

## **complaint**

Mr B has challenged the validity of his mortgage to Nationwide Building Society.

## **background**

In 2002 Nationwide issued a mortgage offer to Mr B. it offered to lend him £119,695. The mortgage offer dated 8 April 2002 is signed by both Mr B and Nationwide.

On 23 August 2002 Mr B signed the mortgage deed to grant a mortgage to Nationwide to secure the loan. He agreed to be bound by Nationwide's terms and conditions.

In September 2007 Mr B switched to a new mortgage product. The product conversion offer dated 13 September 2007 is signed by both Mr B and Nationwide. Again, it is subject to Nationwide's terms and conditions.

In 2016 Mr B questioned whether or not his mortgage was valid. He is unhappy that Nationwide's terms and conditions allow it to have a Power of Attorney in relation to the mortgage. Mr B is concerned that Nationwide has used this without his knowledge or consent.

An adjudicator looked at the complaint, but didn't think it should be upheld. Mr B has now asked for his complaint to be reviewed.

He is demanding proof that Nationwide has a valid mortgage over his property. He wants to know if we have seen any documents which purport to comply with Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. He also wants to know why his conveyancing solicitor is unaware of a Power of Attorney. Mr B has also raised queries about a Subject Access Request (SAR) he made to Nationwide.

## **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'm not upholding the complaint. These are my reasons.

First, I confirm I have seen copies of the mortgage offer and product switch document signed by both Mr B and Nationwide. I have also seen a copy of the mortgage deed Mr B signed when he granted Nationwide a mortgage over his property.

I've noted Mr B's concerns about the Power of Attorney. This is contained in Nationwide's terms and conditions. For the sake of clarity, I set it out in full below:

### **15. Power Of Attorney**

*You irrevocably appoint us and (as a separate appointment) any receiver we appoint to be your attorney and to do the following in your name and on your behalf:*

- (i) exercise, enforce, defend or dispose of any of the property rights and receive and use any money which becomes payable under them or for them;*
- (ii) give any notice and take any proceedings which are needed to exercise, enforce or defend any of the property rights;*

*(iii) execute any document and do anything which is needed to allow any of our rights, powers and remedies under the mortgage to be effectively exercised, enforced or defended, to include exchanging information with any second chargee, housing association or freeholder or other party who has an interest in the property and to include any changes to the mortgage;*

*(iv) execute any document and do anything needed to remedy any failure by you to meet these conditions including registration of any document at HM Land Registry if we require to do so.*

I can see why Mr B was confused by Nationwide's final response letter in which it said it didn't hold Power of Attorney. But the Power of Attorney specified in Nationwide's terms and conditions would only come into effect if Nationwide needed to exercise any of the rights referred to in clause 15, as itemised above. So although Mr B thinks Nationwide might have used his Power of Attorney to raise money through Special Purpose Vehicles, the terms of clause 15 don't allow for this.

I've considered the relevant law which applies in this case. Unfortunately Mr B has misunderstood the legal position relating to the Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A). It's a popular misconception, repeated widely on internet forums, that a mortgage deed has to be signed by both the borrower and the lender, or that the borrower's signature has to be witnessed by two people. In the absence of this, the argument goes, the mortgage is invalid. But this is incorrect and is based on a misunderstanding of the law.

In an unreported case in Preston County Court decided in July 2013 (*TMB vs Lamb*, a copy of which we will provide if Mr B would like us to) a borrower raised the argument that the mortgage documentation didn't comply with the required legal formalities and was therefore void. This is one argument Mr B has raised here and so it is important to look at what the court said about this.

Section 2 LP(MP)A provides that a contract for the disposition of an interest in land must be made in writing, incorporating all the terms of the contract, and signed by each party to the contract. The mortgage offer – signed by both Mr B and Nationwide – in my opinion satisfies this requirement. The mortgage deed – which is the disposition itself – only needs to be signed by Mr B, as the party granting the disposition (the mortgage) to Nationwide.

Section 27 of the Land Registration Act 2002 (LRA) provides that if a disposition is required to be completed by registration then it does not operate at law until the relevant registration requirements are met; and that the grant of a legal charge (or, a mortgage) is a disposition which is required to be completed by registration.

I have seen a copy of the Land Registry entry for Mr B's title to the property, which shows that the legal charge he granted to Nationwide has been registered.

In the case I refer to, the borrower's argument was that her mortgage was "*null and void for want of statutory formality*" because it was signed by the borrower only and not the lender (as is the case with the vast majority of mortgage deeds). Her argument was that it did not comply with the LP(MP)A. Therefore, according to her, the mortgage didn't exist at law and so could not be completed by registration as required by the LRA, and so it was not binding on the borrower.

But the judge held that the borrower's argument was "illusory" and "false". He was concerned that the spreading of these dangerous arguments on the internet could mislead borrowers into wrongly thinking that their mortgage was not binding upon them and that in the event of default they would not be in danger of losing their homes.

The relevant statutory provision for a mortgage, section 53 of the Law of Property Act 1925, does not require every term to be included in a document signed by both parties; rather the document just needs to be signed by "the person creating or disposing of the interest" (that is, the borrower). The judge also explained that section 27 LRA does not go so far as to say that a disposition required to be completed by registration (such as a mortgage) is created by registration and that it does not therefore exist or operate in equity before registration.

But I think it's important to note that the Financial Ombudsman Service doesn't have the power to determine whether or not a deed is valid or not. Only a court is able to do this. What I have to decide is what's fair and reasonable. I'm satisfied that Nationwide provided Mr B with the funds to purchase his property. In the circumstances, it's fair and reasonable for Nationwide to ask Mr B to repay those funds in accordance with the terms of the contract.

I can't comment on anything Mr B's conveyancing solicitor might have said to him about the Power of Attorney. And I can't look at Mr B's concerns about Nationwide's response to his SAR. Neither of those things falls within the scope of our rules.

I appreciate Mr B feels strongly about this matter. It's open to him, if he rejects this decision, to pursue his grievances against Nationwide through the courts, if he wants to do so. If Mr B decides to take this course of action, I'd urge him to take legal advice from a qualified solicitor.

### **my final decision**

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 21 June 2018.

Jan O'Leary  
**ombudsman**