

complaint

Mr G and Mr H complain that Barclays Bank Plc has unfairly withdrawn product features on their buy-to-let (BTL) mortgages.

background

In 2006 Mr G and Mr H took out a BTL mortgage with S. They took out further borrowing in 2009 and 2010. In 2010 S was bought by Barclays. In 2011 and 2012 Mr G and Mr H were given notification that their mortgage was to be transferred to a Woolwich BTL mortgage and that the cash reserve and prepayment facilities on their previous mortgages would no longer be available.

That facility enabled them to put savings in an 'Offset Reserve' (later referred to as a 'Prepayment Reserve') (the reserve). In doing so, Mr G and Mr H could: a) reduce the amount they pay in interest; and b) reduce the term of their mortgage.

Whilst Mr G and Mr H were not paid interest on the money they put in the reserve, they were not charged interest on the equivalent amount in their mortgage. They did not pay tax on the interest benefit gained either.

Mr G and Mr H point out that this was the reason they took out the mortgage (and all the additional borrowing).

After it bought the mortgage book of S, Barclays removed the offset facility (and other features) from Mr G and Mr H's mortgage.

Barclays says it could do this because of Clause 21 of the 2010 terms and conditions, which say:

'21.1 We may change the Mortgage Terms and Conditions, at all times acting reasonably, for one of the following reasons (which may relate to circumstances existing at the time or which we reasonably expect to apply in the future):

21.1.4 to reflect changes in the way we operate your Mortgage (including changes in the technology we use) because of:

21.1.4.1 the reasonable steps we have taken to change our systems for managing your Mortgage; or

21.1.4.2 reasons outside our control.'

When giving notice of that change (in January and March 2012), Barclays explained that its reason for doing so was that its systems do not support the offset facility. Barclays maintains that it was necessary because of the 'differences between the S's systems and the Barclays' systems'.

The change took effect on 11 April 2012. Mr G and Mr H complained to Barclays and to us about the changes made to the account.

Barclays rejected the complaint saying, in summary, that it was entitled to change the terms and conditions of the mortgage if there was a valid reason for doing so. The reason given

was the incompatibility of Barclays' IT systems with S's mortgage products. Barclays said that Clause 21 of its Terms and Conditions allowed it to make the changes.

Our adjudicator didn't recommend the complaint should be upheld. She was satisfied Barclays was entitled to change the terms and conditions.

Mr G and Mr H disagreed. Their solicitors have responded in detail. In summary, they say:

- the mortgage was mis-sold;
- condition 21 was not incorporated into the contract;
- even if it was, it is unreasonable and unfair pursuant to the Unfair Terms in Consumer Contract Regulations;
- if it is found to be incorporated and reasonable, there are limits on the exercise of Barclays' discretion under condition 21 and the condition will be interpreted against the bank;
- the withdrawal of facilities without appropriate compensation is unfair and unreasonable. Because Barclays has control of its IT systems, it is unfair to rely on this as a way to change the fundamental nature of the mortgage, particularly as Mr G and Mr H were given no say in the change nor offered a suitable alternative or compensation for their losses.

Barclays has also provided its further comments. In summary, it has explained that its operational systems do not allow it to provide an offset facility to Mr G and Mr H. Barclays says that certain features of some of the mortgages in S's portfolio – including the Prepayment Reserve Facility – were not supported by Barclays' systems and that the cost of altering its system, coupled with staff training costs, was disproportionate.

Barclays also says that the withdrawal of the Prepayment Reserve Facility made no practical difference to former customers of S. Barclays says that there was no automatic right to draw down any additional borrowing from the Prepayment Reserve Facility. Any application to draw from this would have been subject to status and compliance with lending criteria. So, Barclays says, Mr G and Mr H's position is the same as if they were applying for a further advance on their mortgage.

my provisional decision

In my provisional decision I reached the following conclusions:

- The issue concerning the effect or fairness of clause 21 of the 2010 Terms and Conditions and the Unfair Terms in Consumer Contract Regulations 1999 is more suitable for consideration by a court. I intended to dismiss this part of the complaint without consideration of the merits for that reason.
- I did not intend to uphold the complaint about mis-sale of the mortgage.
- I was not persuaded Mr G and Mr H have suffered any actual financial loss or material distress or inconvenience as a result of the withdrawal of the Prepayment Reserve Facility. I was also satisfied that the ability to apply for a further advance and to make overpayments on the Barclays BTL mortgage is broadly similar to the provisions previously offered by S. So I did not intend to uphold this part of the complaint.

my findings

I have reconsidered from the outset everything Mr G and Mr H, their solicitors and Barclays have said in order to decide what is fair and reasonable in this complaint.

Barclays has made no further comment on my provisional decision. Mr G and Mr H have provided the following:

- a letter from Mr H;
- a letter from their solicitors;
- a letter from a third party.

I'm not required to address each and every point made, but will instead concentrate on the main issues of the complaint. This reflects the informal service we provide. But I confirm I have taken everything the parties have said – including these latest submissions – into consideration. Having done so, I'm not minded to depart from the conclusions reached in my provisional decision.

