

The Panel's approach to challenges to their 'Minded to' Decision ('MTD) in cases that remain within the Re-Review

***** Please note this guidance is provided by the Panel and has been produced separately from the recent discussions with the stakeholder groups and LBG about speeding up the Re-Review process. This guidance applies only to those who remain in the Re-Review and receive a MTD at the end of the information-gathering stage of our process. It is not relevant to a Customer who has been offered and has accepted a Fixed Sum Award.*****

General

1. As explained elsewhere on the website, after we issue an MTD, in accordance with Sir Ross Cranston's recommendations, the Customer and LBG each have the right to respond to or challenge the MTD. We then consider all the material and submissions before we reach our Final Decision ('FD') which is binding on the Customer and LBG.
2. Sir Ross' recommendation to this effect was made against the background of the MTD being produced generally without the involvement of professional advisers (legal and/or financial) acting on behalf of the Customer. Our MTD would be produced "by reference to [the pool of relevant documents and ... the customer's submissions]" and would be provided to the Customer and the Bank "with the documents behind it."
3. As indicated in our various updates last year, in an endeavour to move the Re-Review forward more quickly (and with the agreement of LBG and the stakeholder groups) we made it easier for Customers to obtain legal and other professional support during the information-gathering stage than was envisaged by Sir Ross. This had been designed to ensure that we received all the information that a Customer could reasonably offer us during our information-gathering stage. We had hoped a well-informed MTD would mean a faster process to issuing an FD and avoid the introduction of significant new material being put forward after the MTD. Unfortunately, as indicated previously, greater involvement of professional advisers in the information-gathering stage has (a) slowed things down even more and (b) led to a lot of unnecessary or duplicative submissions. That is why we have made the changes to the basis upon which professional support during the information-gathering stage can be obtained such that we are reverting to a process much nearer to that envisaged by Sir Ross.
4. The effect of these changes is that there are some Customers whose claims have been considered who will already have had the professional support that was permitted under the previous arrangements. From June 2022 when the policy came into operation, all Customers whose claims had not yet been considered and who remain in the Re-Review will be subject to the current arrangements under which funding for professional fees is more restricted until after the MTD has been issued.
5. Is there any difference between our approach to any challenge to the MTD depending on which arrangements for professional support apply? In essence, the answer is 'no'. Sir Ross placed no restriction on the matters that could be drawn to our attention by way of challenge and we will always consider carefully all material points made by way of response or challenge to the MTD. However, so that there is no misunderstanding, we set out the position below in relation to (A) claims being assessed where the fees for professional support have been funded under the prior arrangements and (B) the position of claims being dealt with under the current

arrangements for professional fees funding.

A. CLAIMS UNDER THE PRIOR ARRANGEMENTS FOR PROFESSIONAL FUNDING

Customer challenge

6. For those cases being considered where significant professional support has been given pre-MTD, ordinarily our approach will be simply to review the MTD, not to commence a fresh analysis of the claim. In particular, after the MTD stage -
 - (i) We will not place significant weight on matters which amount to little more than a repetition or reformulation of a point made before the MTD was issued. As we have highlighted in the MTDs we have issued so far, just because the MTD does not refer to some specific matter that has been raised with us or by us in the Information-gathering stage, or to some specific document that may appear in the material with which we have been provided, this does not mean that we have not considered it or that we did not consider it relevant when arriving at our MTD.
 - (ii) Where new information is advanced or fresh material is provided that was not known or available to the Customer prior to the MTD, then we will attach more weight to that information or material (though not necessarily conclusive weight because it depends on the nature of the information or material) than information or material that was known about or could have been discovered, raised or provided before the MTD.
 - (iii) Crucially, where there is a challenge to our judgment on a particular issue, including where we consider we have made a generous assumption in favour of a Customer, we will only reconsider that judgment if we are persuaded that we overlooked some material information, factor or argument in arriving at our conclusion. This point will equally apply to LBG in the context of any challenge to an MTD.

LBG challenge

7. In reaching our MTD, we will normally have taken into account, where applicable, what was said by LBG about the Customer's position at the time of the Customer Review.
8. As Sir Ross Cranston recognised, after the MTD has been issued, LBG will then have the right to comment on it, particularly where new information and submissions have been provided by the Customer over and above those made during the Customer Review.
9. If LBG raises a new submission or puts forward new information as part of its response to the MTD, we always give the Customer the opportunity to comment on that material. Point 6 (iii) above will equally apply to any challenge to an MTD by LBG.

