DRN-3853456

Financial Ombudsman Service

The complaint

Mr and Mrs A are partners in a partnership that I'll refer to as G. They complain that The Royal Bank of Scotland Plc unfairly transferred G's accounts to their Global Restructuring Group ("GRG"), then made various unreasonable demands regarding repayment, the provision of management information and appointing a third party to investigate the business.

What happened

In 2009, G moved their banking to RBS and took out a £1.2m three year loan. The partners were also the directors of several limited companies, some of which also had loans with RBS and the partners also had personal banking with RBS. The bank treated all of this as one connection ("the group").

In 2010, in difficult market conditions and with expired loans elsewhere in the group, the bank transferred the connection to their GRG. The GRG relationship manager ("RM") told the directors she required regular management information and the appointment of one of the bank's panel consultants (who I'll refer to as Mr J) to review the viability of the group, as a condition of considering continued support.

Mr J produced his report in June 2011. In summary, he concluded that, while the business was capable of trading profitably, it was unlikely to generate enough cash in the near term to enable it to make capital repayments to the bank.

The partners sold some properties to bring down debt levels and in 2012, refinanced elsewhere.

In October 2012, the partners engaged lawyers to claim damages from the bank as a result of an alleged breach of confidentiality by Mr J. A settlement agreement was eventually reached. At the time of the conclusion of this settlement, the bank transferred the connection out of GRG and back to its mainstream bank.

In 2018, the partners complained to the bank under the GRG review scheme. The bank declined to consider the part of the complaint regarding the appointment of Mr J, as it said that matter had already been settled. RBS also said the complaints about events in 2009 fell outside the GRG review period. The remaining parts of the complaint were not upheld.

The partners appealed to the Independent Third Party ("ITP") stage of the GRG review, but the outcome remained unchanged. They then referred the complaint to our service.

I issued a provisional decision on 19 October 2022. I said:

Can the ombudsman service look into the parts of the complaint relating to events in 2009?

The partners raised two complaint points regarding events that occurred prior to the transfer to GRG. They said their deposit account had been unfairly frozen and they had been wrongly advised to take out short term loans, which the bank had indicated would be renewed without problem.

RBS hasn't consented to our service investigating these points, as it says the complaint wasn't made in time.

The rules I must follow are the Dispute Resolution (DISP) rules, which can be found in the Handbook of the industry regulator, the Financial Conduct Authority.

There are various tests that must be met, one of which is that a complaint must be made within certain time limits.

There is more than one part to the time limit rules, but the relevant part here is that, if the bank doesn't agree to us considering the complaint, we can't look into it if it was made more than six years after the date of the event the complaint is about.

There's a second part to this rule, which says that, if the complaint wasn't made within the six year time limit, we can still look at it if it was made within three years of when the complainant knew, or should reasonably have known, they had reason to make the complaint.

The only exceptions to these rules are where a complaint was made within the time periods above and there's a written acknowledgement or some other record of it – or the delay in making the complaint was caused by exceptional circumstances.

G is complaining about something that happened in 2009. The partners didn't complain until 2018, some nine years later. I don't consider the three year part of the rule gives G any extra time. In the case of the frozen account, the partners knew about the events at the time. In the case of the short dated loans, even if they didn't realise the implications of the expiry dates immediately, then they were aware of them by the end of 2010 when the bank transferred them to GRG and started questioning their repayment proposals.

I haven't seen any evidence of an earlier complaint about these events and neither am I aware of any exceptional circumstances that would account for the delay. So my provisional conclusion is that these parts of the complaint haven't been made in time under the rules. It follows that I don't have the power to look into them.

I'm satisfied that our service does have the power to look into the other elements of the complaint.

Should the ombudsman service look into the part of the complaint about the appointment of a third party consultant?

Both sides agree that a settlement was reached on a no fault basis to the partners' 2012 legal claim. The bank took the view that this settlement meant that it wasn't appropriate to consider a complaint about any matters connected with Mr J. Our investigator agreed.

I've looked carefully at all the correspondence regarding the legal claim and subsequent settlement, noting that there isn't a formal settlement agreement. I've concluded that the settlement reached was exclusively in response to a breach of confidentiality claim. I don't think it covered the appointment of Mr J. I say this because the letter from the partners' lawyers was headed up "Breach of Confidentiality". Whilst it then goes on to recount some of the general circumstances of the partnership's transfer to GRG (under the sub-heading "Background"), this isn't, in my view, the subject of any claim or allegation. The letter concludes by reaffirming that its purpose is to pursue a claim for breach of confidentiality.

RBS' lawyers' response begins "We note your instruction relates to a formal claim against RBS for damages for breach of confidentiality". Their letter did also touch very briefly on the circumstances of his appointment, but I don't think this means that it was part of the settlement reached.