Mr H's response – To summarise, Mr H says that it is incorrect that there has been no material loss. This is because, he says, there is approximately £3,000 per month available to be paid into the mortgage. What hasn't been taken into consideration are the tax consequences – contrasting what Mr G and Mr H would obtain from the very low (and taxable) interest to be obtained from a deposit account as opposed to the (untaxable) benefit derived from not having to pay interest at 6.5%. Because they accumulate substantial balances at the end of each month and only draw down money intermittently, the benefit in interest payments is substantial.

So Mr G and Mr H are saying that they have lost out by investing the surplus £3,000 per month at a low rate of interest (and upon which the interest is taxable), rather than reducing the mortgage by £3,000 per month. According to the mortgage conditions, overpayments will either reduce the mortgage balance (and the repayments) or the term of the mortgage.

It is Mr G and Mr H's choice whether or not to reduce their mortgage balance each month by the surplus £3,000. If they choose instead to invest that money elsewhere thus incurring a tax liability on the interest earned, I don't see that Barclays is responsible for this.

I do appreciate that it is an inconvenience for Mr G and Mr H that any overpayments made to the mortgage can't be immediately withdrawn. In any event, Barclays has explained that any application to draw down from the Prepayment Reserve Facility would have been subject to status and compliance with lending criteria – so withdrawal of overpayments wasn't guaranteed by S.

By allowing further advances on the mortgage Barclays is not restricting the ability of Mr G and Mr H to draw down further funds against the mortgage.

Mr H has also provided a list of questions which he would like us to put to Barclays for it to answer to his satisfaction. I should explain here that we do not represent the interests either of consumers or financial businesses – we are independent and impartial. So although I note what Mr H has said, it is not possible for us to act as Mr H's intermediary and to put his questions to Barclays.

Mr H has also made some general points relating to his wider concerns about Barclays and its takeover of S. I note his concerns but will make no further comment on them. I have no remit to consider wider issues relating to the general banking operations of either Barclays or S. Those are matters more appropriate for the regulator.

the solicitors' response – Mr G and Mr H's solicitors have reiterated that the mortgage was mis-sold. In summary, they say that the mortgage was sold on the basis that drawdown of overpayments would be a quick and automatic process, whereas a further advance will require an application and credit checks.

It seems here that the solicitors may have misunderstood the position on the mortgage from S. The original mortgage conditions say "*Any overpayment can be borrowed back at any time at mortgage rates, subject to normal lending criteria*" (my emphasis). "Lending criteria" means that, before any borrow-back of overpayments, S would have had to decide whether or not to allow the request and to carry out an assessment of affordability, which may have included a credit check. So there is no difference between this and a further advance in terms of the requirement of the bank to assess affordability.

I also note that no advice was given by S at the time the original mortgage was sold in 2006. Mr G and Mr H bought the mortgage after receiving advice from a financial adviser. If Mr G and Mr H feel they were given incorrect advice or assurances about the terms and conditions of the mortgage (including the flexibility of the product), they would need to take this up with their adviser. It was their adviser's responsibility to ensure Mr G and Mr H fully understood the terms of the mortgage, including the requirement for any borrow-back of overpayments to be assessed against lending criteria. Advice about the mortgage is not something for which Barclays is responsible. Nor does it fall within the scope of the Financial Ombudsman Service, being an unregulated mortgage product.

I note the solicitors' comments concerning Clause 21. But I'm satisfied Barclays is entitled to rely on that clause. I'm also not persuaded that the clause presumes the mortgage operates unchanged. As I explained in my provisional decision, it is outside the scope of our remit to decide whether a contract term is legally binding or enforceable. That is an issue for the courts.

With regard to Barclays' letter concerning a mortgage current account and reserve, I would draw the solicitors' attention to the bank's final response letter in which Barclays explained that it had incorrectly stated that a mortgage reserve would be available. It seems this error was continued in the letter sent in October 2012. I confirm that no reserve is available on a BTL mortgage.

letter from a third party – On behalf of Mr G and Mr H a letter has been written by a third party who is unrelated to this complaint and who has given her opinion on Barclays' IT system. She confirms she is unfamiliar with Barclays' computer system and therefore she explains that her comments are speculative. Given this, I am unable to attach any evidential weight to this letter and so make no further comment on it.

I remain of the view that Mr G and Mr H have not been fundamentally disadvantaged by the changes made to their mortgage account by Barclays, in view of the ability to make overpayments and to apply for further advances. Given this, I do not uphold the complaint. I am aware that Mr G and Mr H and their solicitors have raised a number of wider issues about Barclays' operations generally. But those are not matters which fall within my remit.

Should Mr G and Mr H reject my final decision, they will be able to pursue their concerns (including these wider issues) through the courts, if they wish to do so.

my decision

My decision is that I do not uphold this complaint.

Jan O'Leary
ombudsman