

The complaint

A limited company, which I'll refer to as F, has complained about how Cumberland Building Society has handled its commercial mortgage.

Mr and Mrs P, who are directors of F, bring the complaint on F's behalf.

What happened

The background to this complaint is well known to all parties so I'll just give a broad overview here.

F is a limited company which has a commercial mortgage with The Cumberland. It was taken out in January 2020 for £1.246m on a capital repayment basis. The mortgage offer that was issued in November 2019 set out that the term was 25 years, and the interest rate was a discount of 0.25% off the Commercial Variable Base Rate ("CVBR") for the first three years, with it moving to the CVBR thereafter.

In December 2022 The Cumberland contacted Mr and Mrs P as the preferential interest rate was coming to an end (on 24 January 2023), and a mortgage offer for a new interest rate product was issued on 1 January 2023. That was valid for six months and the interest rate was a discount of 2.30% off the CVBR for the first two years, with it moving to the CVBR thereafter.

In the meantime, Mr and Mrs P had made an application for F to borrow a further £387,500. The application was declined by the credit underwriting team on 22 February 2023. At the same time The Cumberland decided F no longer fit its risk appetite and it wanted the mortgage repaid.

In July 2023, The Cumberland told Mr and Mrs P that it wanted the mortgage repaid in the next three months and it also asked for various documents it said it required to avoid action being taken.

There was then back and forth between the parties with The Cumberland saying there were Events of Default on the mortgage, and F not agreeing.

A complaint was raised on 9 October 2024. The Cumberland responded to the complaint on 17 December 2024. It didn't uphold the main thrust of the complaint but acknowledged that it had taken longer than it should to reach an outcome, for which it offered £150 compensation.

Our Investigator didn't uphold the complaint, saying the offer of £150 was fair. They said when The Cumberland looked at the application for further lending it found F had obtained £5.4m in funding elsewhere and had substantially developed its business beyond what it was when The Cumberland originally lent the funds. They said that was in breach of the mortgage agreement which states the borrower cannot materially increase borrowing and are not allowed to make any substantial changes to the general nature or scope of the business, and whilst F said The Cumberland was already aware of the changes they couldn't

see it had been formally notified. Our Investigator said F never accepted the January 2023 rate change offer and so the mortgage is being correctly charged at the reversionary rate.

Mr and Mrs P didn't agree and so the case was passed to me to decide.

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 that, I've reached the same conclusion as the Investigator, and for largely the same reasons.

I recognise that Mr and Mrs P feel very strongly about this, and I thank them for the thoroughness of their submissions. Although I've read and considered the whole file I'll keep my comments to what I think is relevant. If I don't comment on any specific point it's not because I've not considered it but because I don't think I need to comment on it in order to reach the right outcome.

When considering what is fair and reasonable in the circumstances, I need to take into account relevant law and regulation, regulators' rules and guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the time.

I acknowledge what Mr and Mrs P have said about how this has affected them personally with them saying it has caused them considerable distress and anxiety. But the eligible complainant here isn't Mr and Mrs P personally; it's F, on behalf of which Mr and Mrs P bring the complaint as its directors. As a limited company, F can't be distressed – though it can be inconvenienced. And because this is F's complaint, we can't consider any distress caused personally to Mr and Mrs P.

While there's disagreement about the details, the bigger picture is not in dispute in that F owed a lot more money - and was a very different business proposition - in 2023 to when the mortgage had been taken out in 2020. The business had grown substantially and had borrowed money elsewhere to do so. The disagreement is that The Cumberland says that it is a breach of the mortgage agreement, whereas F says that The Cumberland knew about all the changes as they were happening, and historically had encouraged and accepted them. Mr and Mrs P have said that by knowing about the changes and not doing anything about it at the time, The Cumberland unreservedly accepted F had expanded its enterprise, using finance from another lender. Mr and Mrs P have said that once both parties have an established pattern of accepting a change to a contract term in their course of dealing, that term is considered modified by custom.

