

Complaint

A company, which I'll refer to as S, complains that HSBC UK Bank Plc mis-sold it several interest rate hedging products (IRHPs) and hasn't paid enough compensation.

Background

S brings its complaint alongside another which is brought by S's owner, "Mr D". Like S's complaint, Mr D's complaint is about IRHP agreements, which he entered as a sole trader.

Formally, Mr D and S bring two separate complaints, but all the parties agree that the businesses are so closely intertwined that it makes sense to consider these matters as if they were a single complaint. Mr D and S made – though their representative – a single initial complaint submission to the bank in which it was explained that S and Mr D should be regarded as operating jointly, under the direction of Mr D. That approach has been followed throughout the course of the complaint, including its consideration by this service. To make this decision easier to read, I refer to the combined business of Mr D and S as "the enterprise".

As a formality I'm issuing a separate decision for Mr D's complaint, with the same findings as this decision and differing only in the specific sums offered in redress by the bank.

The circumstances leading to this complaint were set out in my provisional decision dated 18 November 2020, a copy of which is attached and forms part of my final decision.

In 2006 and 2007, the enterprise entered five IRHP agreements alongside loans it took out as part of the finance for its portfolio of rental properties. In mid-2008, the enterprise repaid a significant amount of its borrowing to HSBC, having obtained finance from another lender, which I'll call "L". In 2010, all the IRHP agreements were ended and break costs were incurred. Later HSBC reviewed the sale of the IRHPs under its agreement with the Financial Conduct Authority and offered redress for overpayments and break costs. The enterprise accepted the offer and then made its claim for consequential losses. The claim was for losses under the headings of rental profits, capital value of properties, penalties and fees, debt management costs, corporate fees, future losses and professional fees.

In 2017 HSBC issued its final determination regarding consequential losses. The bank offered the enterprise a total of £4,953.38 plus interest to cover bank charges, and additional overdraft interest payments totalling £5,583.16. Unhappy with the bank's offer, the enterprise referred its complaint to us.

For the reasons set out in my provisional decision, my view was that HSBC had made a fair and reasonable offer to settle the complaint.

The enterprise didn't accept my findings. Its representative and Mr D made the following points, in summary:

- Other than L and HSBC, no lender has taken detrimental action against the enterprise. Materially all the lending relationships that were in place in 2009 are indeed in place today. It's wrong to imply that the complainant had a difficult financial position overall arising from relationships with these other lenders.

- Other lenders took action to protect their interests after they became aware of the enterprise's financial exposure caused by the IRHPs. In particular, L took the LPA course of action mainly because of the HSBC position.
- The bank claims that the enterprise's loan account with L had a shortfall of £65,000 by the end of March 2010. But L has confirmed the actual shortfall at that time was £45,815.15.
- The enterprise doesn't recognise the figure of £47,000 arrears to creditors other than HSBC and L in April 2009. Nor is it credible that such arrears would have existed without the creditors taking action. Figures from the time show the actual monthly profit/loss of the enterprise to have been in the range between £2,000 profit and £2,000 loss.
- The HSBC relationship wasn't affected by the enterprise's debt to other lenders.
- The provisional decision has extended the duty to mitigate losses in a way that is not valid. It's generally not required, nor expected, of any enterprise that it should hold 'spare' capital for the eventuality that someone else (in this case HSBC) causes it an unexpected and significant loss.
- The IRHP charges gave rise to the increased overdraft and that caused the loan-to-security ratio to breach the lending covenant which in turn caused HSBC to take detrimental action.
- It's wrong to regard the fall in house prices as a relevant factor, because there was no material impact on rental income.
- The bank's writing off of the capital loss is a separate matter from the loss caused to the enterprise. The writing off occurred following the detrimental enforcement action. If the enforcement action should not have been necessary, then the writing off might not have been necessary.
- The enterprise disagrees that the pricing of the HSBC loans would have been higher in the absence of the IRHPs.

My findings

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

There's been extensive correspondence on this case. I'd like to assure the enterprise and the bank that I've looked at all the arguments and evidence with care. In this decision I'll concentrate on the key arguments and evidence that are material to my determination of the complaint.

