



Independent Review Finds Widespread Inappropriate Treatment of SME Customers by RBS

Following the serious findings against RBS in the Tomlinson Report (*Banks' Lending Practices: Treatment of Businesses in Distress*) and publication of the lending review (*RBS Independent Lending Review 23 November 2013*) by Sir Andrew Large, the FCA commissioned an independent review through the 'skilled person' regime to look at the treatment of a sample of 207 individual SME customers in GRG.

In November 2016 the FCA had stated that the most serious allegations in the Tomlinson Report had not been made out, but it steadfastly refused to publish the independent review. After much pressure for publication the FCA has finally relented and released what it describes as an 'Interim Summary Report'. Notably absent from this report are the findings made by the independent reviewer in relation to what RBS's management knew or ought to have known about GRG's activities and failings. The FCA justifies this exclusion from publication on the twin bases that it is not its normal practice to publish skilled person's reports and that it does not believe that publishing the findings (which would have required "heavy redaction") would be in the public interest. By contrast and notably, the independent reviewer's preference was to see publication of its full report, with redactions where necessary.

What RBS's management knew, instructed or condoned in relation to GRG's activities is, however, critical to an assessment of its animus. Assume that the independent reviewer found that RBS's management had such relevant knowledge. Then the anodyne conclusion in the Interim Summary Report, that RBS's failing was effectively limited to properly balancing its twin 'commercial' and 'turnaround' objectives, could not stand. Instead the focus would be where it should be: on the deliberate and single minded intent and targeted preference by RBS of its 'commercial objective' that GRG's activities should add to its bottom line, without regard to the interests of its customers and mostly to their detriment. This is overwhelmingly consistent with the experience of many SME customers in the GRG process. As lawyers representing clients in their GRG claims, we have become all too familiar with the recurring narratives of GRG's focus on income generation and asset acquisition and the absence of any genuine effort to assist a distressed SME.

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Meanwhile RBS has established a complaints scheme giving eligible customers the opportunity to make a GRG complaint and claim direct and indirect or consequential losses. The scheme has an appeal and supervisory function that is overseen by Sir William Blackburne (a retired High Court judge). Notably, however, the question of whether consequential losses are to be paid to a complainant within the scheme is entirely in RBS's choosing and, as consequential losses claims are excluded from the appeal function, RBS's decision is final. This has the hallmark of RBS's conduct in the FCA review into mis-sold IRHPs where its standard response to consequential losses claims was a refusal to engage with lost opportunity claims.

SME customers subjected to the GRG process need to be compensated for rather more than their direct losses (overpaid fees or charges). Many have lost businesses and livelihoods, assets and opportunities and have suffered substantial consequential losses. It is particularly pertinent that, typically, the GRG claim flows from the mis-selling of an IRHP because without the mis-sold IRHP the customer would not have been transferred into GRG in the first place. The FCA set the methodology of the independent review to look at the conduct of GRG process in the sample cases in isolation, that is without taking into account any prior mis-sale of an IRHP and RBS's responsibility for that sale.

By contrast the connection between the mis-sold IRHP and the mistreatment of the customer in GRG will be a central feature in many legal GRG claim for consequential losses.

Despite the foregoing criticism of the format of the Interim Summary Report, the independent reviewer has made several findings in relation to the GRG process that should give RBS real cause for concern and SME clients intending to pursue recovery of their consequential losses reasons to be cheerful. The following findings are particularly damaging to RBS and warrant a special mention:

- There was a need for the careful balance of focus in the management of the day-to-day operation of GRG to secure both the commercial objectives and fair customer outcomes. In practice, however, the commercial objective was the strategic focus of management.
- Many of the SME customers transferred into GRG were not financially sophisticated and their financial distress *may have* added to their vulnerability.



