

complaint

Mr and Mrs O complain that Clydesdale Bank Plc mis-sold them a fixed rate business loan. Their solicitor brings the complaint on their behalf.

background

The circumstances leading to this complaint were set out in my provisional decision dated 2 September 2015, a copy of which is attached and forms part of my final decision.

Mr and Mrs O agreed a fixed rate Tailored Business Loan ('TBL') in 2007. It was for £376,000 with a term of 15 years. Later they complained it was mis-sold. The bank made various offers to settle the case, but Mr and Mrs O weren't satisfied.

Mr and Mrs O also sought payment for consequential losses, including a fall in the value of a property, extra interest paid and their solicitor's fees.

It was my view that the bank hadn't provided Mr and Mrs O with enough information to make an informed decision about the loan. I thought it was fair to base the redress on the assumption of a 15-year capped rate TBL, where the premium would have been added to the loan. But I didn't think Clydesdale needed to pay any compensation to Mr and Mrs O for consequential losses.

I asked the parties if they wanted to send me anything further in response to my findings. Clydesdale didn't agree the replacement product should be a capped rate TBL. Among other things, it said:

- The customers didn't have the funds to pay the premium on a capped rate loan.
- The funding of a capped rate premium was actually considered by the bank but it was never progressed or approved. If the bank had been prepared to fund the cap premium, it would have been approved and offered to the customer. This didn't happen. Overall consideration of this lending suggests the bank had no appetite for such a transaction.
- The increase in lending shouldn't be used to support the conclusion that the bank would have lent more at the start. The extra funds were needed for over-runs and the bank had little choice, in order to protect its position. These were exceptional circumstances and shouldn't be taken as evidence that Clydesdale would have been prepared to offer more at the time of the original loan.
- The provisional recommendation strays into the bank's legitimate commercial discretion.

Clydesdale proposed an alternative resolution. It offered to reconstruct the accounts as if the customers took a five-year fix, then on its maturity entered another five-year fix at the prevailing market rate. This would result in redress of around £129,000 including the difference between the break cost paid and what it would have been under the revised arrangement.

Mr and Mrs O didn't accept the bank's new offer. They said they broadly accepted my provisional decision but asked for their solicitor's fees to be repaid. They said the solicitor had been of tremendous help to them in pursuing the complaint.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've given careful thought to Clydesdale's arguments and its new offer.

I accept Mr and Mrs O didn't have the funds to pay a cap premium upfront. I also accept that Clydesdale considered a cap but didn't offer it. But I'm required to determine what would have happened if circumstances had been different – namely, if the bank had fully explained the risks of the fixed rate TBL.

I can't be certain what would have happened, so I have to decide what was most likely. I think Mr and Mrs O would have seen the potential break cost as too much of a hazard, so they wouldn't have agreed the TBL. In those circumstances, given the 15-year hedging requirement, I believe the bank would have thought again about adding a cap premium to the loan.

The extra lending shows the bank was prepared to provide further funds. I understand the bank's point that the project had overspent by then so it made sense to increase the loan. It was a commercial decision by the bank, balancing its risks and opportunities. But what the bank was prepared to offer in the original lending was also determined by a balance of commercial factors. I think the bank would have preferred to lend the cap premium rather than see the customers turn down the loan.

Clydesdale says this intrudes on the bank's commercial judgement. But I'm not saying the bank would have been obliged to add the cap premium to the loan. Rather, I'm saying that in my view, it's probably what the bank would have chosen to do.

I also think it's more likely that Clydesdale would have lent for the cap premium rather than set up a five-year fix coupled with the expectation of two further five-year fixes. So I don't think the redress should be based on the bank's new offer.

I sympathise with Mr and Mrs O about their solicitor's fees. They've clearly incurred costs by deciding to bring their complaint this way. But I haven't changed my view that they could have complained without the help of a solicitor. So I don't think these costs should be added to the award.

For these reasons, I don't depart from my provisional decision.

my final decision

I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend the bank to pay the balance.

determination and award

I uphold this complaint. I believe Clydesdale didn't provide Mr and Mrs O with information which was clear, fair and not misleading. I think Mr and Mrs O would have purchased a 15-year capped rate TBL if they'd been given sufficient information.