B. CLAIMS UNDER THE CURRENT ARRANGEMENTS

10. It remains our objective to identify all relevant aspects of each Customer's case before the MTD. We will have had available –
 - what was said and written by the Customer during the Customer Review
 - anything that has been said or written by or on the Customer's behalf during our information-gathering stage, including matters revealed during any meeting we or our

team have held with the Customer

- material drawn from the criminal trial and information identified from public records through our own research
- the documentation made available to us from the files provided to us by the Bank

As we have said many times, we are alive to the potential deficiencies of the documentation made available, but our experience so far is that the documentation provided has been reasonably extensive (which is consistent with Sir Ross' conclusions) and generally sufficient for us to reach satisfactory conclusions. Where it is lacking, we are normally able to draw appropriate inferences.

11. While a Customer is entitled to produce new information after receiving our MTD, our objective is to try to avoid that if possible. This is because when it occurs it has the twin impact of (i) delaying resolution of the individual Customer's claim and (ii) interfering with our work schedule which is designed to move forward and complete all outstanding Customers' claims as quickly as we can.
12. Our approach to the provision of new information by way of challenge to the MTD after the issue of the MTD will depend to a large extent on the extent of the engagement that the Customer had with the Customer Review and with us before the MTD was issued. If it is plain to us that the information ought to have been revealed at an earlier stage than the MTD, then we will attach less weight to it than if it had been provided when it reasonably could have been provided. Where we are contemplating taking that position, we will raise the issue with the Customer and the Customer's advisers so that we understand the reasons why our attention was not drawn to the information previously.
13. There is nothing in our process that prevents a Customer from challenging any counterfactual scenario(s) that we consider fairly reflect what might have happened to their business in the absence of the IAR Fraud and our assessment of the chances of that occurring. Indeed the Customer may put forward their own counterfactual scenario(s) or alternative assumptions underlying any such scenario. However, as we will have given a reasoned decision in support of our conclusions in the MTD, we would expect a reasoned response which explains the basis for any challenge, with supporting material where applicable. We are unlikely to change our provisional conclusions based only on a generalised rejection of what we concluded and a bare assertion that the outcome for the business or individual Customer would have been significantly better than under our assessment. A realistic scenario, with a sound basis for the assessment of the realistic chances of achieving it, is ordinarily more persuasive.
14. It must be recalled that every counterfactual scenario is by definition hypothetical and judgments have to be made about what is and what is not reasonable to assume and indeed what is a generous assumption and what is not. We have always recognised that there will inevitably be competing views about matters such as this, but it is our responsibility within the Re-Review to make judgments about them, just as it would be for a court if this issue was being resolved by litigation. Where our judgment is challenged, if it is, we will generally need to receive a cogent argument that that we overlooked some material information, factor or argument if we are to change our conclusion.
15. Similarly, where the Customer suggests that our analysis of the financial position of the business at a relevant time is incorrect, we would need to have a clearly articulated response to our

analysis so that we can understand why the Customer says it was wrong. We do our best to interpret the contemporaneous records of the business to reach a reasonable conclusion concerning the financial standing of the business at the relevant time, approaching anything that might have been written or influenced by the fraudsters with appropriate caution.

Expert opinion

16. Some Customers put before us expert opinion. Whilst we welcome constructive assistance in our difficult task, we have to emphasise that we cannot simply accept expert opinion uncritically. That does not necessarily mean that we reject it, merely that we must subject it to objective scrutiny. There are two main reasons for this:

- (a) What an expert will put forward is often simply a reflection of the Customer's perception of what the financial standing of the business was at the relevant time and its prospects for the future had the fraud not impacted. Sir Ross Cranston drew attention in his report to a Customer's "(often overly optimistic) version of events" and "valuations asserted by customers [that] relied upon unrealistic assumptions as to third party actions, and/or overly optimistic profit projections". Accordingly, we need to apply an objective approach to issues of this nature.
- (b) Our process is inquisitorial, as recommended by Sir Ross. Although many of the issues we have to consider are issues that a court would have to consider if a Customer's claim against LBG was litigated, we do not have the facility to test the expert opinion as a court could do. In ordinary adversarial litigation it would be open to the party from whom recompense for loss was being sought to commission their own expert's report which could expose any weaknesses in the expert opinion advanced in support of the loss. The competing views would then be considered by the court following the testing of the expert evidence by skilled cross-examination and a conclusion reached. That feature of the litigation arena is not available to us and, if anything like it was, it would slow down even more what everyone wants to be a speedy process. As has been clear from our website for some time, we have discouraged LBG from putting expert opinion before us in response to an MTD for the same reason. Therefore, in order to perform our task conscientiously, it follows that we must look critically at expert opinions provided by Customers, no matter how ostensibly experienced and well-qualified the expert may be, and endeavour to reach a balanced and objective view. We are not bound to accept an expert's opinion but we do, of course, take it into account.