

complaint

C, a sole-trader business, complains about additional losses that arose because of the mis-sale of an interest rate hedging product (IRHP) by National Westminster Bank Plc (NatWest).

background

C invests in property. Its debts were secured against its investment properties – a number of residential flats and two commercial premises. C's income came from renting and leasing out these properties.

In May 2010 C was sold a three year interest rate swap to cover its lending. The swap rate was 2.20% and covered about £840,000 – the full amount borrowed. In November 2012, C paid a break cost to end the swap early.

NatWest looked at the sale of the swap under the IRHP review it agreed with the Financial Conduct Authority (FCA). NatWest paid redress on the basis that C would've taken an interest rate cap instead of the swap. In May 2014, C agreed to the settlement offered – which was about £23,000 plus interest. This included the additional payments made for the swap, bank charges and the break cost.

C then made a claim for additional losses arising as a result of the mis-sold swap, including:

- lost rent and capital gains due to the forced sale of a commercial property (the sold property)
- costs relating to the attempted sale of a second commercial property (the second property)
- costs relating to attempting to refinance C's borrowing with another lender
- professional fees relating to the claim and complaint

NatWest didn't make any offer for the losses claimed, so C bought the complaint to this service. Our adjudicator didn't uphold the complaint. C remains unhappy, so the complaint has been passed to me.

my findings

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

To make an award for additional losses caused by the swap, I'd need to be satisfied the losses resulted from the mis-sale of the swap. And that the losses weren't too remote from the mis-sale – meaning that it was reasonably foreseeable that such a loss would result from it.

I've also considered C's allegations that NatWest acted unreasonably. Having done so, I've decided not to uphold this complaint. I appreciate that C will be disappointed with this. And I'll explain my reasons.

the sold property

C says NatWest unreasonably forced it to sell the property when it didn't want to. C thinks this breached an undertaking NatWest made to the FCA about how it would treat customers during the IRHP review.

Having looked at the evidence around the sale of the property, I don't think NatWest acted unreasonably or breached its undertaking to the FCA. And I don't think the sale of the property resulted from the sale of the interest rate swap.

C's lending facilities were due to expire in May 2013. NatWest reviewed the situation in early 2012 and found the lending was outside of its lending criteria at that time. The loan to value ratio (LTV) was too high, and C's income from the properties wasn't as high as NatWest would want – given the level of borrowing.

It appears that NatWest told C it wouldn't be willing to refinance the lending unless the situation changed. As a result of this, C sold the property at auction in November 2012 – exceeding the reserve price. The proceeds were used to end the swap early and reduce C's debts with NatWest.

However, despite this, C's lending was still outside NatWest's lending criteria. NatWest kept the matter under review, but agreed to extend the lending facilities for three months at a time until the IRHP review of the sale of C's swap had been completed.

While I appreciate that C felt pressured into selling the property, I've not found evidence of undue pressure being applied by NatWest. Ultimately, NatWest was within its rights to determine what level of lending it was willing to support. I think that was a reasonable exercise of its commercial judgement. And it wasn't willing to continue to lend to C at the same levels as in 2010. I don't think it was unreasonable of NatWest to make this decision, communicate it to C and help C explore its options for repaying the debt.

I also don't think NatWest's actions breached the undertaking it made to the FCA. The undertaking was not to foreclose on or adversely vary existing lending facilities until the IRHP review had been completed (other than in exceptional circumstances or where the customer gave their prior consent).

In this case, NatWest didn't adversely vary the lending. Rather it pointed to the existing terms of the lending, which meant the debt was due to be repaid. I appreciate that C expected the lending to be refinanced. But, unfortunately for C, NatWest's lending appetite had changed. Nor did it foreclose on the lending – but rather it extended the facilities until the IRHP review had been completed.

If the interest rate swap hadn't been mis-sold, C would've had about £23,000 more cash available to it by the time the property was sold (assuming that money wouldn't have been used for other things). If that had been the case, I don't think anything would've happened differently. C's lending would still have been outside NatWest's lending criteria – even if the additional £23,000 had been used to reduce the amount owed. So I don't think the mis-sale of the swap caused the property to be sold. As such I don't uphold this part of the complaint.

the second property

The second property was put up for sale for similar reasons to the first. Having sold the first property, the lending still wasn't within NatWest's criteria. So, if C was to refinance with NatWest, a further reduction in the level of debt was required. It appears that C put the property up for sale but later changed its mind.

For similar reasons as above, I don't think NatWest acted unreasonably or breached its undertaking to the FCA. Nor do I think the mis-sale of the swap caused C to put the property up for sale, withdraw it from sale or incur costs. So I don't uphold this part of the complaint.

refinancing costs

NatWest's notes from the time indicate that one strategy that was explored was for the commercial properties to be sold and the remaining debt to be refinanced with another lender using residential buy-to-let mortgages. It appears the costs were incurred in exploring refinancing the debt in that way.

However, C decided not to sell the second commercial property. That may have made this strategy unfeasible – or C may simply have decided against it.

In any case, I don't think NatWest caused this situation by acting unreasonably. Nor do I think the mis-sale of the interest rate swap caused these costs. I think it's likely they would've been incurred anyway, even if the swap hadn't been mis-sold – because C would've still had to explore reducing or refinancing the debts.

professional fees

Some of the professional fees claimed relate to C's attempt to dispute the basic redress payment. This has been dealt with by this service under a separate complaint, so I won't comment on those fees.

The remaining professional fees relate to C making a claim for additional losses caused by the swap, and in bringing this complaint.

It's unusual for these sorts of costs to be recoverable under such a claim. It's likely that C would've been made aware of this during the review process. So I think C should've known that any costs it chose to incur when making the claim and complaint were unlikely to be recovered.

C was also able to bring the complaint to this service if it remained unhappy with the outcome. We're a free service for complainants, and work in such a way that professional advice and representation is not usually necessary. We make decisions based on what's fair and reasonable in the circumstances of each complaint. And we'll look beyond how a complaint has been presented so we can get to the heart of the matter.

In this case, I don't think the additional fees incurred were necessary, so I make no award for them.

my final decision

For the reasons above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask C to accept or reject my decision before 16 October 2017.

Phillip Lai-Fang
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