In addition, it seems to me that this part of the complaint was prompted, at least in part, by knowledge that the partners didn't have at the time of the settlement. I don't think they became aware until later that Mr J had twice been the subject of bankruptcy proceedings. Neither were they aware that GRG would later face wider criticism for sometimes instructing unqualified accountants.

On balance, I'm satisfied that the complaint about the appointment of Mr J wasn't part of the settlement reached between the partners and the bank. It follows that I see no reason why the ombudsman service shouldn't consider the merits of this part of the complaint, so I have done so below. I will not be commenting on anything connected with the breach of confidentiality, as that part of the matter has been settled between the parties.

My provisional findings on the complaint about the appointment of Mr J and the bank's demands for management information

The part of the partners' complaint about Mr J as I understand it is that the bank employed an unqualified and twice bankrupt individual who then manipulated his conclusions to help the bank.

First, I don't think there was anything wrong in principle with requiring the appointment of an external consultant. The bank wanted more detailed and timely management information than the partnership was able to produce. I haven't seen all the relevant facility documentation, but it was the bank's usual practice to include clauses entitling it to ask for financial information as it saw fit, so I think it was likely that these were included here. In any case, where there are some question marks regarding a business' performance, I think it is good practice to seek more information to understand cashflows and profitability in more depth.

I accept that the partnership's accountancy contract was with a top 5 firm and their accounts weren't overdue. But the bank wanted more immediate information than the formal accounts, which weren't due to be completed until more than a year in arrears. I don't think that's unreasonable. It wouldn't be responsible of lenders, in my view, to always wait for official financial information in arrears, when what it really required was to know whether there was enough cash to meet business needs in the future.

I don't think there's any dispute that Mr J wasn't a qualified accountant. But he was operating a consultancy that was offering accounting-related services to assist businesses similar to those that the bank felt the partnership required. I don't think it is unreasonable to put forward someone without formal qualifications in those circumstances.

That said, I do think that it would have been good practice for the bank to have done some due diligence in advance. And I think if it had done so, a twice-bankrupt individual would have been unlikely to have been deemed suitable. I also think that best practice would have been to offer the partnership a choice of consultants rather than effectively impose one. So I'm minded to consider that the bank didn't act fairly in requiring Mr J's appointment.

Where I find that a bank has done something wrong, the next step is for me to consider whether anything needs to be done to put things right. In this case, my provisional conclusion is that nothing needs to be done. I'll explain why I've reached that view next.

I've looked carefully at all the evidence about Mr J's actions while he was working for the partnership and producing his report (aside from the breach of confidentiality issue) and I haven't seen any evidence that the consultancy acted improperly.

A report was produced, which I have read in full, and appears to me a professional and evidence-based document. This conclusion is supported by the partners' first email to the bank after the report was delivered, they said:

> *"You have a copy of the […] report which confirms no more than we discussed at our various meetings prior to the issue of the report and only validates that [G] is overall a profitable business and continues to trade without any major problems.*
>
> *In addition it ratifies what we already knew that the business could not sustain a change of payments on the … existing loan from interest only to capital and interest on … with market conditions continuing as they are.*
>
> *Although the report is factual we do not agree with all the recommendations as G & S has not reneged on any of its obligations to the Bank and you only became involved because the loans for [other companies in the group] were not to be renewed at the renewal date by RBS as in earlier years".*

I think this shows that the partners had no issue at that point with the work done by the consultancy. They said the report was "factual" for example. Rather, their problem is with the change in stance by the bank, from supporting them to requiring them to repay or restructure their loans on a capital and interest basis. Later on, I note that the directors expressed willingness to meet with Mr J to discuss employing him for further work, which also supports the view that, at the time, they found his work acceptable.

The report's chief conclusion was that G's cash generation wasn't strong enough to support capital repayments on the bank's lending, a conclusion with which the partners themselves agreed.

My provisional finding is therefore that, although the bank shouldn't have imposed the appointment of Mr J on the partnership, I don't think that his appointment actually changed the bank's strategy or led to any losses being incurred by G. It seems to me that the partners' problem was not so much with the conclusions of the report, but with the fact that the bank had decided it was unwilling to renew its lending on the same basis. I therefore don't intend to direct the bank to pay any compensation for Mr J's appointment.

My provisional findings on the other parts of the complaint

I note that, when referring the complaint to us, the partners commented on the difference between the ITP's approach and a Court's – particularly that the ITP could only consider "available written evidence" whereas a Court could hear oral testimony and assess the credibility of rival accounts. In the light of this, I will make some general comments regarding my remit at this point.

