complaint

The liquidator of K complains that National Westminster Bank Plc hasn't paid enough compensation in respect of an interest rate hedging product (IRHP) it sold to K in 2003.

(The liquidator has also made a complaint on behalf of a second limited company, which I'll call 'N'. A Mr C, who in 2003 was the director of both K and N, has also made a complaint on his own behalf. I have issued separate final decisions on those complaints, but since the issues are connected I will mention Mr C and N throughout this final decision on K's complaint.)

background

In December 2003, Mr C, K, and N all borrowed money from NatWest. Part of the borrowing was to refinance existing loans from other lenders, and part was for property purchase and development.

At the same time, Mr C, K, and N each took out a single trigger swap (a form of IRHP) to support their NatWest borrowing. Each swap had a ten year term, but the notional amounts and amortisation profiles were different to reflect the different amounts that Mr C, K and N had borrowed.

The practical effect of the swaps and the loans was that Mr C, K and N paid interest on their borrowing at a variable rate until the swaps were 'triggered' in late 2007. After the swaps were triggered, the interest rate on the borrowing was effectively fixed at 7.28% plus margin. That meant the total borrowing costs for Mr C, K and N increased substantially.

All three of the borrowers suffered cashflow difficulties from early 2008 onwards. There is a dispute about the extent and cause of those difficulties. But everyone agrees that Mr C, K and N were not able to meet their full liabilities to NatWest under the loans and the swaps.

In late 2009 / early 2010, all three of the borrowers' accounts were transferred to NatWest's Global Restructuring Group (GRG). All three of the swaps were subsequently broken – incurring significant break costs. Properties belonging to all three of the borrowers were sold.

K and N both entered liquidation in 2010. N has remained in liquidation ever since; K was dissolved and then later restored to the register.

In 2014, NatWest looked at the sale of all three IRHPs under the review it had agreed with its regulator, the FCA. It ultimately concluded that if it had given Mr C, K and N sufficient information in 2003:

- Mr C would not have taken out a hedging product in his own name.
- K would not have taken out a hedging product either.
- N would still have taken out a hedging product, but it would have chosen a vanilla cap at rate of 6.4% instead of a single trigger swap.

NatWest offered 'basic redress' to all three borrowers. For Mr C and K, that meant a refund of all the swap payments they had made. For N, that meant a refund of the difference

between the swap payments N actually made and the amounts it would have paid for a vanilla cap.

Mr C accepted NatWest's offer of basic redress on his own behalf. The liquidator of K and N accepted NatWest's offer of basic redress on behalf of the two companies, but in light of K and N's outstanding debts NatWest did not pay any cash to the liquidator. Instead, NatWest offset the compensation against the companies' debts.

Mr C, K and N all kept their rights to make a claim for 'consequential loss'. They now bring that claim to the Financial Ombudsman Service. In addition, the CMC would like us to set aside N's acceptance of the basic redress. It noted that the liquidator accepted the basic redress before the CMC's appointment.

The three complaints were considered by our adjudicators. They thought NatWest had already done enough to put matters right. The CMC did not agree, so the entire matter was referred to me.

I issued provisional decisions on these complaints in May 2019. I said:

> "In respect of consequential loss, I need [to] look at whether NatWest's failures actually caused the losses the complainants claim. And if they did, I also need to ask whether it's fair to hold the NatWest responsible for the losses. To do this, I'd need to ask whether NatWest 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.
>
> *loss of properties*
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> The complainants say that but for the IRHPs, NatWest would not have transferred their accounts to GRG. They also say that their properties would not have been sold. So, the complainants say NatWest should put them in the position they would have been in now if the properties had not been sold.
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> NatWest says the IRHP payments weren't the only reason the accounts were transferred to GRG. NatWest says the transfer was also because of serious cost overruns on one of the companies' projects, large tax liabilities to HMRC, security shortfalls, and evidence that rental income was being diverted elsewhere without the bank's consent.
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> I consider that even if the tax liabilities had been the only issue, it would still have been reasonable for NatWest to be very concerned about the risk of winding up petitions from HMRC. I note:
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> - The CMC says that as at October 2009 the cumulative IRHP redress across the three complainants was around £500,000 – which it says would have substantially covered the HMRC debt of around £650,000.
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> - NatWest says its records show Mr C told it in 2009 that the HMRC debt was originally £1.2 million, but he had been able to negotiate it down to £650,000. NatWest says that Mr C did not provide written confirmation of the size of the HMRC debt, but in any event it had no appetite to provide funding for outstanding tax.

- Shortly after the liquidator's appointment, she produced statements of affairs for both K and N. In those statements, she said debts to HMRC were about £590,000 for K and £55,000 for N. On the assumption Mr C had a small personal debt to HMRC, those figures would indeed suggest £650,000 for the HMRC debt across the three complainants.

- However, the liquidator's later statements said N's debts to HMRC were closer to £670,000 than £55,000. She said the large increase was due to "*claims not being included in the Director's Statement of Affairs prepared ahead of the … creditors meeting. The unknown claims were in respect of corporation tax and national insurance contributions*". If N's HMRC debt was indeed £670,000, then NatWest's estimate of a tax bill of £1.2 million across the three complainants appears correct.