Loss of rental profits and capital value resulting from L calling in LPA receivers

The enterprise argues that the reason L took action in 2010 was because of its concern about the enterprise's financial exposure caused by the IRHPs. I don't agree, and I'll explain why.

At Mr D's request, L has recently sent an email explaining why it took action in 2010. It says *"In summary, due to the significant arrears which arose on your mortgage as contractual mortgage payments were not being met, the Society's Credit Committee had no choice other than to appoint an LPA for that period of time."*

It's clear to me, from this explanation and from the account statements, that L brought in LPA receivers simply because the enterprise wasn't meeting its repayments. I'm therefore not persuaded that L took action because of its concerns about the enterprise's position with HSBC.

As I explained in my provisional findings, I don't accept that the arrears with L were caused by the IRHPs. That's because during this period the IRHP costs had been allowed to build up in an overdraft with HSBC, so there was no significant diversion of cashflow from the enterprise's business to service the IRHPs.

I accept that the arrears with L were about £46,000 in March 2010, not £65,000 as the bank has said. But this doesn't change my conclusion. The arrears were substantial, and L says they caused it to appoint LPA receivers.

For the reasons given above, I still don't think it would be fair or reasonable to conclude that the calling in of LPA receivers by L was caused by the IRHP payments.

Loss of rental profits and capital value resulting from HSBC calling in LPA receivers

I'm still of the view that the enterprise suffered substantial business difficulties that were unrelated to the costs of the IRHPs. The enterprise's representative says that in 2009, there was a small profit or small loss each month, and that there's no evidence of any arrears to lenders other than HSBC and L. But the enterprise's own advisers approached the bank in March 2009 and said they would be working towards setting up a programme *"to address the mortgage arrears payments"*, *"a repayment strategy for all creditors"*, and *"a plan for [Mr D] to clear all personal debts over an agreed period of time."*

Moreover, Mr D has said that the enterprise had a *"huge overdraft"* with other banks, and that one of them appointed receivers for two other properties. Mr D says that although other lenders appointed LPA receivers, he believes they were only *"slap on the wrist"* warnings from the banks, and in the end all debts and fees were repaid and the properties weren't sold. But in my view, irrespective of how these arrears were eventually resolved, these statements show that there were arrears to other lenders, one of which was sufficiently concerned to appoint LPA receivers. And as been discussed above, the enterprise also fell into substantial arrears on its repayments to L when it wasn't paying out anything on its IRHPs. I think the balance of evidence indicates that the enterprise was in difficulty with its borrowing from other lenders, as well as with L.

I don't accept that the HSBC relationship wasn't affected by the enterprise's debt to other lenders. As I said in my provisional findings, under the restructured loan the total monthly HSBC payments were reduced and should have been covered by the rents on the secured properties, but the enterprise stopped making repayments in mid-2011. The bank also noted at the time that rents from the secured properties weren't being paid into HSBC. I'm satisfied that business difficulties elsewhere meant that the enterprise couldn't meet the HSBC repayments.

When the accumulated IRHP costs and break costs were incorporated into the restructured loan in 2010, the loan-to-security ratio increased as a result. But I'm not persuaded that this caused the appointment of LPA receivers by HSBC. In mid-2011 the enterprise wasn't meeting its loan repayments. I'm satisfied that the difficulties the enterprise experienced in repaying the loan would have led to the default and appointment of receivers even in the absence of the debt from the IRHPs.

The enterprise's representative suggests that in my provisional findings I pointed to the lack of cash reserves as a failure, on the part of the enterprise, to mitigate its losses from the IRHPs. But that wasn't my argument. I pointed to the lack of cash reserves as part of the general picture of the enterprise's business and the difficulties it faced from late 2008 onwards. I didn't suggest that the enterprise should have arranged its other affairs in such a way that it had funds available to meet its IRHP losses. Rather, I said the rents on the HSBC properties should have been enough to cover the HSBC repayments, and I thought it highly likely that the failure to meet them was the result of business problems elsewhere. In my view, the IRHP debt didn't cause the enterprise to default on its HSBC lending.

Similarly, in my provisional findings I mentioned the fall in the value of its property portfolio as a relevant factor in the general financial position of the enterprise. I haven't changed my mind about that.

