complaint

Mr T complains that Bank of Scotland plc ("BoS") unfairly holds him liable for debts of his limited company.

background

Mr T was director of a limited company that had its current account with BoS. There was an overdraft facility, and Mr T had given his personal guarantee for the company's debt limited to £30,000 plus interest.

Following the general downturn in the economy, the company had essentially ceased to trade. The overdraft balance on its current account, which stood at around £27,000, was not really reducing and BoS agreed that it would give the company a loan to reschedule the overdraft debt. There was discussion between Mr T and BoS about what loan repayments would be affordable, and in November 2011 BoS issued a loan offer to the company.

The section of the loan agreement that set out what (if any) security was applicable contained only the words:

> ***The Loan is Unsecured***

The loan was accepted on behalf of the company and used to repay the overdraft debt. Mr T intended to fund the company's account with sufficient funds to cover the monthly loan repayments but, in the event, that did not happen and so a new overdrawn balance began to accrue on the company's account.

Mr T asked BoS not to continue to debit the company account with the loan repayments, as the overdraft they created was causing significant interest charges.

A few months later, Mr T concluded that he should dissolve the company and close its accounts. He asked BoS for information about his personal guarantee, including whether it applied to the loan, and BoS told him that the loan was secured by his personal guarantee.

Following a consultation with an insolvency practitioner, Mr T told BoS that he had been advised that, although the overdraft on the company's account was secured by his personal guarantee, the loan was not. He pointed to the fact that the loan agreement specifically states that it is unsecured.

BoS told Mr T that this was a clerical error and that the loan had always been intended by it to be secured by the personal guarantee. It also pointed out that Mr T had signed an "all monies" type limited personal guarantee for any borrowing by the company, which it considered caught the loan in any event. It did, however, accept that it had let Mr T down in its handling of his complaint and sent him £200 as compensation for that.

An adjudicator investigated Mr T's complaint. He concluded that BoS had always intended that the loan would be secured by Mr T's personal guarantee. He noted that the personal guarantee that Mr T had given had not been released by BoS, and that it was of an "all monies" type and so not restricted to any one account. Overall, the adjudicator did not consider that the complaint should succeed.

Mr T did not agree with the adjudicator's conclusions. He said, in summary:

- Each year, the directors had to apply to BoS to have the company's overdraft limit renewed. He does not recall any mention being made of the guarantee when that happened, or indeed on any other occasion. He would have reconsidered his position if he had realised the guarantee still stood.

- He accepts that it is unlikely that BoS would want to weaken its position. But he took it at face value that BoS was replacing a high interest debt with a lower interest loan.

- The loan agreement clearly states on its face that it is unsecured. Even if the law would not support that, to insist that it is secured on his personal guarantee seems to go entirely against the principles of treating customers fairly.

- He also still considers it unfair that BoS continued to apply the loan repayments even though it knew there was no money or credit facility in the company's current account.

- He is not in a position to repay the loan; he is currently in an agreement with his creditors and repaying his debts to them by small monthly amounts.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. In doing so, I have taken account of relevant law, regulations and good industry practice.

Although the personal guarantee in this case was originally given jointly by Mr T with his then co-director, the complaint has been brought by Mr T in his sole name. I can see no reason why Mr T – who is an eligible complainant under the rules of this service – cannot pursue the complaint in his sole name and do not consider that his former co-director is required to join in the complaint. The company is now dissolved, and Mr T brings this complaint in his personal capacity as someone who gave BoS his personal guarantee.

Looking at the evidence of the communications between BoS and Mr T in the run up to the rescheduling loan, the parties seem to expect that the loan will be secured by at least the personal guarantee, but there is no specific statement by BoS to Mr T at that stage.
This lack of clear communication was made far worse by the fundamental error on the face of the loan agreement. Whilst BoS has described this as simply a '"clerical error", that seems to me to downplay the very misleading effect of the loan documentation on the reader. That is particularly so since the paperwork for the previous overdraft renewal – sent just a matter of months before – had clearly and properly set out the security that applied.

In order to do justice to this case, I have assessed what – in my view – the parties intended to achieve from the rescheduling of the company overdraft into a loan. At that time, the debt already existed and Mr T was already liable for it under his personal guarantee. It is clear, from the evidence, that both parties intended that the loan should re-price the debt at a significantly lower rate of interest and provide an (at that point) affordable monthly repayment at the sort of level Mr T had requested.

But I am not satisfied, from the evidence, that either BoS or Mr T intended that the loan should – in addition – relieve Mr T of all liability for the debt under his personal guarantee. And I am not persuaded that Mr T entered into the loan on behalf of the company believing

that, in making that transaction, he was also being discharged from liability for the debt under his personal guarantee.

I am satisfied that the personal guarantee, under which (put simply) Mr T had liability to the limit of the guarantee for all the company's debts whether past, present or future, was never released. By agreeing to the loan for the company, Mr T did not make his personal liability any worse at that point – his personal guarantee did not include any provision for him to cancel it, and the best he could have done would have been to give notice to determine (that is, limit) it at the level of the debt then outstanding plus ongoing interest.

BoS sent Mr T a cheque for £200 to reflect the error in the loan agreement. I do not consider that this went nearly far enough to compensate for the effect of the very serious error in the loan agreement, which created substantial confusion and doubt for Mr T about the effect of the loan agreement on him as a guarantor. I also do not consider that BoS approached the matter sufficiently seriously when dealing with Mr T's complaint.

On 7 January 2014 I issued a provisional decision that – subject to the further representations of the parties – the fair resolution of this complaint was for BoS to crystallise Mr T's liability under his personal guarantee at £27,000 without application of any interest. Given the substantial interest concession that this represented, I did not propose to make any additional award for distress and inconvenience. I also asked BoS to clarify the position of the earlier cheque it had sent to Mr T, about which there appeared to be some doubt.

Mr T and BoS each responded to my provisional decision. Mr T said, in summary:

- He is unhappy at the provisional decision, and still believes he was treated unfairly.

- He believes BoS had a duty of care to him to remind him of the existence of the personal guarantee each time an overdraft renewal request was made.

- BoS made a mistake on the loan and, if it had not, he may well have sought another course of action.

BoS said, in summary:

- It is willing to crystallise the personal guarantee debt at £27,000, but only if the ombudsman also makes a specific finding that – should Mr T not pay and it is necessary to take legal action against him – he will also have to meet any legal costs of that.

- The cheque for £200 was paid in January 2013.

The points that Mr T has made are ones that I had already considered and had addressed in my provisional decision. Given the situation at the time the loan was offered, I am not persuaded that there was – realistically – a different course of action that would have been open to Mr T and would have left him in a better position than before. I observe that the continued existence and amount of the personal guarantee from Mr T was set out, very clearly, in the company's overdraft renewal in July 2011.

My provisional decision was that the liability under the personal guarantee be crystallised at £27,000 with no further interest to be added. It was not necessary for me also to consider the separate question of whether or not, in the event BoS takes legal action against Mr T for

repayment of the debt, it is entitled to require him to pay the legal costs. Should legal proceedings prove necessary, that question will be a matter for the courts.

my final decision

My final decision is that I uphold this complaint in part. I direct Bank of Scotland plc to crystallise Mr T's liability under his personal guarantee at £27,000 with no interest to be added to that amount.

Jane Hingston
ombudsman