

## **The complaint**

This complaint is about a mortgage Mr and Mrs J hold with Bank of Scotland plc trading as Birmingham Midshires (BM). The gist of the complaint is about legal action BM carried out to take possession of the mortgaged property, and whether and to what extent it communicated its intentions to Mr and Mrs J.

Both borrowers have joined the complaint, as required under our rules, but our dealings have predominantly been with Mr J, on behalf of himself and Mrs J.

## **What happened**

In what follows, I have set out events in rather less detail than they have been presented. No discourtesy's intended by that. It's a reflection of the informal service we provide, and if I don't mention something, it won't be because I've ignored it. It'll be because I didn't think it was material to the outcome of the complaint. This approach is consistent with what our enabling legislation requires of me.

It allows me to focus on the issues on which I consider a fair outcome will turn, and not be side-tracked by matters which, although presented as material, are, in my opinion peripheral or, in some instances, have little or no impact on the broader outcome.

Our decisions are published and it's important that I don't include any information that might result in Mr and Mrs J being identified. Instead I'll give a summary in my own words and then focus on giving the reasons for my decision.

Mr and Mrs J have held the mortgage since 2006. They put the property up for sale in early 2023, as they were in arrears and struggling to meet the contractual monthly payment (CMP). A sale was close to exchange of contracts but fell through when it was revealed that another business had registered a restriction against the mortgaged property.

BM had agreed to place recovery action on hold while the sale was proceeding; the hold was put in place on 17 May 2023, and was for 90 days. The next BM heard from Mr and Mrs J was a phone call on 26 September 2023 in which they told BM they were concerned the second charge might be fraudulent. BM received a payment towards the mortgage of £100 on 11 October 2023, the first since January 2023. BM wrote on 16 October 2023 asking Mr and Mrs J to contact it urgently. On 30 October 2023, having not heard back, BM instructed solicitors to start legal action.

The solicitors wrote various letters to Mr and Mrs J, including one that told them a court date was set for 8 December 2023. The solicitors didn't hear back, and when the case was heard in court, BM was granted an immediate order for possession. A payment of £111 was received on 14 December 2023, and then, on 9 January 2024, BM received a phone call from Mr and Mrs J informing it that they had been overseas for months, unable to come home due to a combination of severe weather conditions and Mrs J's poor health.

A complaint was registered; Mr and Mrs J said they thought that recovery action had been on hold following the September 2023 phone call, and they were unhappy that BM (and the

solicitors) hadn't attempted to communicate by any other means beyond letters to the mortgaged property. BM issued a final response rejecting the complaint, not least because it had been unaware before January 2024 that Mr and Mrs J were abroad.

BM issued a second final response to correct and apologise for mistakenly having referred to a phone conversation taking place in October 2023 when that hadn't happened. Separately, BM de-instructed the solicitors.

When the case came to us, our investigator wasn't persuaded BM had done anything wrong or treated Mr and Mrs J unfairly. Mr and Mrs J asked for the complaint to be reviewed by an ombudsman.

### **What I've decided – and why**

I'll start with some general observations. We're not the regulator of financial businesses, and we don't "police" their internal processes or how they operate generally. That's the job of the Financial Conduct Authority (FCA). We deal with individual disputes between businesses and their customers. In doing that, we don't replicate the work of the courts.

We're impartial, and we don't take either side's instructions on how we investigate a complaint. We conduct our investigations and reach our conclusions without interference from anyone else. But in doing so, we have to work within the rules of the ombudsman service.

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

That includes listening to a recording of the phone call from 26 September 2023. Where the evidence is incomplete and/or contradictory, I'm required to reach my decision on the basis of what I consider is most likely to have happened, on the balance of probabilities. That's broadly the same test used by the courts in civil cases.

