

Principles governing RBS's assessment of Consequential Loss claims arising from the complaints process for SME customers in GRG

1. Scope and background

- 1.1 The Royal Bank of Scotland plc ('**RBS**') established a complaints process to assess Eligible Complaints (as defined at 2.7) brought by small or medium sized enterprises under the control of RBS's Global Restructuring Group between 1 January 2008 and 31 December 2013 (referred to as '**Customers**' in this document).
- 1.2 The Independent Third Party ('**ITP**') performs an 'assurance and appeal' role in respect of the RBS Complaints Process.
- 1.3 RBS has assessed Eligible Complaints, applying the 'Principles governing RBS's new complaints process for SME customers in GRG' [website link]. Where an Eligible Complaint is upheld and the outcome accepted the Customer may raise a claim for Consequential Loss. This paper outlines the principles that RBS will adopt when assessing any such claims.
- 1.4 Claims for Consequential Loss can be brought in relation to **any** Eligible Complaint upheld by the RBS Complaints Process (including any Eligible Complaint upheld on appeal) where the outcome has been accepted by the Customer.
- 1.5 The ITP Consequential Loss appeals process (referenced at paragraph 6.2) will only be available to claims in relation to Eligible Complaints.
- 1.6 Where an Eligible Complaint has been partially upheld by the RBS Complaints Process (including any Eligible Complaint partially upheld on appeal), claims for Consequential Loss can only be brought in relation to the elements of the Eligible Complaint that have been upheld. For example, if an Eligible Complaint relates to three sets of fees, and is partially upheld by RBS or on appeal in so far as it relates to two out of the three sets of fees, a Consequential Loss claim can be brought in relation to those two sets of fees only.
- 1.7 As the RBS Complaints Process applies a fairness test, in line with the Principles, an upheld Eligible Complaint does not equate to a breach of any legal obligations. The Customer will not be required to demonstrate a breach of legal duty by RBS as part of a claim for Consequential Loss under this process.
- 1.8 RBS will consider claims for Consequential Loss incurred by Customers. Therefore, individuals connected to a Customer in receipt of an Eligible Complaint outcome (for instance, directors and/or shareholders of a company or members of an LLP) are unable to advance personal claims for Consequential Loss arising out of a Customer's upheld Eligible Complaint. Personal losses suffered by shareholders, directors and other third parties related to a Customer will not be recoverable as Consequential Loss.

2. Definitions

- 2.1 Consequential Loss** means financial loss that is not Direct Loss.
- 2.2** For the purposes of the RBS Complaints Process and the ITP Appeals Process **Direct Loss** means:
- 2.2.1 sums of money paid by a Customer to RBS; or
 - 2.2.2 a Customer's out of pocket costs of meeting RBS's requirements.
- 2.3** Examples of Direct Loss include:
- 2.3.1 Arrangement fees;
 - 2.3.2 Renewal fees;
 - 2.3.3 Excess fees;
 - 2.3.4 Increased interest payments made to RBS by a Customer;
 - 2.3.5 Costs and expenditure incurred by a Customer in connection with an independent business review, a valuation report, a security review, or other actions required by RBS, or
 - 2.3.6 Costs and expenditure incurred by a Customer for the appointment of a third party to the Customer at the request of RBS.
- 2.4** There may be instances where Direct Losses (which were not considered by RBS during the RBS Complaints Process or ITP Appeals Process) were incurred by a Customer but RBS had no visibility of them. If so, the Customer may make a claim for these Direct Losses as part of their Consequential Loss claim.
- 2.5** RBS adds 8% Simple Interest to any Direct Loss amount offered as part of an Eligible Complaint outcome. This interest payment is designed to address any Consequential Loss that may have been incurred, or opportunity that may have been lost, as a result of the unfair actions of RBS. In some cases Customers may feel that this adequately compensates them for their Consequential Loss.
- 2.6 Customer** means any small or medium sized enterprises under the control of RBS's Global Restructuring Group between 1 January 2008 and 31 December 2013 treated as in scope of the RBS Complaints Process i.e. including former customers of RBS and dissolved entities. In certain circumstances, a guarantor may also be treated as in scope of the RBS Complaints Process but only in respect of a complaint relating to the guarantee itself.
- 2.7 Eligible Complaint** means a complaint that was determined to be eligible for the RBS Complaints Process and is identified as such in the complaint outcome letter.

