

Complaint

Mr C has complained as a partner of D, a limited liability partnership, that Nationwide Building Society wrongly retained funds in its own security deposit account when it had agreed to hold them to cover the partners' tax liabilities.

Background

Mr C took out business loans with Nationwide on D's behalf and, in 2004, entered into a debenture which gave Nationwide a floating charge over all property and assets owned by D then and in the future.

Following the expiry of the loans D owed Nationwide around £5,000,000. Mr C said he sold properties on a consensual basis to reduce the debt. Mr C's complained about Nationwide's actions following the sale of a property that I'll refer to as W.

Mr C said he'd understood Nationwide was holding £89,879.20 – W's sale proceeds – in a security deposit account for the partner's tax liabilities. He said D no longer owed Nationwide any money as it had confirmed a nil balance on D's account in March 2016. However in August 2016 Nationwide closed the account and used this money to off-set some of the £4,000,000 loss it had incurred in relation to the money it had lent to D.

Nationwide disagreed. It said the account was held in its name and not D's following the payment of £89,879.20 for the society to release its charge over W. Nationwide said the application form showed the account was set up by its employees and not Mr C. It said D's name was on the account for reference only and the authorised signatories were its employees. The society also said it hadn't released the debenture and D still owed money, so it was entitled to use it to off-set what D owed. Nationwide said it wasn't responsible for the partners' tax liabilities.

Mr C asked why Nationwide didn't tell him the account was in its name and said he'd been led to believe it was in D's name. He said the society should have off-set the money against D's debt at the time it received it if that was its ultimate intent. He said the implications of Nationwide's actions meant D's statutory accounts were wrong, his personal tax returns incorrect and D trading when it would actually have been insolvent.

Mr C asked why this money had been treated differently to the money from sales of other properties. He referred to emails between him and Nationwide from 2013 where he asked about how the money would be held. He said as the receivers hadn't accounted for this money that showed it wasn't Nationwide's. Mr C said his solicitors could provide confirmation of the basis on which the money was released and that the solicitors wouldn't have released the money if Nationwide were going to take it. Mr C asked for copies of the interest accrued on the account as he thought the money should be his. Mr C also said Companies House showed the debenture has been discharged in 2016 so Nationwide shouldn't have moved the money when it did.

Nationwide said it had agreed in 2013 that the money would be held in escrow until a way forward could be agreed but this had been followed up with an email saying the money would be held by Nationwide. The society was satisfied the emails between it and D's solicitors made clear it had been paid the money to release the security charge on the property. It said it had also made clear that it wouldn't be able to assist with the partner's tax liabilities. And the money was its property to hold or move when it wanted to.

Nationwide said it appointed receivers in 2014 because the relationship with Mr C and D had broken down and the society wanted to call in the debts and recover as much money as it could from the sale of D's remaining assets. So by that time it had already received the money for W which is why the receivers didn't report on it. It said it wouldn't provide details of the interest accrued on the account as it was its account and not Mr C's. It also said the release of the debenture on Companies House didn't mean Mr C no longer had any obligation to pay what he owed. But in any event the money had been Nationwide's since 2013 so that wasn't relevant.

Mr C said:

- He'd acted in good faith without a formal agreement and the spirit of the emails meant the money should be held in D's name until wider discussions were held.
- The society sent statements showing the closing account balance was nil.
- His solicitor had emailed Nationwide referring to D's security deposit account and it hadn't corrected him.
- His proposals in 2012 that the money be held for the partner's tax liabilities were never disputed and both he and Nationwide had proceeded on that basis.

I asked Nationwide for further clarification about why it didn't off-set the money it received to release the charge on W earlier. It said it had agreed to hold the money in a separate account to see how D's plan and strategy unfolded.

I issued a provisional decision on this complaint on 2 July 2019 where I explained why I didn't intend to ask Nationwide to do anything more. In that decision I said:

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, I've decided not to uphold it. I appreciate this isn't the outcome Mr C was hoping for, and I've set out my reasons below.

Mr C has raised a number of issues and questions he'd like us to respond to. While I appreciate how strongly he feels about his complaint we're an informal dispute resolution service, set up as a free alternative to the courts. In deciding this complaint, I've focused on what I consider to be at the heart of the matter rather than commenting on every issue in turn. This isn't intended as a discourtesy to Mr C. Rather it reflects the informal nature of our service, the remit of the Financial Ombudsman Service and my role in deciding this complaint.