For the reasons given above, I still don't think it would be fair or reasonable to conclude that the sale of properties by LPA receivers called in by HSBC was caused by the IRHP payments.

The write-off of debt

I've concluded that the appointment of receivers by L and HSBC wasn't caused by the IRHPs, so I'm not asking the bank to pay any compensation in connection with this enforcement action. It follows that I don't need to consider how the bank's write-off of debt would affect any such compensation.

As regards any losses from penalties, fees or interest in excess of the redress already offered by the bank, I'm still of the view that it wouldn't be fair or reasonable to make a consequential loss award unless the foreseeable consequential losses that were HSBC's responsibility exceeded the amount of £1.9m debt the bank has already written off. I'm satisfied that if there were any losses in excess of the bank's compensation offer, they wouldn't be more than £1.9m. For this reason I don't require the bank to increase its offer of compensation for penalties, fees or interest.

The pricing of the HSBC loans

As I explained in my provisional findings, I've reached my conclusions in this case without making any adjustment to the loan interest rates that the enterprise would have paid in the absence of the IRHPs. So even if the enterprise is right in its belief that the loans in 2006 and 2007 would have been no more costly without the IRHPs, my determination of the complaint wouldn't change. I don't think the sales of the properties were caused by the burden of the IRHP payments and to reach that conclusion I haven't relied on an assumption that the loan interest rates would have been higher without the IRHPs.

In summary

Having considered all the submissions made by both parties, I don't depart from my provisional decision.

My final decision

My final decision is that the bank has made a fair and reasonable offer of compensation to settle this complaint, and that HSBC UK Bank Plc should pay that compensation to S.

For S, that compensation should be £1,292.00 plus interest to cover bank charges, and additional overdraft interest payments totalling £2,614.40, as set out in the bank's final consequential loss redress determination of 31 August 2017. The interest element of this redress should be updated, as appropriate, to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 12 March 2021.

Colin Brown
Ombudsman

COPY OF PROVISIONAL DECISION

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Background

S brings its complaint alongside another which is brought by S's owner, "Mr D". Like S's complaint, Mr D's complaint is about IRHP agreements, which he entered as a sole trader.

Formally, Mr D and S bring two separate complaints, but all the parties agree that the businesses are so closely intertwined that it makes sense to consider these matters as if they were a single complaint. Mr D and S made – though their representative – a single initial complaint submission to the bank in which it was explained that S and Mr D should be regarded as operating jointly, under the direction of Mr D. That approach has been followed throughout the course of the complaint, including its consideration by this service. To make this decision easier to read, I'll refer to the combined business of Mr D and S as "the enterprise".

As a formality I intend to issue a separate decision for Mr D's complaint, with the same findings as this decision and differing only in the specific sums offered in redress by the bank.

In 2006 and 2007, the enterprise borrowed about £2.95m in six loans from HSBC as part of the finance for its portfolio of rental properties. The enterprise also entered five IRHP agreements with HSBC alongside the loans. These were all interest rate swaps – two in 2006 with a ten-year term and three in 2007 with a five-year term – and their total notional value covered all the borrowing in the six loans.

In mid-2008, the enterprise repaid a significant amount of its borrowing to HSBC, having obtained finance from another lender, which I'll call "L". At this time, no changes were made to the swap agreements.

In February 2010, all the swap agreements were ended. They still had a number of years to run and therefore break costs were incurred on all of them. These costs were added to the enterprise's debt to HSBC, which was restructured at the time.

Later HSBC reviewed the sale of the IRHPs under its agreement with the Financial Conduct Authority and in 2014 the bank concluded the sales hadn't met the required standards. The enterprise accepted the bank's offer to waive liability for the break costs and to refund all the swap overpayments (net of those paid out by the bank) plus interest. The settlement also left the enterprise with the right to make a further claim for consequential losses.

The enterprise then made its claim for consequential losses in 2015. HSBC made a provisional determination of the claim and there followed a series of exchanges between the parties. In August 2017, HSBC issued its final determination regarding consequential losses. The bank offered the enterprise a total of £4,953.38 plus interest, to cover bank charges, and additional overdraft interest payments totalling £5,583.16. Unhappy with the bank's offer, the enterprise referred its complaint to us.

