

complaint

Ms T and Mr Y complain that they were given incorrect information by HSBC Bank plc (First Direct) about an Early Repayment Charge (ERC) that applied to their mortgage account. They say that if they had been told that an ERC was payable they would have taken this into account when setting the sale price of their property. To resolve their complaint, they have requested a refund of the charge.

background

Ms T and Mr Y sold their property and redeemed their mortgage in June 2012. The mortgage had been taken out in 2008 on a 10-year fixed rate with an ERC payable if the mortgage account was closed prior to 2018.

Ms T says she spoke with First Direct in September 2011 to confirm what charges would be due if the mortgage was redeemed and was told that *no* ERC was payable. First Direct has a note of a call being made by Ms T but there is no recording available, nor any notes of what was discussed on the call. But it is not disputed that a redemption statement was issued, seemingly as a result of the call, which showed that no ERC was due.

A second statement issued shortly before the sale of the property also confirmed that no ERC was payable. It was only just prior to completion that a further redemption statement eventually confirmed that an ERC would in fact be charged.

Ms T and Mr Y complained about this to First Direct. It upheld the complaint in part, offering them £200 for the distress and inconvenience the errors had caused. But it didn't agree to their request to refund the ERC. It considered that the charge was due under the terms of the mortgage agreement and noted that, although some incorrect information had clearly been provided to Ms T and Mr Y, they had also been made aware of the ERC on a number of other occasions, including in the mortgage offer and on annual statements.

The adjudicator who considered the complaint recommended that it should be upheld in full. In brief, she was persuaded that, properly informed and in full knowledge of the ERC, Ms T and Mr Y would most likely have negotiated a higher sale price for the property so as to take into account the charge. The adjudicator therefore felt First Direct should refund the ERC.

my provisional findings

I issued a provisional decision in which I set out why my view of the complaint differed to that of the adjudicator.

- *the merits of the complaint*

I noted that it was not disputed that Ms T and Mr Y were given some incorrect information. However, First Direct had questioned the likely impact of the errors, as Ms T and Mr Y had previously been made aware of the ERC. In effect, First Direct was of the view that Ms T and Mr Y should have been aware that the information being provided to them might be incorrect (as they had been told of the ERC before) and should therefore have been prepared for the eventual confirmation that the charge was in fact payable.

I did have some sympathy with this view. The ERC was an important feature of the mortgage, payable for the whole ten-year fixed rate term. I thought it seemed likely therefore that Ms T and Mr Y would have had a general awareness of it. I noted particularly a record of

correspondence between Ms T and First Direct over its electronic messaging system in September 2009 where the redemption of the mortgage and the ERC had been discussed. During the correspondence Ms T stated 'I do appreciate however that...should we close it (*the mortgage*) off before 27 November 2018 we would incur the redemption fees outlined in your message'. The previous message in this conversation had set out that an ERC of £6,006 would be payable on redemption between 2009 and 2018.

But, that said, I recognised that by the time Ms T and Mr Y actually came to sell the property they might have forgotten the precise details of how the ERC would be applied and made efforts in good faith to clarify the situation. And in doing so, as a result of First Direct's errors, they had been left with an expectation that no charge was payable. Two redemption statements, issued months apart, confirmed this. And I thought it was entirely plausible that Ms T was, as she claimed, also misinformed during the telephone call of September 2011. First Direct's systems were evidently capable of issuing incorrect statements. So, it seemed to me quite possible that incorrect information was also being provided by its telephone staff.

- *redress*

So, I was satisfied that there were clearly errors on the part of HSBC and as such the complaint should be upheld. But I noted that it was also not disputed that Ms T and Mr Y were contractually obliged to pay an ERC if they closed the account before 2018.

Despite Ms T and Mr Y having been told no ERC was payable, I thought that fair redress was not the refund of the ERC recommended by the adjudicator, because ultimately the charge was correctly applied. I thought fair redress was instead a payment to compensate for any distress or inconvenience incurred and/or a payment to compensate for any financial loss that led from the errors.

The adjudicator's view was that, in effect, there was such a loss - equivalent to the cost of the ERC - as that amount could otherwise have been 'recouped' by negotiating a higher sale price for the property.

But I wasn't sure that it had been shown that this was the case. I thought that if Ms T and Mr Y had been given the correct information in September 2011 (and later), prior to exchanging contracts, they *may* have been able to negotiate a higher price. But in my view this was far from certain.

Without more persuasive evidence that Ms T and Mr Y actually incurred a loss in this way, whether or not equivalent to the whole ERC, I was not of the opinion that redress should include such a payment. In short, I thought that if the errors had not occurred, it was most likely that Ms T and Mr Y would still be in the same position financially.

I was therefore of the view that fair redress was the other option; a payment to compensate for distress and inconvenience. In the circumstances I thought this would have been quite significant, caused both by the loss of an expectation that no ERC was due and the loss of opportunity to try and negotiate a better sale price, or perhaps rearrange other financial matters to take account of the ERC. First Direct had offered £200, but I didn't think that was sufficient. I thought £500 more reasonably reflected the likely distress and inconvenience caused by the errors.

further submissions

First Direct had nothing to add in light of my provisional decision.

Ms T and Mr Y responded to say that at the time of the sale it had been imperative that they obtained a specific amount for the property and it was on the basis of the misleading telephone call to First Direct that they agreed the sale price. Had they known the true position they would have looked at other options.

They noted that they hadn't had easy access to the paperwork relating to the mortgage, which might have highlighted the errors. They maintained that, correctly informed, they would have negotiated a higher selling price, or considered other options.

my findings

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

Having done so, while I recognise it will come as a great disappointment to Ms T and Mr Y, I find I'm not persuaded to depart from my provisional view. I have based my decision on the balance of probabilities – in other words, on what I consider is most likely to have happened in light of the evidence and wider circumstances.

I accept that Ms T and Mr Y genuinely believe that, correctly informed, they would have negotiated a higher sale price for their property – or taken other steps to compensate for the ERC. But I nevertheless remain of the view that if their enquiries to First Direct in 2011 had confirmed what it is apparent they had previously known - that an ERC was payable – it is unlikely the end result would have been the negotiation of a higher sale price to compensate for it.

I think the eventual sale price was, on balance, most likely to have been the maximum obtainable in the circumstances (as is usually the case when negotiating a sale). And given the nature and size of the transaction it also seems unlikely that there would have been a viable alternative available that would have achieved the same ends as the sale of the property.

As such, I remain of the view that fair and reasonable redress in this case is a payment of £500 for the distress and inconvenience caused by First Direct's errors. I'm not persuaded that Ms T and Mr Y have been shown to have suffered a financial loss as a result of those errors.

my final decision

For the reasons given, my final decision is that I uphold the complaint. I direct HSBC Bank plc (First Direct) to pay Ms T and Mr Y £500.

James Harris
ombudsman