

RBS to Expand GRG Redress Scheme: Independent Oversight for Consequential Loss Compensation Appeals Process

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The Royal Bank of Scotland (RBS) has [recently announced](#) that it will expand its [redress scheme](#) to include appeals with independent third-party oversight for consequential losses incurred by businesses in its [Global Restructuring Group \(GRG\)](#) turnaround division.

RBS's Chief Executive Ross McEwan, divulged the expansion of its current GRG appeal process to introduce an "independent appeals procedure" in a letter to John Glen MP (City Minister) to fill a "gap in our previous position". Former customers of GRG can currently claim compensation for consequential losses, but this has proved inadequate because (unlike for direct loss claims) if a customer's claim is rejected, there is no right of appeal to the independent third party (Sir William Blackburne). RBS's announcement represents a [U-turn on their previous position](#) that it was not practicable to build a third-party assurance and appeals process to provide oversight of the decisions reached by the bank on consequential loss.

It has been reported that RBS will finalise the details of widening the remit of the Independent Third Party Appeals Process to include a consequential loss appeals process with Sir William Blackburne (a former High Court Judge) in the next few weeks. RBS has received just one consequential loss claim thus far but it is expected that the Bank will receive many claims with high value for consequential losses in the near future. However, doubts remain over the effectiveness of the redress on offer.

Ex-GRG customers have the right to refer complaints to the Financial Ombudsman Service and pursue claims for consequential losses through the courts with the benefits of independent judicial oversight, expert evidence and established judicial principles. RBS's announcement to expand the GRG complaints process ensures, to some extent at least, that third-party assurance and independent oversight of the decisions the bank reaches on consequential loss will be in place.

It is essential to seek early legal advice from LEXLAW to advise you on all the potential options to secure compensation, through articulating consequential loss claims in the GRG complaints scheme to High Court [litigation](#).



Global Restructuring Group

What is GRG?

GRG is shorthand for Global Restructuring Group, which was [NatWest](#)/RBS's turnaround or business support unit (BSU) for troubled businesses.

What did GRG do wrong?

The bank recovery team were tasked to recover debt owed to the bank but were purposefully mis-described as providing "*business support*". In fact these departments managed RBS's distressed and impaired customers that had lending secured by property based assets. The members of these teams prepared and submitted exit strategies and liaised with LPA Receivers and Administrators and the bank's solicitors to recover debt owed to the bank.

Like other recovery units such as Barclays' BSR and Lloyds' BSU, RBS's GRG behaved in an aggressive and arguably dishonest and unfair way designed to maximise profit for the bank. Bank recovery departments were often highly incentivised to overstate the bank's write-down provisions in order to obtain bonuses for recovering more than the bank expected to recover. This included for example moving lending rates to rigged rates (LIBOR); setting up pre-pack administration deals without the customer's knowledge; and pressurising customers into Profit or Property Participation Fee Agreements (PPFA) whereby associated parts of the bank (West Register) would take up free shares in a business or gain a percentage of sale proceeds.

GRG misconduct comes to light

In November 2016, RBS admitted it had failed SME customers and established a [complaints process fund](#) of £400million to refund complex fees paid by SME customers between 2008 and 2013 to be overseen by an Independent Third Party. In November 2017, the FCA published a heavily redacted Promontory summary report into GRG mistreatment of customers. In January 2018, Parliament [condemned GRG's parasitic treatment of SMEs, documented by LEXLAW here](#). LEXLAW (through a campaign of [DPA Subject Access Requests](#)), SME victims, the APPG, Treasury Select Committee and Parliament called for the publication of the skilled persons report into GRG's mistreatment of small business customers. The Treasury Select Committee published the [final, unredacted section 166 report](#) on 16 February 2018.

Instead of SMEs getting the help they needed in a weak economy, GRG targeted the unregulated SME sector and became a profit churning processing unit to exacerbate the demise of SMEs and squeeze capital to improve RBS's own post- credit crunch balance sheet.