The enterprise's claim is for consequential losses that it says were caused by having to make the swap payments, which began in the autumn of 2008. From early 2009 until the swaps were terminated in early 2010, the payments were £12,000 per month. In particular, the enterprise's representative says that having the swaps caused the following:

- Loss of rental profits and capital value resulting from L calling in LPA receivers in 2010 in respect of its lending to the enterprise. The representative says that, without the burden of the swap payments, the enterprise would have had more financial room for manoeuvre in 2009.

- Loss of rental profits and capital value resulting from HSBC calling in LPA receivers in 2012.
- Penalties and additional fees incurred by the enterprise as a result of the financial strain.
- Debt management costs.
- Corporate fees incurred by the circumstances.
- Future losses resulting from a loss of reputation and creditworthiness.
- Professional fees for assistance in bringing the complaint.

Our investigator didn't recommend that the bank should pay more than it had already offered for consequential losses. In summary, she gave the following reasons:

- Early in 2009, L declined to release £210,000 to the enterprise. This was to have been the third tranche of lending from the refinancing organised in 2008. This was a blow to the enterprise, particularly as it operated with no cash reserves. Consultants employed by the enterprise reported that, at roughly the same time, the enterprise also had arrears of £47,000 to creditors other than HSBC and L. So at this point, the enterprise's shortfall exceeded the £27,000 that had been spent on the IRHP.
- Moreover, market conditions in 2009 were uncertain, house prices were falling and the lending appetite of all banks had diminished. It's not clear why L brought in LPA receivers, but there isn't enough evidence to conclude that it was caused by the IRHP payments to HSBC. The investigator thought it more likely that L made the decision because of a combination of the enterprise being overstretched, the change in economic climate and breaches of lenders' terms.
- The representative says that by the time the swaps were cancelled, the payments had totalled £160,000. But the overdraft facility given by HSBC was £161,000. So if this facility were used as it was intended, the net effect of the payments on the enterprise would have been nil – except for the interest payments, for which the enterprise has already been compensated in the 8% interest on the basic redress.
- In the absence of the IRHPs, the loans taken by the enterprise wouldn't necessarily have been priced the same as the original loans taken alongside the swaps. In particular, it's likely that there would have been a higher lending margin. So it wouldn't be fair to say the enterprise would have had the benefit of all the additional cash flow claimed.
- HSBC appointed LPA receivers two years after the swaps were cancelled, and therefore two years after the swap payments stopped. The investigator didn't think the appointment of receivers was anything to do with the mis-sale of the swaps.
- In any event, HSBC has (in addition to paying the redress settlement from the review of the IRHPs) written off over £1.9m of the enterprise's debt. This was all the enterprise's remaining debt to HSBC. To recommend any further redress, the investigator would have to be satisfied that the consequential losses were greater than the sum written off – and she hadn't seen evidence to support that.

The enterprise didn't agree with the adjudicator's conclusions. The enterprise's representative and Mr D have made a number of points, in summary:

- The bank's basic review determination was that the customer should be put in the position as if no swaps had been agreed, and there was no alternative product to be put in place. The

consequential loss determination should likewise assume that there would be no replacement product.

- The enterprise's consequential losses exceed the 8% compensatory interest added to the basic redress award. The losses need to be examined day-by-day and followed through in detail. When the effect of the depletion of cash has been established, then the losses can be determined.
- If the 8% compensatory interest already paid should be subtracted from a consequential loss award, then that should happen as the last stage of the consequential loss calculation. Even if the 8% is regarded as compensation for the overdraft interest, it shouldn't be regarded as removing the effects of the overdraft interest at the time it was charged. In other words, any problems triggered by the overdraft interest at the time should still be taken into account when determining consequential losses.
- The representative provided calculations on a spreadsheet showing and comparing the cumulative IRHP payments and the balance of the enterprise's HSBC business bank accounts. The figures are evidence that the banking relationship hadn't been problematic before October 2008 (when the swap payments started) and deteriorated from that time onwards. They also show the steady increase in unauthorised overdrafts, causing the businesses to be treated as 'delinquent customers'. Without the IRHP payments, there would have been no unauthorised overdrafts – which were a total of £160,000.
- The swap payments caused a cashflow shortage for the enterprise. The HSBC authorised overdraft was put in place only after the 2010 restructure.
- The enterprise also had a huge overdraft with other banks. A third bank appointed receivers for two other properties as a result of the HSBC fiasco.
- There is an unsubstantiated allegation that the enterprise was in 'financial distress' as a result of liabilities incurred outside the HSBC relationship. It's for the bank to provide evidence that the enterprise's other liabilities impacted its ability to pay the HSBC debt. In fact, Mr D has demonstrated analytically that the enterprise would have been able to service the HSBC debt in the absence of the IRHP.
- The overdraft debt was built up from the IRHP charges and, as the enterprise was unable to repay that debt, the bank took recovery action, which caused substantial loss - there is clear cause and effect demonstrated by the history of the matter.

