

## The complaint

Mr B and Ms M complain about the refusal by Bank of Scotland plc trading as Halifax to approve their application to remortgage in their names a property that was in the legal ownership of Ms M and her former husband, Mr M.

## What happened

Ms M and her ex-husband divorced. The divorce involved court proceedings and within those proceedings, the court made an order dealing with a financial settlement and the former family home which was subject to a mortgage with Halifax. I have not seen the court order but understand from Mr M's solicitor's letter dated 6 November 2019 to Ms M that Ms M had to pay Mr M £5,000 within 28 days and remove Mr M's name from the property and the mortgage. If that didn't happen, the property was to be sold. In order to take Mr M's name off the title and mortgage, Ms M and her partner Mr B applied to remortgage the property with Halifax with Mr B and Ms M as co-owners.

Mr B and Ms M applied to Halifax for a mortgage in the spring of 2019. Mr B and Ms M at that time had savings and had joint incomes of £38,000 annually. The value of the property was £160,000-£170,000 and the existing mortgage to Halifax in the names of Mr and Ms M was about £47,000. According to a copy of the register of title that I've been provided with showing entries on that register on 3 April 2019, there were three restrictions appearing on the title. One was to a debt recovery company for a debt which was later paid off. Another was to HMRC for a debt owed by Ms M which had not been paid off. The third was to prevent registration of a disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises unless authorised by order of the court.

Halifax was concerned with the restriction in favour of HMRC. This restriction meant that broadly speaking after the entry was added to the register there was to be no disposition of the estate to be registered without a certificate signed by the applicant for registration of the disposition or their conveyancer that written notice of the disposition was given to HMRC. HMRC had the benefit of an interim charging order on the beneficial interest Ms M held in the jointly owned property due to a county court judgement made in 2010. I understand the amount due to HMRC to be just less than £11,000. Mr B and Ms M also refer to another debt to a utility company which appears to have been cleared and does not appear to be on the title register issued on 3 April 2019 which I have seen.

Halifax issued two mortgage offers to Mr B and Ms M. The first one was dated the 21 May 2019 and when it expired it issued a second one dated 26 November 2019. There were issues raised about the restriction in favour of HMRC in relation to both mortgage offers. In summary, Halifax said it would only provide the mortgage if it had a fully enforceable first charge on the property and if it would be able to recover the whole of its loan before any money was paid to HMRC should the property be sold. Its view after taking advice from its solicitors was that the HMRC restriction prevented this. So, the mortgage didn't go ahead. I understand that in early 2020 Mr B and Ms M were able to borrow money from Mr B's mother to redeem the Halifax mortgage and the property was transferred into the names of Mr B and Ms M.

Halifax's view was that it acted properly in following its professional advisers' advice that the restriction would mean that HMRC would have to be paid if it had to exercise its power of sale on the property. But it accepted that there had been some poor service on its part and offered compensation of £400.

#### Our investigator's view

Our investigator didn't recommend that this complaint should be upheld and concluded that Halifax had acted fairly in not proceeding where it felt the restriction prevented it enforcing its security. Mr B and Ms M disagreed saying in summary that they did not believe that their complaint had been properly investigated.

#### My provisional decision

As my decision differed from that of our investigator, I issued a provisional decision in this complaint. In that decision I said:

*"There are two main parts to this complaint. Firstly, the delay in Halifax coming to a decision on the remortgage application and secondly whether its decision to refuse the application was fair and reasonable.*

*The application appears to have been commenced in mid-March 2019. Halifax says that there was some initial issue about Ms M's income following a change of job. A mortgage offer was later issued dated 21 May 2019. The solicitors who were instructed acted for both Halifax and Mr B and Ms M in the remortgage. I shall refer to the solicitors firm as "E". E had picked up an issue about the restriction on the title in favour of HMRC. E appears to have raised this issue by email with Halifax on 15 May 2019 (although I have not been provided with a copy of that email). Halifax also told Mr B and Ms M: "Please be advised that the figure will need to be decided between yourself and HMRC (which you have confirmed you are in the process of doing) and HMRC will need to provide us with a redemption figure and confirmation that upon receipt of the funds they have stated they will remove the restriction on the title of your property."*

