DRN-4343547

The complaint

A company, which I'll refer to as B, complains about how Bank of Scotland plc managed B's request to release a charge on a property, including the new guarantees sought by the bank and the fees which became payable.

Mr C, a director of B, brings the complaint on B's behalf.

Three of the directors of B, including Mr C, are business partners, who together own the property referenced above. They have brought a parallel complaint to our service about the bank's behaviour. As both complaints relate to the same set of circumstances, I have considered them together.

What happened

The circumstances of this complaint are familiar to both parties.

The partners together own some properties and wanted to sell one of their properties, which I shall call W. The partners have a property loan with Bank of Scotland, which was secured on three properties, including W. Therefore, to sell W, they needed the bank to release the charge on this property.

B has an overdraft with Bank of Scotland, which was secured by several personal guarantees, some of which were also tied to the charge on W.

So, in releasing the charge over W, the bank was reducing its security both on the partners' loan and on B's overdraft. For this reason, before releasing the charge, the bank reviewed both debts and the security it had in place.

The bank's conclusion was that it wanted:

- the partners to use some of the proceeds from the sale of W to repay part of their loan, bringing down the outstanding balance
- to replace the personal guarantees supporting B's overdraft with new guarantees
- to tie the partners' loan and B's overdraft so that the guarantees and remaining charges worked together to cover both debts.

The bank estimated its legal fees to complete this work, for which it said B would be liable.

B complained. It said:

- there was clearly adequate remaining security in place to cover the bank's risk on each of the partners' loan and B's overdraft, so there was no need for new guarantees or to tie the debts together
- as the changes to the security were unreasonable, so were the legal fees it was being charged
- the bank hadn't provided any evidence to support its decision for the change to the security, or a breakdown of costs supporting the legal fees.

Bank of Scotland considered the complaint but said it had done nothing wrong. It said that releasing its charge over W created a material difference to its previous agreements with the partners and with B, and it needed to be comfortable that both forms of lending remained within its credit policy. It emphasised that this was its commercial decision to make.

Later in the process, the bank acknowledged that it had taken longer to consider B's concerns than it should have and offered B £200 in compensation. This has now been paid. As this is no long a point of complaint, I do not consider it further.

Not content with the bank's response, Mr C brought B's complaint to our service, and the partners also complained.

Our investigator considered the complaints but said that, in his view, Bank of Scotland had made a reasonable request to enhance its security given the change in circumstances brought about through the sale of W. He didn't comment on the fees being charged to B by the bank's solicitors.

Neither B nor the partners agreed with this view so asked for an ombudsman's decision.

I issued a provisional decision in which I set out, among other things, why I was not persuaded that the bank had assessed the level of security it required from the partners and B in a fair and reasonable way. Both B and the partners supported my overall findings. However, the bank did not agree. It responded with several comments, which I have addressed within my decision below.

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.

While I have read carefully the full correspondence between the partners, B and Bank of Scotland and considered all the evidence submitted, I have focussed my decision on the matters which I consider central to this complaint. I believe there are three issues:

- As a condition for releasing its charge on W, the bank required significant changes to the security provided in support of both the partners' loan and B's overdraft. Did the bank act fairly and reasonably in making these requirements?

- Did the bank protect the interests of B in how it managed the fees charged by its solicitor?

- Did the bank act reasonably in its response to B's requests for information to explain (i) the bank's rationale for requiring changes to the security in place to support the partners' loan and B's overdraft, and (ii) the fees charged by the bank's solicitors?

I consider each in turn.

Additional security

At the time the partners first discussed the sale of W with the bank, the value of their outstanding loan was almost £400,000. However, following the sale of W and a partial repayment, the debt reduced to around £250,000.

B has an approved overdraft up to £100,000.

With regard to the partners' loan, B said:

- The bank's accepted valuation for the two properties on which the partners' loan remained secured was £870,000 (though, due to the increase in property prices since this valuation, the partners estimated they were actually worth about £1.5 million).
- The bank had only ever indicated a requirement for a 50% loan to value (LTV).

With regard to B's overdraft, B said:

- The existing remaining guarantees, which secured B's overdraft, and which were not tied to W (or to any property), were worth several times the value of its maximum overdraft liability.
- Although the bank didn't seem to acknowledge all of these guarantees, it had recognised that guarantees of £267,000 were already in place.
- In addition, B has many other assets (eg vehicles, office equipment, tools and machinery) which are included in the security provided.

However, the bank said it had followed the advice of its panel lawyers who had recommended that the bank obtain new personal guarantees and a new corporate guarantee to link the two debts.

B said that it had asked for contact with the bank's panel lawyers to make its case, but the bank had refused. While I can appreciate this would have been frustrating for B, I can understand why the bank said this, given that its lawyers were instructed only to advise the bank.

B said it had already paid to put in place guarantees and it felt aggrieved that the bank was forcing it to incur substantial additional cost and inconvenience. B did not believe that the bank had provided any reasonable explanation for its requirements.

