

complaint

Mr R1 brings this complaint in his capacity as Executor of the estate of his father, Mr R2. His complaint is that Bank of Scotland plc (trading as Halifax) has failed in its duty of care to his mother, Mrs R, when it granted a lifetime equity release mortgage in 1989. Mr R1 also complains that the mortgage was mis-sold to his father.

background

Mr R2 owned a property in his sole name, which he purchased in 1968. In 1989 an application was made to a building society (which later became part of Halifax) for an equity release mortgage. All references to Halifax also include that building society.

Initially the application was made in joint names. But when the mortgage deed was sent to the Land Registry, it was noted that Mrs R wasn't on the title. She could not, therefore, give any security for the mortgage. The Land Registry deleted Mrs R's name from the legal charge and the mortgage was granted in the name of Mr R2 over the property he owned in his sole name.

Mr R2 died in 2013. Mr R1, as Executor of Mr R2's estate, now complains (and I summarise his submissions):

- a business which is now part of Bank of Scotland plc (trading as Halifax) granted his father a mortgage in 1989 when he was retired and had limited income;
- the mortgage, originally £62,000, had risen to over £210,000 at the time Mr R2 died in October 2013;
- his mother, Mrs R, (Mr R2's wife), was originally a joint applicant for the mortgage, but was removed from the title by the Land Registry. Halifax can't explain why.
- Halifax can't provide any information about whether Mrs R was told to obtain separate legal advice either at the point of the application or when she was removed from the title to the property;
- Halifax has failed in its duty of care to her;
- The present position is that Mrs R doesn't own the house she's lived in since 1967; in her late 80s she finds herself with a large mortgage and cannot downsize from a six-bedroomed house to a more suitable property.

Halifax said that this was a "Homefund" mortgage - specifically for customers aged over 60, with no fixed term and requiring no payment of capital or interest, unless the debt reached 75% of the value of the property. The full amount of the mortgage becomes due upon sale of the property or death of the borrower, whichever is first.

The original amount borrowed was £62,000. In 1992 a further £60,000 was released. Sadly, Mr R2 died in October 2013. Because Mrs R isn't on the title or the mortgage, Halifax asked for the mortgage to be repaid, or for a new mortgage application to be made.

After Mr R1 complained, Halifax offered compensation of £500 for any trouble and upset and £100 for any expenses to the estate in him bringing the complaint. But Halifax didn't uphold

the complaint that it had breached a duty of care to Mrs R, or that the mortgage had been mis-sold to Mr R2.

The current situation is that Mrs R remains in the property. There are insufficient assets in Mr R2's estate to pay off the mortgage. £500 per month is currently being paid to the mortgage.

After the complaint was brought to us, Halifax reassessed Mrs R's position. Halifax now says that it will not enforce repayment of the mortgage. It's happy for the mortgage to remain outstanding until Mrs R's death, or voluntary sale of the property.

But the terms and conditions state that the mortgage is repayable once the loan-to-value (LTV) reaches 75%. As of November 2015 it was at 61%; Halifax says that if it goes over 75%, it will look to arrange a repayment plan. £500 per month is being repaid. Interest is currently £526.19 per month and so there is a slight shortfall each month which, over time, will accrue against the mortgage and which might affect the LTV.

The adjudicator thought Halifax was acting reasonably. Mr R1 disagreed. He asked for an ombudsman's review. In summary, Mr R1 says:

- Halifax put his mother in the position of not owning her own home;
- As executor, he is unable to deal with the property without repaying the mortgage;
- Mrs R became distressed on learning that she doesn't own the property;
- Halifax should have advised Mrs R to take independent legal advice when she was *"taken off the mortgage and title deeds"*.

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 reached the same conclusion as the adjudicator, for largely the same reasons.

title to the property: The property was purchased in 1968 in Mr R2's sole name. This was before he had any dealings with Halifax. Mrs R was never on the title deeds, and so she wasn't "removed" from them by Halifax or the Land Registry.

I think that in 1989 it had been assumed by everyone involved when the application for the equity release mortgage was made that the property was jointly owned, because this was generally how married couples held their property. But when the mortgage was registered at the Land Registry, it was noted that Mrs R wasn't a legal owner of the property, and so her name was deleted from the Legal Charge by the Land Registry.

I don't consider there to be anything sinister in this. This is because Mrs R was never on the Land Registry title. The amendment to the legal charge is simply a deletion of Mrs R's name from a document that didn't apply to her. Because she wasn't an owner of the property, she had no security to give for the loan. Deleting Mrs R's name from the legal charge did not remove her from the title – because she was never on the title to begin with.

Mr R1 says that when he purchased the property in 1968, Mr R2 was holding the property on trust, with Mrs R having a beneficial interest in it.

At the time the property was bought in 1968, Mrs R had a right of occupation under the Matrimonial Homes Act 1967, but this didn't confer on her any legal, beneficial or equitable interest. By the time the mortgage was taken out in 1989, Mrs R's rights of occupation were enshrined in the Matrimonial Homes Act 1983. Again this conferred no legal, equitable or beneficial interest in the property.

It's correct that Mrs R, as a non-owning spouse in actual occupation of the property, had an over-riding interest in the property under s.70(1)(g) Land Registration Act 1925 (now replaced by S.29(2)(a)(ii) Land Registration Act 2002). But again this in itself does not impute any beneficial ownership of the property.

