

The complaint

Mr Y and Mrs Y raised various issues about Mortgage Express' handling of their mortgages with it over time. However, they asked us to look into the matter of whether Mortgage Express had the right to consolidate the amount owed under their current mortgages with a shortfall debt from previous mortgages. They are unhappy that Mortgage Express stopped them selling one of their properties unless they agreed to the equity from the sale being used to reduce the shortfall debt.

What happened

Mr Y and Mrs Y held a portfolio of properties that they rented out. They originally had six properties mortgaged with Mortgage Express. After they encountered financial difficulties around 2010, four of the properties were repossessed and sold by Mortgage Express in 2012 and 2013. None of the properties sold for enough to repay the mortgages attached to it and this process resulted in a shortfall of over £220,000.

Mr Y and Mrs Y have told us they weren't informed of this shortfall until 2016. At this point Mr Y offered to pay £5 per month to the debt. Mortgage Express accepted the offer. However, by the end of 2018 Mr Y no longer considered he could afford to make that payment and offered Mortgage Express £1 per month toward the shortfall. Mortgage Express was not satisfied with that sum because of the size of the outstanding debt.

In 2019 Mortgage Express asked Mr Y and Mrs Y to agree a change to the mortgage conditions for the mortgages on the remaining two properties. This would have allowed Mortgage Express to secure the shortfall debt against the remaining two properties. Mr Y and Mrs Y declined to agree. Further correspondence was exchanged on the matter and Mortgage Express told Mr Y and Mrs Y in September 2019 that if no agreement regarding the shortfall debt was reached it would apply to the courts for a charging order allowing it to secure the debt.

Mr Y and Mrs Y decided to sell one of their remaining properties. Mortgage Express explained to them what the consolidation mortgage condition meant, in that if they wanted to sell the property and repay the mortgage, it could require them to repay the other mortgage in full too. However, it was willing to allow Mr Y and Mrs Y to sell just one of the properties if they agreed that any equity in the property was used to reduce the outstanding shortfall debt.

Mr Y and Mrs Y complained to Mortgage Express. The complaint revolved around the shortfall debt; from how it came about to the fact that Mortgage Express wanted it paid back, even if that meant it claiming the equity from the remaining properties from the portfolio.

Mortgage Express responded to Mr Y and Mrs Y's complaint. It explained the process followed when selling a property in possession. It also confirmed that all of the properties had sold for more than they were estimated to be worth at the time of repossession. Mortgage Express said that it considered it had acted with due care and achieved the best possible prices for the properties, given market conditions at the times of the sales. In relation to Mr Y's proposal to pay £1 per month toward the shortfall debt, it said it couldn't

agree that his offer had been ignored. It had acknowledged the proposal, but had rejected it as it needed a more realistic amount to reduce the shortfall balance due to its size.

In addition, Mortgage Express confirmed that the terms and conditions detailed that each mortgaged property was security for each agreement and would stay in force until the total debt had been repaid in full. As such, it said it was unable to agree to Mr Y's request to discharge the shortfall debt.

Mr Y and Mrs Y didn't accept Mortgage Express' response and referred the complaint to this service. Mr Y explained that the main point of the complaint was that he disagreed that Mortgage Express had a right to consolidate the outstanding shortfall debt with the existing mortgages.

One of our investigators considered the complaint, but he didn't recommend that it be upheld.

Mr Y and Mrs Y didn't accept the investigators conclusions. They repeated that they didn't consider that the mortgage conditions were clear and considered 'each agreement' (in condition 1 below) was ambiguous. It was not clear that the mortgage deed made the property security for all money owed and covered all mortgage accounts held. They pointed out that Mortgage Express had confirmed that the right to consolidate (condition 18 below) didn't secure all debts owed to it. In relation to condition 18, they questioned the investigator's interpretation of the purpose of the condition being to make sure that the outstanding debt was cleared before the borrower received any of the sale proceeds. They didn't accept that the wording meant the shortfall debt was secured by this condition.

In addition, Mr Y and Mrs Y said they signed the mortgage deeds based on their understanding of the mortgage conditions at the time. They said it was not evident that Mortgage Express considered that each property within a portfolio was automatically security for all the others. In summary, they said that they believed a lender should make clear, precise and unambiguous provisions for the handling of money owed to it in its terms and conditions; Mortgage express didn't do so in their opinion. As such, they asked that the complaint be referred to an ombudsman for consideration.

Relevant mortgage terms

1 What the mortgage deed covers

- a The mortgage deed makes the property security for all the money owed to us under:
- each agreement
 - and
 - these conditions.