To complicate matters further, the paperwork which the bank had provided to B about its guarantees was incomplete. B had understood that the guarantees provided for its overdraft were entirely separate and unrelated to the security for the partners' loan, which was supported by the paperwork provided to B when the guarantees were established. However, the bank said that some of the guarantees were supported by the charges over W, so B's overdraft was effectively secured on W as well. It provided evidence to demonstrate this. Bank of Scotland recognised that something had clearly gone wrong in the past in the information provided to B but said this supported its case for reviewing and reforming the security in place for both the partners' loan and B's overdraft.

B also felt that the bank's process for getting things resolved was unreasonably pressured. The bank kept encouraging B to sign the agreements, eg by warning that B would miss the sanction approval deadline if it took too long, which could cause new property valuations to be required at the partners' expense. The bank said to B that, if it no longer wished its overdraft to be secured by charges on P's two remaining properties, it had two choices: either to remove the overdraft and fund B's working capital needs in a different way, or to offer the bank alternative tangible security such as a charge over personal properties – though this would incur legal and valuation costs.

I looked into the value of the security in place for both the partners' loan and B's overdraft after the sale of W.

- The bank has accepted a valuation of the two remaining properties on which the partners' loan is secured of £870,000, and its notes show that prices have risen so this is likely to underestimate their true value. On the basis of an outstanding debt of £250,000 and this accepted security valuation, it appears to me that the LTV of the

outstanding partners' loan was less than 30%. I also note that the security covenants in the loan agreement require only a 70% LTV ratio.

- In addition, I note that, with regard to the partners' outstanding loan, the partners had direct personal liability, and all three partners own their own residential properties.
- The directors of B gave several personal guarantees securing B's overdraft. Excluding those guarantees which were supported by the legal charge held by the bank over W, it appears to me that guarantees totalling about £600,000 remained. This is significantly above the £100,000 overdraft limit.
- With the removal of W, there would have been no high-value security supporting the personal guarantees – though I note B has pointed to its other assets (eg vehicles, office equipment, tools and machinery) as providing some tangible security.

Given the sale of W did reduce the security available to the bank on both the partner's loan and B's overdraft, I think it was reasonable for the bank to review its position. I also think it's reasonable that, at this point, the bank might take a different view of the commercial risks surrounding the debts than at the point of lending, given the passage of time and changes in circumstances.

However, I am also mindful that, at the point of the bank's review, it would have been prohibitive for B and the partners to establish new borrowing facilities elsewhere.

In deciding whether the bank acted fairly and reasonably towards B and the partners, I have noted that the Standards of Business Practice for business customers, issued by the Lending Standards Board (LSB) and recognised by the FCA, state that *firms should inform the customer if any security…is required to support the borrowing … and the reason why [and] the level of security required by the firm should be appropriate to the amount borrowed* (Product Sale, point 8).

I pressed Bank of Scotland to explain its requirements for the new guarantees and a cross guarantee in light of these requirements. However, the bank simply replied that it followed the advice of its lawyers. The bank said that its requirements would both protect its risk position and ensure the guarantors were fully aware of the security pledged by them to cover their liabilities, suggesting that the various historic guarantees might have been subject to challenge if relied upon.

In response to my provisional finding, the bank highlighted that it had also considered the servicing of the remaining debt. It said that higher income was potentially now required to meet the bank's credit policy servicing requirements, and that this had been a key reason for the cross guarantee. However, I note that the partners' total debt reduced by £150,000 (approximately 38%) through the sale of W. Moreover, it is not clear from the evidence provided by the bank how the servicing considerations had affected its requirement for the new guarantees.

Having considered this matter carefully, I do not believe that I have seen evidence to demonstrate that the bank assessed the level of security it required from the partners and B in a fair and reasonable way. While the bank is entitled to make a commercial decision on its risk and security, I would expect the bank to be able to explain to me (in confidence if necessary) its rationale for that decision, and to show how the security it required was "appropriate", consistent with the LSB standards. In the absence of this explanation, and given the extent of security which was already in place (as set out above), I am concerned that the bank extended the protection of its interests beyond "appropriate" levels.

I acknowledge that the bank took independent legal advice on the security it should seek and followed this advice. However, it is for the bank to consider the advice it is given and to determine the appropriate security. In the circumstances of this case, and for the reasons set

out above, I do not believe that the bank (or its lawyers on its behalf) have been able to explain to me how the security it required was appropriate.

In light of this view, the next question is how to put things right. As set out above, I am not in a position to say that the new security arrangements required by the bank were *necessarily* unfair; and I note that B's principal concern has been about the cost of putting the new security arrangements in place. Therefore, I do not propose for the new guarantees to be unwound. Rather, I believe Bank of Scotland should reimburse B and the partners for some of the costs they have incurred.

B has acknowledged that it would always have incurred some costs of its own, and been liable for some costs of the bank, to remove the charge on W and to amend the guarantees which it supported. I also acknowledge that the bank did not require all the proceeds from the sale of W to be used to repay the outstanding loan; and did not require the revaluation of the remaining properties, as it might have required.