As well as the complaint points set out in the background Mr C has also raised concerns about Nationwide's actions prior to the loan ending. However as that wasn't the crux of this complaint and Nationwide hasn't responded to those points in its final response letter I haven't dealt with here. If Mr C remains concerned about Nationwide's actions at that time it will need to be dealt with as a separate complaint.

As set out above, Nationwide and Mr C have different recollections of what agreement was reached in relation to the proceeds of W's sale. There are limited recordings of the discussions that took place at the time so it's difficult to know exactly what was discussed. So I've based my decision on what I think's most likely to have happened using the information provided by both parties. I haven't seen anything that shows there was a formal agreement for D to keep the money to cover the partner's tax liabilities. Mr C also recognises

that there wasn't a formal agreement for him to keep the money but says he acted in good faith on the basis of what was agreed in conversations at the time.

Mr C's provided a detailed timeline of his contact with Nationwide since 2011. I understand he recalls being told by the representative that the money would be held to pay for tax liabilities. He's also provided a statement from his funding advisor that says this was agreed in a face to face meeting.

While I don't doubt they understood this to be the case I find it unlikely that Nationwide would have agreed to return the money if there was still an outstanding debt. It was owed a substantial amount of money and although any tax payment that became due would add to D's liabilities and its overall solvency position, they weren't the society's concern in as much as they weren't debts it was going to take on. Nationwide said it agreed to hold the money in a separate account to see how D's plan and strategy unfolded. I think it's most likely Nationwide agreed to hold the money to one side for a while and there was a misunderstanding about what would eventually happen to the money if D wasn't able to clear the outstanding loan.

I've seen emails between Nationwide and Mr C from 2013. On 17 April 2013 Mr C's solicitor asked if Nationwide "have credit approval authorising the release of the mortgage". On 16 May 2013 Mr C emailed Nationwide to say he'd exchanged contracts on W. He said he'd met with a representative from Nationwide who'd agreed in principle to the sale proceeds being held in escrow until the next meeting where a way forward could be agreed. He asked how and where the money would be held but understood at that point it would be held "entirely to Nationwide's order". He also said D could continue if some proceeds from the sale of W were retained. It's clear from this Mr D wanted to keep the money from the sale of W to cover D's tax liabilities and understood the money would be held to Nationwide's order while they discussed how to move forward.

On 21 May 2013 Nationwide told Mr C a security deposit account was being opened to take the proceeds of the sale from W. That email says the money will be held by Nationwide "under our mandate". I think this email set out that the money wouldn't be held in escrow but by Nationwide for its own use. However I do think Nationwide should have directly addressed Mr C's point that he wanted to keep the money to cover the partners' tax liabilities. It was a query Mr C raised in writing and I don't think Nationwide clearly answered him.

I haven't seen anything to show Nationwide directly addressed that point until the following year. In an email, dated April 2014, Mr C said all parties had worked throughout on an agreed basis that D would be left with enough funds to cover the partner's tax liabilities. In response Nationwide said "there will be no option to cover the partner's tax liabilities I'm afraid and all efforts will be applied towards retaining as much value to reduce the significant losses that Nationwide has been left with".

While I can understand why Mr C might not have been clear initially that Nationwide intended to keep the money to off-set against D's debts, I think it was very clear from this email. And D's reporting from that point onwards could have taken account of this.

I appreciate Mr C said he acted in good faith and without formal agreement. But I think it's more likely than not Nationwide would have confirmed to Mr C in writing if it had agreed to D keeping almost £90,000 – money that the society was entitled to given the debt D owed it and the agreement made which allowed the sale of W. Nationwide also said any agreement

to return the money would have needed signing off at a senior level and that process didn't happen.

Nationwide needed to provide details of the account to Mr C's solicitors for the money to be paid into. I appreciate Nationwide told Mr C's solicitors the name of the account would be D. But I don't find it unreasonable that it would use that as a reference as the account had been set up to receive the money from the sale. I also don't think the email confirms the account was D's.

Nationwide said the account was set up by its employees and Mr C wasn't a signatory. I haven't seen anything to suggest Mr C was a signatory of this account. So I think it's most likely this was an internal account opened by Nationwide for its own purposes and not D's account. That means I don't think D is entitled to details of, or to receive, any interest the account generated as the money belonged to Nationwide.

Mr C also signed a debenture with Nationwide in 2004 which covered all D's assets both at the time and in the future. The debenture says it will be held as a security for all D's debts and other liabilities owed to Nationwide.

