

The complaint

Mr and Mrs P complain that Barclays Bank UK PLC withdrew its offer to port their existing mortgage to a new property, and add new lending, once it became aware that part of the property they were buying was subject to an overage agreement.

What happened

Mr and Mrs P wanted to sell their house, which had a mortgage with Barclays, and port their mortgage to a new property, as well as take out some new lending to support this new purchase. Barclays gave them a mortgage offer at the start of June. But in August, Barclays said it wouldn't lend to them after all, because there was an overage on part of the property they were buying.

Mr and Mrs P said the overage posed no risk to Barclays. They said the area it covered had been the subject of an application for planning permission which had been refused, then appealed and refused again, so there was simply no realistic prospect of planning permission being granted for this part of the land. They also said they had discussed this with the previous owner of the land, who was the beneficiary of the overage agreement. And that person had agreed to remove the overage agreement, for a fee. But Mr and Mrs P said that Barclays was insisting that this provision be removed before completion, which was just not practically possible, given delays at the Land Registry at the time.

Mr and Mrs P said they had to pay an early repayment charge of £12,106.12 and a mortgage exit fee of £80 to Barclays, because they weren't able to move their existing lending. They'd been forced to find a new lender, at very short notice. And that meant they also had to instruct a new solicitor, because their previous solicitor wasn't one their new bank would work with. So they said they incurred £780 in extra legal fees. They said they had to pay an extra mortgage fee to their new lender, of £1,499. And they said that their buyer dropped the price he was willing to pay, by £3,000, because he could see that Mr and Mrs P were having difficulties and knew they would have no option but to accept this last minute reduction. Mr and Mrs P wanted Barclays to pay all of this.

Barclays didn't think it had done anything wrong. It said its offer was subject to compliance with its internal lending policy, and that policy said Barclays wouldn't lend on any property which was subject to an overage agreement. So it decided it wouldn't go ahead unless the overage agreement was removed on or before completion.

Barclays did think it had taken longer than it should to respond to Mr and Mrs P's solicitor, while the overage agreement was being discussed, so it offered them £250 to make up for that. But it wouldn't refund the ERC they had paid.

Our investigator didn't think this complaint should be upheld, because Barclays had just followed its own lending policy. And he wouldn't expect a niche issue like an overage policy to be set out in the mortgage offer documentation. He thought £250 was a reasonable amount to make up for the delays in responding to Mr and Mrs P's solicitor.

Mr P didn't agree. He wanted his complaint to be considered by an ombudsman, so it was

passed to me for a final decision.

I then reached my provisional decision on this case.

My provisional decision

I issued a provisional decision on this complaint and explained why I only proposed to uphold it in part. This is what I said then:

Mr and Mrs P received a mortgage offer on 3 June. That offer had, on pages 10-12, a number of special conditions. Condition 8 allowed Barclays to withdraw this offer or change its terms, in specified circumstances.

8. We can withdraw the offer or change its terms (whether or not you have agreed to buy the property), but only before the advance is made under the mortgage, in the following circumstances: a) where we become aware or suspect that any information you have provided to enable us to make our lending decision is incorrect or misleading; b) where any information that we have obtained materially changes and such change affects our decision to lend; c) where you request and we agree to a variation in the amount of the loan; d) following internal investigations and/or advice from our solicitor, valuer or other professional adviser which would directly affect our decision to lend as the Bank's security might not offer adequate security or the security the Bank would have expected; e) where it appears that the mortgage will be in breach of the law; f) to change the offer so as to correct an error in it (such as inconsistent or inaccurate particulars of you, the property or the terms of the mortgage).

Mr P's solicitor wrote to Barclays on 28 July, drawing its attention to a small number of points about the property. These included that part of the property was subject to an overage deed.

Barclays replied on 3 August, saying "*Unfortunately, we are unable to proceed whilst the overage Agreement is registered on the title to the property, as this falls outside the Bank's Lending policy.*" There is no further explanation of this point, and it isn't expressly linked by Barclays to any of the conditions set out in the mortgage offer, which allow Barclays to withdraw its offer.

Mr P's solicitors replied on 12 August to say that the beneficiary of the overage agreement had agreed to have it removed, subject to a payment to him. The solicitor said he would obtain an undertaking from the beneficiary's solicitor to apply for removal of the entry following completion.

