

The complaint

Mr D complains The Royal Bank of Scotland Plc (RBS) wouldn't accept a Continuing Power of Attorney (CPOA) from him. Mr D brings this complaint with the assistance of his attorneys who are also his parents. For ease of read I shall mostly refer to these representatives in the decision as the 'attorneys'.

What happened

I issued my provisional decision on this complaint on 2 November 2022. I've set out what I said below.

Mr D had a CPOA drawn up, appointing his parents as his attorneys to manage his affairs whilst he was overseas. The CPOA was lodged with RBS, but the bank raised a query about it. RBS said the CPOA only appeared to become actionable once Mr D became physically or mentally incapable, which wasn't the same as him being overseas - so they wished to seek confirmation of Mr D's situation. The attorneys said the CPOA had been correctly drawn up, and specifically to cover Mr D being overseas. But agreed to go back to their solicitors to check.

The solicitors responded – they said they'd checked the position with the Office of Public Guardian (OPG) and the powers under the CPOA could be exercised by the attorneys where the person granting them was abroad.

The attorneys reverted to RBS via its online chat facility to relay this information but say the service they received was extremely poor. For example, there weren't any records of the previous chats about the CPOA which meant they had to start from the beginning and the member of staff wasn't interested in seeing a copy of what the solicitors had sent. Instead, she said the bank's legal team would conduct its own review and make a decision. The bank suggested Mr D's attorneys could be added to the account as third parties and manage the account that way.

The attorneys thought the bank was unhelpful and complained.

RBS responded – it said its legal team didn't think it had done anything wrong insofar as the CPOA was concerned. The wording of the document indicated to it that the attorneys could only act if Mr D lost capacity to manage his affairs. So, this was the only circumstance in which the attorneys could use their powers. But as Mr D hadn't lost capacity it wasn't able to add the CPOA. But it agreed to pay £130 for the poor customer service that had been provided.

Mr D didn't accept this – he felt RBS had got things wrong and he'd been treated unfairly. So, with the assistance of his parents/attorneys he referred his complaint to our service. In doing so, he explained he'd come close to completing a property purchase and that while this had ultimately fallen through, the delay in dealing with this issue had caused significant distress and inconvenience should the attorneys have needed to act.

One of our investigators considered the complaint. She said she'd made some enquiries of the OPG and Citizens Advice Bureau and felt RBS ought to have accepted the CPOA to cover the situation Mr D said he needed it for. She referenced the wording on the CPOA which said,

"I ...considering that in the event of my being unable for any reason in future to deal with my own affairs or being incapable in terms of the Adults with Incapacity (Scotland) Act 2000"

The investigator said that ideally the continuing clause should commence "if unable for any reason in future to deal with my own affairs".

And that there was no reason why the CPOA couldn't be accepted for the purpose Mr D needed it for. She added that as this was a Continuing CPOA it didn't rely on the granter losing physical or mental capacity to become effective. So, she asked RBS to review its position.

RBS didn't agree. It said it wasn't comfortable changing its interpretation for a number of reasons. In summary, it explained that there were two options for when a CPOA comes into force. Straight away regardless of incapacity, or only when the person has lost capacity, and that came down to how the CPOA was worded.

It accepted that a CPOA could be used where the person granting it still had capacity, and that aligned with our investigator research. But the problem it had was that whilst the wording in Mr D's CPOA was standard, it felt it was unclear about when it should kick in. Whilst it did include "or" in the opening wording, it went on to discuss how incapacity was to be assessed / decided upon and it didn't believe that wording was normally included if the CPOA was to come into force straight away (regardless of capacity). It said that this ultimately came down to interpretation and in its opinion the CPOA could be interpreted only coming into effect on Mr D's loss of capacity.

RBS felt that accepting the CPOA whilst Mr D has capacity would carry a risk to the bank. But to help resolve things it reiterated it could still add Mr D's parents as third parties to his account, which would be the quickest way of giving them access to manage Mr D's account(s). Or Mr D could get a new CPOA drawn up that wasn't dependent on him losing capacity and it would be willing to cover all reasonable costs associated with the latter option (of up to £1,000). It also referenced a general power of attorney.

Our investigator reconsidered things and felt that the bank had proposed a reasonable resolution in agreeing to cover the costs of drawing up another CPOA. However, Mr D didn't accept this and requested a decision.

RBS proposed one other option. It said it would be willing to accept a letter from the solicitors that drafted the CPOA addressed to the bank (to be held on file) that would set out their interpretation of the CPOA. That is was intended to come into force on registration and not only on loss of capacity. RBS said any such letter wouldn't validate or rectify the original CPOA for the bank, but it would give some reassurance that it had tried to mitigate the risks associated with accepting the CPOA and help to resolve the dispute. It added it would be willing to cover all reasonable costs associated with this option.
What I've provisionally 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.