My understanding is that:

- on 24 November 2022, B paid £4,818 (excluding VAT) for the bank's legal fees;
- on 15 March 2023, the partners paid £3,993 (excluding VAT) for the bank's legal fees; and
- the costs to B and the partners for their own legal fees was around £3,000, paid entirely by B.

On the basis of the evidence available, I believe that 50% of these costs should be repaid. Therefore, Bank of Scotland should pay B £3,909 (50% x (4,818 + 3,000)) and should pay the partners £1,997 (50% x 3,993).

In addition, Bank of Scotland should add interest at 8% simple per annum to these amounts from the respective dates of payment of these fees (as set out above), until the date of payment.

Solicitors' fees

B says that it believes the bank's solicitors charged excessive fees and that the bank failed in its duty to B to ensure the fees were fair and reasonable.

In March 2022, the bank gave B a written estimate of its legal fees at £6,500 (excluding VAT), consistent with an earlier phone call in February. As set out above, the final total cost was almost £9,000 (excluding VAT).

B also says that its own fees were unnecessarily inflated by the bank insisting on there being two local solicitors involved to explain the documents and witness the signatures.

Having reviewed the information available and taken into account the delay in selling W which caused some additional work to be required, it is not clear to me that the fees charged by the bank's solicitors were excessive – or, therefore, that the bank failed in its duty to B to ensure the fees remained reasonable.

Similarly, while I acknowledge the additional legal costs B incurred due to the requirements imposed by the bank (or its solicitors), I have not seen evidence to demonstrate that these requirements were unreasonable.

B has also complained that the first payment it made of the bank's solicitors' fees, in November 2022, was debited from its account without notice. This was despite B's solicitors holding at the time sufficient funds from B to pay this cost. The bank did acknowledge to B

that this shouldn't have happened but has later suggested to us that B should have been aware that the payment would be taken in this way.

In my view, it is not clear that B suffered any material harm from this misunderstanding. Therefore, while I acknowledge that it was another point of friction between B and the bank in a process which was already subject to some disagreement, it is not something on which I require further action.

Requests for information

On several occasions B asked for:

- An explanation of why the bank was requiring the changes to the security on the partners' loans and B's overdraft.
- A breakdown of the fees charged by the bank's solicitors.

On the first question, the bank explained to B that the sale of W reduced its security on the partners' loans and B's overdraft, which warranted the bank to review its position. It said that it was the bank's commercial decision to determine what security it required.

While this explanation provides little detail, I would not reasonably expect the bank to set out to B how it had reached its commercial decision, which would have been based on its own risk framework. Therefore, while I acknowledge B would have found this limited explanation frustrating, I do not think the bank did anything wrong in the level of detail it provided.

I note that, in reaching my finding above, I have commented that the bank has not provided me with a detailed explanation of its rationale for requiring its new security arrangements, which supports my view that I am not persuaded it conducted a fair process to determine those new arrangements. However, this is not to say that the bank had a duty to provide that level of explanation to B, given the explanation may be commercially sensitive to the bank.

On the second question, the bank twice provided B with an estimate of its solicitors' fees with an outline of the tasks its solicitors had been mandated to complete, but not with any detailed breakdown of their time.

Again, while I acknowledge that B wanted far more detailed information, ideally in an itemised bill, I don't think this is something the bank could reasonably be expected to provide. Although B was liable for the cost of the fees, the bank's solicitors were instructed by and supervised by the bank. Therefore, and in the circumstances of this case, I don't think I could reasonably require the bank to share any detailed itemised billing from its solicitors with B.

Therefore, on both these matters, I do not require the bank to take any further action.

Inconvenience

Given my finding above that it is not clear that Bank of Scotland assessed fairly and reasonably the appropriate level of security for both the partners' outstanding loan and B's overdraft, I have also considered the inconvenience caused to B and the partners.

I have not seen any evidence that there was inconvenience directly to the partners or to the guarantors. However, it is clear that B incurred substantial time and effort through the process of releasing the charge on W and establishing the new security arrangements.

It is impossible to determine what time and cost could have been saved had the bank acted more reasonably, and I also note that our service does not award compensation for inconvenience on the basis of costing the time spent.

Overall, in my view, Bank of Scotland should pay B £500 for the inconvenience caused.

Fair and reasonable assessment

I acknowledge that there are elements of this decision with which B and the partners disagree. Bank of Scotland has also expressed its disagreement with my concerns about its assessment of the security required, the solicitor costs incurred by B, and the inconvenience to B. However, my role is to consider all the circumstances of a case and impartially to reach what I believe to be a fair and reasonable resolution to the dispute. For the reasons set out above, I believe this decision achieves that outcome.

My final decision

With regard to this complaint from B, I uphold it in part and require Bank of Scotland plc to pay B:

- £3,909, plus interest at 8% simple per annum from 24 November 2022 until the date of payment; and
- £500 for the inconvenience caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask B to accept or reject my decision before 9 October 2023.

Andy Wright
Ombudsman