DRN-4974162

The complaint

A company, which I'll refer to as E, complains that National Westminster Bank Plc acted unfairly when its accounts were managed by the bank's Global Restructuring Group (GRG) in 2009 and 2010. The company says the bank's failures caused it to suffer consequential losses.

What happened

In January 2007, E approached NatWest for finance for a property development. The lending was agreed in November 2007. The final repayment date for the loan of £2,460,000 was 1 January 2010. The bank also provided an overdraft facility of £75,000.

The loan was to be drawn in tranches to be agreed by the bank following production of a suitable monitoring surveyor's certificate.

However, by 2008, the development was affected by the economic climate and the downturn in the property market. So, an alternative strategy was sought, under which the development would reach the stage where it was wind and watertight.

In mid-2009, NatWest transferred its management of E's accounts to GRG and the bank expressed a number of concerns about the project.

The bank provided drawdowns up to July 2009 but when a further request was made in August 2009, the bank refused. The bank went on to advise E that it would no longer be providing any more funding. The development was therefore not brought to a stage of being wind and watertight.

In December 2009, NatWest issued a formal demand to E for repayment of the lending. In February 2010, the bank appointed LPA receivers. The unfinished property development was sold in August 2010.

E was dissolved in November 2014 but was restored to the companies register in October 2020.

NatWest investigated the actions of GRG as part of its voluntary review scheme. It upheld a number of complaint points, agreeing that the transfer of E's accounts to GRG had been poorly communicated and that the bank took the following actions unreasonably:

- cheques were returned and direct debits refused
- the bank refused to fund a drawdown on the development, despite assurances to the contrary
- the bank withdrew funding for the development and failed to provide restructuring proposals
- LPA Receivers were appointed without warning

- the bank controlled the property sale process

- West Register was given the benefit of information about the leading bid from another party

The review concluded that most of these failures resulted in no direct loss to E, with the exception of £5,976.50 in fees and charges. The bank additionally offered £11,000 in goodwill payments.

The parties reached a full and final settlement on those points in January 2021. The settlement left it open to E to make a claim for consequential losses.

The company submitted a claim for consequential losses. In response, NatWest offered £1,385, plus interest, for fees that resulted from the bank wrongly refusing to pay cheques and direct debits, but it didn't uphold any other parts of the claim. Following consideration by the Independent Third Party, which was the appeal stage of the GRG review process, the bank also offered compensation of £6,000, plus interest, for the cost of restoring E to the companies register.

E wasn't satisfied by the bank's offer and brought its consequential loss claim to us. The company is claiming for the following:

- Loss of profits and opportunity

- Increased cost of borrowing

- Receiver's fees

- Fees for preparation of the claim

At the heart of E's claim is the argument that in the absence of the bank's failures that were acknowledged in the GRG review basic outcome, the development would have been completed with a substantial profit for the company, and the various other substantial consequential losses would have been avoided.

Our investigator looked at the evidence and concluded that NatWest didn't need to do anything further. He thought that even if the drawdowns had been provided, which would have enabled E to take the development through to being wind and watertight and completing two of the 24 apartments, the company still wouldn't have been able to take the project to completion.

He thought that NatWest wouldn't have renewed the lending when the facilities expired in January 2010, and that E wouldn't have been able to repay the debt owed to the bank. Given the changes in the property market after the 2008 downturn, he didn't think E would have secured a refinance. In the circumstances, he thought the bank would still have appointed receivers, with the development unfinished.

As the receivers would have been appointed anyway, the investigator also concluded that the receivers' fees were not a loss that resulted from the bank's failures that were acknowledged in the GRG review basic outcome.

Similarly, the investigator concluded that any other fees or borrowing costs after January 2010 would have been the same and were therefore not a consequence of the bank's

failures as acknowledged in the GRG review basic outcome. He thought the bank's offer of £1,385 compensation for fees incurred earlier in 2009 was fair.

As regards claim preparation fees, the investigator noted that NatWest had previously paid £2,000 plus VAT to E for initial consequential loss advice. He thought the bank's further offer of £6,000, plus interest, for restoration of E to the companies register was reasonable, and he didn't recommend that the bank should pay any more.

