

The complaint

Mr and Mrs B complain that Kensington Mortgage Company Limited (trading as Kensington Mortgages) is unfairly pursuing them for a shortfall debt some eight years after it took their property into possession and sold it.

What happened

Mr and Mrs B had a mortgage with Kensington. The account fell into arrears and the property was taken into possession and sold in March 2013.

Mr and Mrs B say they thought their debt was cleared when the property was sold. They say they hadn't heard from Kensington since then. Mr and Mrs B say if they'd known they had to pay the debt they'd have agreed a repayment plan.

In late 2020 Mr and Mrs B were contacted by a debt recovery business which said it had bought the shortfall debt from Kensington.

Mr and Mrs B ask if they have to pay the debt after all this time. They also question the property sales price, which they consider was too low. Mr B is recovering from surgery and says this matter is causing significant stress.

I sent a provisional decision to the parties. In summary, I said, it wasn't fair for Mr and Mrs B to be asked to pay the debt. This is because rules on mortgage regulation say that a lender should inform the borrower as soon as possible of any shortfall debt. And, if it intends to recover the debt, it must notify the borrower of this within six years of the date of sale. Kensington hadn't done this.

Kensington agreed. As it had sold the debt to a third party it said it would arrange with the third party for the debt to be written off in full. Mr and Mrs B said this would resolve their complaint.

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.

Where the evidence is incomplete, inconclusive or contradictory, I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in light of the available evidence and the wider circumstances.

Kensington provided a copy of the completion statement for the sale of Mr and Mrs B's property in March 2013 and account statements. These show the sales proceeds as less than the balance owed. The shortfall was about £32,500. The shortfall wasn't written off when Mr and Mrs B's property was sold. This was a debt owed by them to Kensington.

Kensington had instructed a qualified surveyor (a member of RICS) to value Mr and Mrs B's property. The property was valued at £75,000 and sold for a bit more. Kensington appointed

estate agents and the property was marketed for sale. It took advice from the agents about the price at which the property was marketed. There's nothing to suggest Kensington didn't meet its obligation to obtain the best price reasonably available.

Mr and Mrs B ask whether Kensington can ask them to pay the debt after all this time. The Limitation Act 1980 says that a lender has 12 years to use court action to recover a principal sum of money secured by a mortgage. The 12 years starts from the date the property is sold, when the amount of the shortfall is known. The Limitation Act says the period during which the lender can recover arrears of interest is six years.

Less than 12 years, but more than six years, had passed since the sale of the property when Mr and Mrs B say they were first contacted about the shortfall debt. However, if (as is likely) the mortgage terms and conditions say payments are applied first to interest arrears, then interest due, then costs and lastly to the principal amount, the shortfall debt owed by Mr and Mrs B would be of principal.

If Kensington (or the third party that bought the debt) did take the matter to court, it would be for the court to decide whether the relevant time limits are met and whether the debt is enforceable. But that's not the end of the matter for me. Because as well as the time limits in the Limitation Act, I need to consider whether Kensington acted fairly and in accordance with relevant regulations and good industry practice.

It's likely this was a regulated mortgage. So the rules set out in the part of the Financial Conduct Authority's handbook related to mortgages (known as MCOB) applied. The rules in force in March 2013 say the lender should inform the borrower as soon as possible of any shortfall debt. And, if it intends to recover the debt, it must notify the borrower of this within six years of the date of sale. The intention is to ensure that borrowers are treated fairly – it wouldn't be fair for a lender to leave a long period before contacting a borrower about a debt. Borrowers should provide up to date contact details to the lender. But, if they don't, I'd expect to see evidence that the lender made efforts to contact them.

Kensington says it lost contact with Mr and Mrs B prior to their eviction in November 2012. It sent letters to the security property in early 2013. Kensington knew Mr and Mrs B had left the property. But Mr and Mrs B hadn't provided a new address to Kensington so it couldn't write to them at their new address. The letters were returned to Kensington undelivered. So Kensington would have known Mr and Mrs B didn't receive the letters.

It's not necessarily unfair that Kensington didn't succeed in contacting Mr and Mrs B within six years to tell them it intended to recover the debt – especially if they didn't tell Kensington where they could be contacted. I would though expect Kensington to try and get in contact with Mr and Mrs B and it hasn't provided evidence that it did so. Kensington's terms and conditions most likely give it the right to recover the debt. I'm not disputing that. But what I haven't seen is evidence that Kensington made reasonable efforts to contact Mr and Mrs B within six years of the property sale and tell them it intended to recover the shortfall.

I don't think it was fair for Mr and Mrs B to be notified that Kensington (or the third party that it sold the debt to) intended to recover the debt more than seven years after the property was sold – and this didn't meet the rules in MCOB. I don't think that Kensington should have sold the debt in these circumstances.

Kensington agreed and said it would arrange with the third party that now owns the debt for the debt to be written off in full. How it arranges this is for Kensington to decide, but I think it would be fair for it to send written confirmation to Mr and Mrs B that the debt has been written off.

Most likely, Mr and Mrs B's credit files show they defaulted on the debt at about the time Kensington took possession. It might be that, due to the time passed, the debt is no longer shown on their credit files. If the debt is still shown on their credit files, then I think it would be fair for Kensington to update their credit files to reflect the fact that the debt has been written off.

My final decision

My decision is that Kensington Mortgage Company Limited should arrange for the shortfall debt to be written off in full, as it offered to do. It should send written confirmation of this to Mr and Mrs B, and update their credit file as appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B and Mr B to accept or reject my decision before 13 October 2022.

Ruth Stevenson
Ombudsman