

The complaint

Via her legal representative, Miss P complains that Bank of Scotland plc trading as Birmingham Midshires Mortgages ("Birmingham Midshires") is trying to make her pay an Early Repayment Charge (ERC) despite the fact that it doesn't have her signature on the mortgage offer which sets out said ERC. She would like it to be waived and the account fully closed.

She is also unhappy with the management of the direct debit on her account by Birmingham Midshires, and its failure to respond to her legal representatives' concerns.

What happened

In September 2019 Birmingham Midshires made Miss P an offer of a fixed rate mortgage product. This was arranged by Miss P's brokers, who gave her the necessary advice and liaised with Birmingham Midshires.

Using a broker-specific instruction form to Birmingham Midshires, Miss P's brokers effectively accepted the offer on her behalf and the new product completed on 30 September 2019.

In April 2021 Miss P contacted Birmingham Midshires to discuss a few options with regard to her mortgage. She said she believed that her fixed rate product would expire in September 2021. The Birmingham Midshires agent explained that it did not in fact end until 31 January 2022. So changes prior to that date would be potentially subject to an ERC. Miss P expressed her surprise, saying she believed that in 2019 she agreed only to a two-year fixed term product. The Birmingham Midshires agent told her that wasn't the case.

In October 2021 Miss P sold her property and redeemed her mortgage. When she was told that an ERC was due, she refused to pay, saying she had been told that she was fixing her mortgage product for only two years, and that is what she had agreed to. Her legal representatives complained to Birmingham Midshires, saying it could not enforce the ERC as it did not have Miss P's signature on the mortgage offer. Birmingham Midshires disagreed, and so Miss P's representatives came to this Service. However, it did accept that it had not responded in a timely way to Miss P's representatives' letters, so offered £80 by way of compensation for poor service.

Having reviewed the evidence, the investigator didn't think Birmingham Midshires had done anything wrong, so didn't uphold the complaint. Miss P's representatives don't accept that and asked an Ombudsman to look at her case.

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, I'm not upholding it, and I'll explain why.

Firstly, I need to clarify my role as an Ombudsman, and indeed the function of this Service. It is my statutory role to make decisions to resolve disputes based on what I consider to be fair and reasonable in all the circumstances of a complaint. In reaching that decision I take various things into account, such as rules, regulations, law, best industry practice and also what the average person would consider to be reasonable. This latter element is sometimes referred to as the “Clapham Omnibus test”.

Miss P’s representatives are unhappy that the investigator has shown “...a lack of understanding of...the basic elements of contract law...” in his handling of this complaint. And that “...the issue of law has not been addressed.” It would appear to me that they are seeking a determination from this Service which says that a mortgage offer which does not have a borrower’s wet signature has no validity, as a principle of contract law. If that is the precise issue they wish to have resolved, they will need to take it through the courts. The Financial Ombudsman Service exists to provide informal dispute resolution. Whilst I must consider law as part of my deliberations, it is not my role to resolve legal queries of this nature, but to determine what, in the round, is a fair and reasonable outcome to a situation.

To do so, I have identified the key issues on which I make findings. I have read the entire file for this case, but do not need to refer to every single point raised in order to reach a fair answer.

Miss P says she believed in October 2019 that she was entering into a two-year fixed deal, which she therefore assumed would end in October 2021. That is presumably on the basis of what her brokers told her. That timeframe of two years is not mentioned anywhere in the relevant paperwork produced by Birmingham Midshires. So she will need to take up that point with her brokers. I have seen nothing to lead me to conclude that Birmingham Midshires misled her on this point.

When Miss P spoke to Birmingham Midshires in April 2021, her representatives say that the agent again described the fixed term as having been two years, but that because Miss P’s brokers didn’t register the product change until January 2020, that is why in fact the term wasn’t ultimately set to end until January 2022. Unfortunately I haven’t been able to listen to that call recording, but I don’t consider that I need to in order to reach a decision. Even if that is what was said, that doesn’t make any sense, given the mortgage offer dated September 2019, which repeatedly says that the term will end in, and an ERC payable until, January 2022. Fixed rate deals such as this one are fixed to a certain date, applicable to all customers who sign up to it. I am not clear what is being referred to as a registration process in this instance, but no such process could alter the end date of a fixed rate deal.

It’s not in dispute that a rate switch occurred in 2019. However, Miss P’s representatives suggest that she was not provided with the mortgage offer during the sale:

“...we questioned why our client had not been given these documents before the product was put in place.”

As Miss P appointed brokers to act on her behalf as intermediaries, it would typically be for them to review the relevant paperwork with her and receive her instructions.

In any event, I can find no evidence of a mistake by Birmingham Midshires in this respect. The mortgage offer was generated by it, provided to Miss P’s brokers, and accepted on her behalf by the same brokers.

Now I turn to the issue which appears to be at the heart of the matter for Miss P’s representatives – namely that Birmingham Midshires has no signed mortgage offer, consequently it is “unenforceable”.

As a basic foundation, I don't think the average person on the street believes in this day and age that any document without a wet signature is effectively null and void. With the increasing use of a range of electronic systems and portals to make important arrangements, I don't think the presence or absence of a wet signature is pivotal. So the lack of it on the 2019 mortgage offer is of little import in my view. As Miss P's representatives provided us with the 2019 mortgage offer when they first brought this complaint, it follows that both she and they have been in possession of it for at least twelve months. It quite clearly sets out in section 10 that, between 31 January 2021 and 31 January 2022, an ERC of £2,200 will be payable if the mortgage is redeemed.

Indeed, if I were to accept Miss P's representatives' logic, namely that the 2019 mortgage offer has no basis in law as a contract, that would effectively make it null and void. In which case, if the 2019 mortgage offer were disregarded, Miss P would have had to pay more than £114 extra per month in mortgage repayments since October 2019. That is because her previous fixed rate mortgage product, which began in June 2017, expired in September 2019. At that point the interest rate she would have been charged, but for the 2019 mortgage offer and new fixed rate product, would have been more than twice what she had been charged up until then. So if I were to conclude that the 2019 mortgage offer should be set aside due to a lack of a wet signature, Miss P would owe Birmingham Midshires well over £2,700. This complaint would then have no basis as she would have suffered no financial loss.

In the round, and noting the role of Miss P's broker in the arrangement of this mortgage product, I think Birmingham Midshires acts both fairly and reasonably in conducting its business relationship with Miss P on the basis of the mortgage offer dated 17 September 2019. That offer makes the ERC payable clear, and I have identified no reasonable grounds on which it should be waived.

In respect of the concerns about potentially cancelled, then reinstated, direct debit arrangements in October 2021, I have been given no evidence to show that any direct debit instruction has caused a loss to Miss P. And there has been no suggestion of any transactions taking place since the mortgage was redeemed – both parties appear to accept that the full ERC remains in dispute, not a reduced amount as a result of any debits taken by Birmingham Midshires. So I need make no further findings on this point.

In respect of the lack of response by Birmingham Midshires to Miss P's legal representatives, I consider that the £80 it has already offered is sufficient to compensate for any customer service failures.

It therefore follows that I don't uphold this complaint.

My final decision

For the reasons I've explained, I don't uphold this complaint and Birmingham Midshires doesn't need to do anything.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss P to accept or reject my decision before 14 October 2022.

Siobhan McBride
Ombudsman