E also claimed for losses resulting from the bank enforcing personal guarantees given by E's director, including the guarantee payments he made and the legal and professional fees incurred as a result of proceedings initiated by the bank. The investigator said that we couldn't consider this part of E's complaint because the guarantees were given by the director, not by E, and therefore the losses were his alone. The investigator also pointed out that our rules prevent us from considering any complaint by a guarantor where the guarantee was given before April 2019 in connection with the guarantor's own business.

E didn't agree with the investigator's findings. Its representative made the following points, in summary:

- The crux of this matter revolves around the counterfactual scenarios as to how and whether funding would have been obtained for the development. In the absence of the bank's failings as acknowledged in the GRG review basic outcome, the work would have progressed to being wind and watertight, with two of the apartments completed, and then the bank would have extended the facilities to enable the development and sales to be concluded.

- Failing a renewal of NatWest facilities, the indebtedness to the bank would have been refinanced with another lender. Further development build costs could have been met by the sale of the director's family home, other injections of funds by the director and his family and friends, and by sales of the apartments as they were progressively completed.

- There was a court judgment in 2013 which determined that E's director was liable to pay NatWest the sums required under his personal guarantees for E's liabilities. However, the judge also made remarks which support the counterfactual arguments currently put by E.

- The investigator said that it was unlikely that a gross development value (GDV) of £4.285m was achievable in 2010, given the collapse of the property market since the lending was initially sanctioned in 2007 with a the GDV of £4.41m. But this appears to ignore the evidence from an estate agent valuation of £4.32m in September 2009. And the published data for the UK House Price Index shows that house prices had dipped from September 2008 to March 2009 and then bounced back by early 2010.

- The sums paid for by E's director as a result of his personal guarantees were in effect a director's loan for which the company is liable to repay him. That liability is therefore also a loss of the company, and the ombudsman therefore has the jurisdiction to consider that complaint on behalf of the company.

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.

Because the issues upheld in the GRG review basic outcome have already been the subject of a settlement between the parties, the starting point of my decision is that the failures acknowledged in that review shouldn't have happened. I won't be re-opening those matters. E's complaint is now about E's consequential losses. I need to look at whether the bank's failures acknowledged in the GRG review actually caused the consequential losses claimed by E, and if so, whether it's fair to hold the bank responsible for the losses. It's not possible to determine exactly what would have happened in the absence of the bank's failures, so I need to decide what I think was most likely, taking into account all the circumstances of the case.

Both E and NatWest have made substantial submissions. I'd like to assure the parties that I've looked at all the arguments and evidence with care. In this decision I'll concentrate on the key arguments and evidence that are material to my determination of the complaint.

E and its representative have drawn attention to comments made in 2013 by the judge during a court case related to the events in this complaint. I note that the comments were made in obiter and in the context of a case against E's director as guarantor, whereas the current complaint is from E and relates to consequential losses flowing from the bank's failings established in the GRG review. I therefore don't consider the judge's comments to be legally binding on my decision. Even if the comments were relevant law (which, to avoid any doubt, I don't consider them to be), then I would be required to take it into account under our rules (DISP 3.6.4R) but not required to follow it.

Having said that, I have read the judge's comments and I recognise that there is some overlap between the defence in that case and the current complaint, and I have therefore taken the comments made in the judgment into account as part of the wider circumstances of the current case. I am however mindful that the complaint isn't the same as the case that was put before the court in 2013, and the GRG review hadn't even commenced at that point. In my decision I'm considering what is fair and reasonable in all the circumstances of the current complaint

Loss of profits and opportunity

I've looked carefully at NatWest's communications with E during the second half of 2009 and the bank's internal notes which E has submitted to us, and it seems clear to me that the bank had no appetite to continue supporting the development beyond the expiry of the existing loan.

So, even if NatWest had permitted the drawdowns to bring the building to being wind and watertight and to complete two apartments, I don't think the bank would have provided any further funding. The judge in 2013 also commented that the bank would not have advanced further sums.

In September 2009, the bank told E that it had no intention of continuing to support the development following the completion of the first stage. It said "*The Bank will give no commitment to funding beyond this stage and importantly will be looking to exit the relationship. There is no appetite to build out the remaining apartments as the Bank does not wish to expose itself to further development or sales risk on a scheme which it has serious concerns about viability…*"

In a letter to E in October 2009, the bank again expressed its preference to end any support for the development after the first stage. It said "*Based on the information received to date, it is the intention for the units to be made wind and watertight with apartments 1 & 8 to be completed. At this point the Bank's preferred option is for either the scheme to be refinanced or sold*." The same letter did go on to set out conditions under which it might consider

providing funds beyond the first stage, which were E's agreement to a full marketing appraisal by a bank-approved valuer and for an external contractor to be appointed on a fixed-price contract. The bank says it received no response from E to its proposed conditions. In the circumstances, I see no basis on which there was any prospect that NatWest would consider renewing the existing facilities when they expired.

