

The complaint

Ms O has complained about charges added to her mortgage account that she holds with Bank of Scotland plc trading as Birmingham Midshires.

She says she told Birmingham Midshires to make a payment to the freeholder in respect of the ground rent and service charges requested for her leasehold property, and because it didn't do so there were additional legal fees added to the amount.

For ease for the remainder of this decision I'll just refer to 'ground rent' but that should be taken to mean the entire sum requested by the freeholder, including any service charges, costs for works to the property and other fees and charges, where applicable.

What happened

Ms O has held this mortgage with Birmingham Midshires since 2004. There is an extensive history which I won't detail here, instead I'll concentrate on the crux of this complaint. Whilst Ms O has, at times, mentioned other issues, her referral to us was about the payment of the service charges so that is the only issue I'll be deciding here.

In November 2020 the freeholder wrote to Birmingham Midshires about outstanding ground rent, and Birmingham Midshires wrote to Ms O about it. The notes indicate Ms O said she was in dispute with the freeholder and she said the sum shouldn't be paid to the freeholder. At that time the debt was noted to be £27,547.

Throughout 2021 and the first half of 2022 there was correspondence between the parties. There was also some legal action between Ms O and her freeholder, which increased the debt further. The contact notes indicate that at this time Ms O was telling Birmingham Midshires that she was still in dispute with the freeholder, with call notes in that respect in August and September 2021.

The freeholder's solicitor wrote to Birmingham Midshires on 28 July 2022 to say it had issued forfeiture proceedings, with a hearing booked for 24 August 2022.

In August 2022 Ms O said she thought Birmingham Midshires had already made the payment and said that she wanted it to do so at that time, even though she didn't agree it was owed, as she didn't want matters to go to court for forfeiture of the lease.

Birmingham Midshires' solicitor was corresponding with the freeholder's solicitor to request the paperwork required to evidence the debt was due, and that the right process had been followed. It also put some of Ms O's comments across, in that she was still disputing the debt. The paperwork arrived the day before the hearing, and a settlement agreement was reached for Birmingham Midshires to pay the debt and that the lease wouldn't be forfeited.

Birmingham Midshires made a payment of £34,174 at the end of August 2022, and then paid legal fees (which had been invoiced separately) of £2,742 on 4 October 2022, £775 on 1 November 2022, and £211 on 6 January 2023. All of which were debited from Ms O's mortgage account, thus increasing the balance owed.

Ms O raised a complaint with Birmingham Midshires which it didn't uphold, and so she referred her complaint to the Financial Ombudsman Service.

Our Investigator considered the complaint and didn't uphold it. He said everything on file indicates Ms O told Birmingham Midshires throughout 2021 that she was still in dispute with the freeholder and that she had asked it not to make payment. He said it was only in August 2022 that Ms O said payment should be made, albeit she still disputed it. He said the costs incurred by Birmingham Midshires were fairly charged to Ms O's mortgage account, and so he didn't think Birmingham Midshires needed to take any action.

Ms O didn't agree and so the case was passed to me to decide.

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 asked for further information from both parties before coming to this decision and I thank them for their assistance.

I'm very sorry to hear of all the difficulties Ms O has experienced over the years. I haven't gone into details as our decisions are published, albeit in anonymised form. I've taken into account everything that she's said about that, and I've also borne in mind the regulator's guidance both for mortgages in general, and for the treatment of vulnerable customers.

With all that in mind, I've looked very carefully at how Birmingham Midshires has managed Ms O's mortgage in respect of the ground rent payment. Having done so, I don't think Birmingham Midshires has treated her unfairly. I appreciate that won't be the answer Ms O is looking for, but I hope my explanation helps her understand why I've reached that conclusion.

In the call in August 2022 Ms O said she thought Birmingham Midshires had paid the ground rent in 2021. Initially she said that she thought it had been paid because Birmingham Midshires said it was going to pay it if Ms O didn't do so. Later in that call she said she phoned Birmingham Midshires and said that the judge had told her she should pay it and then her counter claims would be dealt with separately. She said she told Birmingham Midshires to pay the money and that she would pursue the freeholder to give her the money that she was owed. Ms O said, when her account was changed in September 2021 (when Birmingham Midshires moved all its mortgage customers onto a new system) she assumed the payment had been made then.

I've listened to the calls Birmingham Midshires has been able to trace from 2021, and I've also reviewed the call notes. Having done so I can't find any evidence of Ms O instructing Birmingham Midshires to make the payment in 2021 and that she wasn't still in dispute with the freeholder. Whilst Ms O's mortgage account was changed in September 2021 (as was the mortgage accounts of all Birmingham Midshires' customers) that was simply a change in system, and didn't indicate the payment had been made. By then the debt stood at over £28,000 so if Birmingham Midshires had made the payment, Ms O's balance would have increased by that much, which it didn't. So I don't find it likely that Ms O, having looked at her account, could have thought the payment had been made.

In fact, contact notes from August and September 2021 indicate Ms O told Birmingham Midshires she was still in dispute with the freeholder over the charges, and said they were trying to bully her into paying by saying Birmingham Midshires would pay if she didn't. The September note indicates Ms O was told by Birmingham Midshires that it wouldn't pay under

those circumstances.