My role here may be somewhat broader than the ITP's, in that I can take into account testimony, such as recollections of meetings and calls, in order to arrive at a fair and reasonable outcome. But unlike a court, I can't compel witnesses to testify, nor can witnesses be cross-examined to test credibility. This means that I generally consider it fairer to attach more weight to contemporaneous evidence, which in this case is likely to be written.

On the subject of the transfer to GRG, I agree with our investigator. In principle, I think the bank is entitled to manage its relationships through whichever department it chooses, provided that department then treats its customer fairly. I can see that the bank explained clearly, with reasons, why the group was being transferred, which was chiefly because other parts of the group had lending that had expired without repayment or any plan to repay and there were concerns regarding the profitability of the partnership.

I appreciate that the partners strongly disagreed with the bank's suggestion that G was lossmaking. Given that difference of view, I think the bank's desire for management information, which I have already discussed, was understandable. I also accept that G's facilities were at that time still performing (although due to mature in 2012). But given the interdependence of the group, I think it was reasonable for the bank to want to manage it all together rather than have separate RMs overlooking separate parts.

I haven't seen any evidence that the bank forced any part of the group to sell assets. I can't know what was said at meetings, but the first written reference I've seen to selling a property in order to repay was in the partners' email in response to the consultancy report, which said that, as the bank was unwilling to renew the lending on the same terms, they had sold one of their properties to repay one of the loans. There is no suggestion that the bank had forced this or any other property sale.

I know that the partners now believe that the bank's strategy was aimed at forcing them to sell assets to West Register at undervalue. But this is as far as I have seen purely supposition by the partners, as I haven't seen anything saying the bank suggested this at the time. I don't think it was unreasonable of the bank to want repayment proposals, given that the facilities had expired (or would do in the next year), it didn't want to renew and was under no obligation to do so. In any case, the partners successfully came up with their own strategy to refinance the main borrowing elsewhere and returned to mainstream.

I can see why the partners are frustrated with their treatment by the bank. They were persuaded to move to RBS, took out short term facilities fully expecting them to be renewed, but then the bank's appetite for lending changed and it wanted repayment. I can see why the partners would have liked the bank to give them more time. But there are no regulations requiring the bank to behave differently. G's relationship with the bank was governed by the contract in the form of the facility agreements G signed. I haven't seen that the bank gave any commitment that lending would be renewed. So once those facilities expired, the bank was entitled to demand repayment if it chose.

I don't doubt that the bank had expressed clearly its unwillingness to continue with the status quo. So the partners felt under pressure to come up with a repayment plan. But I haven't seen any evidence of intimidation or threatening behaviour. Email exchanges I've seen were polite and professional throughout and suggest a civil relationship where different repayment options were being proposed and considered.

In summary, my provisional findings are that the bank shouldn't have required G to employ Mr J, since due diligence would have revealed him to be unsuitable. However, I don't think that his employment had any adverse consequences for the partnership, so I don't currently intend to award any compensation for it. I haven't been persuaded that the bank did anything wrong in any other respect.

In response to my provisional decision, the bank maintained that its legal advice was that the settlement covered both the appointment of Mr J and the breach of confidentiality.

The partners disagreed with my provisional assessment and said, in summary:

- RBS decided to reduce its property book and therefore created GRG to force companies to sell assets.
- The bank had undertaken nine months of due diligence on G, prior to taking on its banking in June 2009. So how could it suddenly decide this was inadequate only eighteen months later?
- The group's transfer to GRG was later shown to be wrong as they were transferred back to mainstream banking as part of the settlement regarding the breach of confidence.
- The partners were successful in finding other bankers but had still suffered stress and losses due to RBS' actions.
- They were ultimately vindicated by being transferred back to mainstream banking – but too late, as they had sold properties at the demand of GRG following the assessment of Mr J.
- The group was tarnished for many years because they had been transferred into the "dreaded" GRG, which signalled a problem with their finances.
- The appointment of Mr J had a profound effect on the group. The bank deliberately employed someone unqualified, who could be more "creative" in his reports.
- Had they been allowed to use their own accountants for the review, the outcome would have been different. Mr J's report was slanted to show the group in a bad light.
- The GRG RM made it clear (verbally) that she was taking action because of the conclusions of Mr J.

- If someone was found to have done something wrong, punishment was required. It was contemptable and shameful to let a company of RBS' size and standing get away with their behaviour.

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'm sorry to disappoint the partners, but I haven't been persuaded to change my provisional view.

First, I've reconsidered the bank's argument that the settlement agreement covered both the appointment of Mr J and the breach of confidentiality. I haven't changed my view on this point. I accept that the bank's current lawyers disagree with me, but I still consider that the evidence indicates that the settlement covered only the breach of confidentiality. I say this in the absence of a formal settlement agreement, as both sides' lawyers at the time refer to it only as a claim for breach of confidentiality in their correspondence.

