

## **The complaint**

C, who has been appointed by Mr P as his enduring power of attorney, complains on Mr P's behalf about action TSB Bank Plc trading as Whistletree has taken in respect of Mr P's mortgage.

## **What happened**

In 2003 Mr P took out a mortgage with another lender. The mortgage was later transferred to Whistletree, which is responsible for answering this complaint. Mr P borrowed around £230,000 on interest only terms, with a further advance of £61,000 later that year. The term of the mortgage was due to end in 2028.

Also in 2003, a trust deed was drawn up under which 99% of the proceeds of any sale of the property would be paid to C, and 1% to Mr P.

Mr P appointed C to act as enduring power of attorney. C brings this complaint in that capacity as Mr P's representative. The Financial Ombudsman Service has not had any contact with Mr P directly, but C tells us that the enduring power of attorney remains in place because Mr P retains capacity but is abroad and not contactable. I have seen a copy of the power of attorney and while it was entered into many years ago, I will proceed to deal with this complaint on that basis.

The mortgage has been in arrears several times over the years, and the lenders have taken possession proceedings on more than one occasion. A possession order was granted in 2015. Whistletree has taken steps to enforce the order several times since then, but arrears were cleared at the last minute.

More recently, the arrears have increased again. Whistletree returned to court and obtained an eviction date for early January 2024.

C complained. He said that Whistletree had acted unfairly in various ways – including in relation to the eviction itself, as well as how it had refused to deal with C on Mr P's behalf. C also complained about the conduct of the mortgage account, including sums added to the balance and Whistletree's refusal to accept payments from him. C's concerns relate to the whole term of the mortgage and there have been many previous complaints to Whistletree.

Certain parts of the complaint are out of time and can't be considered as a result. Another ombudsman has already decided which parts of the complaint we can and can't consider. He said that certain parts of the complaint had been brought outside the time limits which apply. He said that we could only consider:

- The complaint that Whistletree had not acted fairly when it removed recognition of the power of attorney and refused to communicate with C on multiple occasions – but only since 13 February 2018.
- The complaint that Whistletree had scheduled the eviction for 8 January 2024, but did not notify C of that until 4 January 2024.

- The complaint that Whistletree had wrongly treated the property as leasehold rather than freehold, had paid demands for ground rent and service charges, and had added those amounts to the mortgage balance – but only since 15 August 2017.
- The complaint that Whistletree had refused to accept payments from C, leading to arrears – but only since 13 February 2018.
- The complaint that the terms and conditions do not permit Whistletree to vary the mortgage interest rate in the way it has – but only since 15 August 2017.

I agree with the ombudsman's conclusions about that. What follows is my final decision on the merits of those parts of the complaint I can consider.

### **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.

#### *The power of attorney and Whistletree's refusal to communicate with C*

An enduring power of attorney (EPA) was granted by Mr P to C many years ago. C says that the EPA has never been registered with the Office of the Public Guardian because it was put in place before that was a requirement, and as Mr P retains capacity the EPA remains in place and valid, and should be respected as such by Whistletree. He says that there is no power in the mortgage terms and conditions or elsewhere allowing Whistletree to revoke an EPA; only a court can do that.

Whistletree has not revoked the EPA. As C says, it does not have the power to do that. But Whistletree has decided that it is no longer prepared to deal with C in the absence of Mr P notwithstanding the EPA. It says this is because it is a very long time since it had any definite contact with Mr P. And it is concerned about its responsibilities to act in the best interests of its customer – who is Mr P, not C. It is concerned about the possibility of a conflict between the interests of Mr P and of C.

I think Whistletree's concerns were reasonable. C says Mr P is abroad and not contactable, including by C. Given the age of the EPA, I don't think it's unreasonable for Whistletree to want to confirm from time to time that Mr P retains capacity and remains content for C to manage the mortgage on his behalf.

C says that he owns 99% of the beneficial interest of the property under a trust and Whistletree should respect his rights and position as owner of the property. But I don't agree about that. C is not Whistletree's customer; Mr P is. Mr P is the legal owner of the property. If the trust deed remains in place, then Mr P and C have agreed between them to divide the beneficial interest. But that is separate from the legal ownership, and is subject to Whistletree's charge. The property is owned by Mr P, subject to a mortgage with Whistletree. Whistletree has first call on the value of the property for the debt to be repaid. The division of any remaining equity between Mr P and C, once the property is sold or the mortgage is repaid, is a matter between Mr P and C. But any rights over the beneficial value of the property that C might have is a matter between him and Mr P and nothing to do with Whistletree.

Mr P is Whistletree's customer. This is his debt. Whistletree was concerned that in contesting the possession order in court to protect his own interest in the property, and in seeking to prevent the eviction, C was causing further delay and additional cost which would be added to Mr P's debt and reduce any equity in the property. It considered this was not in

Mr P's best interests.