*But after the email of 15 May 2019, there then seems to have been a breakdown in communications between Halifax and E as the next correspondence I see is a letter from Halifax to E which is dated 1 July 2019 and is a response to that email of 15 May 2019. In that letter Halifax said that it was willing to proceed if the charging orders were repaid on completion.*

*At that stage only the HMRC restriction remained referencing a charging order in respect of a debt. That was communicated to Mr B and Ms M who replied on 2 July 2019 that the reason they weren't repaying the HMRC debt was that HMRC had given them permission to challenge that debt and that process would take some months but HMRC would not seek to restrict the remortgage. I've only seen a part of that letter from HMRC, but my understanding is that HMRC wouldn't object to a remortgage and wouldn't remove the restriction. On 3 July 2019 there was an email from E to Mr B and Ms M saying that the mortgage could not proceed unless the debt to HMRC was paid off and confirming that the charging order needs to be paid off upon completion. There was then a further delay until the mortgage adviser emailed Mr B and Ms M on 19th August 2019 to say that the underwriters decided that the remortgage won't proceed unless HMRC was paid and the restriction lifted.*

*Following some further correspondence with Halifax, Mr B and Ms M then raised a complaint. The matter appears to have been revived again in November following Halifax's letter dated 22 October 2019 responding to Mr B and Ms M's complaint. I note that Ms M told*

*Halifax that HMRC agreed to waive a portion of the debt and dispute the remainder. A new mortgage offer was issued on 26 November 2019 as the first one had expired. But the problem of the restriction resurfaced. Halifax asked E to proceed if they confirmed that Halifax would retain a first legal charge and it was fully protected. The notes record E replying that the amount owed to HMRC would be payable if Halifax exercised a power of sale despite Halifax holding a first legal charge. In the end, Mr B and Ms M were unable to proceed with the remortgage with Halifax.*

*I have considered Halifax's reasons for not proceeding with the remortgage whilst the restriction in favour of HMRC was still in place. Halifax says it acted on the basis of the legal advice received. My understanding of E's position as set out to Mr B and Ms M and to Halifax was that the effect of the restriction meant that HMRC's debt would outrank Halifax's mortgage. Therefore, if Halifax exercised its power of sale, HMRC would have to be paid before Halifax. For example, in their email to Mr B and Ms M of 3 July 2019 E says: "we are aware that you with [sic] to proceed with the HMRC debt in place. As we have previously advised we cannot do this. The monies outstanding on this debt would outrank our clients new security and this is not acceptable for Halifax"*

*Later, in their email to Halifax dated 11 December 2019, E said "we wish to make it clear that the Restriction in respect of the £11,000 owing to HMRC will catch should you exercise your power of sale and the sum would be payable despite you holding the first charge on the property ".*

*I have considered the law and whether the position Halifax's legal advisers have taken is justified. Ms M was subject to a charging order which appears to have been held over the beneficial interest in jointly owned property. Legally, a restriction entered to protect a charging order over a debtor's beneficial interest in jointly owned registered property confers no priority in the ranking of which creditor would receive funds in the event of a sale of the property. HMRC's charging order is not protected - for example, by a notice on the charges register or recorded as a registered charge. As such, any new legal mortgage registered after the charging order would override it and take priority over the charging order. This suggests that HMRC would not have obtained the proceeds of sale upon sale of the property ahead of the charge protecting the remortgage (had the remortgage gone ahead and such a charge been added to the title register).*

*I accept that the HMRC restriction would need to be complied with in the scenario Halifax is concerned with - namely were it to seek to exercise its power of sale. However, all the restriction requires is that prior to any disposition of the registered estate being registered that a certificate be signed (by the applicant for the registration or their conveyancer) saying that written notice of the disposition was given to HMRC. To my mind, compliance with the restriction would not therefore give HMRC any priority to the sale proceeds over the proposed Halifax remortgage charge.*