If Mr R2 had, as Mr R1 says, been holding the property under an express or implied trust, there would have been a restriction to that effect in the Land Registry title. There is no such restriction. The available evidence from the Land Registry doesn't persuade me that Mr R2 was holding the property as Trustee for himself and Mrs R.

But in any event, it would be a matter for a court, not the Financial Ombudsman Service, to determine whether or not at the time of the purchase in 1968 or the mortgage in 1989 Mr R2 was holding the property on trust for himself and Mrs R, and to determine the extent of any equitable interests arising out of that trust. This isn't something which falls within the scope of our rules.

Mr R1 says that Halifax owed a duty of care to Mrs R to tell her to obtain independent legal advice to protect her position, and possibly have her added to the title deeds. But I'm satisfied Halifax owed no duty of care to Mrs R in this respect.

The relevant case from the time the mortgage was taken out is *Bristol and West Building Society v Henning* [1985] 1 WLR 778. I summarise relevant part of the case below:

The court considered the position where a non-owning occupier had notice of the fact that a mortgage was being obtained. In this case, Mr H purchased a property by obtaining a mortgage from the claimant lender. Mrs H was in actual occupation and therefore had an overriding interest.

Despite this interest, the court held that because Mrs H had knowledge of the mortgage, Mrs H's interest would not rank in priority to the lender's interest.

In Mrs R's case, the position is that she knew about the mortgage. Indeed, until the Land Registry spotted that she wasn't on the title, Mrs R was intending to provide security for the loan. I've seen no evidence to suggest Mrs R hadn't agreed to the borrowing or that it was taken out without her knowledge or consent.

I appreciate that the fact Mrs R isn't on the title is now proving to be problematic both for her and for the estate. But that isn't something for which Halifax can be held responsible – because the property was purchased in 1968, over 20 years before the mortgage was taken out and it was at that point that it was registered in Mr R2's sole name, as legal and beneficial owner. The problems Mr R2's estate is now having stem from the purchase, not the later mortgage.

mis-sale of the mortgage: Mr R1 says that granting a mortgage to a man of Mr R2's age who was retired and had limited income was unsuitable. But this type of mortgage – an equity release mortgage – was designed for customers in that exact situation.

Equity release mortgages are attractive to elderly customers who are “equity rich but cash poor” because they can borrow against the equity in their home, but aren’t required to make monthly repayments. This provides access to funds for day-to-day expenses, home improvements or large purchases that they would otherwise be unable to afford.

The interest is rolled up into the loan. Repayment isn’t usually required until the borrower dies, goes into nursing care or voluntarily sells the property. As with the Halifax loan, some equity release mortgages have a LTV trigger where the lender won’t allow the outstanding balance to increase above a certain level.

I appreciate that it can come as an unpleasant surprise to family members to discover that a relative has taken out an equity release mortgage. That’s particularly so in cases like this, where the mortgage has been running for many years with interest accruing against it over a long period.

Unsurprisingly, given the length of time that has elapsed, there are no longer any point of sale documents available. The mortgage was sold before mortgages became regulated in 2004, and even before the voluntary Mortgage Code which pre-dated mortgage regulation. So there are no records of any advice that might have been given at the time. But I’ve seen no evidence to persuade me that this mortgage was mis-sold or was unsuitable for Mr R2, given his age and what Mr R1 says about Mr R2’s circumstances at the time.

proposed resolution: Halifax has acknowledged that Mrs R, now in her late 80s, should not have to move from her home. It’s agreed that the mortgage can remain in place (subject to the 75% LTV trigger) until Mrs R’s death or an earlier sale of the property. I’m glad Halifax has acknowledged this, but it’s disappointing that it was only after our involvement that Halifax seems to have taken a more compassionate and pragmatic view of Mrs R’s situation, although I understand Mr R1 says that Halifax had made this offer previously. There is no record of that though.

I understand that Mr R1 and his brother have considered taking out a mortgage to repay Halifax, but would prefer not to do so. I don’t criticise them for this at all.

Under its terms and conditions, Halifax is entitled to ask for immediate repayment of the mortgage. But I’m glad it’s accepted that Mrs R shouldn’t be put in that position. The solution Halifax has proposed to leave the mortgage in place puts Mrs R in the position she would have been in if the mortgage had been in joint names, the only exception being that the house is held by the estate and not by her. But for the reasons I’ve explained above, I can’t attribute any blame to Halifax for the title being registered in only Mr R2’s name in 1968.

Overall I’m satisfied that Halifax’s offer to leave the mortgage in place (subject to the 75% LTV trigger) until Mrs R’s death or voluntary sale of the property (or any earlier repayment of the mortgage) is fair and reasonable. I have no power to direct Halifax to transfer the mortgage to Mrs R but I’m glad to see Halifax acknowledges the situation Mrs R is in.

Halifax offered compensation of £600 - £500 for trouble and upset and £100 for expenses – in its final response letter. This offer still also stands. I think this is fair and reasonable.

my final decision

My decision is that I don't uphold this complaint, in that I'm satisfied that Bank of Scotland plc (trading as Halifax) has made reasonable proposals to settle this complaint. I simply leave it to Mr R1, on behalf of Mr R2's estate, to decide if he wants to accept these proposals to settle the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R1, as Executor of the estate of Mr R2, to accept or reject my decision before 4 April 2016.

Jan O'Leary
ombudsman