What is the current GRG redress scheme?

RBS announced the implementation of a £400million GRG complaints process in November 2016 (and updated in May 2017) to process complaints by SME customers for losses incurred as a result of GRG's misconduct.

RBS will review a complaint from eligible ex-GRG customers (see below) and if the complaint is upheld, redress for direct losses and/or automatic complex fee refunds may be offered. In order to make a claim for consequential loss, the customers' complaint must first have been upheld. LEXLAW have helped many small businesses in analysing consequential loss and whether it is the type of loss that can be adequately evidenced. RBS has agreed to meet the customers' reasonable costs of meeting with a professional loss assessor or solicitor in establishing a consequential loss claim.

RBS's redress scheme is overseen by Sir William Blackburne (the Independent Third Party), whose "*assurance and appeal*" role is to oversee the process and to run an Independent Third Party Appeals Process (ITP Appeals Process) to consider appeals against decisions made in the RBS complaints process for direct losses but not consequential losses. The remit of the ITP Appeals Process will be expanded to include consequential loss in the near future.

The GRG complaints process is different to the FCA Interest Rate Hedging Products Review scheme (IRHP Review Scheme), the failings of which have previously been highlighted by LEXLAW. In some respects, the GRG complaints process suffers from the same defects as the IRHP review scheme in that they are both essentially voluntary reviews undertaken by the banks themselves with- in essence- limited independent oversight.

What is the new consequential loss compensation appeal process?

The [current GRG Complaints Process](#) has been heavily criticised for its lack of adequate compensation for businesses that have suffered consequential losses. The loss of potential profits by an SME forced to close due to GRG misconduct is often the largest head of loss in a claim against a Bank. The current complaints process has been restricted to appealing claims only for direct losses whilst at GRG, whereas now businesses will be able to appeal for indirect consequential losses.

Under the RBS complaints process, if a direct loss complaint is upheld, then a customer can apply to have consequential losses assessed. The reformed appeal process for companies harmed by GRG will now allow those customers to appeal to the independent third party, mirroring the current process for direct loss complaints.

Ross McEwan's letter to John Glen MP stated that the new consequential loss appeals process will be finalised in the upcoming weeks. The independent third party, Sir William Blackburne, will be consulted on how the process should work and whether he will take on the role of hearing consequential loss appeals.

It is expected that once the RBS complaints scheme appeal process for consequential losses gets underway, many ex-GRG customers will be entitled to claim compensation with the assurance that third-party independent oversight is built into the process to ensure the bank's decisions on consequential loss compensation are reasonable.

Are customers likely to receive adequate compensation through the GRG redress scheme?

The compensation scheme has been criticised by politicians as being both time-consuming and ineffective. [RBS publish weekly progress reports of compensation paid out to SMEs here](#). An average of 25 claims a week advance through each stage of the compensation process.

RBS earmarked a £400million pot in November 2016 and despite thousands of businesses suffering loss due to the misconduct of GRG, the pay-outs have been relatively small (on average around £30,000). Approximately £115million has been paid out as an automatic refund of complex fees. Of the remaining £285million which is available in the GRG complaints process, only £3.6million has been offered in compensation and only £2.2million has been paid out.

Liberal Democrat leader Sir Vince Cable has criticised the scheme:

“to see that RBS is processing this compensation, which is almost certainly too little anyway, so slowly is another disgrace in this scandal and suggests that the current leadership of RBS has not learned from the many failure of its predecessors”

[Sir Vince Cable](#)

Clearly adequate compensation for SMEs has not yet been forthcoming through the GRG complaints process. The direct loss compensation scheme appeals system has received independent oversight and the [damning indictments of the levels of redress offered](#) leads to assumptions that independent oversight of consequential loss appeals will not ensure effective redress for ex-GRG customers.

Which customers are eligible for redress in the GRG review scheme?

