DRN-4964668

The complaint

This complaint is about two loans Mrs and Mr S hold, secured by a mortgage with Handelsbanken plc. The essence of the complaint is that Mrs and Mr S believe Handelsbanken mis-sold the loan to them by misrepresenting the interest rates that would apply and then setting those rates arbitrarily without reference to the relevant market swaps rates that applied at the relevant times.

Mrs and Mr S are represented here by Mr HS.

What happened

In what follows, I have set out events in rather less detail than they have been presented. No discourtesy's intended by that. It's a reflection of the informal service we provide, and if I don't mention something, it won't be because I've ignored it. It'll be because I didn't think it was material to the outcome of the complaint. This approach is consistent with what our enabling legislation requires of me.

It allows me to focus on the issues on which I consider a fair outcome will turn, and not be side-tracked by matters which, although presented as material, are, in my opinion peripheral or, in some instances, have little or no impact on the broader outcome.

Our decisions are published and it's important that I don't include any information that might result in Mrs and Mr S being identified. Instead I'll give a summary in my own words (and rounding the figures where appropriate) and then focus on giving the reasons for my decision.

Mrs and Mr S took out the loans that are the subject of the complaint in October 2016 and July 2017 respectively. The October 2016 loan was for £1.45m, and refinanced two existing variable rate loans. The July 2017 loan was for £1.6M and refinanced another existing variable rate loan. Both of the new loans were taken on fixed rates; the rate for the October 2016 loan was 2.92%, that for the July 2017 loan 2.78%. The October 2016 loan is due for repayment in August 2025, the July 2017 loan is due for repayment in August 2027.

In 2021, Mrs and Mr S raised a complaint about the breakage costs or early repayment charges (ERCs) that came with the fixed rate loans, saying if they'd known about the ERCs, they wouldn't have taken the October 2016 and July 2017 loans on fixed rates. Handelsbanken issued a final response rejecting the complaint; in that response, Handelsbanken also said the loans were unregulated, and no advice had been given about their suitability for Mrs and Mr S' needs and circumstances. That complaint isn't part of what I'm addressing here; I mention it merely for context. That said, I will come back to the point about whether the loans are regulated, as that question has featured heavily during the course of our investigation.

The current complaint began in 2024 and is comprised of five broad heads: which I summarise below:

- Handelsbanken acted unfairly when providing the fixed rates, as it didn't present

Mrs and Mr S with the true facts or enough information to make an informed decision;
- Handelsbanken selected the rates on an arbitrary basis whereas Mrs and Mr S understood the rates would be based on market swap rates;
- Handelsbanken misrepresented the fixed rates as being the cheaper alternative when in reality it was concealing a substantial margin and fees;
- If Handelsbanken had disclosed the swap rate it had used, Mrs and Mr S would have looked elsewhere and compared options; and
- The loan agreements are confusing and ambiguous, and Mrs and Mr S could not have been expected to understand them.

Handelsbanken rejected the complaint, and when it was referred here, our investigator didn't recommend it be upheld either. Mr HS has asked for the case to be reviewed by an ombudsman.

What I've decided – and why

I'll start with some general observations. We're not the regulator of financial businesses, and we don't "police" their internal processes or how they operate generally. That's the job of the Financial Conduct Authority (FCA). We deal with individual disputes between businesses and their customers. In doing that, we don't replicate the work of the courts.

We're impartial, and we don't take either side's instructions on how we investigate a complaint. We conduct our investigations and reach our conclusions without interference from anyone else. But in doing so, we have to work within the rules of the ombudsman service.

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 and/or contradictory, I'm required to reach my decision on the basis of what I consider is most likely to have happened, on the balance of probabilities. That's broadly the same test used by the courts in civil cases.

It's for us, rather than the parties to the dispute, to decide what evidence we need to reach a fair outcome. It's also for us to assess the reliability of evidence, from both sides, and decide how much weight should be attached to it. When doing that, we don't just consider individual pieces of evidence in isolation. We consider everything together to form a broader opinion on the whole picture.

Mr HS has challenged why no recordings are available of the phone calls between the bank and Mr S. There's no obligation, either in law or regulation, for lenders to retain call recordings. It's good practice to do so, but even then, they're not retained indefinitely. We're dealing here with events that happened between seven and eight years ago. It's not unusual for recordings to be disposed of long before reaching that age, so whilst I know this will disappoint Mr HS, I draw no adverse inferences from the absence of call recordings in this case.

