

## **complaint**

Mr K has complained that NRAM Limited has refused to allow him to borrow back overpayments on his mortgage account. Mr K argues that this is unfair and breaches the terms of his contract with NRAM.

## **background**

Mr K has a mortgage taken out in July 2007 with a business which is now known as NRAM. He borrowed £1,653,479 plus £2,290 for fees and £25 for insurance – a total of £1,655,794. The mortgage was on an interest-only basis over a term of 7 years. The mortgage was originally taken out in the joint names of Mr K and his wife. I am very sorry to note that Mrs K passed away in 2008.

Having previously made overpayments of £400,000 and subsequently borrowed back £250,000 from his mortgage account in 2009, Mr K approached NRAM with a further request to borrow back the remaining £150,000 in 2012. He needed to do this to fund a commercial development.

In his letter requesting the borrow back, Mr K also said that he intended to take a payment holiday, commencing 1 February 2012 for six months.

But by 2011 NRAM had changed its policy on borrowing back overpayments, requiring an assessment of affordability. As a result, in 2012, Mr K's request was refused, on the basis of unaffordability. Mr K had to realise other assets to fund his development instead.

Mr K had built up a credit of £149,731.00 in January 2012. The overpayments previously made by Mr K were used by NRAM towards mortgage repayments. By 29 October 2014 arrears of £41,758.22 had accrued. The arrears were cleared on 4 November 2014 and Mr K maintained the monthly payments again until 5 May 2015. Further arrears were cleared on 30 October 2015, but the account again fell into arrears from November 2015.

On 22 March 2017 a court granted a possession order over the property, and a money judgement in favour of NRAM for £1,798,950. The order specifically provided that Mr K could still complain to us.

Mr K complained to us in September 2017 about NRAM. He said it had acted in breach of the mortgage contract by refusing his request to borrow back funds in 2012.

An adjudicator looked at the complaint, but she didn't think it should be upheld. She was satisfied NRAM was entitled to change its policy in relation to borrowing back overpayments.

Mr K disagreed with the adjudicator's findings. He says his solicitors have advised him that NRAM is in breach of contract and he wants an ombudsman to rule on this.

Mr K also says that the Charges Register on the title entries says that NRAM is obliged to grant him further advances. He considers this to be the "*vital piece of the evidential jigsaw*" and says that it proves the withdrawal of the borrowback facility is "*illegal*".

## **my findings**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. In making this decision I have taken account of, amongst other things, the law, relevant regulations and good industry practice. But the overarching principle by which I am bound by the Financial Services and Markets Act 2000 is to decide what is fair and reasonable.

Mr K has made extensive submissions, some of them which he says are of a legal nature. But this is in fact a relatively simple case. What I am being asked to decide is whether NRAM was under any obligation to allow Mr K to borrow back his overpayments when he asked to do so in 2012.

I must clarify at the outset that I can't decide whether the contractual term between Mr K and NRAM in relation to borrowing back overpayments is legally enforceable or not. That's something that only a court can decide – so I won't be making any ruling on that point, because I don't have the power to do so. But I can look at whether or not NRAM has acted fairly and reasonably.

The relevant clause in the mortgage offer dated 3 July 2007 is set out below.

In my opinion, the use of the word "*may*" in the clause makes it clear that any borrow back is discretionary. I'm not persuaded that NRAM ever guaranteed that Mr K could borrow back overpayments on demand.

I'm fully aware that Mr K argues that correspondence between him and NRAM from June and July 2008 mean that NRAM isn't able to decline his request – and that if his account was in order with no missed payments, he'd be able to have the facility to borrow back his overpayments.

I'm not persuaded this alters the discretionary nature of the borrow back clause. I appreciate Mr K says his solicitors think otherwise and that NRAM is in breach of contract. But as I've said above, it's outside my power to determine that.

I'm satisfied NRAM was entitled to change its policy in 2011 in relation to allowing customers to borrow back overpayments. Following the property crash from late 2007 onwards, lenders were adopting a more cautious approach to lending, both from their own perspectives and also in relation to the level of risk to which borrowers were exposed.

NRAM wasn't required to tell Mr K of any changes to its lending criteria or policies. But I think the borrow back clause explains that any return of overpayments has to be agreed by NRAM. That agreement would be subject to meeting affordability criteria.

I can also see from NRAM's notes that in 2009 Mr K was told that requests to borrow back were subject to an affordability check. I can see that these were done for the 2009 requests. So I'm not persuaded that Mr K was unaware of this until his request in 2012.

I've noted the point Mr K has made about the entry on the Charges Register. But I'm afraid this is not the 'smoking gun' he believes it to be.

The entry says *“The proprietor of the Charge dated 1 October 2007 referred to above is under an obligation to make further advances. These advances will have priority to the extent afforded by section 49(3) of the Land Registration Act 2002.”*

This is wording sometimes included on all first charge registrations, and is part of the “tacking” provisions included in sections 49-50 of the Land Registration Act 2002. Tacking is the means by which a lender is able to use its charge to “tack on” (meaning add) any further advances it makes to the amounts secured by the relevant charge ahead of any subsequent charge holders.

It simply means that any other party wanting to register a charge on the property would come behind NRAM, and that any further advances by NRAM would be included in the first legal charge, and thus have priority over second charges.

The entry doesn’t compel NRAM to grant a further advance. A request to borrow back overpayments isn’t a further advance. The courts have held (in a case called *In the matter of Black Ant Co Ltd (in administration)* [2014] EWHC 1161 (Ch)) that a “further advance” is an advance of “further or additional funds”. So s.49(3) of the Land Registration Act 2002 wouldn’t apply to borrowing back overpayments in any event.

In addition, the Land Registry entry doesn’t affect the mortgage offer, which is clear that any request to borrow back overpayments is subject to NRAM’s agreement. There is nothing in the mortgage contract which obliges NRAM to grant a further advance either.

As I said at the outset, my over-riding duty is to decide what is fair and reasonable in all the circumstances, pursuant to our enabling legislation. In all the circumstances I’m not persuaded NRAM acted unfairly or unreasonably when it declined Mr K’s request to borrow back overpayments in 2012.

It is possible that a court – which unlike the Financial Ombudsman Service does have the power to declare a contract term unenforceable – might reach a different view.

My decision is not binding on Mr K if he does not accept it and does not prevent him from raising the arguments he has made about this issue in any subsequent court action. If Mr K considers the Land Registry entry to be misleading or incorrect, he would need to take this up with the Land Registry, which has its own dispute resolution process.

### **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 K to accept or reject my decision before 30 April 2018.

Jan O’Leary  
**ombudsman**