Even if the CMC is right to say the HMRC debt was only £650,000 in 2009, the cumulative IRHP redress as at that point would not have completely covered the debt. The liquidator's later statements suggest Mr C was mistaken about the effect of his negotiations with HMRC, and that the HMRC debt was in fact in the region of £1.2 million.

I note the CMC's view that NatWest would have funded the HMRC debt if there had been no IRHP. But in the circumstances, I think that highly unlikely. Mr C did not give NatWest written confirmation of the size of the complainants' HMRC debt at any point, and it appears that he himself was confused about the size of that debt. It would be unusual for any lender to agree to fund a tax debt of unspecified size, and I do not believe NatWest would have done so here.

The companies' inability to fund their tax debts had an indirect impact on Mr C, because he had given personal guarantees to NatWest for the companies' borrowing.

I also consider that it was reasonable for NatWest to be concerned about what it called the "*diversion of rental income*". The CMC notes that NatWest has not provided any detail about that. But NatWest says it did not have any detail – the lack of visibility was the reason for its concern.

I have not considered the issues of cost overruns and security shortfalls in any detail, because I think the tax liability alone shows that the complainants would have suffered significant financial difficulties even without the IRHPs.

Overall, I am not persuaded that NatWest's mistakes in respect of the 2003 IRHP sales caused the complainants' 2009 financial difficulties. Clearly the additional cash flow pressures of the IRHP did not help matters, but I am satisfied that the complainants would still have been unable to meet their financial obligations in any event. I am therefore not persuaded that NatWest's mistakes in respect of the IRHPs led to the sale of the complainants' properties, and so I do not intend to make any award in that respect.

professional fees

The complainants ask NatWest to cover the liquidators' costs, various legal costs, and the costs associated with the support they received from the CMC. Our adjudicators did not recommend that NatWest refund any additional fees.

The CMC says it is concerned "*that there might be what could be called a 'house policy' [in respect of professional fees] … if there is then that is contrary to the duty of an ombudsman to consider each case on its merits*".

On our website, we say:

> "*The ombudsman service is a free and informal alternative to going to court. We decide if the business has handled your complaint fairly by looking at the facts of the case – not at how well you present your complaint. And we prefer to hear from you in your own words.*
>
> *But everyone has the right to appoint someone else to act on their behalf. Some consumers might ask their local Citizens Advice Bureau, or a friend, carer or relative, to help them with their complaint.*
>
> *If, on the other hand, you decide to employ someone to present your case for you – for example, a lawyer or financial adviser – you will almost certainly have to pay their costs yourself. This could mean you have to pay them part of any compensation you get.*"

I acknowledge the CMC's concerns about a 'house policy', but I see nothing wrong in our telling complainants that we are unlikely to order a financial business to reimburse professional costs. We do order the reimbursement of those costs in some circumstances, but only where – after considering the evidence in an individual case – we consider that to be a fair and reasonable outcome.

Here, I've carefully considered the CMC's arguments as to why professional fees should be refunded. But I do not agree that such a refund would be fair and reasonable in these complaints. I consider that Mr C and the liquidator were both able to refer complaints to us and to NatWest without professional assistance.

In light of my conclusions about the property sales, I consider it likely that K and N would have entered liquidation regardless of the existence of the IRHPs. So I don't think it would be appropriate for me to order the refund of those fees.

tax losses

So far as tax is concerned, the overall effect of NatWest's basic redress is to move profits from earlier accounting periods to a later one. In some circumstances, that can mean a complainant has to pay more tax overall than they would otherwise have done – for example if they received tax relief on the costs relating to the IRHP at a lower rate of tax than that applied to the redress payment. But I have seen no evidence of that here.

If the complainants provide me with evidence to show that they have suffered actual tax losses, then I will consider making an award. Otherwise, I do not intend to do so."

Mr C and his representatives did not accept my provisional decision. Briefly, they said:

- I was wrong to assume Mr C might have had an unpaid personal tax liability in October 2009; he did not.

- In June 2017, NatWest acknowledged that Mr C had negotiated HMRC liability across K and N down to £650,000. But in February 2018 the bank said it hadn't received enough evidence to confirm that negotiation. The bank did not cite tax liability for K as a concern in its determination for K's consequential loss claim, and so they do not understand why I mentioned it in my provisional decision.

- K was dissolved in 2012, but restored by order of the court because the bank would not pay compensation to a dissolved entity. The HMRC claim before restoration was around £600,000, but had increased by over £1 million after restoration. The increase represents the failure to complete and satisfy the proposed agreement with HMRC.

- It doesn't matter whether the cumulative IRHP redress would have fully covered the HMRC debt. What matters is whether – in the absence of the IRHPs – the bank would have continued to provide financial support to K and N. Looking at K alone (the entity with the most significant bank exposure), if there had been no IRHP K would only have breached its overdraft limit very briefly in August 2008. But for the IRHPs, the security ratios would have been in line with a typical banking relationship of this type. Overall, it is therefore much more likely than not that NatWest would have continued to provide banking support to Mr C, K and N.

