

complaint

Mr and Mrs R complain that HSBC Bank plc is wrongly requiring them to pay £175,000, rather than £100,000, under security they gave in 2003 for the debt of their son-in-law's business. They want the bank to accept that they are only required to pay £100,000.

Mr and Mrs R are supported in their complaint by their daughter, Mrs S.

background

In 2003 Mr and Mrs R agreed to support their son-in-law's business, which needed to borrow more money from HSBC. They gave a legal charge over their house to HSBC as security for the borrowings of the business. Within a few months the business failed, and HSBC looked to Mr and Mrs R to repay its outstanding debt. This they did by taking out a £175,000 equity release mortgage with HSBC, which was provided on an interest-only basis on a nine-year term.

Since 2006 Mr and Mrs R have been seeking HSBC's agreement that they are only liable for £100,000 of the failed business's debt. They have raised a number of issues relating both to the original charge over their house and to the subsequent interest-only mortgage, which I list below.

charge over house

1. They signed the charge believing that they were only securing £100,000 of the business's debt, and the bank told the Land Registry that the charge was only securing £100,000 of debt.
2. They were not given independent legal advice before signing the charge form.
3. The valuation done at the time on their property was not correct.
4. The bank has provided inconsistent information about whether they provided a guarantee.

equity release mortgage

1. This was mis-sold, as the interest repayments were unaffordable from their regular income, and they had no means to repay the capital at the end of the nine-year term.
2. The bank is wrongly still relying upon the original charge over their house, which is for the business debt and not the mortgage debt.
3. They were not given independent legal advice before agreeing to the mortgage.

Our adjudicator did not recommend that the complaint should be upheld. She concluded, in summary, that HSBC was entitled to require Mr and Mrs R to repay the full debt outstanding on their mortgage. She agreed that the bank had confused issues by incorrectly referring to a guarantee from Mr and Mrs R, and that it had not carried out a full affordability check when agreeing the mortgage, but did not consider that these prevented the bank from requiring full repayment.

Mr and Mrs R have not accepted the adjudicator's conclusions. They say, in summary, that there is considerable evidence to show that they are only liable for £100,000 of the business's debt, and that the bank made several procedural errors.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

I will deal with the issues underlying this complaint in the same order as I set them out above.

Charge over house

1. Did Mr and Mrs R secure a maximum of £100,000 of the business's debt?

The charge form that Mr and Mrs R signed did not contain any restriction on the amount of debt that it secured. I have therefore considered whether HSBC said or did anything that could have caused Mr and Mrs R reasonably to believe that their liability was limited to £100,000. HSBC's records made at the time refer to £100,000, but while this may have been the outstanding debt at the time the discussion about the giving of the charge took place, I have found nothing in those records that persuades me that the bank agreed to limit its security to that amount.

This was clearly explained to Mr and Mrs R in a letter from the solicitor who advised them and witnessed their signatures (and I will comment on that solicitor's independence below).

When a charge is registered at the Land Registry a bank is required to indicate the amount of debt then being secured. It is not prevented by this, however, from subsequently relying on the charge for a higher amount. I accept that HSBC told the Land Registry that the charge was initially securing £100,000 of debt, but am satisfied that this does not mean that the bank can then only rely upon it for that amount.

I also note that when the business failed Mr and Mrs R agreed to repay the then £175,000 business debt by taking out an equity release mortgage for the same amount. Had they thought that they were only liable for £100,000 I would have expected them to insist that they only needed to borrow that amount – something which they did not raise with the bank until 2006. I appreciate that at the time they may have felt under pressure to come to agreement with the bank, because had they not done so the bank could have used its charge to take possession of their house. However, that does not mean that they are not bound by the document that they signed.

2. Were Mr and Mrs R given independent legal advice?

Mr and Mrs R were introduced to a local solicitor by the bank. However, this does not mean that the solicitor was acting as the bank's agent, and was therefore not independent. Mr and Mrs R were his clients when he saw them, and he had a duty to give them advice about the nature of the liability they were about to take on. Having reviewed the letter he sent them, I consider that he made very clear the risks involved in giving the charge, including the risk of the amount secured rising, and that they did therefore receive independent legal advice.

3. Was the valuation of their house incorrect?

There is some confusion about the assessed valuation of Mr and Mrs R's house at the time they agreed to give the charge, but it is my view that this is not relevant to the key issue here about the effectiveness of that charge and the amount of debt it secured.

4. Did Mr and Mrs R give a guarantee?

HSBC has confused matters by wrongly referring in some correspondence to Mr and Mrs R having given a guarantee for the business's debts. It appears that this might have been the initial bank plan, but that it then changed its view on the security it required.

It is common practice when taking security for a third party's debts (in this case those of the business) to take a guarantee (from Mr and Mrs R) and then also take a direct charge over their property to secure that guarantee. HSBC did not do this here, but instead took an indirect charge over the property to secure the business's debts. Under both approaches the bank can look to recover its debt from the value of the property, but by not taking a guarantee in this case it cannot require Mr and Mrs R to repay the debt by the sale of other assets.

I do not consider that the confusion about whether there was or was not a guarantee changes Mr and Mrs R's liability under the charge.

equity release mortgage

1. Was the mortgage mis-sold?

The bank's records made at the time of the mortgage application show that the interest-only mortgage was regarded as an interim measure, with an intention to review the arrangement after 12 months, by which time it was hoped that Mr and Mrs R would be in a position to reduce the debt by a lump sum payment or start capital repayment of the mortgage. As such, the need for the bank to establish the affordability of the repayments was less than if it had been a normal 25-year mortgage. This also meant that the bank did not consider it necessary to confirm that Mr and Mrs R would have sufficient funds to repay it at the end of its nine-year term.

I am not persuaded that the mortgage was mis-sold. The alternative at the time was for the bank to use its charge to force sale of the house, and the interest-only mortgage gave Mr and Mrs R time to consider how best to repay their liability to the bank. It was a fair and reasonable approach for the bank to take in the circumstances.

2. Does the bank's charge secure the mortgage?

HSBC has itself identified that it should have taken a new, direct charge over Mr and Mrs R's house when it provided the mortgage, and has asked them to sign a new charge form, without success. It is my view that the charge it currently holds is likely to be unenforceable for this reason. It is potentially an unsecured loan but it is not an illegal loan, as Mr and Mrs R suggest. I consider that Mr and Mrs R still owe HSBC the money they borrowed under the mortgage agreement, whether it is secured or not.

3. Should Mr and Mrs R have been given independent legal advice before signing the mortgage agreement?

While it is normal practice for independent legal advice to be recommended before security is given for a third party's debt, this is not the case where the debt is being taken out by the persons giving the security. There was no obligation on HSBC to ensure that Mr and Mrs R obtained such an advice before signing the mortgage agreement.

In summary, I conclude that HSBC is acting fairly and reasonably in requiring Mr and Mrs R to repay the full outstanding debt on their mortgage, which they took out to repay the full debt of the business. I am not persuaded that the bank has sought to trick or manipulate Mr and Mrs R in the manner they suggest.

my final decision

My decision is that I do not uphold this complaint.

Malcolm Rogers
ombudsman