I consider that fair compensation requires Clydesdale Bank Plc to carry out the steps I specify below. I order the bank to do this – up to a maximum financial effect of £150,000.

recommendation

If the financial effect of my award exceeds £150,000, I recommend that Clydesdale Bank Plc still carry out in full the steps I specify.

This recommendation isn't part of my determination or award. It doesn't bind the bank. It's unlikely that Mr and Mrs O could accept my decision and go to court to ask for the balance. They may want to consider getting independent legal advice before deciding whether to accept this decision.

the specified steps

Clydesdale Bank Plc should reimburse Mr and Mrs O as though a 15-year capped rate TBL at 6.00% had been put in place from the outset, instead of the fixed rate TBL. The award should reflect the following practical considerations:

- Clydesdale should reimburse the difference in payments between the existing TBL and the replacement variable rate.
- Clydesdale should refund any break costs incurred by Mr and Mrs O when exiting the fixed rate TBL early.
- Clydesdale should add compensatory interest at 8% simple per annum to the reimbursed payments from the date the cost arose to the date of settlement.
- The above steps will need to be carried out with the assumption that any premium for the capped rate TBL was added to Mr and Mrs O's loan.
- If Clydesdale believes it's legally obliged to deduct tax from any interest, it should send a tax deduction certificate with the payment.

For reasons explained above and in my provisional decision, I don't make any additional award for consequential losses.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs O to accept or reject my decision before 2 November 2015.

Colin Brown
ombudsman

COPY OF PROVISIONAL DECISION

complaint

Mr and Mrs O complain that Clydesdale Bank Plc mis-sold them a fixed rate business loan. Their solicitor brings the complaint on their behalf.

background

Early in 2007, Mr and Mrs O approached Clydesdale for a loan to renovate a property and refinance other borrowing. The bank made it a condition that it be protected against future interest rate movements. A fixed rate Tailored Business Loan ('TBL') was agreed.

The TBL covered lending of £376,000, running for 15 years from April 2007. It was at a fixed rate of 5.71%, plus the lending margin.

Since our involvement, the bank has from time to time offered to alter the terms of the loan in Mr and Mrs O's favour, and to waive the break costs when they eventually sold the property. But that's much less than Mr and Mrs O seek in redress.

Our adjudicator thought Clydesdale hadn't given Mr and Mrs O enough information about the risks associated with the TBL. The adjudicator felt that if the bank had fully informed Mr and Mrs O, they would have opted instead for a 15-year interest rate cap. Neither party accepted these conclusions.

Since then Mr and Mrs O have also sought compensation for consequential losses resulting from their inability to sell the property in 2011. Specifically, Mr and Mrs O say they heard about the size of the break costs only after they'd agreed the sale of the property. They had to abandon the sale. After a further decline in their finances in the years which followed, Mr and Mrs O say they had no choice but to market the property again and sell it for a reduced sum.

Mr and Mrs O are seeking compensation for the property's loss of value, extra interest they've been forced to pay between the intended and actual sale, and fees for their solicitor's involvement in the complaint.

my provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I'll address Mr and Mrs O's complaint that Clydesdale mis-sold the TBL, then I'll go on to consider consequential losses.

As regards the complaint that the TBL was mis-sold, the key questions I need to ask are:

- Was hedging interest rate risk a legitimate condition of the lending?
- Did Clydesdale give Mr and Mrs O information that was clear, fair and not misleading, so they could make an informed decision about the TBL?

was hedging a legitimate condition of the lending?

It was a condition of the loan agreement that hedging arrangements should be in place for the whole amount of the loan, over a minimum of 15 years. I'm satisfied Mr and Mrs O were aware of this condition.

A bank is entitled to decide the terms on which it's prepared to lend. We wouldn't normally interfere with this. In my view the condition to hedge was legitimate, as it protected the bank if interest rates rose to a level that Mr and Mrs O couldn't afford.

did Clydesdale Bank provide Mr and Mrs O with information that was clear, fair and not misleading?

Clydesdale provided information explaining how the TBL worked. But I don't think the paperwork went far enough to highlight how much it could cost Mr and Mrs O if they left the TBL early. The bank's information said these potential break costs would depend on market rates at the time, and could be "substantial". I don't think this was helpful to Mr and Mrs O, who I believe were inexperienced with these types of products. I don't think Clydesdale clearly explained the impact that any significant change in interest rates would have on potential break costs.

