complaint

Mr R complains that Drydens Limited, trading as Drydens Fairfax Solicitors, ("DL") is unfairly pursuing him for a debt. He says that the debt is statute barred because the mortgage lender hadn't contacted him within 12 years.

background

Mr R was the owner of a property upon which there was a mortgage with a third party mortgage provider ("M"). The property was repossessed and sold in February 1999. M no longer has a paper file on the matter, but it appears that the original shortfall on the mortgage was £18,126.41. M said that Mr R had phoned M in September 2003 and acknowledged the debt, although Mr R disputes this. Mr R then made some payments towards the debt from June 2013 until April 2015 totalling £220. DL was instructed by M to collect the debt in July 2014, but Mr R told DL in December 2014 that the debt was statute barred. DL said that as payments had been made on the debt, the limitation didn't apply.

The adjudicator didn't recommend that the complaint should be upheld. He thought that DL had acted fairly because DL said that payments were made from 15 September 2009. So, he didn't think that it was unreasonable for DL to pursue payment of the debt even though it had originally arisen in 1999. The file notes he had seen indicated that Mr R was contacted about this by phone in 2003 and that he acknowledged the debt, and that Mr R had made a payment in 2009. The adjudicator was satisfied that the debt was properly due to be repaid.

Mr R disagreed and responded to say that under the Limitation Act 1980, an acknowledgement of the debt must be in writing and signed by the person making it. A telephone call didn't count as an acknowledgement of the debt. He also referred to DL's statement that the payments started to be made in September 2009, which was over ten years since the sale of the house. He said that no contact or acknowledgment has been made prior to this. He also referred to the Council of Mortgage Lender's guidelines which said that an action to recover the debt must be taken in the first six years following possession.

Initial provisional conclusions

I issued a first provisional decision on this complaint to Mr R and to DL on 10 February 2016. I summarise my findings:

I noted that under the Limitation Act 1980, the limitation period for mortgage shortfalls is twelve years for capital owed and six years for the interest part of the shortfall. I explained that usually the money from the sale of a house will be taken by a lender to pay interest before capital, so it was likely that Mr R's debt was capital, and the 12 year limitation period would apply.

In the absence of any more information about the debt, I had assumed that the time period began from the date of the sale of the property, 1 February 1999. Once the time limit had started running there were two ways in which it could restart. Payments made within the 12 years would start the time limit running again. DL said that a payment had been made on 15 September 2009. But DL's own contact notes showed that this payment was reversed on the same day, so it was noted on the account as an error. The next payment wasn't made by Mr R until 2013, more than twelve years after 1999. So, I said that the limitation period had already gone by.

I also noted that the second way in which the time limit could restart under sections 29 and 30 (1) of the Limitation Act was if Mr R had formally acknowledged the debt in writing and signed it within the twelve year period. This is known as "acknowledgement". I noted that there was only a record of a conversation in 2003, which Mr R disputed in any event. So I didn't think that this was an acknowledgement for the purposes of the Limitation Act.

Mr R had also referred to the Council of Mortgage Lender (CML) Guidelines. These said that from 11 February 2000, lenders who were members of the CML (which M was) had agreed voluntarily that they would begin all recovery action for the shortfall within the first six years following the sale of a property in possession.

I also explained that the guidelines went on to say that the new time limit wouldn't apply in all cases. Specifically, it wouldn't affect anyone who had already been contacted by their lender, even if the initial contact had been made after six years from the date of sale of the property in question. I could see that recovery action hadn't begun within six years of possession of the property, but that there may have been contact by phone between Mr R and M within six years in September 2003. But there was then no further contact until 2013.

The guidelines say that anyone whose property was taken into possession and sold more than six years ago, and who hadn't been contacted by their lender for recovery of any outstanding debt wouldn't now be asked to pay the shortfall. As there was contact in 2003, I thought that the six years period started running again, but it then ran out in 2009.
The CML guidelines were put in place to avoid situations where borrowers were being pursued for a shortfall many years after repossession. The guidelines said that *'individuals should not face long delays before lenders contact them to discuss repayment of the shortfall'.*

I needed to consider whether DL had acted unreasonably by continuing to pursue Mr R for the outstanding debt. Mr R believed the debt to be statute barred. DL didn't accept this. It said that Mr R had recognised the debt because of the payments which had been made since June 2013. But in view of the provisions of the Limitation Act and the CML guidelines, I didn't believe that DL had acted reasonably by pursuing the shortfall in this case. Whilst I had no power to declare that the debt was statute barred – only a court could decide this - Mr R had said that he wouldn't pay the debt. For the above reasons, I didn't think it was fair that DL continued to press him for payment.

Subject to any further representations by Mr R or DL, my first provisional decision was that I intended to uphold this complaint. In full and final settlement of it, I intended to order Drydens Limited, trading as Drydens Fairfax Solicitors, to take no further action to recover the debt.

Mr R responded to my first provisional decision to say, in summary, that he was seeking evidence that the debt was statute barred.

DL disagreed and responded to say, in summary, that the mortgage had been a joint mortgage and the other borrower had acknowledged the debt within the limitation period, so it wasn't statute barred. DL had provided evidence to show this and apologised for not providing it earlier.

second provisional conclusions

I issued a second provisional decision on this complaint to Mr R and to DL on 11 April 2016. I summarise my findings:

I had noted that DL had provided evidence to show that the debt wasn't statute barred. I was satisfied with the evidence DL had provided to show this, although for data protection reasons, I couldn't provide details in this decision. That's because it related to another person who was on the mortgage with Mr R.

I had asked the adjudicator to check with Mr R that the mortgage was a joint mortgage. He confirmed this and said that he had been told by DL 18 months previously that the other borrower had commenced repayments.

I had reconsidered all the evidence. As the debt had been acknowledged by the other borrower within the limitation period, and liability for the shortfall is joint and several, I didn't think that the debt was statute barred against either Mr R or his joint borrower. I realised this would be unwelcome news for Mr R, but it didn't look to me as if this was a debt he could walk away from.

Subject to any further representations by Mr R or DL, my second provisional decision was that I didn't uphold this complaint.

DL responded to say that it had no further comments.

Mr R responded to say that as the debt had been acknowledged by his joint borrower ("J"), this only affected J, but he noted that if J had made a payment, it restarted the timeframe for both parties. He still believed that the CML policy wasn't adhered to.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

As I think that the debt was acknowledged by J within the limitation period, and liability for the shortfall is joint and several, I don't think that it's statute barred against either Mr R or J. I have also seen evidence that the first payment by J was made within six years of the telephone call in September 2003 referred to above, so I also think that the CML guidelines have been followed. So, I'm satisfied that the proposed resolution in my second provisional decision is fair in all the circumstances, and I find no basis to depart from my earlier conclusions.

This is the last stage in our process. I appreciate that Mr R may not be entirely happy with my decision, but he isn't bound by it. If he doesn't wish to accept my decision, his legal rights remain intact.

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 R to accept or reject my decision before 20 June 2016.

Roslyn Rawson
ombudsman