On 17 August, Barclays replied saying "*...we would advise that we can only proceed if the overage is removed on or before completion and written confirmation received from you to confirming this.*"

I don't think that it was fair and reasonable for Barclays to simply say, on 28 July, that it had an internal policy not to lend on properties which were subject to an overage agreement, when this condition was not set out in the offer document, and Barclays hadn't linked this policy to any of the conditions set out in the offer document. And it isn't clear that this is just poor communications by Barclays. I cannot see any internal notes which make clear Barclays had properly considered whether its right to withdraw was triggered.

So now I have to think about what should have happened. I think Barclays ought to have considered whether the overage agreement meant that one of the terms allowing it to withdraw its offer (as set out in Condition 8, above) had been triggered.

Mr P has argued strongly that Barclays could not have reached the view that its security would have been affected, but I wouldn't agree with that. Rather, I would expect Barclays to take a cautious approach to this. And I think Barclays could reasonably have concluded that the condition reading "... *information that we have obtained materially changes and such change affects our decision to lend*" had been triggered, because the new knowledge that the land was subject to an overage agreement was a material change. Or Barclays could have concluded that the security it now understood it would receive, a property partially subject to an overage agreement, "... *might not offer ... the security the Bank would have expected*". So I think the offer could fairly have been withdrawn once Barclays had found out the land would be subject to an overage agreement, if there was no subsequent deal to remove this agreement.

However, we know that things didn't end there. Mr P then offered to have the overage agreement removed from the deeds. His solicitor said he would obtain a solicitor's undertaking to this effect. I note that a solicitor's undertaking is more than just a promise that something will be done. It's a binding promise, it is enforceable, and in my view ought to carry very considerable weight. I think this proposal by Mr P changed the position considerably.

Barclays responded by insisting that the overage agreement be removed either before sale, or on completion. But it does seem to me it is unlikely that Barclays could fairly and reasonably have withdrawn from the mortgage offer on the basis of the newly discovered overage agreement, where a solicitor's undertaking was in place that this provision would be removed after completion. For that reason, I don't think making removal of the overage agreement at or before completion a condition of maintaining the mortgage offer was a fair and reasonable response by Barclays.

That means I have to think about how this has affected Mr and Mrs P. They've set out a number of significant costs they faced, which they would not have faced if Barclays had accepted their solicitor's proposal to remove the overage agreement.

But I have to assess this complaint in all the circumstances of this case. And Mr and Mrs P have also explained that their new lender had no objection to the overage agreement. So they did not need to remove this after all. They told us that the cost of doing this would have been £15,000.

I don't know whether Mr and Mrs P went ahead with having the overage agreement removed or not. But we do know that once they took out a mortgage elsewhere, they no longer had to.

So I have to bear in mind that once I remove the price reduction that Mr and Mrs P were subject to by their buyer (which is unfortunately not unusual at a late stage in property transactions, and which I don't think Barclays can be held responsible for) they were actually, looking at the amounts they have told us about, a little better off remortgaging elsewhere, because they didn't need to pay for the overage agreement to be removed.

That doesn't mean I think Mr and Mrs P weren't affected by what has happened here. They have clearly experienced significant stress during the later stages of their house purchase, as a result of Barclays' decision not to lend to them. And at least some of the additional costs that they have faced, such as additional solicitor's fees, would have needed to be paid right away, rather than included in the mortgage and paid off over its

remaining term. For these reasons, I think Barclays should pay more than the £250 it has offered. I think it should make a payment of £500 in compensation to Mr and Mrs P.

I understand that this is significantly less than Mr and Mrs P were hoping to recover, but I think that would provide a fair and reasonable outcome to this complaint, including the points Barclays has already accepted, about whether it provided a timely response to their solicitors queries.

I invited the parties to make any final points, if they wanted, before issuing my final decision. Both sides replied.

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.

Barclays said it agreed with my provisional decision. But Mr P didn't, and he wanted to make some additional points.

Mr P quoted what I'd said about expecting Barclays to take a cautious approach to whether its security could have been affected by the overage. He said it was important to be clear that the overage itself covered only part of the title, a section of garden, not the whole of the property (and particularly, not the house).