From the transcript of the TBL trade call, I can see the bank didn't give any more detail about potential break costs during the call.

In sum, I don't think Clydesdale provided Mr and Mrs O with enough information to enable them to make an informed decision about this product.

what might Mr and Mrs O have done differently?

I can't be certain about what Mr and Mrs O would have done if they'd been given better information. So I have to decide what was most likely, given all the circumstances and evidence.

Hedging was a condition of the lending. The TBL provided Mr and Mrs O with a degree of certainty about rising interest rates. But there was always a real possibility they might want to end their TBL product early. I think the bank should have realised there was a good chance Mr and Mrs O would need to react quickly to changes in their circumstances. The fixed rate TBL severely limited this flexibility, because of its potential break costs. So I don't think it was an appropriate interest rate management product.

Although Mr and Mrs O agreed to lock themselves into a TBL product for a relatively long term, that term had been stipulated by the bank as a condition of lending. Without it, funding wouldn't have been granted.

If Mr and Mrs O had been given clearer information, I think it's likely they'd have chosen a cap. It would have effectively put a ceiling on the interest rate payable, but it wouldn't have limited early exit like the fixed rate product. Also, a cap would have allowed Mr and Mrs O to benefit from interest rate reductions.

Mr and Mrs O would have had to pay an upfront premium for a cap. Clydesdale says Mr and Mrs O's loan was only just within their lending guidelines. The bank says it approved the loan amount only, and no additional funding could have been provided for a cap premium. But I note that Clydesdale did grant Mr and Mrs O additional lending, just two months later. So on balance I believe it's likely that money would have been available for the premium.

For these reasons, I think it's fair to base calculations of compensation on the assumption of a 15-year capped rate TBL, where the premium would have been added to the loan.

consequential losses

When I uphold a complaint, I'm required to determine fair compensation. I've already discussed compensation for the direct losses resulting from the TBL. Mr and Mrs O say they also suffered consequential losses. For this part of their complaint, I need to look at whether the bank's failures actually caused these losses. And if they did, I also need to ask whether it's fair to hold the bank responsible for the losses. To do this, I'd need to ask whether the bank could reasonably foresee that

its failures would result in losses like these. In other words, I'd need to be satisfied that the losses weren't too remote from the bank's failings.

Mr and Mrs O say they suffered consequential losses of over £265,000 as a result of the mis-selling of the TBL. These losses fall into two categories, which I'll consider in turn. The first is loss of business profits. This was because they had to abandon the first property sale, had to sell it later at a lower price, and had to pay additional interest in between. The second category is professional costs, arising from employing a solicitor to make their complaint.

loss of profits – did the bank's failings cause the loss?

Mr and Mrs O say the prospect of paying the TBL break cost prevented them selling the property in 2011. They wanted to sell at the time because they had cash-flow problems. But despite finding a buyer and an exchange of contracts being imminent, they weren't able to sell. Mr and Mrs O say they discovered that the break cost would reduce the proceeds of the sale by so much that it wouldn't help with their cash flow problems.

It wasn't until earlier this year that Clydesdale informed Mr and Mrs O that they could pay the break cost without prejudicing the result of our investigation. Mr and Mrs O then sold the property. But Mr and Mrs O couldn't get the same price they were offered in 2011. Their solicitor put a figure of between £130,000 and £150,000 on this loss. This is the difference between the agreed price in 2011 and the amount the property was eventually sold for – though it's unclear what the latter figure is.

From the evidence I've seen, it looks likely that if it hadn't been for the break cost on the TBL, the sale of the property could have gone ahead in 2011. But I don't think that alone shows the bank caused Mr and Mrs O's losses. I need to be sure that the bank's actions made it necessary to sell the property.

Mr and Mrs O's problems started in the years after the property market crashed in 2008. They say the market developments coincided with vacant periods in various flats. This affected rent income as well as the capital value of the property. Mr and Mrs O had to make up the TBL payments from their own money and delay scheduled capital repayments. They also opened up the flats to students, where the previous tenants were professionals.

This situation continued until 2011, when Mr and Mrs O began to see an improvement in the market for buy-to-let properties such as the one financed by the TBL. So they decided to sell the property.

