complaint

Mr M, who brings this complaint with the consent of his former business partner Ms A, has complained that The Royal Bank of Scotland Plc ('the bank') is wrongly seeking repayment from him of the debt of the former partnership.

background

The former partnership ('the partnership') was a professional partnership established in Scotland. Mr M and Ms A were the only two partners. The partnership had signed an agreement with the bank whereby the bank granted overdraft facilities to the partnership, which the partnership used. It's this debt that the bank is seeking to recover from Mr M. He says the bank has no right to do so.

In early 2015 the partners signed an agreement whereby the business, assets and liabilities of the partnership were transferred to a new company in which the partners (Mr M and Ms A) were the sole shareholders. Not long after this transfer (in mid-2016), Mr M withdrew from the business, and later still (2017) the new company was wound up.

Mr M's basic argument is that the new company became solely responsible for the overdraft, and the bank's course of conduct showed the bank accepted this. So the bank can't now pursue Mr M for the debt.

Our investigator didn't agree. His main conclusions were:

- His reading of the overdraft agreement was that the partners would remain liable for the overdraft regardless of whether the partnership changed its legal status or dissolved.
- The partners were jointly and severally liable for the outstanding overdraft. There weren't any specific terms in the available documentation to suggest otherwise.
- The partnership wasn't dissolved in the traditional sense due to the transfer. However, it fell within section 38 of the Partnership Act 1890. This section stated that the rights and obligations of the partners continued in certain circumstances, such as completing transactions begun but unfinished at the time of the dissolution.
- The partnership deed wasn't available to check if the scenario was covered. On balance and without express provision contained in the agreement dealing with this issue, the partners remained liable under the agreement. This was fair and reasonable under the circumstances.

Mr M didn't accept the investigator's conclusions. His main points in summary were:

- The partnership wasn't dissolved, so section 38 of the Partnership Act didn't apply. The partnership was sold to a third party company. But in any case, it wasn't necessary, in terms of the law, for the partners' obligations to continue.
- Under the common law, the rule in Clayton's Case would apply. Under this, the new company's payments into the overdraft account would correspondingly reduce the partners' liability, if any, under the overdraft.
- In terms of joint and several liability - under the law of Scotland, the partnership was a legal entity in its own right, so in the first instance the bank should pursue the partnership, not the partners. The partnership had in turn been bought by the new company, so it was the new company, and now its administrators, that were responsible for the overdraft.

- The investigator had misunderstood how the burden of proof should apply, and he shouldn't have construed the legal agreements in favour of the bank, where a potentially relevant provision was missing.

my findings

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

The ombudsman service takes account of the law, but ultimately we make our decisions, as I've just said, according to what we think is fair and reasonable.

As a financial ombudsman, I have no power to determine Mr M's legal rights, unless he accepts a final decision of mine. So I have no power or right to make Mr M pay the bank.

What I do have the power and duty to do is to decide if I think it's fair and reasonable that the bank should stop seeking repayment of the overdraft debt from Mr M, as he's asked.

I'm sorry to disappoint Mr M but like the investigator I've answered this question in the negative. My reasons are:

- Regardless of partnership law, Mr M and his then business partner freely signed a legal agreement with the bank under which they individually agreed – by which I mean not just on behalf of the partnership but also for themselves as individual partners – that they would be jointly and severally liable for repayment of the overdraft. This is clear from the text of the overdraft agreement (clause 11).
- When recently writing to the contact for his former business partner Ms A, Mr M wrote: *"Ms A as a former equity partner in the firm is jointly and severally liable for [the overdraft]."*
- Nothing has happened since Mr M signed the overdraft agreement which in my view would make it unfair for the bank to seek repayment of the debt, including as it exists today, from Mr M.
- I've seen no evidence that the bank agreed Mr M would no longer be liable for the debt.
- For example, I've seen no legal agreement whereby the bank agreed to release Mr M from the debt or one whereby the bank agreed to substitute another party for Mr M as being responsible for the debt.
- There was a potential mechanism in clause 11 of the overdraft agreement for cases where a partner leaves the partnership: *"… if a partner leaves* [and the partnership has advised the bank of that immediately]*, the Bank may stop operations on any overdrawn account and open a new account on which no borrowing will be permitted."* I've seen no evidence the mechanism was implemented, or that the power it confers on the bank was used.
- I find it inherently unlikely that the bank would release Mr M from the debt, expressly or impliedly, without substituting another party or another type of security for Mr M's repayment covenant.
- It's trite law that the burden of a debt can't be transferred by the debtor without the consent of the creditor. I haven't seen any evidence the bank consented to the transfer away from Mr M of the obligation to repay the overdraft.
- It wasn't the partnership that was sold. The partnership transferred its business, assets and liabilities to the new company.

- In his complaint form Mr M wrote: *"I was a partner in a [professional] partnership based in [named city]. The partnership is now dissolved…"*

Based on what I've found, I can't conclude the bank isn't entitled to pursue the debt. I haven't seen enough evidence to show the debt is no longer owed by the partners, and certainly not enough for me to reach the conclusion that it would be fair for me to order the bank not to seek repayment from Mr M.

my final decision

I don't uphold Mr M's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 28 March 2020.

Roger Yeomans
ombudsman