

The complaint

A limited company, which I'll refer to as J, complains that Hampshire Trust Bank Plc ("HTB") unfairly changed the agreed terms of a commercial mortgage offer.

J is represented by one of its directors, who I'll call Mr P.

What happened

In mid 2022, J employed a broker to look for finance for a property it had developed. The broker submitted an application to HTB, which gave an agreement in principle.

In late August 2022, J's broker had a conversation with a senior member of HTB's staff, who I'll call Mr M, to discuss a planning permission problem affecting the transaction. J's broker explained that J didn't have full planning permission and was looking for the bank to agree to accept indemnity insurance covering this risk, pending a retrospective planning application.

Following this discussion, J's broker sent an email to HTB, which he said was outlining what had been discussed. This included a sentence indicating the bank had said that indemnification for the planning permission problem was possible.

In September 2022, a survey of the property was carried out at J's expense.

In November 2022, HTB informed J's brokers that they would not accept indemnity insurance. They said this was because the development was too recent and also in a listed building.

In December 2022, the bank provided a formal offer letter, which required full planning permission to be in place as a condition of drawdown.

In January 2023, J complained about what it said was a last minute change in terms. It said the new conditions were unworkable, as it wouldn't be possible to get planning permission in time.

HTB did not uphold the complaint. They said they hadn't done anything wrong and had never committed to the original terms. They said that, while the indemnity cover had been discussed, it would always have been subject to underwriting and legal due diligence.

J asked the Financial Ombudsman to look into its complaint. One of our investigators did so, but he didn't think that the bank had made an error. He said he'd seen no evidence that HTB had agreed to accept an indemnity policy without involving their underwriters, nor that HTB had made a commitment to accept such a policy, either verbally or in writing.

J disagreed with our investigator and asked for an ombudsman to look at the matter again. In summary, J made the following points:

- The August 2022 conversation discussing the planning permission issue had been followed up by email from the brokers the same day confirming what had been discussed. This was contemporaneous evidence of the agreement.

- Our investigator had misinterpreted an “internal” email sent in November 2022 by HTB. This email was sent to several employees of HTB and the broker. In a list of four points, it said “2-Planning ‘Breach’ indemnity in play and agreed we can use by [Mr M]”. This confirmed the agreement to allow the indemnity policy.
- A senior executive should be expected to follow the correct protocol. If he had not done so and had given his agreement to the indemnity without getting underwriting consent, then this was negligence. J should not be expected to suffer as a result of that negligence.
- The broker recalled clearly that Mr M did not state -or even hint – that the agreement to the indemnity was subject to underwriting. He had said that it “will” be acceptable.
- This agreement was confirmed numerous times by various HTB employees. None of them had questioned that the indemnity was agreed.
- Given the level of security provided, HTB would not be exposed to any risk.
- HTB were using their lack of accurate record-keeping to exit a deal that was no longer attractive to them after the mini-budget.

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’ve reached the same conclusion as our investigator, for essentially the same reasons. I know this will be a disappointment to Mr P, who thought his broker had found a solution to a difficult problem with the planning permission. But my role is to decide whether HTB has done anything wrong. I’d like to explain why I’ve concluded that the bank hasn’t acted unfairly or unreasonably.

To uphold this complaint, I would need to be satisfied that HTB had unfairly reneged on a formal commitment to lend. I haven’t seen evidence that this clear commitment existed.

There’s no doubt that an indemnity to cover the planning permission breach was discussed with HTB.

The fact that discussions occurred is evidenced first by the broker’s note of his conversation with Mr M, in which he said “To allow us to proceed with funding, I have sought and received confirmation that the bank can be indemnified for this breach of planning permission”. J has suggested that this shows contemporaneous evidence of an agreement. But I consider that it shows contemporaneous evidence of a discussion and shows the broker’s interpretation of that discussion.

I think that an indication that the bank “can be indemnified” is different from saying that the bank has agreed to accept an indemnity. In other words, I think it shows a possibility not a commitment. I note the bank did not respond to the broker’s email to confirm the accuracy of his record (or otherwise).

Where there are disputes like this about what was agreed between parties, I need to make a decision on the balance of probabilities – in other words, I must decide what I think is most likely to have happened. In this case, I am not persuaded that a contractual agreement ever existed. I don't doubt that discussions took place about the bank's willingness to lend on those terms. Optimism may have been expressed by the bank over the chances of this happening. But I think if a formal agreement had been reached over the terms of that lending, then it is more likely than not that it would have been documented in some way.

I can see that the broker tried to get HTB to put their agreement to the indemnity in writing. On 2 September, in an email, he wrote "It would be reassuring if [HTB's online portal for intermediaries] could reflect the agreement I had with [Mr M] on Tuesday that HTB will accept the indemnity insurance to protect the bank..." I can't see that the bank responded to this either. I realise that the broker has characterised this as HTB hiding behind poor record-keeping. I agree that it would have been more helpful if the bank had replied to either this or the broker's earlier email to point out that everything was subject to underwriting at that stage.

The broker has also provided a copy of an email from HTB dated 10 November as evidence of HTB's commitment to accept the indemnity. This was an email between HTB employees, to which the broker was also copied in. It said "Planning 'Breach' indemnity in play and agreed we can use by [Mr M]". I don't think the bank staff were as clear as they could have been in that wording. In my view, given that the broker was on the recipient list, HTB should have caveated the term "agreed" to indicate that this was all still subject to credit approval. Nonetheless, I don't think this could reasonably be said to constitute a contractual agreement.

The broker has argued that HTB have behaved negligently and in breach of their duty of care. I am not persuaded by this. I accept that they could have been clearer, but I think it's relevant that the conversations and emails took place through a broker. Brokers are experts in this field and in my view, can reasonably be expected to know how bank lending works. I think it's fair to expect a broker to understand that there is always an underwriting stage and until that underwriting stage has been completed, it is highly unlikely that anything the bank has said constitutes a binding commitment. If this wasn't apparent to J, I don't think this was HTB's fault.

My finding is that HTB might well have mentioned a willingness to consider lending against an indemnity, but this didn't constitute a contractual commitment. And in the absence of any commitment, I consider that the bank were able to change their mind and didn't make any error by doing so.

In my view, where there is no contract between the parties, banks are entitled to make a commercial decision to change their risk appetite. So whether Mr P's broker is correct about HTB's change of stance and the reasons for it, would not alter my decision as to whether the bank have acted fairly in the individual circumstances here. Neither is it relevant whether there was ample security for the lending or not.

I appreciate that what has happened has been both frustrating and expensive for Mr P. He may well have been unfortunate in the timing of this transaction. But I'm afraid I think this is a risk he took and is not due to any error on the part of HTB.

My final decision

My final decision is that I don't require Hampshire Trust Bank Plc to do anything to settle this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask J to accept or reject my decision before 30 April 2024.

Louise Bardell
Ombudsman