DRN-4714692

The complaint

Mr G complains that Castle Trust Capital PLC trading as Castle Trust Bank lent him an unregulated business loan that was secured on his residential property by way of a second charge, when he should have been given a regulated mortgage product.

What happened

In January 2018, following advice from a broker, Mr G applied for a roll-up mortgage with Castle Trust to fund the development of an investment property which he says was to provide his long-term pension from the rental income. Accompanying the application Mr G submitted a business plan which said Mr G was a sole trader of a business letting and operating real estate. The plan set out his refurbishment plans and expected rental income upon completion. He planned to repay the loan upon completion of the development by re-financing with a buy-to-let mortgage secured on the property. The loan was agreed in April 2018 for £130,719 plus fees. There were no monthly payments due under the roll-up mortgage, but the capital and the interest were to be repaid when the mortgage term ended in 2019. The mortgage was secured on Mr G's residential property by way of a second charge.

Mr G's property development did not complete on time, and despite Castle Trust granting extensions to the mortgage term, Mr G says he was unable to re-finance as planned as a result of the reduction in property values, and the impact of the pandemic. Mr G was unable to repay the mortgage without re-financing, and so Castle Trust started legal proceedings in 2020 to recover the outstanding mortgage balance. The proceedings were paused for some time, but then were re-instated in 2021. The matter was dealt with by the Courts and ultimately a warrant for possession of Mr G's residential property was issued.

Castle Trust granted further holds on enforcing the warrant to allow Mr G time to sell his home. But as no progress had been made, they applied to the court for an eviction date in 2023. Since then, the court has set three further eviction dates after each one had been cancelled due to Mr G providing evidence of potential re-finance, Mr G saying the property was tenanted, and also because a property sale had been agreed. As none of the above events materialised, Castle Trust applied for a fourth eviction date which was granted for 7 March 2024.

Mr G complained to Castle Trust on 21 February 2024. He complained that Castle Trust had not lent him a regulated mortgage product as the loan was secured on his family home and was to secure his future pension plan.

Castle Trust issued their final response letter on 22 February 2024. They said that Mr G's loan was taken out through a broker, and it was the broker's responsibility to provide Mr G with the options appropriate for his circumstances and to explain the products he was considering. They said that given the length of time the loan had been outstanding, they intended to proceed with the eviction of Mr G from his property on 7 March 2024. They said Mr G should seek independent legal advice on his position, and any requests for formal delay to the eviction should be directed to his local court.

Mr G brought his complaint to our service, and he successfully applied for the eviction date to be adjourned to allow the sale of his property to go through. He explained to us that he has been suffering from very poor health in recent years, both mentally and physically, and his wife was also experiencing poor mental health as a result of Castle Trust's actions. Mr G said he had a cash buyer for his house, but he wanted to wait for the outcome of this complaint before he progressed with the sale as he really does not want to lose his home.

Our Investigator looked into things, but she didn't think Castle Trust had done anything wrong by lending to Mr G on an unregulated basis. She said any concerns about the advice he received to take out the loan should be directed to the broker who gave that advice. Overall, whilst she empathised with Mr G's circumstances, she wasn't satisfied Castle Trust had mis-sold the loan.

Mr G disagreed. He felt that the regulator's rules meant that he should have been given a regulated mortgage contract as he was an individual sole trader taking the loan out for business purposes and the loan was secured on his house. He was satisfied that's what the Financial Conduct Authority's (FCA's) Perimeter Guidance Manual said. So he said that Castle Trust should have either offered him a regulated mortgage contract, which would have afforded him additional protections under the regulation, or they shouldn't have lent to him at all.

The complaint has now been passed to me to issue a decision.

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.

Mr G is concerned he's been given the wrong type of mortgage and as a result he's been left with no protections from the regulator as his mortgage contract isn't regulated. When Mr G took out this loan in 2018, it was the responsibility of the broker who advised him to ensure it was a suitable product for his needs at the time. Castle Trust did not give Mr G any advice in relation to this mortgage, and so are not responsible for the fact that Mr G now feels it may not have been the right product for him.