The mortgage deed will stay in force until the total debt has been repaid in full.

- b each agreement is independent of any earlier agreement. It does not add to or alter the earlier agreement unless the agreement states that it does.

18 If you have more than one mortgage with us

- a Our right to combine mortgages is not restricted in England and Wales by section 93 of the Law of Property Act 1925, or in Northern Ireland by section 17 of the Conveyancing and Law Property Act 1881.

- b If you have more than one mortgage with us, and you want to pay off just one of those mortgages, we have the right (except where the money is owing under a regulated agreement) to stop you paying off the mortgages separately, and to insist that you pay them all off.

I issued a provisional decision on 15 September 202, in which I set out my conclusions about this case and my reasons for reaching those conclusions. Below is an excerpt.

'Mr Y, who has been the main correspondent on this case, clearly has very strong feelings about this matter. He has provided detailed submissions to support the complaint, which I have read and considered carefully. However, I hope he and Mrs Y won't take the fact my findings focus on what I consider to be the central issues, and not in as much detail, as a discourtesy.'

Mortgage Express' solicitors put forward that the wording of condition 1 – that it referenced 'each' agreement, rather than 'this' agreement - meant that it covered all mortgages in a portfolio if one existed. Mr Y believes this wording to be ambiguous.

I have carefully considered this matter. I would firstly say that mortgage conditions must be read in context and as a whole, rather than in isolation. It is clear that the conditions are designed for both residential mortgages and buy-to-let mortgages, and there is some provision built in that is designed to protect the lender in the event of there being a portfolio of buy-to-let mortgages. In that context, it could be argued that 'each agreement' in condition 1 could be interpreted as each property within a portfolio would be used as security for all mortgages within that portfolio. However, I am not persuaded that it is clear that this is what condition 1 means. Indeed, I note that when Mortgage Express updated the mortgage conditions some years later, it introduced very clear wording to that effect.

As such, I don't consider condition 1 means that Mortgage Express has the right to any equity released from the sale of a mortgaged property because there is an outstanding shortfall debt from previous mortgages.

However, as I said above, the mortgage conditions have clearly been written with the provision for multiple mortgages to exist within a portfolio arrangement such as the one Mr Y and Mrs Y originally had. This is evident from condition 18 which gives Mortgage Express the right to stop an individual sale from within a portfolio (presumably if it would affect the overall risk the portfolio represented) and require the entire portfolio of mortgages to be paid off at the same time. It effectively consolidates the various mortgage debts. Mortgage Express has correctly said that this doesn't give it the right to secure the shortfall debts to the remaining mortgages.

However, what the mortgage conditions did do was allow Mortgage Express to require both remaining mortgages to be paid off in the event one of them was (in this case due to the sale of the property). Based on what Mr Y has said, it seems the purpose of selling the property was to release the equity to be used to assist his financial position. Mortgage Express wasn't willing to allow this to happen, given the amount of the shortfall debt. It said it wouldn't force Mr Y and Mrs Y to repay both the mortgages, but it wasn't willing to allow the single sale on the basis they wanted it to progress. As such, it effectively gave them the choice of three options; they could choose not to sell the property (which is what they did), to pay off both mortgages (at which point the two debts would be consolidated and any equity from one sale would cover any shortfall in the other), or to sell the single property, but agree for any equity to be used to reduce the shortfall debt.

I know that Mr Y and Mrs Y want the shortfall debt written off, due to Mr Y's financial circumstances. However, given Mr Y and Mrs Y own a commercial asset that might provide

monies that could be used to partially redeem the debt owing, I don't consider Mortgage Express was unreasonable in declining to write off the debt. In light of Mr Y and Mrs Y's decision not to agree to the equity from the sale of the property to be paid toward the shortfall debt, it would also not be unreasonable for Mortgage Express to take legal action to attach a charging order to the remaining properties – this will effectively secure the shortfall debt to the remaining properties and entitle Mortgage Express to any equity released to reduce or repay the shortfall debt. Whether any such application will be granted will be the decision of the court.'

Mortgage Express confirmed receipt of my provisional decision and confirmed it had nothing further to add. Mr Y did the same on his and Mrs T's behalf.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, and in the absence of any further comments or evidence from the parties, I see no reason to change my conclusions.

My final decision

My decision is that I don't uphold this complaint. Under the rules of the Financial Ombudsman Service, I am required to ask Mr Y and Mrs Y to accept or reject my decision before 3 November 2021.

Derry Baxter
Ombudsman