NatWest had explained to E that it had concerns about the development and the conduct of the project. When E's accounts were moved to GRG, the bank said its principal reasons for the transfer were the viability of this development and connected developments, cost overruns, creditor pressure and a lack of visibility of the remaining costs to complete the development. During the autumn of 2009, NatWest said it was concerned about cost controls and required the appointment of a new monitoring surveyor. Internally the bank's own property management unit had assessed the property GDV as much lower than the GDV used at the time the lending was agreed in 2007. E and its representative regard the bank's view of the GDV to have been too pessimistic, but the point here is that the bank's view of the project as the facilities approached expiry was that renewal would involve serious and unresolved risks.

There was no obligation on NatWest to renew the facilities on expiry in January 2010 or to make any proposals for restructuring the debt. In its GRG review basic outcome, the bank acknowledged that it should have put forward restructuring proposals in 2009 to bring the first stage of the project to wind and watertight and to complete two apartments. But the review outcome didn't say that the bank should have made proposals to restructure the lending for renewal after its expiry in January 2010.

For all the above reasons, I'm not persuaded that the bank would have renewed the facilities when they expired. I therefore conclude that the bank would have required repayment of the balance of the loan.

It's possible, as the judge suggested in his comments in 2013, that the bank would have allowed E an extension of the facilities for a period to seek refinance elsewhere for the lending. I therefore consider below whether it's likely that in those circumstances E would have secured the finance it needed to complete the development.

To finish the development, E would have had to find finance to cover both the existing debt and the further building work.

E's representative says this could have been achieved by refinancing with another lender and by the director selling his own London property and/or obtaining funds from his family and friends, and by control of E's cashflow requirement by progressive sales of the apartments.

I can't see from the evidence that, after the bank said in September 2009 that it would be looking to exit the relationship, E took any steps to look for refinance from another lender, or that its director made any moves to sell his London property or raise funds from other sources. I'm therefore not persuaded that if the development had completed stage one by January 2010 and the bank had declined to renew the facilities, E would have raised all the finance it needed by these means.

E's director did sell the London property, but not until the end of 2010, and the larger part of the net proceeds were then used to purchase another property. E's representative says that if the London property had been sold to fund the development, then the director would have rented a property to live in instead. But there's no contemporaneous evidence of any plan or intention to do this when E was faced in 2009 with the likely withdrawal of support by the bank.

E has submitted an assessment of E's borrowing prospects in 2010, prepared by a specialist finance broker in 2020. This states that in the broker's opinion, E would more likely than not have been able to refinance with an alternative lender in early 2010. But that assessment was based on a number of assumptions, including that the GDV of the property would still have been close to the GDV used at the time the lending in 2007, and that the net proceeds of the sale of the London property would have been applied to reduce the debt. The broker also counted the value of the two apartments both in the debt reduction and in the GDV, which E has acknowledged was a mistake – though its director says that, even correcting for this, the borrowing would still have been within the loan-to-value limit that the broker said would be acceptable to a lender.

I note that at the end of 2009, there was a wide disparity between the parties' respective views of the development's GDV. Neither party had the benefit of a full valuation – the bank's internal valuation by its property management unit was a GDV of £2.4m, while E obtained the opinion of a local estate agent, who gave a valuation of £4.32m. The estate agent's figure was close to the original £4.41m GDV used when the lending was agreed in 2007, and it was the figure later used by the broker in 2020 for its retrospective assessment of E's borrowing prospects.

Our investigator thought the GDV would have diminished as a result of the downturn in property prices after the financial crisis, so he believed E wouldn't have been able to refinance. In response, E's representative said that according to the UK House Price Index published by the Land Registry, property prices – taking all types of property together – had dipped from September 2008 to March 2009 but then bounced back by early 2010.

