

## **The complaint**

Mr J said that he has been the victim of mortgage fraud in respect of five buy-to-let mortgages with Topaz Finance Limited trading as Siberite Mortgages ("Siberite"). He complains that when he raised his concerns with Siberite, Siberite failed to fully investigate whether the mortgages were fraudulently obtained and also failed to give him all of the information he requested regarding those mortgages.

## **What happened**

Between January and March 2008, Mr J's former business partner, Ms M, took out five buy-to-let mortgages with another lender. The lender understood that each of the mortgages was a re-mortgage and that Ms M already owned the properties at the time of the re-mortgages.

The mortgages were subsequently transferred to Siberite and I will therefore refer to Siberite throughout this decision.

In October 2008, an application was made for Mr J to be added to all of the mortgages. Siberite said this would have been through its change of ownership process. It said that after receiving proof of identity and residency it sent Mr J change of ownership offers, which set out full details of each of the mortgages and said that Mr J should discuss the terms and conditions of the mortgage with his solicitor.

Siberite said it required all applicants to own the mortgaged properties. It said it was for the solicitor to verify that the names on the mortgage offers matched those on the deeds or, where that wasn't already the case, make changes to the deeds as necessary, along with acting in line with the relevant part of the CML Lenders Handbook.

In 2009, TR1 forms were completed transferring the ownership of the properties from Ms M's sole name to joint ownership between her and Mr J. Siberite said it received all of the required documents and checklists. Mr J consequently was added as a joint mortgagor to all five of the buy-to-let mortgages.

In 2021, Mr J complained to Siberite. He said in summary:

- Ms M had purchased the properties using the funds from the re-mortgages and did not therefore own the properties at the time of applying for the re-mortgages.
- The TR1s on the properties were either unsigned or, where signed, Ms M's signature had clearly been forged.
- None of the mortgage deeds were signed by Ms M. Her son had admitted that he had signed the deeds on behalf of Ms M with her explicit consent. The deeds were therefore "void".
- He was not properly added to the mortgages as, in view of the above, there were no valid mortgages in place.

- There had been a breach of the Law of Property (Miscellaneous Property) Act 1989.
- Siberite had failed to provide him with copies of the original mortgage deeds.
- Siberite refused to give him copies of correspondence between Siberite and Ms M and/or with Ms M's solicitor in connection with the original re-mortgage transactions.
- The mortgaged properties had been obtained fraudulently but Siberite was refusing to carry out a full investigation into the allegations.
- There was a Tomlin Order between him, Ms M and other parties where it was agreed the properties would be sold at auction and where there was a mortgage shortfall, he would be liable for it. Topaz was therefore entitled to pursue him for any shortfall under the mortgages as a result of being a victim of fraud.

Subject to further submissions, I issued a provisional decision, proposing to uphold the complaint. My provisional findings, which form part of his decision, were:

#### The complaint

*I understand the reasons why Mr J thinks things have moved on. But I can only consider the complaint that he referred to us on 5 October 2021. That is, Mr J thinks that Siberite should complete its investigation into his allegations of mortgage fraud and also provide him with all of the information it holds about the mortgages. So those are the issues I am considering here.*

#### The Tomlin Order

*The Tomlin Order said, "The terms of this Agreement are in full and final settlement of all claims, cross-claims, or counterclaims that any of the Parties have against each other, including for the avoidance of doubt, any claim that the Claimant sought or seeks to make in respect of [a third party]."*

*The Tomlin Order was in full and final settlement of any claims between the parties involved in that dispute. But Siberite was not one of those parties. Therefore, the Tomlin Order would not prevent Mr J bringing a complaint about Siberite.*

#### Investigation

*In considering what is fair and reasonable I must take into account relevant regulators' rules, guidance and standards amongst other things. The Financial Conduct Authority's Principles are likely to be relevant here, particularly:*

- *Principle 1 Integrity – A firm must conduct its business with integrity.*
- *Principle 2 Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*
- *Principle 6 Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly.*

*Looking at all of the information we have from the parties, I accept that there is objective evidence of mortgage fraud. I say that as there is evidence that the properties were not already owned by Ms M when the mortgages were originally taken out. The stated purchase*

prices were higher than the amounts actually paid for the mortgaged properties. Mr J also has other evidence regarding forged signatures on various documents that might also indicate fraud in my opinion.

However, I am not making any finding about whether the mortgages were obtained fraudulently. That is not for me to decide – and as I've explained, it is not the complaint that Mr J has referred to us. But I do consider there is evidence that might support that the mortgages had been obtained fraudulently. That could indicate that the lender did not do what it should have when the initial applications by Ms M were considered and when Mr J was added to the mortgages.