According to the [“Principles governing RBS’s new complaints process for SME customers in GRG”](#), RBS customers are eligible for redress if they were:

- A UK or Republic of Ireland customer;
- and a small or medium-sized enterprise (SME) customer;
- under the control of GRG; and
- during the period 2008-2013.

Customers are excluded from the definition of an SME if they are:

- an entity with listed securities
- an entity with debt syndicated across a number of banks
- registered offshore or the majority of its shareholders are offshore
- private equity backed
- a Special Purpose Vehicle (SPV), or

- a sizeable business based on financial metrics (e.g. debt facilities and/or turnover higher than £20m).

Eligible customers have the right to enter the automatic fee refund process and automatically receive the refund of complex fees. RBS believe that this refund process is substantially complete. GRG utilised a number of different terms to describe fees charged, and the following fees during 2008-2013 are included in the automatic fee refund:

- management/monitoring fees;
- asset sales fee;
- exit fee;
- mezzanine fee;
- ratchet fee;
- risk fee;
- late management information (MI) fee.

What is the GRG redress scheme process for direct loss claims?

[Guidance on a direct loss complaint can be found on the RBS website here.](#) Direct loss is defined as any “*sums of money paid by a customer to RBS or a customer’s out of pocket costs of meeting RBS’s requirements that were a direct result of an upheld complaint*”. Examples of direct losses include:

- arrangement fees;
- renewal fees;
- excess fees;
- increased interest payments made to RBS by a customer;
- costs and expenditure incurred in connection with an independent business review, valuation report, security review or other actions required by RBS; or
- costs and expenditure incurred by a customer for the appointment of a third party to the customer at the request of RBS.

The RBS complaints process initially involves the bank itself assessing the complaint and deciding whether to award compensation for direct losses to a customer. Direct losses include sums paid by a customer to RBS and out of pocket costs of meeting RBS’s requirements.

RBS will self-investigate the complaint based on documentary evidence held by the bank and provided by the customer. LEXLAW are experienced in identifying the causes of action, the evidence required and formulating the complaint on behalf of SMEs and submitting this to Bank’s review team. Unlike a truly independent Court process, no detailed written arguments or oral evidence is considered. LEXLAW have pursued all avenues in the pursuit of justice for SME customers and have managed cases in the courts and complaints to the [Financial Ombudsman Service](#) (FOS) which offer a more detailed assessment of misconduct claims.

The basis of assessment is NOT a test of legality. The GRG complaints team assess customer complaints on standards of reasonableness (whether RBS’s actions were justifiable), transparency (timeliness and clarity of communication) and compliance (with their own internal procedures). In the event that the complaint is upheld by RBS, the bank assesses

what it considers to be fair and reasonable compensation. In addition, at its sole discretion without an appeal to the Independent Third Party, the bank may award a “*goodwill payment*” in respect of disruption that was caused to the business.

Following the Outcome letter, the customer has 28 days to either accept or appeal against RBS’s offer of redress for direct losses. If accepted, this is taken as a full and final settlement of the claim and no further action is permitted to recover further sums for direct loss. If compensation is not forthcoming or inadequate, the customer has 56 days to appeal the decision to the Independent Third Party Appeals Process (ITP Appeals Process) overseen by Sir William Blackburne.

The customer is required to complete an appeal form explaining the reasons why RBS’s decision was wrong. The Independent Third Party will reach their own conclusion on whether the complaint should be upheld or not and on what basis. The decision will be based on contemporaneous documents gathered by RBS, evidence submitted by the customer and materials created during the initial RBS complaints process. The Independent Third Party will record their decision, including any award for direct loss only, and a brief summary of the reasons will be provided to RBS and the customer. Subject to the customer accepting the Independent Third Party’s decision, the decision of the Independent Third Party will be binding on the bank.

What is the current GRG redress scheme process for consequential loss claims?

[Guidance on the current process for obtaining compensation for consequential loss can be found here.](#) If redress is awarded by RBS for direct losses, the customer then has a limited right to claim for any consequential losses. Consequential losses (or indirect losses) are lost potential profits as result of a business being forced to close due to GRG’s misconduct. The bulk of the losses incurred by small businesses lie in consequential losses.

