

The complaint

Mr P complains that Oakwood Homeloans Limited is pursuing him for outstanding debt following the repossession and sale of his buy-to-let properties in 2016. The mortgages were secured against the properties but the sales left a shortfall that remains outstanding.

What happened

In 2016 Oakwood took possession of three of Mr P's buy-to-let properties and sold them. The sale of the properties left a total shortfall amount of £126,455.38.

In February 2023 Mr P received contact from the solicitors acting on behalf of Oakwood stating he had an outstanding debt to pay. Mr P complained. He said it wasn't fair for Oakwood to ask him to repay this debt now when it hasn't tried to contact him about it for seven years. He referred to mortgage regulation which said lenders must provide customers with statements at least once a year. He said he was in poor health, was unable to repay the outstanding debt, and had forgotten all about it.

Oakwood said Mr P was liable for the shortfall debt that remained after the property sales in line with the mortgage conditions. It said the Limitation Act 1980 states that an action to recover mortgage debt should be started within 12 years of the date the debt becomes due. The Financial Conduct Authority (FCA) says a customer must be informed of the decision to recover any shortfall within six years of the sale of the repossessed property. Oakwood said its records show its solicitors wrote to Mr P several times in 2016, 2017 and 2018. It was satisfied it made Mr P aware of its intention to seek repayment of the outstanding debt within acceptable timescales and in line with its regulatory obligations.

One of our Investigators looked into things. He didn't think Oakwood had acted unfairly.

Mr P said that he had sent a new address letter to Oakwood following his move and he struggled to see how he was untraceable. He also said that he was a vulnerable adult as a result of his poor mental and physical health and had no way to pay the money back.

The complaint was passed to me, and I issued a provisional decision which said the following.

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

Firstly, I want to acknowledge what Mr P has told us about his health in recent years. I'm sorry to hear what he's been through, and I appreciate this has been a very stressful time for him. But whilst I understand this will come as a disappointment to him, I agree with the Investigator that he does remain liable for at least some of this debt.

Mr P isn't disputing that the debt exists. He thinks it's unfair for Oakwood to expect him to pay it after so much time has passed.

The relevant law (the Limitation Act 1980) states that a lender must take action to recover any principal sum of money secured by a mortgage within 12 years of the debt becoming due. However, it also says that no action to recover arrears of interest payable in respect of any sum of money secured by a mortgage shall be brought after the expiration of six years from when the amount fell due. So this means that – by law – Oakwood has 12 years to recover the principal balance secured by the mortgage deed, but it only had six years to recover any unpaid interest.

All three of Mr P's mortgages were interest only mortgages. So when he was making his monthly payments, he was paying the interest as it fell due each month. But unfortunately, the mortgages fell into arrears as Mr P wasn't able to keep up with the monthly payments, and therefore – not all the interest was repaid as and when it fell due. Oakwood has confirmed that when it sold the three properties, it used the proceeds of the sales to reduce the capital owed. As such, I'm persuaded that some of the outstanding amount it is now pursuing Mr P for will be made up of interest charges that weren't paid on time. The interest payments fell due more than six years before Oakwood made successful contact with Mr P in February 2023. As such, I don't consider Oakwood has any legal right to pursue the collection of that interest.

I've seen evidence (in the form of letters sent), that Oakwood and its solicitors had written to Mr P several times during 2016, 2017, 2018. Those letters clearly stated the debt that was outstanding and that it expected it to be repaid. I'm satisfied Oakwood attempted to contact Mr P about the shortfall debt it was expecting him to repay within six years. However, it wasn't able to make successful contact and the money wasn't repaid.

Oakwood has said that Mr P acknowledged the debt in 2017, and so the six years starts from that point as a 'fresh accrual of action'. Oakwood has provided letters from 2017 which do refer to a phone call it had with Mr P about the debt. The letters acknowledge that Mr P would be unable to deal with the matter himself and Oakwood was waiting for him to let it know who it could contact on his behalf. Based on the evidence I've seen, I think it's likely a phone conversation did take place in 2017 about the outstanding debt. However, in order for that conversation to have created a 'fresh accrual of action' under the Limitation Act, the acknowledgement needed to have been in writing and signed by Mr P. I've not seen anything to suggest Mr P did write to Oakwood to acknowledge the debt during the period in which it has been trying to trace him.