My provisional findings

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

Because the issue of the mis-sale has already been resolved between the two parties, the starting point of my decision is that the enterprise shouldn't have had the IRHPs. I won't be re-opening that issue.

Consequential losses

I need to look at whether the bank's failures actually caused these consequential losses. And if they did, I also need to ask whether it's fair to hold the bank responsible for the losses. To do this, I'd need to ask whether the bank could reasonably foresee that its failures would result in losses like these. In other words, I'd need to be satisfied the losses weren't too remote from the bank's failings. I'd also need to be satisfied that the customer had taken reasonable steps to mitigate any losses.

In making these assessments, I need to compare what actually happened with what's likely to have happened if the enterprise hadn't had the IRHPs.

I agree with the enterprise's representative that the determination of the consequential loss claim should assume that there would have been no replacement hedging product. There may have been a misunderstanding about the investigator's arguments here. I note that the investigator talked about "alternative products that would have been in place" and "using another product", so I can appreciate why the representative took this to mean an alternative IRHP. But the investigator's argument was really about the terms and costs of the loans, which she thought would have been different in the absence of the IRHPs. She wasn't suggesting that there would have been any alternative IRHPs in place, or fixed rate loans. I examine the substantive argument about the loan costs below.

The write-off of debt

I agree with the investigator that, in this complaint, it wouldn't be fair or reasonable to make a consequential loss award unless the foreseeable consequential losses that were HSBC's responsibility exceeded the amount of debt the bank has already written off.

Mr D has argued that the bank's write-off was a refund of the IRHP charges and therefore shouldn't be taken into account. But my understanding is that over £1.9m was written off in addition to the settlement of the basic IRHP redress.

Loss of rental profits and capital value resulting from L calling in LPA receivers

L is not a party to this complaint, and I've been provided with no documents issued by L regarding either its decisions to withhold the third tranche of its lending early in 2009 or its decision later to bring in LPA receivers.

Regarding the decision to withhold the third tranche of lending, the enterprise's representative has said there's uncertainty over why L made this decision and it was possibly as a result of a change in the market or the lender's appetite, or there may have been a technical failure by the enterprise to comply with all the lender's requirements, warranties or procedures.

Both the bank and the enterprise's representative have said that the lending from L was at a fixed interest rate, and I note that base rates fell substantially during the period over which the lending was to be drawn down, making the final tranche a different lending proposition from the one originally intended. I'm satisfied that there are a number of plausible reasons, unconnected with the IRHP payments, why L may have reconsidered its assessment of risk between mid-2008, when the refinance was arranged, and February 2009, when L declined to release the third tranche.

The enterprise and its representative have said the enterprise's problems were largely the result of a cashflow shortage caused by the IRHP payments. But I haven't seen convincing evidence that such a cashflow shortage was caused by the IRHP.

The figures I've been given regarding the IRHP payments and the enterprise's business accounts show that at the time when L decided to withhold the third tranche of lending, the cumulative total of the IRHP payments was about £27,000, and the enterprise's business accounts had become overdrawn by about £23,000. As the IRHP payments largely became debt to the bank, the enterprise didn't need to divert its business cashflow to meet the payments.

As the IRHP payments continued through 2009, the unauthorised overdraft grew correspondingly. The enterprise's representative has said that by the end of January 2010 the overdraft total was £160,000 and without the IRHPs there would have been no overdraft at all. So by the time L took action which culminated in the LPA receivers being called in, the IRHP payments had not been met by any significant diversion of cashflow from the enterprise. In effect, the IRHP payments had been largely financed by HSBC.