In my view, the evidence supports that there was a lack of due care, skill and diligence by Topaz both when the mortgages were originally agreed and when Mr J was added to the mortgages – and that could have led to detriment for Mr J. In view of that, and to meet its obligation to pay due regard to Mr J's interests and to treat him fairly, I consider that it would be reasonable for Siberite to complete its investigation into how the mortgages were obtained and whether it did everything it should have – and to let Mr J know the outcome of that investigation with its reasons.

Siberite initially said it would not investigate unless Mr J produced a crime reference number. But when he did so, it told him that it would assist the police if it contacted it. That wasn't entirely accurate as Siberite has given us evidence that it had already carried out an investigation into the lending. But that investigation was carried out in respect of whether the solicitors acting for Siberite were negligent. It considers that investigation is confidential and contains information that could not be disclosed to Mr J.

Siberite has also given other reasons why it does not consider that it is required to do anything else. But that was on the basis that it can't make a finding of fraud. As I've said, bearing in mind Siberite's obligation to pay due regard to Mr J's interests and to treat him fairly, it ought to look at things again from his perspective, take into account all of the evidence it has and consider whether it acted fairly in approving the mortgages to Ms M and in adding Mr J later to the mortgages.

I consider Siberite should carry out an investigation into the circumstances and let Mr J know the outcome of that investigation – and if it finds that there were failures in how it handled things it should set out what it considers is a fair way to put things right for Mr J. If Mr J is unhappy with the outcome of the investigation, he can make a complaint about that and refer it to us if he wishes. We would then be able to decide what was fair and reasonable in the circumstances of that complaint.

I've found that Siberite has not treated Mr J fairly in refusing to investigate his allegations of fraud – albeit from the perspective of whether it acted fairly and reasonably in assessing the initial application and subsequently adding Mr J to the mortgages. That has caused him some distress in that Siberite was not taking his allegations seriously and that by failing to do so there could have been serious repercussions for him, including being held liable for any shortfall on the sale of the properties (although we now know there was not any shortfall). He's also had the inconvenience of pursuing the matter to this extent.

Of course, Siberite is not responsible for the distress and inconvenience caused by the actions of other parties – and my award is only intended to compensate Mr J for the distress and inconvenience caused by its failure to treat Mr J fairly by not fully carrying out an investigation into his concerns. In all the circumstances, I consider £300 would be a fair amount to reflect the impact of this matter on Mr J.

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*I consider it is fair and reasonable for Siberite not to provide information and documents relating to any third parties to Mr J. It has a duty of confidentiality to Ms M and it is reasonable for it not to disclose her information to Mr J without her consent. It is not for me to decide if there has been any breach of the Data Protection Act 2018. But it seems unlikely there would have been, bearing in mind Mr J is requesting data held about someone else. Siberite would need a court order to lawfully comply with a request for the data it held on Ms M.*

*In any event, the Information Commissioner's Office is best placed to determine whether there has been a breach of the Data Protection Act 2018. But bearing in mind the complaints Mr J has made, I do not consider that Siberite has treated him unfairly in respect of his request for information about the mortgage.*

I proposed that Siberite should:

- Within 28 days of Mr J accepting this decision, carry out an investigation into how the five mortgages held jointly by Mr J were set up and when he was added to the mortgaged. And whether it treated him fairly in adding him to the mortgages and in its subsequent actions.
- Write to Mr J with the outcome of the investigation setting out its reasons for reaching the decision it did and if appropriate what it intends to do to put things right.
- Pay Mr J £300.

Mr J responded to say that he had nothing further to add. Siberite responded to make a number of points, which I will summarise:

- Siberite was not the lender when the mortgages were taken out or when Mr J was added to them – it only became the lender in 2019 when the mortgages were transferred to it.

Mr J had not complained about whether the mortgages were obtained fraudulently and that would not be a complaint about the provision, or failure to provide, a financial service which relates to Siberite. If Mr J wanted to make such a complaint he would need to complain to Mortgage Express.

I should change the wording in my decision to more accurately reflect the different roles undertaken by Mortgage Express and Siberite.

- It had previously carried out a thorough investigation into the alleged fraud and concluded there was no evidence to support Mr J's allegations. In the absence of any new evidence it is unlikely its position will change.

Nevertheless, Siberite will undertake a "re-investigation". But its investigation can only be based on the information passed to it by Mortgage Express. So its ability to uncover new information is limited.