Mr P has said he wrote to Oakwood in 2015 telling it of his new address. I've seen a copy of that letter and note Oakwood did update its systems with Mr P's new address. That's where it was writing to in 2016. Our service has since asked Mr P about his address history, and he hasn't said he was living at that address during the relevant times. But for the purposes of the Limitation Act, I'm not satisfied that makes a difference as to whether Oakwood has any legal power to collect the sums it feels it's due.

Mr P has also referred to mortgage regulation and the fact Oakwood didn't send him annual statements about this debt. Mr P's mortgages weren't regulated mortgage contracts and so the mortgage regulation he refers to didn't apply. But in any event, I'm satisfied Oakwood attempted to contact him multiple times over the years about this debt and to tell him what he owed.

Considering all the evidence, I'm satisfied that Oakwood is legally entitled to collect the outstanding principal sum that was secured by the mortgage – as the relevant law says it has 12 years in which to do so, and the amounts fell due within the last 12

years. However, I'm not satisfied Oakwood has any legal basis to collect any outstanding interest that it has asked Mr P to pay. I appreciate Oakwood hasn't applied any interest to the mortgages since the properties were sold, but I'm persuaded there are likely to be arrears on the mortgages that were made up of interest payments and that form part of the balance Oakwood is now asking Mr P to pay. So Oakwood will need to remove those amounts from the total balance it's asking Mr P to pay.

Whilst the law is something I must take into account when reaching a decision, I also need to decide what is fair and reasonable in all the circumstances.

Oakwood has told Mr P that he will have to discuss the potential options for repayment with its solicitors. Mr P is clearly very vulnerable. He's very unwell and says he has no way to repay what Oakwood says he owes. As Oakwood is the owner of this debt and is responsible for the relationship between it and Mr P, I will remind it of its obligations to treat vulnerable customers fairly in line with the regulator's rules and guidance, taking Mr P's specific circumstances into account.

Whilst Oakwood may have the legal right to pursue Mr P for the principal balance, it also needs to treat its customers fairly, and take account of any vulnerabilities it is aware of. Oakwood has successfully traced Mr P in 2023, but it has taken it seven years to do so. I do consider that to be a long time, and it's unclear why the greater efforts it (and its solicitors) made in more recent years couldn't have been done sooner. I do think that's likely to have impacted Mr P's ability to repay the debt now, especially considering his age and health conditions.

As a result, I'm currently persuaded Oakwood should do the following:

- Re-calculate the outstanding balance removing the interest charges that went unpaid before the properties were sold (including any interest charged on that interest).
- Provide the above information to Mr P and carry out a full review of his circumstances to assess his ability to repay the amount owed. Mr P will need to co-operate with this assessment, for example by providing information about his income and expenditure, as well as his health and wider circumstances.
- If it appears Mr P will struggle to make any significant inroads into the debt (for example, repay at least half of the debt) within a reasonable period of time (which I consider, taking into account the time that has already passed when Oakwood ought to have been more pro-active, to be 10 years) without putting him in financial difficulty, then Oakwood should consider writing off the debt and consider the matter settled.

The outcome of the above conversations cannot be known at this time and so once Oakwood has discussed the matter with Mr P, if Mr P remains concerned about the treatment he is receiving from Oakwood, that could give rise to a fresh complaint which could be brought to our service separately at a later date if necessary."

Responses to my provisional decision

Mr P said that he was disappointed Oakwood made no robust attempt to contact him regarding the sums outstanding. He said his health has deteriorated significantly and was due to have major surgery in November. He has been warned to avoid stress and is not in a position to address any issues regarding repayment of the debt. He said he has no assets and no significant income.