The enterprise had debts with other lenders, but I've been shown very few details of the enterprise's dealings with them. The bank says that its records show that in August 2008 the enterprise had borrowing facilities with other lenders (including L) of over £5m. I note that the enterprise's financial consultants reported that in April 2009 there were arrears of £47,000 to creditors other than HSBC and L. The bank has said the enterprise's loan account with L had a shortfall of over £26,000 by the end of August 2009 and £65,000 by the end of March 2010. This indicates that the enterprise was indeed suffering cashflow problems but, for reasons given above, I believe they came from somewhere other than the IRHP payments.

I understand that the enterprise's representative has argued that the consequential loss claim should be determined in isolation, looking at the enterprise's relationship with HSBC but without considering what was happening in its dealings with other lenders. I don't agree. The consequential loss claim is about the impact of the swap payments on the enterprise's wider financial situation and business activities, and it is therefore from the outset a matter which involves connections between the enterprise's HSBC transactions and those wider events and circumstances. In any event, I'm required by rule to determine the complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case – so I can't ignore the wider circumstances relevant to the enterprise's financial affairs.

The representative has said that the effect of the IRHP payments was to reduce the enterprise's room for manoeuvre after L decided to withhold the £210,000 third tranche of lending, and affected the enterprise's credit prospects, tightening the terms on which it could borrow in order to trade out of the situation. But the available evidence suggests that the enterprise's problems resulted from its existing borrowing commitments plus changes in lending appetites that had already happened, as a result either of market changes or of the enterprise's highly leveraged position, or of a combination of both. In my view, it hasn't been shown that, in the absence of the IRHP payments, the enterprise would have rescued the situation by borrowing more elsewhere.

For the reasons given above, I don't think it would be fair or reasonable to conclude that the calling in of LPA receivers by L was caused by the IRHP payments. So it wouldn't be fair or reasonable to hold HSBC responsible for any associated loss of rent or capital value.

Loss of rental profits and capital value resulting from HSBC calling in LPA receivers

The enterprise's representative says that after the debts were consolidated and restructured in January 2010, the business suffered a cashflow burden that was ultimately caused by the IRHP payments which had been made before the restructure. To summarise, the representative says that there was an increase in the loan payments, made up of (a) the increased interest payments on the larger debt, and (b) the capital repayments, whose timing was brought forward from the original schedule, and which the parties refer to as the 'soft amortisation'.

The representative argues that these increased costs caused the enterprise to suffer business difficulties which led to HSBC calling in LPA receivers.

I therefore need to consider whether the increased outgoings that I've labelled (a) and (b) above were caused by the IRHPs, and then whether the increase led to LPA receivers being called in.

Looking first at (a), I agree that the enterprise's monthly loan payments did increase as a result of the accumulated IRHP costs (which had previously built up in the overdraft) and the break costs being added to the enterprise's debt. The bank argues that the debt restructuring in 2010 would have happened even without the IRHP costs, because of the enterprise's other business difficulties. But at this point I'm considering only the scale and components of the debt after the restructure, and the resulting interest – I'm not considering the trigger to the restructure. I'm satisfied that after the restructure, the HSBC debt included the accumulated IRHP payments and the costs of breaking the IRHPs, neither of which would have existed if there had been no IRHPs.

As for (b), the bringing forward of the capital repayments, I'm not persuaded that the IRHPs caused this. The bank has argued that discussions between the parties on this subject began as early as March 2008, and at least one of the loans was due to commence capital repayments as early as April 2009, though these were postponed. But in any event, given the substantial changes in market conditions between 2007 and 2010 and the impact on the enterprise's property values, I don't think I can conclude that the loans would have continued interest-only in 2010 in the absence of the IRHPs.

It's my view, therefore, that after the loan restructure in 2010, the enterprise did pay increased monthly loan outgoings as a result of increased interest payments on the larger debt, which wouldn't have happened if there had been no IRHPs. But I don't think the IRHPs can be said to have caused the capital repayments to be brought forward.