*Halifax's legal advisers have noted in more recent correspondence with this service that if Halifax exercised its power of sale, notice to HMRC would be sufficient to comply with the restriction and would allow the purchaser to register the transfer of title into its ownership. In its most recent correspondence with this service, Halifax's legal advisers summarise the position as follows:*

*"We understand that, legally, the interest protected by the restriction may be overreached by a disposition under a power of sale even where the restriction pre-dates the Lender's charge however in practice this is accepted neither by the Land Registry nor by purchasers. Therefore the Bank's ability to dispose of the property and attain the best price would be significantly affected if the restriction were to remain on the title in its current form.*

*....*

*The wording of the charging order Restriction requires a certificate that notice of the disposition was given to HMRC. A disposition post possession would be under the bank's power of sale. The notice itself would allow the bank to comply with the Restriction and would allow the purchaser to register the transfer of the title into their ownership - although there is a risk that the notice would also give HMRC the opportunity to raise objections. Compliance with the Restriction, therefore, would not necessarily remove the Restriction and a purchaser is likely not to proceed without an undertaking from the Bank's conveyancer that the Restriction would fall away. This would be due to the lending requirements of the purchaser's incoming mortgagee and of course due to the fact that purchasers will not commit to buying a property where there is a risk that debts of previous owners may remain protected by registration against the title."*

*Halifax's legal advisers say that HMRC could raise an objection when given notice under the terms of the restriction but I'm unaware what objection HMRC could raise if the terms of the restriction have been complied with. The purpose of the restriction is to alert the creditor to the fact that monies may be available on the sale of the property. It's not a mechanism that would allow HMRC to prevent the secured creditor with a first charge recovering its debt from the sale.*

*The other point raised by Halifax's legal advisers at this stage is that a purchaser will not accept a transfer with a debt recorded on the title and would request an undertaking that it would fall away. But this issue has been dealt with in guidance issued by the Land Registry. Land Registry Practice Guide 75 which deals with power of sale notes that "Provided the charge under which the power of sale is being exercised had overreaching effect or was created before the trust to which the restriction relates, we will also cancel the following types of restriction [Form K restriction] (and inform the restrictioner of this) regardless of when they were registered."*

*It should be noted that the restriction in this complaint is a Form K restriction. As the property was held in joint names any sale would be by two persons. Therefore, exercising the power of sale would have an overreaching effect as a purchaser would pay capital money to the debtor and the co-owner which would allow the purchaser to take free of the charging order, as per the guidance in Land Registry Practice Guide 75 set out above. It is noted from E's comments above that they say "We understand that, legally, the interest protected by the restriction may be overreached by a disposition under a power of sale even where the restriction pre-dates the Lender's charge..."*

*I have considered the concerns raised by E that the overreaching of the restriction would not be accepted by the Land Registry or purchasers and would impact the ability of Halifax to get the best price upon sale. I note that Land Registry Practice Guide 76 at Part 4 says that: "We (the Land Registry) will automatically cancel the Form K Restriction once it has been complied with on registering a transfer of the registered estate for valuable consideration". It should be noted that Part 4 of Land Registry Practice Guide 76 was updated in July 2019 to include this guidance on automatic cancellation. So, this provision of Practice Guide 76 would have been relevant during the course of this complaint following that update. This Land Registry guidance confirms that upon sale of the property the Land Registry would automatically cancel the restriction. It therefore seems unlikely that the restriction would impact on the sale price and even if a purchaser required an undertaking that could be given on the basis of this Land Registry guidance. Even if the restriction still caused a reduction in the resale price, as I will go on to explain later in this decision, the low loan to value ratio meant that there was a fair degree of equity in the property. I consider that it is likely that this equity cushion could absorb a potential price reduction without likely impacting on Halifax's recovery of the remortgage.*

*Overall, having considered the legal arguments put forward by Halifax and E, I am satisfied*