3. Key Principles

3.1 Burden of proof

3.1.1 In accordance with established legal principles, the burden of proof is on the Customer to prove the Consequential Loss and to:

- a) make out their claim; and
- b) provide evidence in support of their claim.

3.1.2 The Customer must provide sufficient evidence to demonstrate that it is more likely than not (i.e. on the balance of probabilities) that the Consequential Loss was caused by the unfair actions of RBS detailed in the Eligible Complaint outcome. This means evidencing both the fact that a loss was incurred and the amount of that loss.

3.2 Evidence

3.2.1 Only claims which are supported by evidence will be considered. Customers are referred to the website guidance provided by RBS to understand how best to evidence any potential claims for Consequential Loss.

3.2.2 Greater weight will be attached to;

- a) contemporaneous evidence; and
- b) factual evidence that is undisputed and/or verifiable.

3.3 Established legal principles

3.3.1 In considering a claim for Consequential Loss, RBS will apply the legal principles applicable to the assessment of damages for breach of a legal duty when determining whether, on a balance of probabilities (as explained in paragraph 3.1.2 above), the loss claimed is attributable to all or any of the unfair actions of RBS detailed in the Eligible Complaint outcome. The object of the assessment will be, so far as the award of a sum of money can do so, to put the Customer into the position that the Customer would have been in but for the unfair actions in question. In making that assessment RBS will consider:

- a) whether the loss was caused (whether directly or indirectly) by the unfair action;
- b) whether the loss (although not the extent of that loss) was reasonably foreseeable at the time of the action in question (i.e. the loss must not be too remote in law); and
- c) assuming that causation is established (but subject to the application of the remoteness test), the extent to which the loss was or could reasonably have been mitigated by the Customer, or conversely was aggravated by reasonable attempts by the Customer to avoid or reduce the loss.

3.3.2 In considering causation RBS will take full account of the findings set out in the Eligible Complaint outcome, including a finding that the unfair action was causative of some subsequent event, for example the forced sale of an asset, or that it resulted in the Customer suffering a Direct Loss for which the Customer has already received a payment.

3.3.3 The application of the above principles will be fact-specific and will depend on the circumstances of the Customer bringing the Consequential Loss claim.

3.4 Presentation of the Consequential Loss outcome

3.4.1 RBS will present its Consequential Loss outcome to the Customer in a clear, succinct manner, setting out information sufficient to allow the Customer to understand the basis for the conclusion reached by RBS in respect of each type of loss comprising the Consequential Loss claim.

3.5 Challenges

3.5.1 Upon receipt of their Consequential Loss outcome Customers may correct factual inaccuracies or provide material additional information, which was not recognised as material or not available at the time the claim was submitted, and will be provided with one opportunity in which to do so.

3.5.2 Customers wishing to challenge the outcome may only do so through the appeal process outlined in section 6.

4. The high level process

4.1 Customer representation and professional loss assessors

4.1.1 As per the RBS Complaints Process, Customers may be represented, for example, by solicitors and/or registered claims management companies.

4.1.2 RBS will meet the reasonable cost of an initial meeting with a professional loss assessor (for example, a solicitor or accountant) to assist the Customer in establishing whether they may have suffered a Consequential Loss.

4.1.3 The RBS Consequential Loss team will be available to respond to questions from the Customer (or their adviser).

4.2 Submission of a Consequential Loss claim

4.2.1 It is for the Customer to raise their Consequential Loss claim, which includes sending all relevant information and evidence to RBS at the commencement of their claim. What is capable of being claimed as a Consequential Loss, along with the level of evidence required to meet the applicable legal tests, will depend on the facts of each case. The Customer should explain in as much detail as possible:

- a) the particular loss being claimed;
- b) the specific amount of loss being claimed; and
- c) how this loss was caused by the unfair actions of RBS detailed in the Eligible Complaint outcome.

4.2.2 As per paragraph 1.3, a Customer must accept their Eligible Complaint outcome and any offer of Direct Loss before submitting a Consequential Loss claim.

4.2.3 RBS will set deadlines for the submission of Consequential Loss claims. All Customers will be given three months from the date of acceptance of their final Complaint outcome (following appeal where appropriate) to submit their Consequential Loss

claim. Customers who at the date of this document have already accepted their Complaint outcome will be sent a letter by RBS to notify them that they have three months from the date of that letter to submit their Consequential Loss claim.