The bank argues that even without the loan restructure, LPA receivers would still have been brought in. It said the enterprise's business problems arose as a result of other difficulties in the management and financing of its property portfolio. It made the following points, in summary:

- The enterprise had built up no cash reserves and its position across its property portfolio was highly leveraged with numerous other lenders.
- The significant increase by the enterprise of its portfolio and borrowing commitments unfortunately occurred shortly before the sharp decline in the property market following the 2008 crash.
- By February 2009 the enterprise was unable to meet the payments under the 2008 loan from L. At this time L declined to release the £210,000 third tranche of its lending to the enterprise, which the enterprise described as "a significant problem".
- At the end of April 2009, the enterprise's own advisers informed the bank that there were £47,000 arrears to lenders other than HSBC and L.
- By the end of August 2009, the shortfall on the L account was £26,865.
- In August 2009, another lender appointed receivers to ensure the rent was properly collected on part of the portfolio.
- In September 2009 the enterprise's advisers told the bank that the L portfolio was "a disaster" and the enterprise couldn't maintain the payments.
- In November 2009 the enterprise's advisers informed HSBC that the L portfolio wasn't covering its expenses and a property mortgaged with another bank would need to be sold as it would never cover its mortgage cost.
- In March 2010, both HSBC and L were both told by the enterprise's advisers that rents had been directed to L from other lenders' properties.
- By April 2010, the arrears on the L account had risen to £65,000. L then appointed LPA receivers.
- The rental income from the HSBC properties should have been more than sufficient to cover the enterprise's loan liabilities to HSBC.
- There was a very significant reduction in the value of the HSBC secured properties following the revaluation of the assets in November 2010.
- The bank identified the following factors as potentially having an adverse effect on the value of the properties: the prevailing economic circumstances, and the fact that the properties were situated in poor locations, suffered from lack of refurbishment and at times lay empty.

- In 2011 the bank noted continued diversion of rental income to debts other than HSBC's.
- In 2011 the enterprise defaulted on the interest and capital payments on its HSBC lending.

Having looked at the available evidence, I'm satisfied that from late 2008 onwards the enterprise suffered substantial business difficulties that were unrelated to the costs of the IRHPs. Its business model was highly geared and there were no cash reserves, and the value of the properties fell because of economic conditions. The enterprise had substantial borrowing from lenders other than HSBC, and clearly there were problems supporting the debt (Mr D has said there was a "huge overdraft" with other lenders). I haven't been given all the details of that other borrowing, but it's common ground that two of the other lenders acted to deal with shortfalls.

Before the 2010 restructure, the IRHP payments built up as an unauthorised overdraft and therefore weren't a cash drain on the enterprise's activities. After the 2010 restructure, there were no further IRHP payments and, as a result, the total monthly payments due to HSBC fell sharply. From early 2010 until the time HSBC called in LPA receivers, the rents from the properties ought to have been enough to cover the interest due on the (albeit increased) HSBC borrowing. I note that, over this period, the rents ought to have covered the capital repayments too (although, as I said above, I don't consider the IRHPs to have caused the capital repayments anyway).

As the total monthly HSBC payments fell and should have been covered by rents on the secured properties, I can't see how the restructured HSBC lending could have resulted in a cashflow problem for the enterprise. The enterprise initially kept up the payments to HSBC but stopped in mid-2011. In the circumstances, I think it's highly likely that this was the result of business problems elsewhere in the enterprise's activity. In my view, the IRHP debt didn't cause the enterprise to default on its HSBC lending.

Mr D has reminded me, via his representative, that the starting point for considering a consequential loss claim should be the 'counterfactual scenario' that could reasonably have been understood to have developed. I've referred to this above as comparing what actually happened with what's likely to have happened if the enterprise hadn't had the IRHPs. This is the starting point, but it isn't necessarily the end of the matter, because there are other factors to consider in determining whether it would be fair and reasonable to hold the bank responsible for any losses. As I've said above, those would include remoteness and mitigation. But I also need to take into account all the other circumstances of the case, notably the impact of the enterprise's financial arrangements elsewhere.

For the reasons given above, having taken all the evidence into account, I don't think it would be fair or reasonable to conclude that the sale of properties by LPA receivers called in by HSBC was caused by the IRHP payments. So it wouldn't be fair or reasonable to hold HSBC responsible for any associated loss of rent or capital value.