In reaching my decision, I will have regard for the law and good industry practice where relevant, but my overarching responsibility is to decide what is fair and reasonable in the circumstances. That can sometime mean reaching a different outcome from what might prevail in court.

Under our rules, we can consider a complaint from a consumer. Here, Mrs and Mr S are "eligible complainants" as set out in our rules. Our rules say that a complaint may be brought on behalf of an eligible complainant by a person authorised by the eligible complainant or

authorised by law. In this respect, Mr HS is bringing the complaint on behalf of Mrs and Mr S.

I must explain that, although Mr HS the Mrs and Mr S, it is they who are Handelsbanken's customers. It's Mr HS's role is to bring the complaint on behalf of Mrs and Mr S, in the same way that other consumers might instruct a solicitor or accountant to represent them in a complaint.

But this does not entitle Mr HS to consider it his complaint or to air his own grievances about Handelsbanken, because he is not its customer. This is Mrs and Mr S' complaint, and Mr HS' role is limited to putting it forward on their behalf.

Under our rules, the subject matter of a complaint needs to have been referred to the business first, and the business given the opportunity to deal with it in a final response, before we can look into it. Once that happens, we can only look into the subject matter covered in the final response. We can't investigate complaints 'on the fly' so to speak, with consumers adding new points along the way whilst our consideration is ongoing. Otherwise, there's a risk that a complaint becomes a moving target that can never be concluded.

That's happened here; Mr HS has identified further areas of complaint from the evidence generated by our investigation into this one. Our investigator explained to Mr HS that the new issues would have to be raised with Handelsbanken. He's done that, and as I understand it, has received a fresh final response. However, that doesn't form part of what I'm reviewing here. In order that there should be no ambiguity, my decision here deals solely with the subject matter covered in the final response dated 28 February 2024. If I mention any other matters, it will be for context only.

I'll make one more general point before I go to the main thrust of the complaint. Mr HS has indicated that he believes Handelsbanken has tried to conceal what he sees as its wrongdoing. All other things aside, I don't think that's a fair criticism. There are time limits on our rules that, one of which specifies that we can only look into complaints about events that happened fewer than six years before the complaint started.

Insofar as this complaint is about events that happened more than six years before the complaint began, there was a reasonably strong possibility that, subject to other time limits being assessed as well, we might have been prevented from looking into the complaint at all. As our case-handling process requires of us, the first thing we did was contact Handelsbanken to check if it intended to invoke the time limits or, alternatively, consent to us looking into the complaint.

Handelsbanken didn't seek to invoke the rules and time-bar the complaint; it consented to us investigating it. It didn't have to do that; it gave us consent when it could perfectly legitimately have refused it. That doesn't strike me as the action of a business that is trying to cover anything up.

Having no regulatory power means it's not open to me to direct Handelsbanken on how it sets its interest rates. So the pricing of the fixed rates isn't part of my remit. What is in my remit is how the terms of the October 2016 and July 2017 agreements, including the rates and how they would be set, were communicated to Mrs and Mr S.

Before I address the five heads of complaints directly, I'll begin with the point about whether the loans are regulated mortgages or not. A great deal of time and effort has been expended on this, chiefly as a result of one of the qualifying criteria for a mortgage loan to be regulated being that a minimum of 40% of the security must be used for residential purposes.

Having considered everything that has been said and provided, the issue of whether the October 2016 and July 2017 loans are regulated or not isn't actually something I can make a definitive finding on, because it wasn't part of the complaint as originally made. That the loans are unregulated was mentioned in passing in the final response of 28 February 2024, just as it had been in the final response to the 2021 complaint about breakage costs that wasn't referred to us. But that was for context, it wasn't in the summary of the heads of complaint at the start of the final response, and it wasn't made as a finding to rebut a complaint that loans were unregulated by mistake. Nor was the loans' status mentioned in the complaint form presented to us; it's something that Mr HS has brought up during the course of the investigation.

Handelsbanken issued the loans on an unregulated basis in 2016 and 2017 respectively. If Mrs and Mr S wish to complain expressly that the loans *should* have been issued on a regulated basis, and that they have suffered detriment because that didn't happen, they have the option to raise a complaint with Handelsbanken. If not satisfied with the response they receive, they can refer it to this service for separate consideration in due course. But for the purposes of addressing the current complaint, I must treat the loans as unregulated.

What is of greater material relevance to the outcome of the current complaint, is whether the October 2016 and July 2017 loans were made on an advised or non-advised basis. The former is where a lender makes a specific recommendation that the proposed mortgage is suitable for the applicants needs and circumstances. The former is where no such recommendation is made and it is incumbent on the applicants to satisfy themselves that the proposed deal is right for them.