However, I can consider whether Castle Trust ought to have leant him a regulated mortgage contract when they agreed to lend to him in 2018 based on the application that was made.

The FCA's Perimeter Guidance Manual (referred to as PERG) gives guidance on which activities are regulated under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 as amended (the Regulated Activities Order), and the exclusions that apply.

PERG 4.4.1G states that "Article 61(3)(a) of the *Regulated Activities Order* defines a *regulated mortgage contract* as a contract which, at the time it is entered into, satisfies the following conditions:

(1) The contract is one where the lender provides credit to an individual or trustees (the 'borrower');
(2) The contract provides for the obligation of the borrower to repay to be secured by a mortgage on land, where "land" for this purpose means:
    (a) In relation to a contract entered into before *IP completion day*, land in the *United Kingdom* or, if the contract was entered into on or after 21 March 2016, within the territory of an *EEA State*; and
    (b) In relation to a contract entered into on or after *IP completion day*, land in the *United Kingdom*; and
(3) At least 40% of the land is used, or is intended to be used, as or in connection with a dwelling."

PERG 4.4.1-AG states that "a contract is not a *regulated mortgage contract* if it is:

(1) A loan to a commercial borrower excluded under PERG 4.4.17G or PERG 4.4.21G; or
(2) A second charge loan by a credit union excluded under PERG 4.4.24G; or
(3) A second charge bridging loan excluded under PERG 4.4.27G;
(4) A *CBTL credit agreement* excluded as described in PERG 4.4.31G."

So, on the face of it, Mr G's mortgage does meet the criteria set out in PERG 4.4.1G for it to be a regulated mortgage contract, as it was a loan secured by a charge on land in the United Kingdom, and that land is Mr G's home. However, I've then gone on to consider whether any of the exclusions set out under PERG 4.4.1-A apply.

PERG 4.4.21G states that "there is also an exclusion for loans to commercial borrowers secured by a second or subsequent security. A contract is excluded from the definition of a *regulated mortgage contract* if, at the time it is entered into, it meets the following conditions:

(1) It meets the conditions in PERG 4.4.1G(1) to (3); and
(2) The lender provides the borrower with credit exceeding £25,000; and
(3) The mortgage ranks in priority behind one or more other mortgages affecting the land in question; and
(4) The agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower."

PERG 4.4.22G states the *Regulated Activities Order* refers to this as a "second charge business loan."

Considering all the evidence, I'm satisfied this exclusion applies to Mr G's mortgage. I say that because the mortgage was for more than £25,000, was secured by a second charge on the Land Registry behind Mr G's first charge residential mortgage, and Mr G took this mortgage out to develop an investment property he owned with the view to re-financing it as a buy-to-let property that would provide him with an income.

Mr G has said that whilst the mortgage was taken out to develop an investment property, the aim of that development was to provide him with a personal pension. As a result, the mortgage was ultimately for his personal use. Whilst I appreciate what Mr G has said, I'm satisfied that the exclusion still applies because the mortgage was taken out for the purpose of his business. Even if the business was ultimately intended to provide Mr G with personal income. That is the nature of a sole trader business. It does not mean the mortgage was for his personal use. Mr G submitted his business plan with the mortgage application which set out his plans for the funds, and the income he was expecting to receive as a result of the development project that was to be funded by the mortgage. Considering all the evidence, I'm satisfied Mr G took this mortgage out for business purposes.

PERG 4.4.29G states that "the exclusions for loans to commercial borrowers (PERG 4.4.17G and PERG 4.4.21G depend on the borrower not being a consumer. For these purposes, if an agreement includes a declaration which:

(1) Is made by the borrower; and
(2) Includes:
    (a) A statement that the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, by the borrower;
    (b) A statement that the borrower understands that the borrower will not have the benefit of the protection and remedies that would be available to the borrower under the *Act if* the agreement were a *regulated mortgage contract* under the *Act; and*

(c) A statement that the borrower is aware that if the borrower is in any doubts as to the consequences of the agreement no being regulated by the *Act,* then the borrower should seek independent legal advice;

The agreement is to be presumed to have been entered into by the borrower wholly or predominantly for the purposes specified in (2)(a)."