It's for us to assess the reliability of evidence, from both sides, and decide how much weight should be attached to it. When doing that, we don't just consider individual pieces of evidence in isolation. We consider everything together to form a broader opinion on the whole picture. It's also for us to decide when we have enough evidence to reach a fair conclusion. In this case, I'm satisfied that point has been reached, without needing to see the output from a data subject access request that Mr and Mrs J made to BM.

In reaching my decision, I will have regard for the law and good industry practice where relevant, but my overarching responsibility is to decide what is fair and reasonable in the circumstances. That can sometime mean reaching a different outcome from what might prevail in court.

Whilst on the subject of what a court might decide, it's not in my remit to second-guess or otherwise interfere with a decision a court has already made. In this case, even before Mr and Mrs J had begun the complaint that I'm reviewing here, a court had decided that BM should be granted an immediate possession order over Mr and Mrs J's property.

I won't be reviewing that, or the decision BM made to seek the possession order in the first place. If it helps to provide context, I'll simply observe that between January and October 2023, when BM started possession proceedings, £100 was paid into the mortgage. Meanwhile, the phone call of 26 September 2023 was the first contact BM had received from Mr and Mrs J since the 90-day hold had been put in place on 17 May 2023.

I've listened to the phone conversation of 26 September 2023. Having done so, I don't find that BM said anything false or misleading about what might happen next if Mr and Mrs J didn't agree to a payment arrangement to clear the arrears. Nor can I fairly criticise BM (or its solicitors) for sending all written communication about the arrears and the steps it intended taking to recover them to the mortgaged property address.

Mrs J talks in the conversation about being anxious because no one had called them to find out what was going on. But it was always open to them to call BM sooner than 26 September 2023 if there was news they wished to share with BM. Meanwhile, BM didn't have anywhere else to send letters other than the mortgaged property because Mr and Mrs J hadn't given it an alternative address or let the business know they were out of the country for an extended period. Indeed, early on in the phone call of 26 September 2023, Mrs J answered yes when asked if they were living in the mortgaged property.

Once it did know, in January 2024, BM put any action to enforce the possession order on hold, and it's my understanding that's remained the case whilst we have been considering the complaint.

There's one last point to make, and that is to do with the restriction registered against Mr and Mrs J's property title as a charging order that caused the sale to fall through. I've studied the entry on the title register. I won't reveal any key information from it, other than that there's nothing to suggest a connection between the party that registered the restriction and BM. What the entry does show, which may be of help to Mr and Mrs J in identifying what it relates to, is the date of the registration, the name of the interested party, the name and address of the party's solicitor, the location of the county court that granted the charging order, the date the order was made, and the court's reference number.

But all of that aside, what comes over from the 26 September 2023 phone call is that Mr and Mrs J thought it reasonable not to be willing to enter into a payment arrangement with BM for the arrears on their mortgage unless and until they had identified the reason for the restriction on their property title. Insofar as the title entry indicates this was completely unrelated to the BM mortgage, I'm not persuaded that was a prudent position to adopt, especially when BM made it clear that without a payment arrangement to deal with the arrears, not simply a token payment to "show willing", legal action was likely to follow.

I said at the outset that I wouldn't be commenting on every single point, and I haven't. I have, as I said I would, confined myself to those matters that I consider have a material effect on the outcome. I can see how strongly Mr and Mrs J feel. That's a natural, subjective reaction, and entirely understandable in the circumstances.

Be that as it may, I have to take a different approach. I'm impartial and I have to look at things objectively, sometimes taking a step back from the minutiae, focussing on the broader picture. That's what I've done.

All I can do further is express the hope that both parties can move on from here without recrimination over what has gone before, and somehow find a way to reach agreement on what happens next.

### **My final decision**

My final decision is that I don't uphold this complaint, or make any order or award against Bank of Scotland plc trading as Birmingham Midshires.

My final decision concludes this service's consideration of this complaint, which means I'll not be engaging in any further discussion of the merits of it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs J to accept or reject my decision before 7 October 2024.

Jeff Parrington

**Ombudsman**