RBS will assess a claim for consequential losses based on evidence and information submitted by a customer. The claim is assessed using the bank’s sole discretion. The bank self-determines whether the consequential loss is factually and legally attributable to it. Crucially, *“this will be considered by the same team in RBS that conducted the RBS Complaints Process but, for the avoidance of doubt, this process will not be overseen by the ITP and there will be no right appeal to the ITP”*.

Although RBS apply a self-described “*fairness test*” in their complaints process, an upheld complaint does not relate to a breach of legal obligations. Nevertheless, the bank does assess consequential loss complaints by reference to established legal principles. Therefore, it is important to seek legal advice if considering a consequential loss claim. The bank will apply the following legal tests which LEXLAW are adept at presenting on behalf of businesses:

- the consequential losses would not have happened but for the misconduct of GRG and/or the direct loss. In other words, it must be shown that the bank caused the loss. Often a counterfactual scenario is conducted to ascertain whether the losses would have incurred if the actions of the bank were fair and reasonable.
- The consequential loss must have been reasonably foreseeable at the time GRG’s unfair actions caused the direct loss.

- Only claims supported by contemporaneous evidence will be considered.
- The burden is on the customer to demonstrate on a balance of probabilities that a loss has been incurred and would not have occurred but for the actions of RBS.

RBS will send a final letter to the customer setting out the findings and any offer for compensation for consequential loss. If this is accepted, the customer is required to enter into a full and final settlement of any consequential loss claim with RBS.

However, a major criticism of the current redress scheme for consequential losses is that if a customer chooses to reject RBS's compensation, the decision of the bank is final and the Independent Third Party has no power to review the decision. This has meant there is a lacuna in the GRG complaints process, whereby the Independent Third Party can review a compensation redress offer for relatively small direct loss claims but has no power to review compensation (or lack of) for the much larger consequential loss claims.

Which consequential losses can a former GRG customer make a claim for?

Consequential losses (or indirect losses) are lost potential profits as result of a business being forced to close due to GRG's misconduct. Compensation for consequential loss covers the knock-on effect of RBS's mistreatment of small businesses. RBS already to a limited extent will consider claims for consequential loss involving quantifiable financial loss. Claims involving non-financial loss, for example stress, illness or inconvenience caused by GRG's misconduct, is not recoverable through the complaints process.

RBS have stated that it will meet the costs of an initial meeting with a professional loss assessor to "*assist you in establishing whether you may have suffered a Consequential Loss*".

In the current complaints scheme, RBS refund direct losses and in some cases have additionally compensated for the cost of being deprived of direct loss funds by adding 8% simple interest annually to all payments. RBS considers that in the majority of cases this 8% is enough to compensate customers for consequential loss claims. For the majority of ex-GRG customers, this will not be the case and they are encouraged to make a separate consequential loss claim.

Consequential losses include the following:

Loss of profits in relation to a lost new business opportunity

A claim for consequential loss will be unsuccessful if the lost profit was less than the 8% simple interest received from the direct losses claimed in the initial stage of the complaints process. An ex-GRG customer would need to demonstrate that there was a specific opportunity available contemporaneously which had to be forgone due to the unfair actions of GRG, for which a complaint must have previously been upheld and/or direct losses been attributed. It is important to demonstrate that the lost profits were caused and occasioned by the misconduct of GRG rather than extraneous factors, such as the depressed economic climate in 2008-2013. It is essential to gather supporting documentary evidence such as:

- evidence of the concrete opportunity at the time (e.g. planning permission granted, architect drawings, builder quotes);
- correspondence which documents that the opportunity was foregone (letters, emails);
- evidence of a causal link between the bank's unfair actions and the failure to pursue the new opportunity (e.g. revised cash flow statements);
- evidence that the same or similar opportunity has been undertaken when funds became available (e.g. details of actual costs incurred);
- evidence of additional profits forgone at the time (e.g. increased demand, evidence that the new opportunity has led to increased profits).