The terms and conditions document defines 'Event of Default' as "any event or circumstance specified as such in Condition 11.1 below".

Section 3 of the terms and conditions document is titled 'Your Responsibilities' and that contains the following two conditions:

- 3.10 not materially to increase Your level of Borrowings beyond the level which existed as at the date of the Loan Documentation (not including any increase caused by the Mortgage) without the Society's prior written consent
- 3.11 to manage and conduct Your business in an efficient and business-like manner and not make any substantial change to the general nature or scope of Your business

as carried on at the date of the Loan Documentation and referred to in the Application Form

Section 11 of the terms and conditions document is titled 'Events of Default' and that says:

- 11.1 Each of the following events or circumstances set out in this Condition 11.1 is an Event of Default
 - 11.1.2 any Obligor fails to comply with any provision of any Finance Document not referred to in the rest of this Condition 11.1 and such breach is either incapable of remedy or is not remedied within such reasonable period as the Society may notify
 - 11.1.15 any other circumstance or event occurs which in the Society's reasonable opinion has or is reasonably likely to have a Material Adverse Effect.

Mr and Mrs P, as the directors of F, signed the document containing those terms and conditions on 14 November 2019, with the declaration saying:

To accept the terms of this Loan Documentation (including all terms and conditions incorporated into it) please sign below and return one copy of the entire Loan Documentation to [address].

We strongly advise that you obtain independent legal advice before you sign the Loan Documentation and any related Finance Document.

I/We acknowledge receipt of the Loan Documentation above and confirm its acceptance (including acceptance of all the terms and conditions incorporated into it).

I've considered what both sides have said very carefully, and having done so I'm satisfied F was in breach of conditions 3.10 and 3.11 as Mr and Mrs P had materially increased F's borrowings, and they had also made a substantial change to the general nature or scope of the business.

Mr and Mrs P have said that by knowing about the changes and not doing anything about it at the time, The Cumberland waived those covenants by conduct, and it is estopped from strict enforcement. But I'm not persuaded by that argument. Section 3.10 quoted above states that the Society's prior written consent is required which F didn't obtain. And then section 15 of the terms and conditions quoted below explains that a failure or delay in exercising any right of remedy shall not constitute a waiver of that, and that any waiver of any right or remedy is only effective if given in writing by The Cumberland:

- 15.5 A waiver of any right or remedy under the Loan Documentation or by law or any consent given under the Loan Documentation is only effective if given in writing by the waiving or consenting party and shall not be deemed a waiver of any other breach or default. It only applies in the circumstances for which it is given and shall not prevent the party giving it from subsequently relying on the relevant provision.
- 15.6 A failure or delay by the Society to exercise any right or remedy provided under the Loan Documentation or by law shall not constitute a waiver of that or any other right or remedy, prevent or restrict any further exercise of that or any other right or remedy. No single or partial exercise of any right or remedy by the Society provided under the Loan Documentation or by law shall prevent or restrict the further exercise of that or any other right or remedy by the Society.

I understand how upsetting it must be to Mr and Mrs P to be told that F was in breach of the mortgage terms and why they feel that is unfair, but I must take a step back and, having done so, I'm satisfied The Cumberland didn't act unreasonably when it said F was in breach (that is, there were Events of Default) and what the consequences of that would be. These are listed in section 11.2 of the terms and conditions:

- 11.2 If any of the events listed in Condition 11.1.1-11.1.15 above occurs, then (without limiting the Society's rights to demand repayment at any time or any other rights it may have) the Society may at any time by notice to You;-
 - 11.2.1 cancel all its outstanding obligations under the Loan Documentation and the rest of the Finance Documents;
 - 11.2.2 demand repayment of all or any of the Debt and/or the rest of the Secured Liabilities;
 - 11.2.3 enforce, or take any step to enforce, any Security;
 - 11.2.4 appoint a receiver under any Security;
 - 11.2.5 demand payment from any Guarantor and take any action under any Guarantee; and/or
 - 11.2.6 charge an administration or other Fee to compensate it for the additional Cost arising from the Event of Default.