Mr P said there were two matters Barclays wasn't willing to consider. One was that the seller could have split the title, allowing him to provide a "*clean*" title as security. And two, that Barclays could have obtained a fresh valuation to provide an opinion of market value, to reassure it that the house was worth no less with the overage.

Mr P said he didn't think that Barclays took a "*cautious response*". Rather, he thought it was negligent, given that it wouldn't even enter into a discussion on these two options.

Barclays has been clear about its policy not to lend on land which is covered by an overage clause. I don't think that's an unreasonable policy for Barclays to have, and I don't think it has to make exceptions to that, based on a fresh valuation, as Mr P appears to suggest.

Mr P also said the title could have been split, so he was only mortgaging the part of the property which wasn't subject to an overage clause. I wouldn't expect Barclays to proactively suggest this to Mr P, as it's a matter for Mr P whether he would wish to enter into such an agreement, and would be financially able to do so. If this had been suggested to Barclays, I would have expected it to consider this. But I cannot see it was suggested. When Mr P's solicitor responded to Barclays' concerns about the overage, he offered to remove the overage after the sale, not to split the title of the purchase.

It's also not clear whether splitting the title would have helped Mr P, or whether this option would also have been ruled out by delays at the Land Registry. But the most important thing here is that it doesn't seem likely, on the evidence I have to date, that this was suggested to Barclays, and I wouldn't expect Barclays to have raised this as an option.

Mr P said I'd provisionally decided it was unlikely that Barclays could fairly and reasonably withdraw from the mortgage offer once the solicitor's undertaking was in place. So Mr P said I'd explicitly confirmed this was not a fair and reasonable response by Barclays. Mr P has suggested a future court case may be based on this. I would note here that our service reaches its decisions on a slightly different basis to the courts, and my decision here is not intended to be used as a predictor of a court's likely response.

Mr P said that I'd wrongly assumed he would have had to pay a £15,000 fee to remove the overage, but what he would actually have done would be to try to negotiate with the seller to cover the cost of removing the overage. He also confirmed that the overage hadn't been removed.

I understand that Mr P could have asked the seller to reduce the price, as a result of having to pay to remove the overage. However, Mr P has also said he was confident the overage wouldn't affect the property's value at all. So Mr P would essentially have been asking the seller to reduce the price, because his purchase costs were now higher. I think that this is something Mr P could equally have done, in response to the additional costs arising from his need to remortgage elsewhere.

Mr P said that there wasn't just a delay in providing a timely response to his solicitor's queries (which I'd explicitly noted as one of the reasons for paying compensation in this case). He said there were also unacceptable delays in responding to his formal complaint which weren't addressed in my provisional decision.

Mr P's formal complaint to Barclays seems to be dated 30 September. Barclays acknowledged receipt of this on 7 October. It wrote to apologise for not yet having completed its review on 19 October. And it provided a full response on 26 October. This is well within the eight weeks that Barclays has, under the Financial Conduct Authority's dispute resolution rules, to respond to Mr P.

At this point, Mr P was able to refer his complaint to our service – he didn't need to write to Barclays again and await its further reply. However, I understand that Mr P then replied, and Barclays has said unfortunately it didn't receive his response. Once it became aware that Mr P had replied, it wrote again, saying it was really sorry it hadn't been able to locate his letter. It also reviewed but essentially confirmed its previous response.

I accept it's unfortunate that Mr P's reply to Barclays wasn't safely received and actioned, but I don't think that Barclays' response to Mr P's complaint changes my view of the appropriate compensation in this case.

Mr P told us about his professional background, and said it was with the benefit of this professional experience and knowledge that he believed Barclays was negligent in its actions and treated him unfairly, resulting in a significant financial loss. So Mr P said he didn't agree with my decision, and wouldn't wish to accept the compensation offered.

I have considered Mr P's further points, but for the reasons set out above, I haven't changed my mind. I know that Mr P will be disappointed, but I still think it's appropriate in this case to make the decision I originally proposed. Mr and Mrs P have indicated that they might prefer to take this case to court. They would only be bound by this decision if they accept it. So they are of course free to reject this decision and litigate, if they would prefer to do so.

My final decision

My final decision is that Barclays Bank UK PLC must pay Mr and Mrs P £500.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P and Mr P to accept or reject my decision before 12 December 2022.

Esther Absalom-Gough
Ombudsman