The investigator didn't think Handelsbanken had advised Mrs and Mr S; indeed she observed that Mr HS was more concerned about how they had been informed than whether they had been advised.

There's no correlation between regulated/unregulated and advised/non-advised; they're two entirely separate and discrete variables. Both regulated and unregulated mortgages can be advised or non-advised, and here I agree with the investigator that these were non-advised sales.

If a mortgage is offered on an advised basis, it's normal for the offer document (or facility letter – the terms are interchangeable) to specify that the lender has recommended the mortgage to the applicant. Neither facility letter (from October 2016 or July 2017) contains such a narrative. Mr HS has alleged that Handelsbanken duped Mrs and Mr S into the change by claiming fixed rates would be cheaper than variable. However, I've seen an internal memorandum dated 19 October 2016 provided by Handelsbanken which indicates the idea of changing from variable to fixed rate came from the borrowers to begin with, and that the motivation for the change was primarily about mitigating the risk of fluctuation in the monthly payments.

Mr HS has pointed to questions Mr S asked about swap rates, which apparently weren't answered, and that is something I'll return to in due course. But the seeking of information to help make a decision isn't the same as the seeking of advice. Overall, having considered everything that both parties have said and provided, like the investigator, I'm not persuaded that the October 2016 and July 2017 mortgages were advised sales where Handelsbanken recommended the fixed rates as being suitable for Mrs and Mr S's needs and circumstances. Whilst I can't be certain, it seems more likely that they made that assessment themselves.

I now turn to the five heads of complaint.

Handelsbanken acted unfairly when providing the fixed rates, as it didn't present Mrs and Mr S with the true facts or enough information to make an informed decision

In each case - October 2016 and July 2017 - the offer document specified that there were two options to select from. The loan could either be on a variable rate or a fixed rate. If a variable rate was chosen, it would be linked to the now defunct London Inter-Bank Offer Rate (LIBOR).

Bearing in mind the entire purpose of the transaction was to refinance two variable rate loans into a single fixed rate loan – the initiative for which came from the borrowers to begin with – it's reasonable to conclude that Mrs and Mr S would have understood that the information relating to the LIBOR option was for completeness only and could be disregarded.

When I focus on the fixed rate option, as I consider it reasonable that Mrs and Mr S would have done, the loan agreements set out at section 5.2 that the rate chargeable was made up of two components aggregated together; the margin and the rate at which the bank was willing to fix the interest. One of those components, the margin, was specified earlier in the facility letter, and was recorded (1.00% for the October 2016 loan and 0.82% for the July 2017 loan).

The second component wasn't separately detailed on the facility letters, but in both cases, Handelsbanken confirmed the aggregate rate actually chargeable in a covering letter marked "Confirmation of Drawdown. In the case of the October 2016 loan, that was 2.92% (making the fixed rate component 1.92%) and for the July 2017 loan that was 2.78% (again the fixed rate component being 1.92%

Handelsbanken has told us that before drawdown took place, it informed the borrowers by phone conversation what the aggregate rate would be and obtained their agreement before proceeding. As already explained, there aren't any call recordings, so I can't know, and won't speculate on what was said in them, but the letters themselves set out the aggregate rates at which interest was chargeable. If those rates didn't correspond with what had been relayed in the phone calls, it's quite reasonable to expect that Mrs and Mr S would have challenged the information as soon as they received the letters.

Taking all of that into account, I'm satisfied that with regard to both loans, Mrs and Mr S were given enough information about the interest rates chargeable, and how these were made up, when they made the decision to draw the loans down.

Handelsbanken selected the rates on an arbitrary basis whereas Mrs and Mr S understood the rates would be based on market swap rates

I've already explained that it's not in my remit to decide the fairness or otherwise of the interest rates at which Handelsbanken was willing to lend to Mrs and Mr S, or the methodology it used to set the rates. As to Mrs and Mr S' understanding that the rates would be based on market swap rates, again the point of sale documentation is a valuable reference point.

I've already explained why the information the facility letters contained about swap rates pertaining to the LIBOR option was solely for completeness and should reasonably have been disregarded. As far as the fixed option is concerned, neither the facility letter nor the confirmation of drawdown letter contains any information from which it could reasonably be inferred that market swap rates also pertained to the setting of the fixed rate.