*that the restriction would not have prevented Halifax having a first legal charge on this property under the proposed remortgage. I do not consider this reason, nor any of the other reasons E has provided support its decision to prevent the remortgage from being carried out until the restriction was removed.*

*Halifax has made a further point that it appoints professional advisers and relies on that advice for its lending decisions. It is concerned that I may be challenging this process and its right to make decisions based on that advice. I do indeed see that Halifax throughout this process took advice from E. But the decision on the remortgage was ultimately Halifax's and if that decision was unfair, I'm entitled to uphold this complaint against Halifax.*

*Even if I am wrong on my analysis of how the restriction would legally operate, I consider that there are other valid reasons on which to conclude that Halifax acted unfairly. In particular, I note that E drew Halifax's attention to an issue that I believe it should have considered but didn't give appropriate weight to. In its email of 11 December 2019, referred to above, E told Halifax that the restriction would catch and that the sum just under £11,000 due to HMRC would be payable. E invited Halifax to consider if it in any case wished to proceed "given the low loan to value ". I would have thought that this was an issue that Halifax should have addressed without needing the prompting of its legal advisers in a consideration of the best interests of Ms M and Mr B but it appears not to have considered it.*

*If the restriction meant that the debt had to be paid from the repossession sale, the amount that would have to be paid to HMRC, not taking into account any possible reduction which may have been agreed, was just below £11,000. In that situation the total debt including the secured debt on the property was about £60,000 and the value of the property, I'm told, was about £160,000-£170,000. That would seem to be a fair degree of equity to provide a cushion to Halifax against what it terms "the potentially adverse effects for the bank on a repossession sale of the property". So, I consider that for this reason as well Halifax acted unreasonably in refusing this remortgage.*

*In addition, I consider there was an unreasonable delay in processing the application given the urgency with which Mr B and Ms M required it to be processed. Halifax is subject to the FCA principles that it must have regard to the interests of its customers and treat them fairly. The request for the remortgage arose out of a divorce which can be contentious, as here, and the interests of the customers would be to have the matter settled and put behind them as expeditiously as possible. The background to the application was Ms M's requirement to comply with a court order under pressure of time. But there were periods of unreasonable delay throughout. It took between 15 May and 1 July for Halifax to respond to its solicitors who were seeking instructions about how to deal with the charging orders.*

*Further, on 22 August 2019 Ms M contacted Halifax to ask it to review its decision not to proceed until the HMRC debt was repaid taking into account that they were disputing this charge and the equity in the house far exceeded any debts against it; contact Mr M to avoid him taking further action or to provide Ms M with a response she can pass on to Mr M and to provide Ms M with an understanding of exactly what has gone wrong with the process between Halifax and E.*

*That was, in part, a request to review its decision. Halifax would have been aware that Ms M was under pressure to sort out the matrimonial problem and wanted a quick response. Halifax treated it as a complaint to which the lender did not respond until 22 October to say that it couldn't continue with the re-mortgage process until the HMRC restriction had been removed. It was on 26 November 2019 that Halifax instructed E to act on this remortgage once again.*

*I note that Halifax's own complaint manager said in an email of 29 November 2019 that*

*"Since [May 2019] nothing much appears to have happened and the application expired". Although the complaint manager considered that nothing much happened at Halifax's end, Mr B and Ms M were still hoping that Halifax would review its decision as Ms M was still under pressure to carry out the steps set out in the court order.*

*For the reasons set out above, my intention is to uphold this complaint. I've looked at what compensation is appropriate. In their complaint form, Mr B and Ms M complain about the length of time the process lasted, the threat of further court action hanging over them, the possibility that they might lose their home as the result of that action and all the stress associated with this. In relation to financial loss Mr B and Ms M at that stage believed that they would be unable to obtain a mortgage with another lender as the mortgage was refused by Halifax and they might end up losing their home and having to rent.*

*As I say above, the background was the breakdown of a marriage and Ms M having to comply with an order that was intended to bring a finality to the financial relationship between the separated couple. Mr B and Ms M had a plan that would have allowed them to comply with the order but in my view were unfairly prevented from doing that. As Ms M hadn't complied with the order, she began to get letters from Mr M's solicitor.*

