A Financial Ombudsman Service

FSCL FINANCIAL SERVICES COMPLAINTS LTD
RATONGA PŪTEA PUNA MANAAKI

Clawback fees – a consumer guide

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What is a clawback fee?

Mortgage advisers and insurance advisers (sometimes called mortgage brokers and insurance brokers) usually receive a commission payment from the lender or insurer if the adviser's client draws down a loan or takes out an insurance policy. If the adviser receives a commission from the lender or the insurer, the adviser does not usually charge their client a fee for the service they provided.

However, if the client repays their loan early or cancels their insurance policy soon after taking it out, an adviser may later charge their client a fee. When this happens, the lender or insurer will ask the adviser to pay back some or all of the commission they paid the adviser. This is called a 'clawback'. This typically happens when the borrower repays their loan within 27 months of when the loan was drawn down, or when the insured cancels their policy within 24 months of taking it out.

As the adviser loses their commission (or part of it), they may charge their client a fee so the adviser is paid for the service they gave their client. This type of fee is commonly known in the financial advice industry as a 'clawback fee'.

How much is a clawback fee?

Clawback fees can be large. It is common for clawback fees to be up to $3,000, and sometimes the clawback fee will be more than this.

FSCL's approach to complaints about clawback fees

FSCL can investigate complaints about clawback fees (and other types of fees an adviser has charged their client), but we must first give the adviser an opportunity to resolve the complaint in their internal complaints process.

Most complaints we receive about clawback fees are about how the fee was disclosed or whether the fee was fair. In these cases, we usually consider whether the adviser was entitled to charge the fee and whether the fee amount was reasonable.

It is standard industry practice for advisers to include terms in their agreements with their clients that allow the adviser to charge the client a clawback fee. We look at the circumstances of each individual case to decide whether the adviser was entitled to charge their client a clawback fee.

Did the adviser disclose the fee?

By law, since 15 March 2021, the adviser must disclose certain information about fees. In summary, the adviser must explain to the client:

- when, or in what circumstances, fees will or may be charged
- the amount of the fee (if known) or explain how the fee will be determined and an estimate of the amount of the fee
- the payment terms.

In cases where the advice was given before 15 March 2021, we take a similar approach about what information the adviser should have disclosed to their client.

We also consider whether there is evidence that the client agreed to the fee and whether the fee charged was within the agreed terms.

Was the fee amount reasonable?

We usually look at whether the fee was a reasonable amount for the work the adviser did. Our approach is that a fee based on a fair hourly rate, which reflects the adviser's skill and expertise and the complexity of the work they did, is a fair way for advisers to determine the amount of their clawback fee. However, other approaches may also be fair. We consider the circumstances of each individual case.

If we're satisfied the adviser was entitled to charge the fee and that the fee was reasonable, we are unlikely to uphold the client's complaint and will suggest to the client that they should pay the fee. If the client can't afford to pay the fee in a lump sum, we may help the adviser and client agree on an affordable payment plan.

If we have concerns about the clawback fee, we'll discuss our concerns with the client and adviser, and will try to help the parties reach an agreed outcome. If the adviser and the client can't agree on an outcome, we'll decide how the complaint should be resolved. Our final decision is binding on the adviser if the client accepts the decision in full and final settlement of their complaint.

Case notes

The following are examples of cases about clawback fees we have considered. Each case turns on its facts. More case notes are on our website.

Brokerage commission clawback fee

Kahurangi's case is an example of where we concluded that the client was obliged to pay the clawback fee. In that case, the terms about fees in the contract between the adviser and Kahurangi were not well drafted, but if Kahurangi had read them she would have understood that she would have to pay the adviser a fee if she repaid her loan within three years. Kahurangi agreed to pay the fee, around $3,000, within two weeks. The adviser agreed not to chase payment of debt recovery fees and interest they had charged Kahurangi, which we thought were excessive.

New lending in uncertain Covid-19 times

Jason and Roimata's case is an example of where we were satisfied the adviser had properly disclosed their clawback fee, but we were concerned about the amount of the fee. We thought the clawback fee, which was $8,000, was too high for the work undertaken. We suggested that the adviser should discount their fee to $4,000 to more reasonably reflect the work they had undertaken for Jason and Roimata.

Clawbacks and clarity

Youness' case is an example of where an adviser agreed not to charge a clawback fee. We believed the adviser's terms of engagement were too vague to be enforceable. The terms said the adviser would be entitled to charge Youness a fee if he repaid his loan within 24 months, but the adviser had not set out how much the fee could be or how the fee would be calculated.