From February 2023, The Cumberland wasn't willing to enter into a new, or revised, mortgage agreement with F due to the Events of Default and that meant it wasn't willing to put in place any new preferential interest rate product. Whilst an offer had been made for a new rate in January 2023, Mr and Mrs P (on behalf of F) hadn't accepted that, and had they tried to accept it after the further borrowing application had been declined I'm satisfied The Cumberland would have told them the offer had been withdrawn due to the Events of Default. Instead, F's mortgage just continued in line with the contract it entered in January 2020 which was that after the preferential rate ended then the mortgage would be charged at the CVBR.

There's nothing to say a lender has to offer a new preferential rate to a customer, and I don't think The Cumberland is acting in breach of the terms of the mortgage agreement either. Nothing in the mortgage offer or the mortgage terms say that F would be entitled to another preferential interest rate after its preferential rate expired. I'm aware, of course, that it's common for borrowers to take a preferential rate product – and then take another rate rather than move to any reversionary variable rate. Sometimes that's with an existing lender; sometimes it's with another lender. But as I say, there's nothing in F's mortgage agreement that says it's entitled to a new rate.

There's nothing in F's mortgage agreement that would prevent it remortgaging elsewhere – it is no longer liable for an early repayment charge, for example. The Cumberland isn't standing in the way of Mr and Mrs P moving F's mortgage elsewhere. The Cumberland also isn't treating F any differently from how it treats its other customers where there is an Event of Default in terms of not offering a new interest rate product on an existing mortgage.

The Cumberland also decided to demand repayment of all the debt, as it was entitled to do due to the Events of Default. Despite making it clear that the mortgage needed to be repaid, The Cumberland didn't push things forward by taking action, instead it gave F plenty of time to arrange alternative financing elsewhere. All it asked was to be kept informed about how

the refinancing was going, and that certain information was provided to it in the meantime. None of that seems unreasonable in the circumstances.

That then led to a further Event of Default by F whereby The Cumberland asked F for information which then wasn't provided "promptly", which is a breach of section 3.5 of the terms and conditions:

- 3.5 promptly to provide such financial or other information (including copies of balance sheets, profit and loss accounts and management account and operating statistics) as the Society may from time to time request relating to You, Your business and/or financial position or that of any other Obligor

The Cumberland asked for that information on 16 July 2023 (and then chased it on 8 August, 18 August, 9 October and 2 November 2023). F eventually supplied some of the requested information on 14 December 2023, which was only after The Cumberland said if it wasn't supplied by that date then it would instruct a revaluation of the security at F's expense. And even then not all of the requested information was provided.

Since early 2023 Mr and Mrs P have said they'd be refinancing the mortgage by moving it to another lender, but I understand the mortgage with The Cumberland remains outstanding.

In summary, I understand Mr and Mrs P's strength of feeling in this matter and I'm grateful to them for explaining what happened from their point of view. But, because of what I've said above, I can't reasonably hold The Cumberland responsible for any of F's losses as I'm satisfied there were Events of Default, The Cumberland hadn't waived any right of remedy (either intentionally or not) and therefore The Cumberland was entitled to take the actions it did.

The Cumberland offered £150 compensation for the lack of follow-ups between January and July 2023, and the delay in responding to the complaint. Having considered everything very carefully I'm satisfied that is a fair and reasonable offer.

My final decision

Cumberland Building Society has already made an offer to pay £150 to settle the complaint and I think this offer is fair in all the circumstances. So my decision is that Cumberland Building Society should pay £150.

Under the rules of the Financial Ombudsman Service, I'm required to ask F to accept or reject my decision before 14 January 2026.

Julia Meadows
Ombudsman