I should acknowledge the findings of its previous investigation and amend the wording in my decision to reflect that Siberite had not treated Mr J fairly by refusing to disclose the findings of its investigation to him, rather than in refusing to investigate his allegations of fraud.

- The wording of my decision should reflect that its ability to disclose certain information to Mr J is limited as it has a duty of confidentiality to third parties including Mrs M.

- Siberite is not able to make a legal determination of fraud. Its role is to investigate the circumstances surrounding the origination and modification of the mortgages and to co-operate with any law enforcement agencies that choose to investigate the alleged fraud. My decision should make that clearer.
- Under the law if fraud is committed it generally renders the mortgage voidable rather than void. The mortgage remains valid and enforceable until it is set aside by a court. The lender retains the right to repayment of the loan and the mortgage continues to secure the debt until a court decides otherwise.

It referred to a number of court cases that it considered supported its position that fraudulent transactions do not always constitute a sham and that property rights can transfer under an illegal contract. That means that the mortgages in this case remained valid at the point of redemption as they had not been voided by a court. Siberite was entitled to repayment when the properties were sold.

- If Mr J was a victim of fraud, then his only recourse would be against Mrs M not Mortgage Express or Siberite. But Mr J compromised his rights when he signed a Tomlin Order in full and final settlement of all claims between the parties involved.

Although Siberite was not a party to the Tomlin Order, and while it agrees that does not prevent Mr J from bringing a complaint against it, it did not consider it fair and reasonable for us to ignore its broader impact.

Mr J's complaint had changed from a concern about liability for a shortfall debt to a belief he's suffered a financial loss when the properties were sold. Given Mr J agreed a Tomlin Order, any losses were of his own making. And it would not be fair and reasonable for anyone including Mr J to profit from the properties if they were purchased by fraud.

I should do more to discourage Mr J from bringing further complaints about these mortgages and should delete the sentence where I say Mr J can complain about the outcome of the investigation by Siberite.

### **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 am independent and impartial. It is not for Siberite or Mr J to tell what I should write or not in my decision.

It is not clear that when the mortgages were transferred to Siberite from Mortgage Express that Siberite took on liability for Mortgage Express's actions in selling the mortgage or not. But I have not made any findings about the sale of the mortgage in this decision. Therefore that is not relevant to my determination of this complaint.

Nevertheless, Siberite became the lender in 2019. For the reasons set out in my provisional decision, I consider it is reasonable for Siberite to carry out an investigation into how the five mortgages held jointly by Mr J were set up and when he was added to the mortgaged and whether he was treated fairly in being added to the mortgages and in its subsequent actions.

Siberite carried out its investigation after it had sent Mr J its final response. Mr J has not been given any information about the outcome of the investigation or the reasons for the outcome that was reached. I accept that Siberite has a duty to protect its customer

confidentiality. There might be some information it is unable to disclose to Mr J. But it is not helpful or fair for Siberite to pre-judge the outcome of the investigation in the way it has here.

My decision is that Siberite should carry out a new investigation. It should do so with an open mind and make sure that it investigates the issues thoroughly and fairly. I accept that it is reliant on the previous lender to provide information and it can only carry out its investigation based on the information it has.

Siberite does make some valid points about the potential outcomes for Mr J and that it can't make a legal determination of fraud. It seems unlikely that any investigation would result in Mr J recovering what he considers are his losses or that the lender and/or Siberite could reasonably be responsible for any of those "losses".

Nevertheless, it is for Siberite to carry out its investigation and to write to Mr J with its outcome. Mr J is able to bring a complaint to us about the outcome of the investigation if he is unhappy with the outcome. I am not going to pre-judge the outcome of the investigation. I have not made any findings on whether Siberite is responsible for the sale of the mortgage or what, if anything, Siberite would be required to do to put things right following the investigation.

After careful consideration I see no reason to reach a different outcome than I did in my provisional decision.

## **My final decision**

My final decision is that Topaz Finance Limited trading as Siberite Mortgages should:

- Within 28 days of Mr J accepting this decision, carry out an investigation into how the five mortgages held jointly by Mr J were set up and when he was added to the mortgaged. And whether it treated him fairly in adding him to the mortgages and in its subsequent actions.
- Write to Mr J with the outcome of the investigation setting out its reasons for reaching the decision it did and if appropriate what it intends to do to put things right.
- Pay Mr J £300.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 20 March 2025.

Ken Rose  
**Ombudsman**