Although this complaint hasn't arisen because Birmingham Midshires paid disputed ground rent (as I said earlier, it did so in August 2022 at Ms O's request) it may provide some helpful context and background if I explain why the issue generally is of such importance to a mortgage lender. The threat by a freeholder to seek forfeiture of the lease due to unpaid ground rent or other items by a leaseholder has the potential to leave a lender without any security for the money it's owed under a mortgage.

So it's not uncommon for a lender, on learning of a dispute between freeholder and leaseholder, to step in and pay the disputed sums once certain steps have been taken, in order to preserve its security. Under the terms of the mortgage, a lender can then debit the amount it has paid (plus any costs incurred) to the leaseholder's mortgage account. But that shouldn't happen when there is just a mention of the threat of forfeiture; the likelihood of forfeiture needs to be more substantive.

If Birmingham Midshires had paid the freeholder in 2021 when Ms O was telling Birmingham Midshires that she was still in dispute with the freeholder, we could potentially have received a very different complaint from Ms O, that Birmingham Midshires had acted hastily and gone against her express wish and paid a sum that she was adamant she didn't owe. As it stands, Birmingham Midshires didn't act hastily (by paying the ground rent before the threat of forfeiture had become substantive) and it didn't go against Ms O's express wish.

But the fact remains that Birmingham Midshires was concerned about the potential for its security to be lost, and it was right to be, given the risk I've explained above, combined with the history of the dispute between Ms O and her freeholder.

Ms O has taken issue with the level at which Birmingham Midshires' solicitors charge for their time, and queried the fact these were debited to the mortgage account in three separate transactions.

We don't cover the activities of firms of solicitors, and it's not within my power to decide what a firm's charging rate for its professional time should be or how quickly, and in what way, it should invoice the business in question. So I can't consider how much Birmingham Midshires' solicitors charged for the work they did, or the fact they presented these charges in three separate invoices; all I can look at is whether the amount of work they charged for was fairly and reasonably carried out.

On this latter point, there are many variables that go into determining how much activity a firm of solicitors needs to carry out in a situation such as this; it's not just dependent on the extent to which the court case itself is directly active. There's correspondence - letters, phone calls and emails - with the client (that is, Birmingham Midshires), correspondence with the court, correspondence with the individual (that is, Ms O), correspondence with the "other side", court fees, time spent assessing the merits of the various arguments of the case, as well as the general supporting administration. Only part of that equation is controllable by Birmingham Midshires; there are things that other parties might do (or not do) that have the potential to increase the amount of chargeable activity on the part of its solicitors.

For example, whilst Ms O gave an instruction to pay the ground rent in August 2022, she said as part of that instruction *"You may go ahead and pay them as you stated because I can no longer cope with the harassment, intimidation and bullying by [the freeholder] and their agents."* She went on to say that she didn't agree with the sum owed, and that she was a victim of a massive conspiracy to deprive her of her property.

It is understandable, from that correspondence, that Birmingham Midshires' solicitors had

concerns about just paying the sum requested, as Ms O had made some serious allegations about why she was paying. That is she was, in effect, saying she was agreeing to payment under duress.

Birmingham Midshires' solicitor queried that with Ms O and said that it will only seek to make such a payment on her behalf if the sums were not legitimately disputed. Ms O replied to that, two days before the hearing, saying she was left with no other alternative than to accept that there are no more disputes.

Meanwhile, Birmingham Midshires' solicitor was in correspondence with the freeholder's solicitor, asking for up to date copies of the relevant paperwork. The last of that information was received by Birmingham Midshires' solicitor on 23 August, the day before the hearing.

Ms O has said that in forfeiture cases the proceeding will cease if the total amount owed is paid not less than five clear days before the hearing day. But it is clear from the above that Birmingham Midshires' solicitor wasn't in a position to make the payment at that time as Ms O was still saying she disputed the sum owed, and had implied she was only agreeing to the payment being made under duress. It would have been entirely inappropriate for Birmingham Midshires and its solicitor to not act on that information and instead to have made the payment in time for the hearing to be cancelled.

It is unfortunate that everything came to a head so close to the hearing date, which left limited time to resolve matters so the hearing could be cancelled, but I can't hold Birmingham Midshires liable for that. Unfortunately as it only received the last of the information it had requested the day before the hearing, it seems Birmingham Midshires' solicitor wasn't in a position to settle things in time for the hearing to be cancelled.

Ms O was obliged to pay all expenses including solicitor's costs incurred by the freeholder and Birmingham Midshires in respect of this matter. Unfortunately due to the fact Ms O told Birmingham Midshires that she disputed the amount due and was being harassed, intimidated and bullied into payment, she exposed herself to payment of the legal fees for both sides as Birmingham Midshires' solicitor then needed to look at the claim in more detail.

Taking everything into account, I don't find that the amount of chargeable activity on the part of Birmingham Midshires' solicitor was excessive, nor do I think Birmingham Midshires or its solicitor caused things to go to a hearing when it didn't need to.

Whilst I've a great deal of sympathy for the position Ms O found herself in, having considered everything very carefully I'm not persuaded that Bank of Scotland plc trading as Birmingham Midshires acted unreasonably in this matter and so I don't uphold this complaint.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms O to accept or reject my decision before 2 July 2024.

Julia Meadows
Ombudsman