- There was a tone and emphasis in the appraisals of senior managers which placed RBS's financial objectives first.
- The dominant message passed to staff by management concerned GRG's own commercial objectives, such as levying fees to achieve incremental income targets at the expense of objectives that might have mitigated adverse impacts for customers.
- The criteria for transfer of a customer into GRG were widely drawn and gave significant discretion to RBS staff.
- RBS failed to recognise the potential conflict of interest arising from GRG's twin objectives ('commercial' and 'turnaround') and its impact on the decision to transfer individual SME customers.
- GRG placed little emphasis on turnaround of SME customers, and there was inadequate focus on returning them to financial health and mainstream banking.
- GRG relationship managers were reluctant to engage with (viable) counterproposals put to them by customers. RBS should have, but did not, factor the impact of IRHPs into any turnaround plan.
- The inappropriate treatment of customers resulting from GRG's failure to place appropriate weight on turnaround options was widespread and systematic. The word "systematic" in the independent review refers to an intentional and coordinated strategy and included situations where RBS failed to take action to address the inevitable and foreseeable consequence of a decision. The independent reviewer found that GRG systematically:
 - Prioritised its commercial objectives at the expense of its turnaround objectives; and
 - Failed to adequately manage its relationship with West Register leading to an environment where case strategy was influenced by the interests of West Register (more on this below).



- GRG's decision making relating to existing facilities was inappropriate because GRG pursued its objective of reducing existing facility levels with insufficient regard for the impact on its customers.
- There was an undue and inappropriate focus on the generation of income from SME customers in the form of pricing increases.
- Some of the pricing observed was inappropriate when assessed against risk/return principles or was otherwise excessive, questionable or opportunistic.
- RBS used its pricing discretion as leverage to achieve its objectives.
- In a number of cases, while exposure was being reduced (by debt reduction or increased security cover), RBS was nevertheless still increasing the pricing.
- The undue focus on pricing increases without due consideration to the longer term viability of customers resulted in the widespread inappropriate treatment of customers and was systematic.
- There were frequent failures in respect of valuations, and RBS should have taken better steps to ensure the appropriateness of external and internal valuations which were used to drive decisions about strategy, pricing and the calculation of upside instruments.
- The use of internal and external valuations based on insufficient and/or inadequate work was an inappropriate treatment of customers and this occurred on a widespread basis.
- RBS's relations with its customers were often insensitive, dismissive and sometimes unduly aggressive. GRG policy and procedure concerning the relationship between relationship managers and customers were inadequate.
- RBS's complaint handling procedure and its approach to complaints was inadequate and inappropriate. RBS's approach to complaints was dismissive and resulted in its pursuit of a 'zero justifiable complaints' objective.



- GRG should have been aware (and was not) of potential conflicts presented by the use of individuals from third party firms seconded to RBS for valuations or independent business reviews. Monitoring was insufficient and conflicts that did arise were not managed appropriately.
- The overall relationship between GRG and West Register was inappropriate and too close and gave rise to a series of conflicts of interest. Inappropriate information sharing took place at a time when West Register was able to and did influence GRG's strategy toward the customer. Case strategy was influenced by West Register, and insufficient regard was paid to turn around options for the customer. Governance of the relationship was inadequate and inappropriate and concentrated in the same hands that were concerned with the future profitability of GRG and RBS. These failings were widespread and systematic.
- Inappropriate customer treatment in the use of EPAs (equity participation agreements) was widespread and systematic. The pricing associated with these arrangements was opportunistic and, in some cases, excessive. GRG and SIG failed to exercise adequate safeguards to ensure that the terms of EPAs were appropriate. GRG placed considerable emphasis on obtaining upsides and, in freely sharing information with SIG, there was a risk that SME case strategy would be influenced by the interests of SIG and the expectations of future 'upside'.

It goes without saying that each GRG claim must be fashioned in accordance with its own facts. But the objective confirmation in the independent review of detailed instances of inappropriate treatment of SME customers, which was also widespread and systematic, will support claims that RBS/GRG breached implied duties of good faith in performing the terms of the underlying facilities and that RBS exercised its discretion to transfer SME customers into GRG and how they were treated within the process for improper purposes. In appropriate cases a claim for relief from an unlawful means conspiracy and an action in deceit may be possible. Equitable remedies based on the power and knowledge imbalance between RBS and the SME customer playing out in a position engineered by RBS, and RBS's exploitation of its position of ascendancy are also likely to feature in most GRG cases.

The team of expert barristers at Forum Chambers frequently assist SME customers in their claims against banks. RBS is not the only bank to have mistreated its distressed SME



customers, and we have been made aware of similar allegations against other banks' restructuring divisions, especially Lloyds, HBOS, and Clydesdale, but also Barclays and Santander.

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