Whistletree was in a difficult position here. It had no contact from, and no way of contacting, its customer. Its customer appears to have abandoned the property to the care of a third party (even though, as this is a residential mortgage, he is obliged to live in it himself). The property seems to have been altered and rented out in the past. The longer matters drag on, the more Mr P owes and the less he would realise from any sale of the property. I think it was reasonable for Whistletree to be concerned about whether Mr P knew what was happening, whether he agreed to the steps C was taking, and whether – in the absence of any contact with Mr P direct – allowing things to continue was really in Mr P's best interests.

I'm not therefore persuaded that Whistletree acted unfairly in refusing to deal with C unless and until it had definitive contact from Mr P himself confirming his current intentions, confirming that the EPA remained valid and in place, and confirming that he was content with C's conduct of his mortgage.

*Whistletree has refused to accept payments from C*

This part of the complaint follows on from the last. Once Whistletree decided it would no longer deal with C it refused to accept payments from him – its policy is not to accept payments to a mortgage from a third party who is not its customer. For the same reasons as I've given above, I don't think this was unreasonable. And I'm not persuaded that this is the reason the property was repossessed. There have been arrears over many years, from long before Whistletree refused to accept payments from C. Although arrears have been cleared in the past, they had mounted again before Whistletree refused to accept payments. Ultimately this is Mr P's mortgage and Mr P's property. He is obliged to live in it and to make the mortgage payments. He told the court in 2017 that he had a substantial income. As the court noted at the time, it is difficult to see why, if that is the case, he has not done so.

*Whistletree did not tell C of the eviction in good time*

It's unfortunate that the letter notifying Mr P of the eviction did not arrive until 4 January 2024 when the eviction was set for 8 January. It was sent by Whistletree on 27 December 2023, promptly after the court had set the eviction date. There are often delays in the post at this time of year. But the setting of the eviction date was a matter for the court, not Whistletree. I'm satisfied Whistletree passed on the date as soon as could reasonably have been expected once it was notified of the date by the court.

*Whistletree has wrongly treated the property as leasehold and added ground rent and service charges to the mortgage balance*

There has been some confusion here. This is not a leasehold property, it is a freehold property. The payments Whistletree has added are not ground rent and service charges, they are estate rentcharges. Rentcharges are obligations on a freeholder whose property is part of a larger estate to pay contributions to the costs of running the estate, such as the upkeep and maintenance of communal areas or unadopted roads.

Failure to pay a rentcharge can lead to the estate owner taking possession of the property. This would impact Whistletree's mortgage secured over the property. The mortgage terms and conditions allow it to make payments to protect its security on the borrower's behalf and then, if the borrower doesn't reimburse Whistletree, add the payments to the mortgage balance.

I've seen correspondence from the estate owner to Whistletree, notifying Whistletree of its intention to take further action because of unpaid rentcharges. I'm satisfied it was therefore

fair and reasonable for Whistletree to pay these costs on Mr P's behalf and add them to the mortgage balance when Mr P did not reimburse Whistletree.

It's unfortunate that in its letters to Mr P, Whistletree described these charges as ground rent and service charges, not estate rentcharges. That led to C complaining that Whistletree was wrongly treating the property as leasehold. But C is not the complainant here, Mr P is. I've not seen any evidence that Mr P was aware of these letters, let alone distressed or inconvenienced by them. And the incorrect description of the charges in the letters doesn't affect Whistletree's entitlement to add them to the mortgage balance. So while it's unfortunate that the wrong information was set out in the letters, I'm not persuaded this caused Mr P any detriment.

*The mortgage terms and conditions do not permit Whistletree to vary the interest rate in the way it has*

The mortgage terms and conditions do permit Whistletree to vary the interest rate. The mortgage offers set out that the applicable interest rate is the standard variable rate (SVR), less a discount. The terms and conditions say that the SVR can be varied, among other reasons, to take account of changes in the Bank of England base rate. In the period I can consider, Whistletree has only varied the interest rate to reflect changes in the Bank of England base rate. I'm also not satisfied that historic changes to the interest rate, before the period I can consider, led to unfairness in the level of the interest rate at the start of that period. I'm satisfied that Whistletree is entitled to charge interest on all parts of the mortgage at the SVR (less discount, where applicable) and that it has not charged interest unfairly.

C also says that Mr P is a mortgage prisoner. A mortgage prisoner is a borrower who is up to date with their mortgage but unable to move to another lender to take advantage of lower interest rates. Mr P is not up to date with his mortgage payments and has not been for long periods during the life of the mortgage. And as he is not resident in the property it's unlikely any other lender would offer him a new residential mortgage even if he had applied for one – I have seen no evidence that he has. I'm not persuaded that, if Mr P is unable to move his mortgage elsewhere, that is as a result of anything unfair in what Whistletree has done or not done.

### **My final decision**

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 21 April 2025.

Simon Pugh  
**Ombudsman**