Loss of profits in relation to lost opportunity for the grossing up of business profits

A claim would be successful if it can be demonstrated that but for the unfair actions of GRG, additional stock would have been purchased AND the additional demand for said stock existed at the time. It is essential to gather and submit supporting documentary evidence such as documented above. A claim will be unsuccessful if the lost profit was below 8% and if the evidence only demonstrates a "speculative or generic opportunity".

Loss of profits in relation to lost opportunity for acquiring assets

A SME that was not able to acquire new assets as a result of GRG's misconduct and/or direct loss can then go on to make a consequential loss claim. The associated losses due to not purchasing property assets can include: lost capital appreciation, lost rental income and lost development opportunity. It is essential to gather supporting evidence of a specific opportunity at the time and evidence of a causal link between the unfair actions of the bank and the failure to pursue the asset acquisition.

Loss of profits due to asset disposal

Ex-GRG customers that were forced to dispose of assets due to the unfair actions of the bank are entitled to make a consequential loss claim.

Increased cost of borrowing

This head of consequential loss is incurred by businesses that have had to borrow money to meet payment of a direct loss (defined above) or refinance externally with another lender at an increased cost due to GRG's actions. A claim has a higher chance of success if evidence can be gathered to demonstrate a causal link, for example revised cash flow showing the business would have had sufficient funds and not required the additional loan. It is also important to evidence the loan agreement which quantifies the loss.

Legal and professional fees

Businesses are entitled to claim costs for fees incurred in relation to the complaints process. The complaints process team will assess whether it is fair and reasonable for the business to have obtained legal or professional advice on aspects of the complaints process. The evidence required would be copies of invoices which includes a detailed narration of the tasks performed in relation to the complaints process.

How do you protect legal rights from expiring against RBS GRG?

It is an absolute must that victims of RBS GRG or other bank BSUs protect their legal rights. Businesses that were affected must urgently take legal advice on their specific cases. If you fail to do so your legal rights will become time-barred by virtue of the Limitation Act 1980, resulting in the complete loss of your legal right to compensation via the courts. If no adequate redress is achieved through the GRG complaints process for direct loss and/or consequential loss and your claim becomes time barred, your legal rights will expire.

Legal rights can be protected by taking urgent legal advice and by instructing [specialist GRG solicitors](#) to issue a protective claim form or by instructing [GRG litigation solicitors](#) to prepare and agree a carefully written standstill agreement.

Should you consider a GRG litigation claim?

Customers should be aware that their right to take legal action cannot be compromised by a GRG complaint. In addition, another option involves a legal claim again against RBS- litigation will give customers far greater prospects of a successful outcome. The courts are the most appropriate forum for a consequential loss claim where detailed legal arguments can be elucidated. In addition, claims which are often of a high value and involve complex technical arguments will need expert evidence.

If a business is not satisfied with redress for direct or consequential loss in the GRG complaints process and/or independent third party appeals process, redress can also pursued through litigation. LEXLAW have pursued litigation on behalf of many businesses that have been mistreated by RBS's GRG, [one client was featured in a BBC report here](#).

The legal basis for claims against GRG is as follows:

1. Breach of contractual terms specific to each case;
2. Breach of an implied duty of good faith whereby contracting parties have a duty of good faith under which they are obliged to treat each other honestly and responsibly;
3. Breach of fiduciary duties by directors including where the bank forces appointment of a director or otherwise acts as shadow director;
4. Unlawful means conspiracy where two or more parties agree to use unlawful means to injure the business customer causing the business damage;
5. Misrepresentation where Natwest, RBS and/or GRG make a false statement of fact to a customer, which induces the customer to enter into a contract such as a profit participation agreement (PPA) or property participation fee agreement (PPFA) or exit fee agreement or loan agreement;
6. Negligence in the form of a failure to treat GRG customers with proper care and attention.