Nationwide said the debenture hasn't been released as the full debt hasn't been paid. I understand why Mr C feels that Nationwide had written-off his outstanding debts by providing him with an account statement that said D's account having been closed in March 2016 with a nil balance. I think this was confusing and Nationwide should have been clear about the status of D's outstanding debts as Mr C had asked for the information for the company accounts. I'm pleased to see that Nationwide clarified the amount outstanding on the loan in its final response letter.

But that's not enough to persuade me the society shouldn't have taken any further money it was entitled to. D's loan accounts may well have been closed but that doesn't necessarily mean the loan was written-off. The terms of the debenture says it secures the debt and acts as a security even if the account has been settled.

Companies House show the debenture having been satisfied in 2016, so Mr C doesn't think this means it should apply. But the £89,879.20 was transferred to Nationwide in 2013 to release the charge on the property. I'm satisfied this was an internal account and Nationwide was entitled to keep the money it received in 2013 for its own means. So I don't think whether the debenture applied at the time Nationwide moved the money from its own account is relevant.

When considering all the information available I'm not persuaded that Nationwide needs to give D the money it received for W. It received the money in 2013 which is when it became the society's property. Also, I think it's fair and reasonable that Nationwide would want to off-set any money it was able to from the £4,000,000 D owed and it was entitled to do so.

I think Nationwide should have been clearer in answering Mr C when he asked about holding the money for the partner's tax liabilities and for a statement. But I don't think he's been put in a worse position than if it had been clearer. I also don't think it would produce a fair and reasonable outcome for me to award any compensation for this given that Nationwide isn't attempting to recover the outstanding debt from D. Mr C said if he'd known the money wasn't being kept for the partner's tax liabilities he might have liquidated the partnership sooner. But I think this is unlikely as it seems from emails at the time that he was keen for D to keep

trading. And Nationwide's been clear since 2014 that the money wasn't being held for the partner's tax liabilities.

Overall, I can understand Mr C's frustration given his belief that Nationwide was holding the money for the partner's tax liabilities. But I currently think the money was Nationwide's and it was entitled to use it towards D's outstanding debt. And while Nationwide should have been clearer when Mr C asked for the account information, it doesn't mean it had actually written-off the debt or made a mistake in off-setting the debt with the money it received to release the charge over W at the time it did. So I don't intend to uphold this complaint.

Nationwide didn't have any further comments in response to my provisional decision however Mr C strongly disagreed with it. He said the statements Nationwide sent him clearly showed the balance of the debt had been written-off before it moved the money. He also said Nationwide still hadn't accounted for the money and it hadn't provided him with any updated information about whether the loan was outstanding.

My findings

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 I've decided not to depart from my provisional findings.

I appreciate Mr C's frustration with the wording on the statement. I don't think the statements Nationwide sent him in June 2016 were clear and I can understand why he thought the debt had been written-off due to the wording used in them. However Nationwide wrote to Mr C in April 2017 to say there was a final shortfall of £4,000,000 and it had transferred £91,141.56 to reduce that shortfall in August 2016. In that letter it also said the funds in the security deposit account were covered by the debenture from 2004, which required D to pay all money due. So I think Nationwide was clear here that the debt hadn't been written-off.

I still don't think it would produce a fair and reasonable outcome to this complaint if I told Nationwide to give D £90,000 – when D owed around £4,000,000 – just because it was unclear in the wording of its statement. And I still haven't seen anything to persuade me that Nationwide being unclear between June 2016 and April 2017 caused D a loss.

I'm still satisfied the money was correctly transferred to Nationwide's own account in 2013 when it released the charge on W. In releasing the charge it kept the money as security against D's loans. And I think it was fair and reasonable for it to ultimately use it to off-set some of the shortfall of the debt because the money belonged to the society and D's loans hadn't been re-paid.

Mr C said Nationwide hasn't provided any update about the balance of the loan. However I can see it confirmed details of the outstanding loan amount in April 2017 and in the follow up to its final response letter in December 2017. As the money from the sale of W belonged to Nationwide since 2013, I don't think any interest it accrued from that date belonged to D. So I'm not going to ask Nationwide to provide any further details to Mr C about the money within that account or interest accrued on it.

I understand this isn't the outcome Mr C was hoping for, but I'm not going to ask Nationwide to do anything further.

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 C to accept or reject my decision before 24 August 2019.

Sarann Taylor
Ombudsman