*Mr M's solicitor wrote to Ms M at the beginning of November noting that under the order if Ms M was unable to take over the existing mortgage or effect Mr M's release that the property was to be sold and as that hadn't occurred, Mr M's solicitor said:*

*"We therefore put you on notice that unless completion of the transfer, the payment of the lump sum and the release of our client from the Halifax mortgage has occurred within 14 days, our client will seek a sale of the property".*

*This was followed up by a letter of 21 November, part of which reads:*

*"As stated in our earlier letter, our client is not prepared to leave matters further in abeyance. Therefore, unless you immediately take steps to place the property on the market for sale, we will have little choice but to pursue an enforcement application through the Court and will seek to pursue the question of the cost of those proceedings against you"*

*That potential further legal action resulted in the sustained contact by Mr B and Ms M with Halifax at the end of November and into December when they clearly felt that without a Halifax remortgage that they would face further court action and might lose their home and so were pleading with Halifax to reconsider their application.*

*Halifax, which accepted that there were delays, offered £400 as compensation. In addition to the frustration caused by the delays and the disappointment of not getting the remortgage there was the continuing anguish of the matrimonial dispute not being brought to a finality, the continuing contact from Mr M's solicitor which should have been unnecessary had the remortgage gone through, the possibility of further legal proceedings and the possibility of the loss of the property.*

*Luckily, the matrimonial issue was able to be finalised shortly after Christmas 2019 and the sale of the house was avoided as Mr B was able to borrow money from family to pay off the mortgage and to have Mr M removed from the title. But I consider that Halifax's failures over a prolonged period combined with the threat of further legal action hanging over Mr B and Ms M and the resulting anxiety that I can read in Mr B and Ms M's correspondence did result in substantial distress, upset, and worry. For that I assess that Halifax's award be increased from £400 to £900. I consider that this would be appropriate compensation for the distress and inconvenience caused, rather than the £400 offered by Halifax. I understand from the file that the £400 hasn't yet been paid as Mr B and Ms M didn't agree with that offer so I will be asking Halifax now to pay £900.*

*I've also looked at whether there was any financial loss. The possibility of financial loss was raised by Mr B and Ms M in their complaint form where they referred to the possibility that*

*they might lose their house and have to rent. But that didn't happen. In the end Mr B and Ms M borrowed from Mr B's mother's savings and are repaying that. Mr B says that until it's repaid that it will have a knock-on effect on his mother's ability to meet emergencies. I hope that it doesn't. But Mr B's mother isn't a party to this complaint and I'm unable to consider compensation for her.*

*I note that in its letter of 5 December 2019 that Halifax offered, on receipt of an invoice, to consider any legal costs incurred to date as a result of Halifax's delays. I don't see that one was presented. It seems to me that it would be appropriate for Halifax to meet any reasonable legal costs Ms M and Mr B incurred which were associated with or arose from the delay. As I have concluded that Halifax has acted unfairly in not proceeding with the remortgage I also consider that Halifax should also meet any reasonable legal costs Ms M and Mr B incurred which were associated with or arose from Halifax unfairly deciding to not proceed with the re-mortgage. If Ms M and Mr B wish to make a claim for legal costs, they will need to provide detailed invoices to me and I will consider the details of those invoices before issuing my final decision.*

*There is one other matter. It seems that when Halifax hadn't processed the mortgage at the end of October, Ms M stopped paying the existing mortgage as a new one should have issued by that date. Whilst I agree that a new one should have been completed by that time, there was still an outstanding loan to Halifax and that loan would have been the same whether it was on the old mortgage or the hoped for new one. So, I don't consider that it was appropriate that Ms M stopped making her mortgage payments at that time and I don't consider it appropriate that I make any direction or award to relieve Mr B and Ms M of any consequences of doing that."*

I issued my provisional decision saying that I upheld this complaint and required Bank of Scotland Plc trading as Halifax to increase its previous distress and inconvenience award and to pay Mr B and Ms M compensation of £900. I also said that I would require Halifax to meet any reasonable legal costs which were associated with or arose from Halifax's delays and any reasonable legal costs which were associated with or arose from Halifax unfairly deciding not to proceed with the remortgage. I then invited Mr B and Ms M and Halifax to make any further submissions which I said I would consider before issuing my final decision.

