

The complaint

Mr S complains about a £2,400 fee (the Fee) that he believes Julian Hodge Bank Ltd (Hodge Bank) unfairly charged him.

What happened

The background to the complaint is set out in my provisional decision dated 4 August 2023, which forms part of this decision.

I provisionally concluded that Mr S' complaint should not be upheld.

In summary I said:

It isn't disputed Mr S' initial intention was not to redeem but to reassign the Loan. And neither is it disputed the Fee was charged for the aborted reassignment. Hodge Bank's solicitors' invoice persuades me they were paid by the bank for all the legal work conducted on their behalf in connection with the redemption of the Loan. I am satisfied it included the Fee for the aborted reassignment.

What is at issue and what I have to decide is whether the Fee was properly and fairly incurred. In particular, bearing in mind Mr S' case that there were no provisions in the terms and conditions of the Loan on which the bank could rely for charging the Fee.

Were Hodge Bank entitled to charge the Fee?

Mr S' has told us that his lawyer advised him that, although the Fee was submitted as part of the redemption costs, nonetheless, it falls outside the scope of redemption payments generally. He said he was further advised that it was for each side to bear responsibility for their own legal costs associated with the aborted reassignment of the Loan.

So, I've weighed up the terms and conditions of the Loan against Mr S' arguments.

Schedule 2 of the terms and conditions of the Loan, states the following:

"2. Covenants

2.2 you shall fully indemnify us from and against all expenses, costs, losses, damages or liabilities incurred by us arising out of the occurrence of any Event of Default"

Clause 4.2 of the same Schedule provides examples of Events of Default which includes:
"i.) if on the due date any amount payable by you hereunder is not paid;"

Mr S defaulted on the repayments towards the Loan. And I note it was in the aftermath of the default he and the Guarantors asked about the possibility of a reassignment of the Loan. To that end the lawyers for both sides were engaged.

I am minded to conclude therefore that the Fee arose from an Event of Default. That is Mr S' failure to make his contractual payments. It was against that background he put to the bank the reassignment proposal which ultimately led to the generation of the Fee. Therefore, I'm presently satisfied Hodge Bank were entitled to ask Mr S to settle it and I don't therefore accept Mr S's case the bank had no proper basis for requiring him to do so.

Was Mr S treated unfairly when asked by Hodge Bank to pay the Fee?

Although, for the reasons I've already explained I'm satisfied Hodge Bank were entitled to recover the Fee from Mr S, I've nonetheless thought about whether in the circumstances of the case it was fair for them to do so.

As the investigator observed, Hodge Bank haven't shown that they told Mr S about their solicitors' charges for their work in connection with the reassignment of the Loan and that he agreed to them. And it is possible Mr S wouldn't have proposed the re-assignment of the Loan if Hodge Bank's solicitors' likely costs were known beforehand.

But I've seen no evidence and nor is it Mr S's case that at the outset, knowledge of Hodge Bank's solicitors' costs was a pre-condition to proceeding with the reassignment and, importantly, Hodge Bank knew this.

Moreover, bearing in mind the reassignment proposal came from Mr S, I find it difficult to conclude Hodge Bank were obliged to check first with Mr S whether he was happy with their solicitors' charges for the work they'd have to undertake.

In any case as noted above, Hodge Bank have said that they believe they were entitled to appoint fixed charge receivers in light of Mr S' default. However, in order to assist and support Mr S, and the Guarantors, agreed to the reassignment as a gesture of goodwill. I'm minded to conclude therefore, the bank would likely have appointed receivers at a cost estimated at £2,500 – and therefore more than the Fee - if the reassignment proposal hadn't been suggested as a way forward.

It would seem Hodge Bank's solicitors' charges were based on the scope of the legal work they thought necessary, which ultimately seemed to make the transaction prohibitive. However, it is not for me as ombudsman to determine the nature of the work both sides were required to undertake for the reassignment of the Loan. And in particular, whether the fees Hodge Bank's solicitors were willing to charge for that work were unreasonable.

Ultimately, Hodge Bank were able to negotiate a reduction in their solicitors' fees to £2,400. The bank paid the Fee and the terms and conditions of the Loan required Mr S to indemnify the bank in respect of it. In the overall circumstances of the case, I do not think at present that I am able to conclude it was unfair for the bank to recover the Fee from Mr S.