I've looked carefully at the UK House Price Index figures as referenced by E's representative and I don't agree with his interpretation. I think the appropriate starting point would be the time of the original GDV figure, which was late 2007. From early 2008, the index fell, reflecting the depression in the market. Although there was some recovery in 2009, the index was still about 10% lower in early 2010 than it was at the end of 2007, for English prices. For Welsh prices, the index was about 15% lower (this has some relevance because of the location of the development). So I don't think the data cited by E's representative show that by early 2010 the property market had returned to the same level as it was when the GDV was originally valued in 2007. The indices didn't return to the 2007 level until 2014 in England and 2017 in Wales.

I'm therefore of the view that E's and the broker's assessment of the likelihood of obtaining refinance from another lender in 2010 didn't take into account the likelihood that the GDV of the development would have fallen as a result of the downturn in property prices. That's in addition to the double-counting error regarding the value of the two flats. I also believe that several other assumptions underpinning their assessment may have been too optimistic – such as the expectation of selling all the apartments within a year. I think these and other factors would have been seen as points of risk by potential lenders, making it even less likely that E would have been able to refinance in the circumstances.

But even if I'm wrong about this and a new lender would have regarded the GDV to be sufficient and all the risks to be within its appetite, the arrangement would still have depended on E's director selling his London property, putting the proceeds into the deal and renting a property instead. I've already said that there's no evidence that he would have done that, given that he made no moves to sell the property when the bank said in 2009 that it wished to exit the relationship.

I'm therefore not persuaded that E would have been able to finance its existing borrowing and further building work from other sources, sufficiently to complete the development.

For these reasons, I agree with the investigator that, in the absence of the failures that were acknowledged in the GRG review basic outcome, it's likely that NatWest would still have declined to renew E's facilities, E wouldn't have been able to repay the debt owed to the bank, and the company wouldn't have secured refinance. As a result, the bank would still have appointed receivers, with the development unfinished. I therefore don't find that NatWest caused E the loss of profits and opportunity claimed by E.

Receivers' fees

I agree with the investigator that as the receivers would have been appointed anyway, the receivers' fees were not a loss that resulted from the bank's failures that were acknowledged in the GRG review basic outcome.

Increased cost of borrowing

I also agree with the investigator that, in the absence of the failures that were acknowledged in the GRG review basic outcome, any fees or borrowing costs after January 2010 would have been the same, for reasons I've given above. I therefore don't find that those fees and costs were a consequence of those failures. I also agree that the bank's offer of £1,385 compensation for fees incurred in 2009 is fair.

Fees for preparation of the claim

I note that NatWest has already paid £2,000 plus VAT towards the cost of the initial preparation of the consequential loss claim. Given that I haven't upheld the main parts of the consequential loss claim, it wouldn't be reasonable to require the bank to pay for E's professional costs for the preparation of those points. In the circumstances, I conclude that the bank has already paid enough for preparation of the claim.

I agree that the bank's additional offer of £6,000 plus interest, for the costs of E's restoration to the companies register, is fair and reasonable.

Personal guarantees

The current complaint is from E, the company. I therefore agree with the investigator that in this complaint we can't consider any personal losses suffered by E's director, including payments made in connection with his personal guarantees, because these weren't company losses.

I'm not persuaded by E's representative's argument that the director's guarantee payments were effectively director's loans to E, which should be regarded as E's losses. I've seen no evidence demonstrating that E actually owes or will owe the money to its director. In any event, even if E's director were to possess any right to pursue E for a sum related to the guarantees, I wouldn't regard it as a loss which resulted from the bank's failures that were acknowledged in the GRG review outcome. That's because I'm satisfied, for reasons given above, that in the absence of those failures, the bank would still have sought repayment of the lending from E and then appointed receivers, with the same results for E's debt.

My final decision

The bank has already made an offer to settle this complaint and I think the offer is fair and reasonable in all the circumstances.

My final decision is therefore that I require National Westminster Bank Plc to pay E the following:

- £1,385 for fees that resulted from the bank wrongly refusing to pay cheques and direct debits

- £6,000 for the cost of restoration of E to the companies register

The bank should also pay interest on the above amounts at 8% simple per year from the date of the loss to the date of settlement.

I don't require National Westminster Bank Plc to pay E any other compensation for consequential losses.

Under the rules of the Financial Ombudsman Service, I'm required to ask E to accept or reject my decision before 16 September 2024.

Colin Brown
Ombudsman