4.3 Assessment of a Consequential Loss claim

- 4.3.1 A dedicated team will be formed to manage Consequential Loss claims from Customers (the '**Consequential Loss Team**').
- 4.3.2 The Consequential Loss claims will be assessed against the established legal principles set out at paragraph 3.3.
- 4.3.3 Once in receipt of a Customer's Consequential Loss claim, if RBS considers that information may be available to the Customer which would help their claim, then RBS will proactively contact the Customer and request this information.
- 4.3.4 For complex cases, where RBS considers it appropriate to suggest a meeting, and the Customer agrees, RBS will hold a meeting with that Customer (and/or their adviser) to discuss their Consequential Loss claim. If not agreed, then RBS will proceed with their assessment.
- 4.3.5 Separately, expert opinions may be required by RBS in the course of the assessment of a claim (for example, where current property valuations are of relevance, or forensic accountancy input is required). Wherever possible, both the requirement and the firm will be agreed with the Customer.
- 4.3.6 The cost associated with any such opinions will be met by RBS.

4.4 Sharing the Consequential Loss outcome

- 4.4.1 Once RBS has completed the assessment of a Customer's Consequential Loss claim, it will advise the Customer of the outcome in a letter. The letter will set out, for each type of claim made, whether the claim:
 - a) has been upheld; and
 - b) if so, the amount of any payment offered (and whether the Customer's claim has been offered in full by RBS).
- 4.4.2 If the Customer chooses to accept the Consequential Loss outcome, the Customer will be required to enter into a full and final settlement of any claims they may have against RBS in relation to the Eligible Complaint or similar issues.

4.5 Appealing the Consequential Loss outcome

- 4.5.1 In line with paragraphs 1.5 and 6.2, Customers will have the option to appeal to the ITP RBS's decision in relation to a Consequential Loss claim arising from an Eligible Complaint.
- 4.5.2 An appeal form will be provided with the outcome letter which must be completed and sent to the ITP providing the information set out in 6.2.4 below.

5. Types of loss

5.1 There is no exhaustive list of the types of loss that can be claimed as Consequential Loss (assuming they meet the applicable legal tests and noting that additional losses claimed must be clearly linked back to the unfair actions of RBS detailed in the Complaint outcome); however, certain examples are detailed below:

5.2 Stress / physical inconvenience and loss of amenity

5.2.1 Consequential Loss claims relating to stress and/or physical inconvenience and loss of amenity suffered as a result of the unfair actions of RBS may in principle be recoverable by partners in a partnership or sole traders but not by limited companies, limited liability partnerships or other corporate bodies or by individuals (save for a guarantor) connected to a limited company, LLP, or corporate body. However, to be successful, Customers will need to provide sufficient evidence to meet the legal tests detailed at 3.3, as well as demonstrate how the stress resulted in a quantifiable financial loss (for example, through evidence of medical expenses).

5.3 Loss of profits / loss of opportunity

5.3.1 A claim for loss of profits may relate to the loss of a new business opportunity, loss of revenue from an existing business or property, or the restriction of ability to trade.

5.3.2 For these claims, it will be necessary to submit evidence to demonstrate a specific opportunity or course of action that the Customer was aware of at the time and had intended to pursue but was prevented from doing so due to the unfair actions of RBS detailed in the Eligible Complaint outcome.

5.3.3 This will require evidence, preferably contemporaneous, that the Customer was aware of the opportunity at the time it arose, and intended to pursue it. Claims that speculate (without supporting evidence) how money refunded as a Direct Loss could have been invested or what may have been done but for the unfair actions of RBS are unlikely to succeed.

5.4 Asset disposal

5.4.1 If an upheld Eligible Complaint outcome relates to the Customer having to dispose of an asset (e.g. a property) which, but for the unfair actions of RBS, they otherwise would have retained, they will be able to make a claim for Consequential Loss.

5.4.2 In order for such a claim to be successful (and if the causation test has not already been met in line with the upheld Eligible Complaint outcome), they will need to provide evidence that the unfair actions of RBS (as opposed to other factors) caused the disposal, as well as evidence of the amount of the Consequential Loss suffered as a result.

5.5 Increased cost of borrowing

5.5.1 Increased cost of borrowing, as a result of the unfair actions of RBS, may be recoverable (e.g. additional interest, loan arrangement fees). To support such a claim, the Consequential Loss Team will require evidence that the unfair actions of RBS caused the increased cost of borrowing.

5.6 Legal and professional fees

5.6.1 Fees incurred in relation to dealing with the actions of RBS (e.g. the cost of professional advice about restructuring the business) will be recoverable where it has been found that the actions of RBS were unfair, resulting in an upheld Eligible Complaint. However, in many instances professional fees incurred as a result of the unfair actions of RBS will have been reimbursed as part of an offer of Direct Loss.