CPOA

It's clear from reading everything, both parties feel very strongly about their respective positions. Mr D doesn't believe there is an error with the CPOA only RBS's interpretation of

it. I appreciate his strength of feeling, not least because he says other institutions have accepted the document without question. But it may help here to explain that this service is an informal alternative to the courts for deciding complaints against financial businesses. It's not our role to decide whether this document is 'valid' or whether it achieves the purpose Mr D says it was intended for. That's something better addressed legally. Instead – my role is to consider what's fair and reasonable in all the circumstances of Mr D's complaint against RBS. The starting point for that is that I have to decide whether RBS has acted fairly in how it dealt with the CPOA.

From what I've seen, RBS considered the CPOA – it referred it to their legal department who in turn explained the difficulties it had in interpreting it the way Mr D thought it should. It's provided a detailed response and having reviewed that I don't think it's said anything that's arbitrary or it hasn't been able to support, even if Mr D takes a different view. It considered the document and had concerns, which it treated seriously and having done so – said it couldn't accept this. That's a decision I think it was entitled to make and one that it made fairly. So, my provisional finding on this issue is that I don't think RBS was unreasonable.

Resolving matters

When responding to Mr D's concerns, RBS suggested the attorneys could be added as third parties to help manage the account. I know that wouldn't have replicated the powers in the CPOA, but I think it was genuinely trying to assist Mr D with a workaround solution. More recently it's suggested a number of other options, which I've reviewed.

I can appreciate why drafting another CPOA would be difficult given Mr D's location. But the bank's offer to accept a letter from the solicitors that drafted the CPOA, setting out their interpretation of the CPOA and that it was intended to come into force on registration and not only on loss of capacity seems a fair and reasonable way to resolve this dispute given the impasse that's been reached. It'll assist both parties in providing a way forward.

The effect of such a letter would negate the need for Mr D to draw up another CPOA and allow his attorneys to operate the account while reassuring RBS that it has taken steps to mitigate the risks it feels there are associated with accepting the CPOA in isolation. RBS has said it will cover all reasonable costs associated with drawing up the letter, which is reasonable in that it doesn't impose costs on Mr D.

Customer service

RBS has already accepted there were some shortcomings in its customer service and paid £130 when addressing the complaint. Any compensation would ordinarily be payable to Mr D and not the attorneys under our rules as it's Mr D who is the bank's customer. But in any event, I'm not going to require the bank to pay any additional compensation here given my overall findings about the bank's handling of the CPOA. And because any difficulties, such as, frustration and inconvenience in raising the complaint about this have in my view been adequately addressed in the payment that was made.

My provisional decision

My provisional decision is that The Royal Bank of Scotland Plc has already made an offer which I consider is a fair and reasonable way to resolve this complaint. It's offered to accept a letter from Mr D's solicitors (as detailed above) and cover all reasonable costs associated with it. When responding to my provisional decision, I invite Mr D through his parents/attorneys to provide an estimate of how much such a letter will cost him and for The Royal Bank of Scotland to clarify any monetary limit to costs (in that is this also up to a maximum of £1,000 on production of a bill/quote) and any other information it feels would be relevant in the letter.

RBS of Scotland responded to say that it accepted my provisional decision and didn't have anything further to add.

Mr D said he'd been in touch with his solicitor and they could write a letter but wanted to know if this needed to be on headed paper or could be an email? He also required an address of where to send the letter to. The estimated costs of the work were £170 plus VAT. Mr D said he accepted my provisional decision but wanted the bank to act on the CPOA once in receipt of the letter and for it to cover his solicitor's costs for the work connected to the letter.

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.

To confirm the letter wouldn't replace the CPOA. The effect of such a letter would negate the need for Mr D to draw up another CPOA and allow his attorneys to operate the account while reassuring RBS that it has taken steps to mitigate the risks it feels there are associated with accepting the CPOA in isolation.

Given both parties have accepted my provisional decision, I adopt it fully as part of this final decision. I'm satisfied the RBS has already made an offer which is a fair and reasonable way to resolve this complaint. It's offered to accept a letter from Mr D's solicitors that drafted the CPOA, setting out their interpretation of the CPOA and that it was intended to come into force on registration and not only on loss of capacity. It has also agreed to cover all reasonable costs associated with the letter. Mr D has indicated this will be around £170 plus VAT. Though I'd like RBS to note there might be some variation if this takes too much time.

Given the bank's position, which I outlined my thoughts on above, the information from the solicitor will need to be in a letter not an email and be on headed paper addressed to RBS. To help things run smoothly I am requiring RBS to contact Mr D when it receives this decision to make arrangements to provide him with the details that might reasonably be required to facilitate this letter/resolution.

My final decision

My final decision is that The Royal Bank of Scotland Plc has already made an offer which I'm satisfied is fair and reasonable. It's said it will accept a letter from Mr D's solicitors (as detailed above) and cover all reasonable costs associated with it, on production of an invoice. I require The Royal Bank of Scotland Plc to contact Mr D when it receives this decision to make arrangements to provide him with the details that might reasonably be required to facilitate this letter/resolution.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 26 December 2022.

Sarita Taylor
Ombudsman