Hodge Bank did not respond to my provisional decision. Mr S on the other hand has. He's maintained his position that the Fee was neither fair or reasonable for reasons which I summarise.

Mr S said:

- He agrees with the finding that there were no provisions in the terms and conditions of the Loan on which Hodge Bank could rely for charging the Fee. And this is at the heart of the matter. Therefore, if there were no contractual provisions for such a fee to be charged, it cannot be fair and reasonable for the bank to do so.

- He did not propose reassignment of the Loan, and neither was he informed of the Fee before it was incurred.
- The reassignment of the Loan was negotiated directly between the bank and a third party.
- The property against which the loan was secured was put into receivership in any event. And those fees were charged to him. So, the reassignment was not an attempt to prevent those fees being incurred.

What I've decided – and why

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

Where the evidence is incomplete or inconclusive (as indeed some of it is here) I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

Mr S has explained that the crux of this case is that there were no provisions in the terms and conditions of the Loan by which Hodge Bank were entitled to charge the Fee. And I note he stated that he agreed with me on this point.

However, my provisional finding was not to that effect. I explained that the terms and conditions of the Loan were important considerations in determining whether the bank was entitled to charge the Fee. But to be clear, I was satisfied that those terms and conditions did allow the bank to do so.

I came to that conclusion because I was satisfied that under Schedule 2 of those terms and conditions, Mr S was obliged to indemnify Hodge Bank against, among other things, all expenses, costs, liabilities, that were incurred by the bank arising from the occurrence of any Event of Default. And, again in reliance on the terms and conditions, I was also satisfied that an Event of Default occurred in circumstances where payment of the Loan falls due on a certain date but isn't paid. Those were the circumstances in this case, bearing in mind that Mr S omitted to make contractual payments to Hodge Bank when they were due.

Separately, however, I did also think about whether Hodge Bank acted unreasonably when they charged the Fee. And relevant to that consideration were the circumstances in which the Fee was incurred.

I am satisfied that on Mr S' default, the bank was entitled to appoint a fixed charge receiver. But rather than proceed along those lines, the evidence seems to point to some flexibility in the bank's approach.

Mr S has explained that he did not propose the re-assignment of the Loan. And that in fact the re-assignment was negotiated by the bank and a third party. That may well be true. I note for example the Loan was guaranteed and the Guarantors were part of the discussions with the bank regarding the way forward.

More importantly, however, whether or not the proposal came from Mr S or elsewhere it is no part of Mr S' case that he was unaware of the proposed re-assignment as a way forward. And furthermore, that discussions were taking place towards that end. Indeed, I find it more likely than not that Mr S would not have been unaware of these events given they were taking place in the aftermath of a significant event affecting him – which was his default.

As to the Fee, I have no reason to doubt Mr S' testimony that he was not informed about it beforehand. But the crucial point in this regard is that the Fee seemed only to have become an issue when it turned out to be relatively substantial. I note that there followed a series of discussions with the bank about the scope of the legal work involved in the reassignment. And it would appear that the bank's apparent unwillingness to consider alternative legal representatives to mitigate the extent of the costs led to deadlock.

But as I explained in my provisional decision, it is not for me as ombudsman to determine the nature of the legal work that was required for the reassignment of the Loan. And neither is it for me to determine whether the charge proposed by Hodge Bank's solicitors for that work was reasonable. I see no reason to depart from that opinion.

Finally, I note Mr S' evidence that the property ended up in receivership in any event and therefore the re-assignment was never an attempt to avoid the Fee.

From the evidence I've seen, however, it would appear that the fixed charge receiver was appointed after the aborted re-assignment. And, moreover, it also appears that decision was taken in light of the stalemate between Mr S and the bank regarding who should ultimately bear responsibility for the Fee. Against that background it is difficult to conclude the bank's action in this regard was unfair.

Having considered Mr S' case and although anticipating this will unfortunately further disappoint him, I have not been persuaded to reach a different conclusion than that which I set out in my provisional decision.

My final decision

My final decision is I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 20 October 2023.

Asher Gordon
Ombudsman