5.6.2 In addition, RBS will consider claims for reasonable costs incurred in making a successful Eligible Complaint outcome and/or successful Consequential Loss claim.

5.7 Tax loss

5.7.1 Depending on the circumstances of any offer made by RBS, the receipt of a Direct Loss or Consequential Loss payment may generate a tax liability. If the Customer is able to show that they are in a worse tax position as a result of receiving a payment, relative to the tax that would have been incurred at the time, then a claim for the tax loss will be considered.

5.7.2 Customers can make a claim for tax loss after they have received the applicable payment(s) and are fully aware of their final tax position, noting that this may only be finalised after receipt of any Consequential Loss outcome payment.

5.8 Wasted management time

5.8.1 Financial losses related to wasted or lost management time may in principle be recoverable as a Consequential Loss. However, in practice it is very difficult to demonstrate that such claims meet the relevant legal tests.

5.8.2 Customers would need to show that the unfair actions of RBS detailed in the Eligible Complaint outcome resulted in a diversion of management time that caused a significant disruption to the business, which in turn resulted in a quantifiable financial loss.

5.9 Quantum

5.9.1 In considering the quantum of any loss RBS will off set payments to ensure that double recovery does not take place. Subject to this overriding principle:

- a) RBS will not set off the 8% interest payment added to Direct Loss against a Consequential Loss claim apart from, for example, in claims for additional interest where this would be viewed as double recovery.
- b) Goodwill Payments and discretionary payments will not be off set other than where it would result in double recovery of the same loss.
- c) RBS will set off a Consequential Loss payment where redress has previously been made under the review of interest rate hedging products (or another remediation review), as appropriate.

6. The ITP's role in the Consequential Loss process

The ITP will perform the following roles in respect of the Consequential Loss process:

6.1 Consequential Loss Assurance Role

- 6.1.1 Prior to implementation, the ITP will review and confirm that the principles and processes adopted by RBS in considering Consequential Loss claims are appropriate, and provide a framework that enables a thorough and robust assessment by RBS of such claims.
- 6.1.2 The ITP reserves the right of access to all papers prepared by RBS and attendance at any of the governance meetings as he sees fit, including any decision meetings, but will not formally assure adherence to the Consequential Loss principles or process.

6.2 Consequential Loss Appeal Role

- 6.2.1 RBS's outcome in respect of eligible Consequential Loss claims will be subject to appeal by the Customer to the ITP. The Customer will have 56 days to appeal their Consequential Loss outcome to the ITP, and shall do so by lodging an appeal form with the ITP within the 56-day period following the issuance of RBS's outcome letter.
- 6.2.2 Any Consequential Loss claim (or part of a claim) that has been upheld in full by RBS (such that the full monetary amount sought by the Customer in respect of their Consequential Loss claim (or part of a claim) has been awarded to the Customer) cannot be appealed to the ITP.
- 6.2.3 The ITP will assess appeals according to the same principles as RBS, as set out in section 3 of this document.
- 6.2.4 The Customer will be required to identify on their appeal form why they consider RBS has reached an incorrect conclusion to their Consequential Loss claim. Specifically, the Customer will be required to identify the particular item(s) of claim that they are appealing, explain why the conclusion reached by RBS on that item is incorrect, and (where appropriate) cite relevant evidence in support of their position. Subject to the position set out in paragraph 6.2.5 below, such evidence is restricted to the evidence that was before RBS when reaching the conclusion that is under appeal.
- 6.2.5 In pursuing an appeal, the Customer will not be permitted to rely on any facts or matters that were not provided to RBS in the course of RBS's assessment of the Customer's Consequential Loss claim nor raise on appeal a new item of claim not previously considered by RBS.
- 6.2.6 The ITP has the right to request further explanation from the Customer and/or RBS to assist him with his consideration of the appeal.
- 6.2.7 The ITP has the right to conclude for reasons of exceptional factual or legal complexity that an appeal is not one that it is appropriate for him to hear. In such a case, the Customer will be free to pursue any other forms of recourse available to them.
- 6.2.8 The ITP shall be entitled, when assessing an appeal, to enlist the assistance of appropriately qualified and independent third party expertise (unconnected with RBS) to assist him in reaching a decision on the appeal. Where he does so, his decision will state that he has done so.

6.2.9 The ITP's decision on appeal is final and binding on RBS.