The pricing of the loans from HSBC

The investigator thought that in the absence of the swaps, it was likely the lending taken out by the enterprise would have been more expensive than the actual loans taken from HSBC in 2006 and 2007. She said that the cash savings from not having the swaps would thereby be reduced, so it wasn't simply a matter of removing the swap payments from the picture to determine what would have happened without them.

I agree that it's likely that the loan margin and other costs would have been different in the absence of the hedging, so I can't assume that the enterprise's outgoings would have been exactly as they were originally minus the swap payments. In other words, it's likely that the enterprise's overdraft, in the absence of the swaps, wouldn't have been reduced by as much as indicated by the spreadsheet submitted by the enterprise's representative.

Mr D has said the IRHPs were portable and therefore unconnected with the terms of the loans. I agree that the IRHPs and loans were separate products, but they were sold at the same time and I believe the bank's decision-making about its offers would have taken all the circumstances into account.

Similarly, the representative's analysis has assumed that if there'd been no loan consolidation in 2010, the bank would still have reduced the margin on the property loans at the time. I don't think that's a safe assumption. Without the consolidation, the bank might have continued with the margin unchanged.

Even though I believe it's likely that the loans themselves would have been more expensive in the absence of the IRHPs, my provisional determination doesn't depend on this point. I've already said that I don't think the sales of the properties were caused by the burden of the swap payments and I've reached that conclusion without making any adjustment to the loan interest rates that the enterprise would have paid in the absence of the swaps. If I had made such an adjustment, it would have further reduced the likelihood of finding the IRHPs responsible for the losses claimed in this complaint.

Penalties and additional fees incurred as a result of the financial strain

The enterprise has already received 8% compensatory interest on the basic redress in respect of losses from being deprived of the money, and the bank has offered a further £4,953.38 plus interest, to cover bank charges, and additional interest payments totalling £5,583.16 (these are the sums offered to the enterprise as a whole – Mr D and S together). The bank has also offered to update the interest on this award to the date of settlement. In the light of the bank's write-off of £1.9m of the enterprise's debt, as discussed above, I don't think it would be fair or reasonable to require the bank to offer more compensation for penalties, fees or interest.

Debt management costs

I understand the loss claimed under this heading is for advisory and consultancy costs for dealing with the enterprise's financial difficulties. I said above that I don't find that the IRHPs caused the cash flow problems for the enterprise and there were other problems with borrowing from other lenders. So I don't think the IRHPs caused the enterprise to pay the debt management costs.

Corporate fees incurred

I understand these fees were in relation to the LPA receivers. I've already provisionally determined that the swap payments didn't cause the involvement of LPA receivers, so I also conclude that they didn't cause any associated costs.

Future losses resulting from a loss of reputation and creditworthiness

I haven't seen any details of future losses or evidence to support this part of the claim.

Professional fees for assistance in bringing the complaint

As regards the complaint to HSBC and to this service, the enterprise was of course entitled to seek professional help, but the question I must answer is whether the bank should be liable to pay the costs.

In my view, the enterprise could have pursued its complaint in the FCA review, for basic redress and consequential loss, without professional help. The review was set up with processes agreed by the regulator and it was overseen by an independent reviewer. The enterprise was entitled to refer the complaint here, free of charge, if it wasn't satisfied with the review outcome.

The ombudsman offers a free and informal service to resolve disputes. We don't usually require a bank to pay a customer's costs for professional help in bringing their complaint here.

I'm satisfied that the enterprise could have complained both to the bank and to this service without professional assistance. I therefore don't think the bank's actions caused it to pay for professional help with the complaint, so I can't fairly and reasonably hold the bank liable to reimburse the costs.

In summary

For the above reasons, I've provisionally concluded that it wouldn't be fair or reasonable to require HSBC to pay more for consequential losses than it has already offered.

My provisional decision

My provisional decision is that I'm minded to say that the bank has made a fair and reasonable offer of compensation to settle this complaint, and that HSBC UK Bank Plc should pay that compensation to S.

For S, that compensation would be £1,292 plus interest, to cover bank charges, and additional overdraft interest payments totalling £2,614.40, as set out in the bank's final consequential loss redress determination of 31 August 2017. The interest element of this redress should, as appropriate, be updated to the date of settlement.

Colin Brown
Ombudsman