But I don't think the evidence shows they had to sell this particular property. They had other properties. The portfolio balance sheet suggests available equity of between approximately £600,000 and £700,000 net of loans secured against the properties. Of course, part of the equity was within the property at the centre of this complaint. But Mr and Mrs O were seeking to reduce their overall indebtedness and exposure. So I would have expected to see evidence of reasonable steps taken to sell other properties that weren't subject to Clydesdale's break cost.

Put simply, I don't think that selling this particular property was Mr and Mrs O's only option, either in 2011 or in 2015. They say their losses came from the fall in its value between those times. As I don't think they were forced to sell it at either time, I can't say any losses on the property sale were caused by the bank's failures.

For the same reason, I don't think the interest Mr and Mrs O paid on their lending between those times was caused by the bank's failures (other than the difference between the fixed rate and capped variable rate, which is already part of my award). I believe they had other options for reducing their debt in that period.

Because I don't think the lost profits were caused by the bank's actions, I don't need to determine whether they were foreseeable.

professional costs – did the bank's failings cause the loss?

Mr and Mrs O's solicitor has sent us a large number of submissions. The consequential loss claim includes some £4,200 incurred in the course of their solicitor "*reviewing and considering documentation*", attending meetings and "*preparing, drafting and perfecting a complaint to the Financial Ombudsman Service*".

Mr and Mrs O say that Clydesdale consistently failed to take their concerns seriously. They say it didn't even notify them of its complaints procedure. Mr and Mrs O eventually instructed their solicitor in September 2013. They say Clydesdale's continued attempts to frustrate any kind of resolution left them with little confidence they would be able to prepare a case.

I don't doubt Mr and Mrs O found their dealings with Clydesdale frustrating and distressing. But I'm not persuaded they were unaware the bank had a procedure for formally raising complaints. And even if the bank didn't tell Mr and Mrs O they could complain, I think they could have found out about the complaint process by their own enquiries.

In any event, from the evidence I've seen, Mr O had already logged the complaint with the bank in May 2013. This was some four months before he approached the solicitor. And if Mr and Mrs O were unhappy with Clydesdale's response, or the time it took, they would have been entitled to bring their concerns to us.

The ombudsman offers a free and informal service to resolve disputes. We decide if the business has handled the complaint fairly by looking at the facts of the case – not at how well the complaint is presented. So we don't usually require a bank to pay a customer's costs for professional help in bringing their complaint here.

I think Mr and Mrs O could have complained both to Clydesdale and to this service without the help of a solicitor. I don't think Clydesdale's actions caused Mr and Mrs O to get legal help. So I don't think Clydesdale's actions caused them to incur their solicitor's costs.

Because I don't think the professional costs were caused by the bank's actions, I don't need to determine whether they were foreseeable.

In light of the above, I don't propose to make any award for consequential losses.

my provisional decision

I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend the bank to pay the balance.

determination and award

I'm minded to uphold this complaint. I believe Clydesdale didn't provide Mr and Mrs O with information which was clear, fair and not misleading. I think Mr and Mrs O would have purchased a 15-year capped rate TBL if they'd been given sufficient information.

I consider that fair compensation requires Clydesdale Bank Plc to carry out the steps I specify below. I provisionally order the bank to do this – up to a maximum financial effect of £150,000.

recommendation

If the financial effect of my award exceeds £150,000, I may recommend that Clydesdale Bank Plc still carry out in full the steps I specify.

This recommendation wouldn't be part of my determination or award. It wouldn't bind the bank. It's unlikely that Mr and Mrs O could accept my decision and go to court to ask for the balance. They may want to consider getting independent legal advice before deciding whether to accept this decision.

the specified steps

Clydesdale Bank Plc should reimburse Mr and Mrs O as though a 15-year capped rate TBL at 6.00% had been put in place from the outset, instead of the fixed rate TBL. The award should reflect the following practical considerations:

- Clydesdale should reimburse the difference in payments between the existing TBL and the replacement variable rate.
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- The above steps will need to be carried out with the assumption that any premium for the capped rate TBL was added to Mr and Mrs O's loan.
- If Clydesdale believes it's legally obliged to deduct tax from any interest, it should send a tax deduction certificate with the payment.

For reasons I explained above, I'm not minded to make any additional award in respect of consequential losses.

Colin Brown
ombudsman