Oakwood disagreed with my provisional decision. It said that when the properties were sold, the proceeds of sale were first used to repay any interest arrears, and so the outstanding sums are made up of the capital owed under the mortgage agreements. It said it was unable to provide any evidence of that, but it referred to the mortgage conditions in support of its position.

It said section 2.9 says “Any interest which is not paid by the end of the interest period in which it accrued will bear interest from the end of that interest period until it is paid.”

Section 10.1 says “We can apply any payment made by you which is less than the full amount due against any part of the amount owed which we decide.”

“Amount owed” is defined as “the total of the money which you owe us from time to time under the mortgage including (a) the loan; and (b) and unpaid interest and expenses.”

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, my decision remains largely unchanged, and as set out in my provisional decision.

Oakwood has provided our service with conflicting information about how the property sales’ proceeds have been applied to Mr P’s accounts. Initially it told us that the proceeds were added to the outstanding balance and reduced the capital. It also said that **most** of the outstanding balance will be capital and fees (bold added for emphasis). That implies that not all the outstanding balance is made up of capital.

It now says that the sales proceeds were used to repay the interest first, and so there is only capital remaining. It hasn’t been able to provide any evidence of that, but I’ve considered the relevant sections of the mortgage terms and conditions it has referred to. Having done so, I’m not persuaded those terms and conditions imply that only capital is remaining. The terms and conditions allow Oakwood to apply funds to the account in the way it decides. It doesn’t stipulate the priority of what would be repaid first, interest or capital.

In any event, whilst the above is important to determine how much of the debt Oakwood is legally entitled to pursue Mr P for, my role is to determine what is fair and reasonable in all the circumstances of the complaint. That includes taking account of relevant law, but it is not limited to it.

In Mr P’s case, it’s not clear to me whether any of the shortfall debt Oakwood is asking him to pay is made up of interest. Oakwood has been contradictory about that during this complaint, and hasn’t been able to provide evidence either way. As I explained in my provisional decision, Oakwood has taken a significant amount of time to successfully trace Mr P. And whilst attempts were made, it seems those attempts only became more robust last year in 2023. It’s not clear why that couldn’t have happened sooner.

I’m also aware that Mr P is in a very vulnerable position at the moment because of his health and wider financial circumstances. In the particular circumstances of this case, because of the delays Oakwood has caused and also Mr P’s vulnerabilities, I think it would be fair and reasonable for Oakwood to remove any unpaid interest from the balance it is asking Mr P to pay.

Based on what Mr P has told our service, I think it’s unlikely he’ll be in a position to repay

much, if any, of this debt at all. But he has said he is willing to engage a debt advice charity once he's recovered from his surgery to help him. I think it's important that Oakwood has the opportunity to discuss Mr P's circumstances with him itself, so it can establish how likely it is that Mr P will be able to repay the outstanding mortgage debt. However, as Mr P has just undergone major surgery, I think it's reasonable to allow him some time to recover from that surgery before expecting him to have any serious conversations about his finances. He's received medical advice to avoid stress. And so I think Oakwood should allow Mr P until February 2025 before it attempts to engage him in discussions about a repayment plan.

Putting things right

To put things right Oakwood should:

- Re-calculate the outstanding balance removing the interest charges that went unpaid before the properties were sold (including any interest charged on that interest).
- Provide the above information to Mr P and carry out a full review of his circumstances to assess his ability to repay the amount owed. This should not take place before February 2025 to allow Mr P time to recover from major surgery. Mr P will need to co-operate with this assessment, for example by providing information about his income and expenditure, as well as his health and wider circumstances.
- If it appears Mr P will struggle to make any significant inroads into the debt (for example, repay at least half of the debt) within a reasonable period of time (which I consider, taking into account the time that has already passed when Oakwood ought to have been more pro-active, to be 10 years) without putting him in financial difficulty, then Oakwood should consider writing off the debt and consider the matter settled.

My final decision

For the reasons I've explained, I uphold this complaint and instruct Oakwood Homeloans Limited to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 1 January 2024.

Kathryn Billings
Ombudsman