I also haven't changed my provisional view on the appointment of Mr J. I conclude that the bank shouldn't have appointed him. RBS didn't carry out due diligence on his background, which would have swiftly turned up his two sequestrations. The bank also didn't offer the partners a choice of firms.

That said, I don't think it was unreasonable to require the appointment of a consultant to review the viability of the business, given the bank's concerns. So I don't intend to direct the bank to refund the fees the partnership paid for the review, since I think they'd have paid them to another firm anyway.

The partners dispute that Mr J was on the bank's panel of consultants. The bank has repeatedly said that he was on this panel, although I haven't seen any evidence proving this. I don't think it makes any difference, as I don't think the bank should have appointed him whether he was on the panel or not.

I note the partners' comments on the requirement to punish the bank. It may help if I explain that punishing respondents isn't part of the remit of the Financial Ombudsman Service. I can only consider what is fair and reasonable compensation for losses incurred. It isn't my role to make punitive awards to discourage reoffending.

I've considered carefully the partners' thirty-one page letter to the ITP and I can see that they believe the appointment of Mr J was just part of a carefully constructed plot by the bank to gain control of their property assets. I am not persuaded this was the case. As I said in my provisional findings, I've read Mr J's report on the group and consider it to be a professional document that reached reasonable conclusions on the basis of evidence. And I think that the contemporaneous evidence of the partners' email on receipt of the report supports this. I don't think the report was slanted against G and I don't think a different accountant would have come up with a radically different view.

I also don't think that the report was crucial in the bank's approach to handling the group, since the RM had already made her position very clear before it was received. The underlying problem it seems to me is not the conclusions of the report, but a change of stance by RBS. The bank was happy with interest-only property lending in June 2009, but wasn't happy with it eighteen months later. And both sides agree that the group's cashflows didn't support repayment on a capital and interest basis.

The bank's appetite for lending is a commercial decision for them and they are entitled to change their stance. This doesn't entitle them to renege on existing contracts, of course, but I haven't seen any evidence they did this in this case. Rather, the RM made it very clear that they wouldn't be renewing their lending to G on the same basis. And some of the other lending in the group had already expired.

I can understand why it was distressing for the partners to be transferred to GRG and told their loan wouldn't be renewed, only some eighteen months after moving G's banking to RBS and undergoing extensive initial checks. I can see that, from the partners' perspective, there was little reason for the change – they were continuing to trade through a difficult trading period. But there are no regulations preventing a bank from changing its appetite for lending. And I consider giving plenty of notice of an intention not to renew to be good practice rather than bad.

I know that the partners don't think the bank had any genuine basis to transfer the group to GRG in December 2010. But I think that two expired interest-only loans were a valid reason. I also think it was reasonable to treat the group as one connection. Given the importance of Mr and Mrs A throughout, I think there was clearly some element of interdependence.

The partners have repeatedly pointed out that G was never loss-making, despite what the RM said in her email confirming the transfer to GRG. I agree that G's annual accounts never showed a loss. But that doesn't mean that there weren't legitimate concerns regarding its cashflow, particularly given the bank's desire to change its lending to a reducing basis. Overall, I don't think the transfer to GRG was out of line with normal banking practice at the time, so I'm satisfied that there was nothing unreasonable about it.

I realise that the partners consider the fact that they were transferred back to mainstream banking in 2013 as evidence that the group should never have been in GRG in the first place, but I don't think that's a fair conclusion to draw. By the time the group was transferred back, they had sold several properties and refinanced G's loan elsewhere, so the position was very different from when they were transferred into GRG.

I also don't think it was unreasonable to keep the group in GRG until their threat of legal action regarding the breach of confidentiality was resolved. I think it would be normal practice to keep a customer in an area where there were more resources in circumstances where legal action was unresolved.

I don't doubt that the group's period in GRG was a very stressful time for the partners. They had to come up with a repayment strategy that they weren't expecting to need, including selling property they didn't want to sell. I acknowledge the partners' comments about the RM expressing her views more forcefully in face to face meetings than in her written correspondence. But in the absence of any written or contemporaneous evidence, I don't think I can reasonably award compensation for this.

In summary, my conclusions remain that the bank shouldn't have required G to use the services of Mr J, since due diligence would have revealed him to be unsuitable. However, I don't think that his employment caused the partnership a loss or changed the outcome for them, so I don't intend to award any compensation for it. I haven't been persuaded that the bank did anything wrong in any other respect.

My final decision

I uphold the part of this decision about the appointment of the consultant. I don't uphold the other parts of the complaint and I make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask the partners of G to accept or reject my decision before 11 January 2023.

Louise Bardell
Ombudsman