Mr G's mortgage contract contained such a declaration, which included those statements, that was signed by him at the time this mortgage was taken out. Mr G has pointed to different dictionary definitions and internet searches that define commercial borrower, as he's persuaded that he shouldn't be classed as a commercial borrower. But for the purposes of PERG, and the Regulated Activities Order, I'm satisfied that Mr G was a commercial borrower when carrying out this transaction.

Mr G has also pointed to PERG 4.4.2G which states "The condition set out in PERG 4.4.1G(1) limits the range of borrowers to whom the protections of the mortgage regulation regime apply to individuals and trustees. If a *company* (which is not acting as a trustee) borrows money for the purpose of funding the *company's* business, and the loan is secured by a mortgage over the company's property, the mortgage contract is not a *regulated mortgage contract.* So a lender will not carry on a *regulated activity* if it advises on, arranges, or administers that contract. However, if the lender makes a loan for business purposes to an individual sole trader, or (in England and Wales) a partnership, and the loan is secured on the borrower's house or houses, the contract will be a *regulated mortgage contract*."

Mr G says that as he is a sole trader, even if the loan was taken out for business purposes, because the loan is secured on his house then his mortgage should be a regulated mortgage contract. But PERG 4.4.2G simply sets out the borrowers that 4.4.1G applies to. This does not mean that the exclusion set out in PERG 4.4.21G no longer applies to Mr G's mortgage. There can be a scenario where a sole trader takes out a loan for business purposes and it is a regulated mortgage contract because there aren't any exclusions that apply. For example, the loan may be for less than £25,000, or be secured by a first charge. But I've already explained why I'm satisfied the exclusion does apply in Mr G's case. And what he's said about PERG 4.4.2G doesn't change my mind about that.

Having considered all the information and evidence available, I'm not persuaded Castle Trust ought to have provided Mr G with a regulated mortgage contract based on the application Mr G made. Mr G applied for a one-year roll-up mortgage to develop his investment property after he received advice from a broker. That is the product that Castle Trust lent him. Mr G had a clear repayment strategy when he applied for this mortgage, and it was only intended to be a short-term mortgage. It's unfortunate that Mr G's plans didn't work out in the way he'd hoped, but I'm not persuaded that Castle Trust ought to have foreseen how the events would unfold, or that they lent to Mr G irresponsibly.

I'm sorry to hear about the difficulties Mr G has faced both with his investment property and also his personal circumstances and ill health. Castle Trust have given Mr G several opportunities to repay this mortgage that remains outstanding despite the term ending in 2019. I'm satisfied from looking at the way Castle Trust have handled things over the years that they've considered Mr G's circumstances when offering forbearance, and he's had the time to explore options for him and his wife. I would encourage Mr G to engage with Castle Trust about the progress of his house sale so that eviction can be avoided. I can also see Castle Trust have signposted Mr G to some other organisations that might be able to help him with his current situation, so I would encourage Mr G to seek advice from them too.

Mr G has also mentioned that Castle Trust have sold him this mortgage in his sole name even though his wife is on his first charge mortgage. Mr G's wife is not on the title deeds of Mr G's property, and she does not own it. Mr G applied for this mortgage in his sole name, and so I’m not persuaded Castle Trust did anything wrong by lending to him on that basis.

Overall, considering everything, I’m satisfied Castle Trust have not acted inappropriately by lending Mr G an unregulated mortgage.

My final decision

Considering everything, for the reasons I’ve explained, I don’t uphold this complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr G to accept or reject my decision before 6 May 2024.

Kathryn Billings
Ombudsman