### **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.

I invited Mr B and Ms M to make further submissions before I made my final decision. Mr B and Ms M thanked me for my provisional decision and asked me to consider an invoice from their solicitor dated 10 February 2020 for £636.00 for legal services in connection with their transfer of equity.

Halifax also responded to say that it disagreed with my provisional decision. It said that it agreed that there were elements of poor service and that it agreed to cover any direct solicitors costs. But it felt that it was correct to take guidance from its solicitors and to rely on that to make a decision and that it was proper to rely on its solicitor's advice.

I thank the parties for their patience whilst I dealt with this matter. In regard to Halifax's further submissions, I note that Halifax has made no further or new submissions in respect of the legal issues relevant to the restriction. I reviewed those issues but my views on that are as set out in detail above. I accept that Halifax took guidance from its solicitors on the restriction but as I said above the decision on the remortgage was ultimately Halifax's and if that decision was unfair, which remains my view, I'm entitled to uphold this complaint against

Halifax. I also said in my provisional decision that its solicitors had invited Halifax to consider the matter not only from the strict legal point of view but more generally, given the amount of equity in the property and the size of the HMRC debt but Halifax had failed to consider that and in my view had failed to consider the best interests of Mr B and Ms M. I've reviewed the complaint file and the further submissions but consider that my provisional decision represents a fair outcome to this complaint, and I will be upholding this complaint.

There is one remaining issue. In my provisional decision I said that *"Halifax should also meet any reasonable legal costs which were associated with or arose from Halifax's delays and any reasonable legal costs which were associated with or arose from Halifax unfairly deciding not to proceed with the re-mortgage."* And that remains my view for the reasons set out above. I note that Halifax in its submission also indicated that it would cover any direct legal costs. I asked Mr B and Ms M to provide me with any relevant invoices and I would consider them before issuing my final decision.

Mr B and Ms M have produced an invoice dated 10 February 2020 for £636 for a transfer of equity from their solicitor. Whilst Halifax shouldn't be responsible for the cost of the transfer of equity as that is a cost for Mr B and Ms M, it should be responsible for any legal cost that Mr B and Ms M had to meet resulting from it not proceeding with the remortgage. That would include any additional legal cost for the transfer of equity caused by Halifax not proceeding with the remortgage.

During the course of the remortgage Mr B and Ms M had got a quote from E for the transfer of equity of £265 plus vat. I have forwarded that estimate to Halifax. If the remortgage had proceeded that would be the cost that Mr B and Ms M would have paid. When the remortgage didn't proceed Mr B and Ms M used another firm of solicitors for the transfer of equity. There was an additional cost to this which wouldn't be unreasonable given that the new firm would not have had the advantage of E which was already dealing with the remortgage and would have had a familiarity with the title from dealing with that. E's quote was £265 plus vat and the new firm's invoice was for £520 plus vat. The difference being £255 is in my view a cost which arose from Halifax unfairly deciding not to proceed with the re-mortgage and I would require Halifax to reimburse Mr B and Ms M for that. There is a disbursement on the solicitors' bill of £12 but Mr B and Ms M would have to pay this in any event, and I don't require Halifax to pay that.

### **Putting things right**

Bank of Scotland plc trading as Halifax should increase its previous distress and inconvenience award and now pay Mr B and Ms M compensation of £900 and reimburse them £255 for their legal costs.

### **My final decision**

My decision is that I uphold this complaint and require Bank of Scotland plc trading as Halifax to pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Ms M to accept or reject my decision before 27 May 2022.

Gerard McManus  
**Ombudsman**