Cash Life Fund. There was a fund switch to the Invesco Perpetual Higher Income Fund in May 2009. He surrendered his investment in April 2023.

Mr D has already complained about the advice he was given and about the performance of the fund. Those complaints have been dealt with separately but during the complaint about advice being dealt with Mr D raised a complaint about the trail commission.

Coutts didn't uphold the complaint. It said that it had received trail commission through encashment of units from 11 July 2005 through to 11 July 2020, with no payments thereafter following Coutts asking all product providers to stop paying trail commission on all investment products.

Coutts explained that whilst trail commission was payable on an ongoing basis this was for the original advice given when the investment was first taken out and wasn't payable for ongoing advice.

Mr D referred his complaint to our service and Coutts said that it had been made too late. It said the presence of trail commission began when the original advice was provided and on that basis the complaint was out of time under the six and three year time limits that apply.

One of our investigators considered whether the complaint had been made too late and concluded that it hadn't. In short he made the following points:

- It was only as a result of his complaint made in 2021 about being put into the wrong fund in 2009 that Mr D became aware he had been paying trail commission and enquired about this.
- The meeting that Mr D had with an adviser in 2014 to discuss accepting a new service that provided ongoing advice for which an annual fee would be payable wasn't necessarily something that ought to have made him aware he had cause for complaint about trail commission.
- As Mr D made his complaint within three years of being aware he had cause for complaint in 2021, his complaint has been made in time.

Coutts didn't agree with the investigator. In summary it made the following points:

- Mr D would have been aware at the outset when he was first advised to take out the investment that he was paying trail commission.

- In 2014 he met with an adviser and would have known at this point he would no longer be receiving advice – which is separate to his awareness that trail commission was applicable to his existing investments but highlights he was aware he was no longer receiving advice.
- The suitability letter from 2011 is no longer available but its standard wording at the time would have confirmed that trail commission was an ongoing charge for advice provided and not for ongoing advice.

As Coutts didn't agree with the investigator the matter was referred to me to decide if we have jurisdiction to consider the complaint. I issued a provisional decision in which I explained why we had jurisdiction but also that I didn't think the complaint should be upheld on the merits. In short my findings on jurisdiction were that:

- There are two time limits I need to address as set out in the Dispute Resolution rules (DISP) in DISP 2.8.2R. The first requires that a complaint is referred no more than six years from the event complained about. The second applies where a complaint is brought more than six years from the event and allows that we have jurisdiction as long as the complaint is made no more than three years from when the person complaining was aware or ought reasonably to have been aware they had cause for complaint.
- Coutts argues that the event complained about was in 2001 when payment of trail commission started. This treats the complaint as if it is about one event but each payment of trail commission amounts to a separate event a complaint can be made about.
- In the circumstances the complaint about any trail commission paid to Coutts within six years of the complaint made by Mr D has been made in time under the six year time limit. This is any complaint about trail commission received by Coutts after 2 October 2017.
- Mr D was aware from the outset that Coutts was being paid trail commission but his complaint is that it wasn't entitled to trail commission at all but that it wasn't entitled to this following the FCA's Retail Distribution Review (RDR) in 2012 when it wasn't providing advice.
- The RDR introduced new rules that came into force on 31 December 2012 and Mr D has said that he only became aware that Coutts shouldn't have been receiving trail commission as a result of the RDR around the time of his complaint. I have no reason to think he was aware of the RDR before this so his complaint about trail commission received by Coutts following the introduction of the new rules at the end of 2012 up to 2 October 2017 is also in time, under the three year time limit.

In terms of the merits of the complaint I made the following findings:

- The change to the rules about firm remuneration that came into force as from 31 December 2012 didn't prevent the ongoing receipt of trail commission for a product such as the investment bond which Mr D paid into in 2001.
- I have seen nothing to support Mr D's argument that Coutts wasn't entitled to continue to receive trail commission and the information provided by it indicated the contrary.
- Based on the evidence provided Coutts has done nothing wrong in continuing to

receive trail commission.

I gave both parties the opportunity of providing any further information they wanted me to consider before making my final decision. Coutts didn't respond but Mr D didn't accept my provisional decision.

He said that after the introduction of the RDR the options he was given were to reinvest in new products that benefitted Coutts in fees whilst leaving him worse off or continue with the status quo. He said he was forced to choose paying trail commission for a non-existent service as this was better than the alternative.

He argued that the level of service didn't warrant the charging of trail commission regardless of the interpretation of the FCA guidance about those circumstances where this could still be taken by a firm following the RDR. He asked what else I relied on apart from the guidance in deciding not to uphold his complaint.

I informed Mr D that the right to continue receiving trail commission was set out in rules set by the regulator in the Conduct of Business Sourcebook (COBS), in particular at COBS 6.1A.4A. In response he said that if I wasn't upholding the complaint on the basis that Coutts didn't have to rebate trail commission this isn't right when it is commonly known that trail commission is paid for an ongoing service. He said most of the websites he had considered supported this.

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.

Jurisdiction

Coutts has said it had nothing further to add in response to my provisional decision and Mr D made no comment on my findings on jurisdiction in his response. In the circumstances I see no reason to change the findings I made about our jurisdiction as set out in my provisional decision which are part of this final decision. In short we have jurisdiction to consider the complaint about the trail commission paid to Coutts between 2013 and 2020 – when Coutts stopped receiving this.

Did Coutts do anything wrong in continuing to receive trail commission?

I gave brief findings in my provisional decision explaining that the change to the rules following the RDR didn't prevent the ongoing receipt of trail commission for a product such as an investment bond sold in 2001. I said that from what I had seen the information provided by the FCA indicated that Coutts was entitled to continue receiving trail commission.

I didn't refer to any specific rule in relation to this but did so subsequently when Mr D indicated he didn't agree with my provisional decision, referring to COBS 6.1A.4A This rules provides an exception to the foregoing rule, COBS 6.1A4 - which specifies that a firm must only be remunerated by adviser charges and not accept other forms of remuneration such as commission.

COBS 6.1A.4A is headed 'Exception: Events before December 2012' and in short allows for the ongoing payment of commission where there was a personal recommendation on or before 30 December 2012 and the contract was entered into before that date and included the right to receive commission.

In this case the personal recommendation – the advice to invest in the bond – was in 2001, when Mr D invested in the bond. Neither party has been able to provide documentation from the time of sale, which isn't surprising given it took place so long ago. So, I have not seen the contract that was originally entered into and whether this included the right to receive commission.

However, Coutts continued to receive trail commission after the change to the rules at the end of 2012 and in the absence of any evidence to the contrary, I think it is more likely than not it would have complied with the rules. In short, I am not satisfied that it would have continued to take trail commission unless the contract with Mr D entitled it to do so.

I have considered what Mr D has said about trail commission being payable for the provision for an ongoing service. However, whilst this was true in many cases, trail commission could also be payable where the only advice provided was the original advice to invest and no ongoing service was provided, as was the case here.

Mr D says that his choice in 2013 was either to take out a new product that benefitted Coutts in fees and was detrimental to him or continue with the bond and paying for a non-existent service. However, I would point out he could also have decided not to continue with Coutts and invested in something else. In any event, he had the option of getting out of the bond and not paying the trail commission but chose to keep it knowing that Coutts would continue to receive this and that this didn't entitle him to ongoing advice or any other service. In the circumstances I am not persuaded Coutts did anything wrong because it still received trail commission.

My final decision

I don't uphold this complaint for the reasons I have explained.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 21 June 2024.

Philip Gibbons
Ombudsman