I've next considered how likely it is that Handelsbanken made oral representations that could reasonably have caused Mrs and Mr S to believe the fixed rates were set by the same method as the LIBOR option. In that context, whilst I accept that Mr HS' testimony to that effect is evidence, the weight I can attach to it when deciding what is most likely to have happened is inevitably limited unless there's other contemporaneous evidence to corroborate it.

Mr HS says that the fact Mr S asked what swap rates would be used is a clear indication that Handelsbanken told him the rate would be "fixed out at the swap rate". I don't think the argument is quite that binary. That Mr S asked about swap rates is no more than an indication he believed swap were relevant. It tells me nothing about how he formed that belief.

To find in the consumers' favour, I have to be persuaded that Mr HS' version of how Mr S came to that belief (i.e. that Handelsbanken told them) is more likely to have happened than any other alternative medium; for example, that he mistakenly inferred it from the information in the facility letter that pertained to the LIBOR option or from some other source altogether.

Based on all that is before me, the most I could conclude is that Mr HS' account is no more than equally as likely as any of the alternatives. That's not enough for me to conclude on the balance of probabilities that Handelsbanken misled Mrs and Mr S about how it set the fixed rates. Lastly on this point, that Handelsbanken didn't answer the question doesn't help Mrs and Mr S' case. Firstly, if Handelsbanken didn't answer the question, it can't have answered it wrongly. Secondly, that Mrs and Mr S proceeded with the fixed rate agreements without an answer tells me that getting an answer to the question wasn't as important to them than as it is being presented as being now.

Handelsbanken misrepresented the fixed rates as being the cheaper alternative when in reality it was concealing a substantial margin and fees

I have the same difficulty with this element of the complaint that I had with the preceding one; that is, the absence of corroborating evidence to convince me that Mr HS' account of events is more likely than the alternative. I return to my earlier finding that the available evidence points to these being non-advised sales, and that contemporary documentary evidence attracts greater weight that individual recollections so long after the event.

As I've already referred to earlier, the contemporaneous evidence points to the initiative to switch from variable to fixed rates having come from Mrs and Mr S originally, and Handelsbanken noted at the time that cost-stability, rather than cost-saving, was their greater concern.

As far as concealment is concerned, the written documents set out the rates Handelsbanken proposed to charge on the fixed rate option, and that the rates were comprised of two components, one of which was the margin. The letters also disclosed the fees to be charged, including the provision for breakage costs. Mrs and Mr S accepted them without advice or a recommendation from Handelsbanken.

If Handelsbanken had disclosed the swap rate it had used, Mrs and Mr S would have looked elsewhere and compared options

I've already found that by proceeding with the fixed rate deals without having received an answer to a question about swap rates points, Mrs and Mr S attached less importance to the question than is being suggested now. The fact is that Mrs and Mr S were always free

to explore the market and see what deals were on offer from other lenders. They were also free to approach an independent financial advisor to help them do that.

The loan agreements are confusing and ambiguous, and Mrs and Mr S could not have been expected to understand them.

Mr HS has told us that whilst an experienced professional, Mr S' expertise is not in financial matters. I can't know how much of the information in the facility letters Mrs and Mr S read and understood. But I think Mr HS is giving Mr S less credit than he deserves when it comes to his understanding of financial matters. The fact that Mr S asked a question about market swap rates suggests a degree of knowledge above that of the typical lay person.

That said, I'm not sure being an expert in financial matters was needed in order to understand what the aggregate interest rates being charged on the two loans would be. It's a matter of basic arithmetic. In any event, whatever his area of expertise might be, it doesn't seem very likely to me that someone of Mr S' professional standing and experience would allow himself and his wife to enter into lending commitments totalling around £3m without knowing what they were doing.

I said at the outset that I wouldn't be commenting on every single point, and I haven't. I have, as I said I would, confined myself to those matters that I consider have a material effect on the outcome.

My remit requires me to be objective, impartial, and to decide what is fair, reasonable and pragmatic in all the circumstances of the case. It also means that I'm not required to provide answers to every specific question that comes up if I don't consider doing so will affect the overall outcome.

If Mrs and Mr S ultimately reject my final decision, then subject to any time limits or other restrictions a court might impose, their recourse to a legal remedy of their own against Handelsbanken over the subject matter of this complaint won't have been prejudiced by our consideration of it. But of course they will need to weigh up the likelihood of a successful outcome and the potential cost implications of engaging in litigation.

My final decision

My final decision is that I don't uphold any part of this complaint.

My final decision concludes this service's consideration of this complaint, which means I'll not be engaging in any further discussion of the merits of it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs and Mr S to accept or reject my decision before 16 December 2024.
Jeff Parrington
Ombudsman