- The liquidator cannot reasonably have been expected to have the specialist knowledge needed to pursue this matter. N was unable to do anything without incurring costs, so it was appropriate for the liquidator to engage somebody on behalf of N. It would be a criminal offence for an accountant to provide that service, unless the accountant was also authorised as a claims management company.

my findings

I have reconsidered all the available evidence and arguments from the outset, in order to decide what is fair and reasonable in the circumstances of this complaint. Having done so, I have come to the same conclusions as I did in my provisional decision, for broadly the same reasons. I now confirm those provisional findings as final.

As I said in my provisional decision, so far as consequential loss is concerned I need to look at whether NatWest's failures actually caused the losses the complainants claim. And if they did, I also need to ask whether it's fair to hold the NatWest responsible for the losses.

loss of properties

To decide whether properties would still have been sold if NatWest had made no errors, I need to take into account all relevant circumstances. I am satisfied that K's tax position – and its debt to HMRC – is relevant to my consideration of whether the IRHP issues caused N's financial difficulties. Since Mr C had given personal guarantees for both K and N, I consider that N's tax position is also relevant.

The evidence as to Mr C's companies' tax positions at the time they went into liquidation is conflicting. I note:

- Mr C's recollection is that he negotiated with HMRC, and his companies' tax bills were significantly reduced.

- NatWest's internal records imply that, as at 2009, NatWest believed that Mr C had indeed been able to negotiate a significant reduction to the companies' tax bills. But NatWest's records do not show that it had seen any documentary evidence of that reduction.

- Publicly available documents (submitted by the liquidator to Companies House) show that the liquidator's estimate of N's tax liabilities increased substantially as a result of "*claims not being included in the Director's Statement of Affairs prepared ahead of the … creditors meeting. The unknown claims were in respect of corporation tax and national insurance contributions*".

- Mr C's representatives have recently provided me with HMRC's "*final proof of debt*" claim for K. They have not provided me with the equivalent document for N, but they say the principles for N are similar. For both companies, they ask me to note that "*a significant element of the claim is penalties and interest… [and] the HMRC claim before liquidation is substantially lower than the claim after liquidation*".

- Mr C's representative has also asked me to note that if HMRC was prepared to negotiate the tax down but the renegotiated amount was not in fact paid, then the original tax liability will remain – and further penalties will accrue. They say that is what happened here.

I do not have full details of N's situation, but I consider it fair for me to rely on the liquidator's statement that her estimate for the tax liabilities increased because claims were not initially included in the director's statement of affairs. I note that the liquidator had the opportunity to respond to my provisional decision – and if she thought I had misunderstood or misrepresented her comments, she could have said so.

Mr C's representative is right to say that a significant proportion of HMRC's claim in respect of K relates to penalties and interest. But I don't think that's surprising. I can see from the documents that HMRC's position is that K was underpaying national insurance as far back as the 2000/2001 tax year – before the IRHP was sold, and well before the IRHP was triggered.

In my view, the issue here is not whether Mr C *believed* that he had negotiated lower tax payments with HMRC. The issue is whether those lower tax payments had in fact been negotiated. I have not seen sufficient evidence to persuade me that that was the case.

NatWest says it had no appetite for funding K and N's tax debts. I accept its evidence on that point. On balance, I don't think NatWest would have provided funding for the tax debt in any event. As I said in my provisional decision, I think it unlikely that any bank would have agreed to fund a tax debt of an unspecified amount. Once the size of the debt had been established, I still think it is unlikely NatWest would have agreed to fund such a significant liability.

So, for the reasons given in my provisional decision, I consider that the complainant's 2009 financial difficulties were not caused by the IRHP. In the overall circumstances, I still consider that it was reasonable for the bank to be concerned about the risk of winding up petitions from HMRC.

Overall, I am not persuaded that NatWest's errors in respect of the IRHP caused the loss of K's properties.

professional fees

I have carefully considered the CMC's further points about professional fees. Having done so, I remain satisfied that the liquidator could have brought this complaint to our service herself. I do not agree that she needed specialist knowledge to do so. Whilst there are (now) restrictions on offering claims management services to the public, those restrictions do not prevent liquidators from carrying out their duties.

A director of a solvent company is entitled to act on that company's behalf in bringing a complaint to our service. Similarly, a liquidator of a company may bring a complaint to our service on behalf of that company, regardless of whether the liquidator is herself authorised to act as a CMC.

I acknowledge that anything a liquidator does in relation to a company in liquidation will incur fees. But I don't think that automatically means it would be fair for me to require NatWest to reimburse those fees.

In this particular case, for the reasons I gave in my provisional decision I do not uphold K's complaint about consequential loss. I do not think it would be fair for me to order NatWest to reimburse the liquidator's fees for pursuing a complaint that did not succeed.

my final decision

My final decision is that I do not uphold this complaint against National Westminster Bank Plc. I make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask K to accept or reject my decision before 5 September 2019.

Laura Colman
ombudsman